THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal No. 2013000714

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph P. Stroman, Special Referee

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

Ronald Jarmuth — Appellant,

v.

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

CORRECTED RECORD ON APPEAL

VOLUME 1

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INDEX

1	December 1, 2010 Order Transferring to Circuit Court	1
2	September 16, 2011 Order Consolidating	3
3	May 17, 2012 Consent Order Disposing of all outstanding matters and motions	6
4	June 13, 2012 Consent Order of Reference	7
5	October 17, 2012 Special Referee's Order of Recusal	13
6	March 11, 2013 Order Denying Plaintiff's Post-Trial Motions	15
7	September 10, 2012 Final Order following Trial before Special Referee	28
8	October 12, 2010 Complaint. (2010CP2611320)	76
9	November 18, 2010 Answer (2010CP2611320)	89
10	October 24, 2011 Defendant's Amended Answer adding Counter – Claim (2010CP2611320)	93
11	December 20, 2010 Plaintiff's Answer to Defendant's Amended Answer and Counter – Claim asserting additional Plaintiff Claim against Defendant (2010CP2611320)	101
12	May 30, 2012 Defendant's Amended Answer responding to Plaintiff's additional Claim.	110
13	April 7, 2009 Complaint (2009CP263596)	113
14	May 12, 2009 Answer of Defendants International Club and Rosemary Toth (2009CP263596)	183
15	May 15, 2009 Plaintiff's Answer to Counter – Claim	187
16	May 15, 2009 Plaintiff's Reply to Defendants' Answer	191
17	June 9, 2009 Plaintiff's Amended Complaint	205
18	June 19, 2009 Answer of Defendants International Club and Rosemary Toth to Amended Complaint	238
19	June 30, 2009 Plaintiff's Reply to Defendants' Answer to Amended Complaint	244
20	June 30, 2009 Plaintiff's Answer to Counter – Claim in Answer to Amended Complaint	264

21 October 24, 2011 Amended Answer of Defendant International Club to Amended Complaint and assertion of Counter – Claim 268

22 December 17, 2011 Answer of Defendant KA Diehl to Amended Complaint 280

23 December 20, 2011 Plaintiff's Answer to Amended Answer and Counter – Claim of Defendant International Club....288

24 May 30, 2012 Defendant International Club HOA and Rosemary Toth's Answer to Complaint as Amended....297

25 August 20, 2012 Plaintiff's Post-Trial Brief and Memo of Law 300

25 August 20, 2012 Plaintiff's Proposed Order....536
Brief and Memo in Support of Proposed Order 4425

26 August 20, 2012 Defendant's Proposed Order. 563

27 September 19, 2012 Plaintiff's Motion to Amend Final Order, New Trial, and for other Relief....659

28 January 23, 2013 Defendant's Memorandum in Opposition to Plaintiff's Post-Trial Motion....757

29 January 23, 2013 Exhibits attached to Defendant's January 23, 2013 Memo. 798

30 January 22, 2013 Plaintiff's Brief in Support of Post-Trial Motion 928

TESTIMONY

31 February 13, 2012 Julie Case Deposition....1055

32 February 13, 2012 William Freiboth Deposition 1123

33 February 17, 2012 Ronald Pyle Deposition 1292

34 February 17, 2012 Rosemary Toth Deposition....1385

35 March 27, 2012 Louis Astorino Deposition #1 1510

36 March 27, 2012 Michael Butryn Deposition....1578

37 March 27, 2012 Jane Pizzi Deposition....1656

38 March 27, 2012 Peter Pizzi Deposition 1685

39 May 25, 2012 Louis Astorino #2 Deposition 1778

40 August 8 – 10 Trial Transcript 1863

Ronald Jarmuth 1965
..... 2251
..... 2601
Chris Sullivan 2152
Jane Pizzi 2317
Louis Astorino 2330
Peter Pizzi 2365
Michael Butryn 2389
Denise Ambuhl 2478
Maureen Sullivan 2523
Jeffrey King 2703
William Freiboth 2753
Beckie Abel 2863

41 January 13, 2012 Defendants' Rule 16 Statement 2901

42 January 17, 2012 Plaintiff's Rule 16 Statement 2919

43 May 7, 2012 Plaintiff's Supplement to Rule 16 Statement 2936

44 May 14, 2012 Plaintiff's Revised Rule 16 Statement 2939

45 July 16, 2012 Plaintiff's Pre-Trial Brief. 2954

46 July 31, 2012 Plaintiff's Exhibit List. 2973

47 August 6, 2012 Plaintiff's Revised Exhibit List 2992

48 August 6, 2012 Defendant's Revised Rule 16 Statement & Exhibit List 3011

49 August 8, 2012 Defendant Discovery CD File Name List filed by Plaintiff with the trial judge at trial 3071

50 August 21, 2012 Plaintiff's Letter to Special Referee 3078

51 October 3, 2012 Plaintiff's Letter to Chief Administrative Judge with Exhibits 3080

52 November 16, 2012 Plaintiff's Request to Clerk of Court for copies of receipts releasing Case File documents 3083

53 January 23, 2013 Clerk of Court list of case record items returned to Court by Sharon Brock 3084

54 December 11, 2011 SC Attorney General Opinion to SC Legislature on HOA Voter Lists. 3086

55 August 8, 2012 Defendant January 13, 2012 Mark Up Exhibit List filed by Plaintiff with the trial judge at trial. 3089

56 August 8, 2012 Defendant August 6, 2012 Mark Up Exhibit List filed by Plaintiff with the trial judge at trial. 3094

57 January 6, 2013 Horry County Council Letter to Appellant re Roads....3100

58 February 21, 2013 Email from Ch. Administrative Judge announcing post-trial decision. 3103

59. Plaintiff's Exhibits

1 Map international club 3108
2 16 Ft Fence 0033 3109
3 8 Foot Hi Fence Prop Line 3110
4 112 Worchester Court 3111
5 1120 Seville 8 ft Fence 0035 3112
6 1120 Seville GSWSA Lot 6 3113
7 160 Madrid Drive 3114
8 165 170 174 Seville Drive Fences 3115
9 166 170 174 Seville Drive Fences 3116
10 166 170 174 Seville Fences 3117
11 176 Madrid Drive 3118
12 184 Seville Dr Fence 3119
13 164 Seville Dr Fence 3120
14 186 Seville GIS local 3121
15 166 Seville Realtor Picture 3122
16 199 Madrid Drive 3123
17 239 Pickering Paar Playset 3124
18 249 Pickering Horry Street Sweeper Sep 20 2011 3125
19 249 Pickering 2010-09-00 USPS Mailbox Approval 3126
20 249 Pickering 2011-09-20 Flooding in Streets 3127
21 249 Pickering 2012 2 Palm Trees 3128
22 249 Pickering 2012 Palm Location 3129
23 249 Pickering Approved Disapproved Flower Beds 3130
24 249 Pickering Approved Flower Bed 3131
25 249 Pickering Approved Flower Bed 3132
26 249 Pickering Approved Palm Bed 3133
27 249 Pickering Bernstein Lot Line 3134
28 249 Pickering Flower Bed stoped 3135
29 249 Pickering Horry Street Sweeper 2012-09-22 3136
30 249 Pickering Horry Street Truck 2012-09-22 3137
31 249 Pickering New Palm Location 3138
32 249 Pickering Pathfinder Swingset 3139
34 249 Pickering Privacy Panel Fence 3140
35 249 Pickering Road Sign 35 3141
36 249 Pickering The Wall 3142
37 249 Pickering Bernstein Cartman Lot Line 3143
38 254 Pickering Fletcher Driveway St Set back 3144
39 254 Pickering Fletcher Street Prop Line Setback 3145
40 265 Pickering Masters Curb Edging 3146
42 270 Pickering Drive Comer Palms 3147

42 276 Pickering Taylor House 3148
44 276 Pickering Tabor Fence 1 3149
46 276 Pickering Tabor Fence 3 3150
47 312 Caldera Approved Not A Wall 3151
48 312 Caldera Approved Not A Wall View 2 3152
49 312 Caldera Approved Not A Wall 3153
50 1016 Knightsbridge fence 3154
51 1112 Worchester Court 3155
53 1212 Harrogate Robert S House Front 3156
54 1212 Harrogate Robert S Side yard w Playset 3157
55 1998-07-31 Kaminski and MIGPA Areas Plat 3158
56 1999-02-08 Covenants Recorded 3159
57 2000-5-9 Amendment 1 Recorded 3160
58 2002-01-02 Plat Bk 181- 89 Parcel D 3161
59 2004-08-04 Parking Deed Page 7 3162
60 2010-09-08 USPS Mailbox Approval (p2) 3163
61 2008-06-25 Bldg Grnds Presentation 3164
62 2008-06 Encr Permit 3165
63 2008-09-26 Villas Encro Permit pg 1 3166
64 2008 Assessment Coupons 3167
65 2008 Landscape Contract Page 2 3168
66 Bernat Parking 3169
67 2009-02 Calendar Feb 3170
68 2009-03-22 Pool Park lot Sign 3171
69 2009-03-24 Board Minutes Pool Parking 1 3172
70 2009-03-24 Board Minutes Pool Parking 2 3173
71 2009-05-12 Board Minutes Mow Road 3174
72 2009-05-27 PDF Created 3175
73 2009-05-28 Al HOA Env 3176
74 2009-05-28 Email Click Here 3177
75 2010-09-08 USPS Mailbox Approval (p2) 3178
76 2010-09-29 ARB Fine Chk 3179
77 2012-03-01 Env to Goodman Certified Mail Envelope 3180
78 2012-03-08 McNair Goodman Letterr Envelope 3181
79 2012-03-15 Goodman Certified Mail 3182
80 2012-04-08 McNair Goodman Ltr Env 3183
81 2012 Dish TV Offer pg 2 3184
82 2012 Dish-TV Offer A10 3185
83 Adare Court 3186
84 Amenity Center Ponds 3187
86 Bernat Parking Bernat Sign 3188
87 Blacks 1 p-0416 Eminent Domain 3189
88 Blacks 1 p-0416 Eminent Domain overlay 3190
89 Blacks 1 p-0942 Privity Overlay 3191
90 Blacks 1 p-0942 Privity 3192
91 Blacks 1st Conspiracy w Overlay 3193
92 Blacks 1st Conspiracy 3194
93 Blacks 1st Defamation at 344 w Overlay 3195
94 Blacks 1st Defamation at 344 3196
95 Blacks Cover 3197

96 Blacks Dedication....3198
97 blacks waiver-at 1231....3199
98 Blacks waiver at 1231 Overlay....3200
99 Caldera Court Lot Lines....3201
100 DD Lantana....3202
101 Diehl Sign 1....3203
102 Diehl Sign 2....3204
103 Feb 1997 MIGPA Plat Title....3205
104 Fence DSC 0024....3206
105 Fence DSC 0026....3207
106 Fletcher and Corbett....3208
107 Glens Common Area 11944301060....3209
108 Glens Common Area 21944301072....3210
109 Glens Townhouses 01....3211
110 Glens Townhouses 02....3212
111 HC RoD to 2003 Ind Club Deeds....3213
112 HC RoD to 2003 Murrells Inlet Golf Deeds....3214
113 HCC 18-4-2 Streets Design Stds....3215
114 Horry PUD Zoning....3216
115 Hwy 172008-02-19 wire chart....3217
116 March 2001 Calendar....3218
117 March 2002 Calendar....3219
118 MIGP Master Plan Ph 2 Glens....3220
119 MIGP Zoning....3221
120 Paar Playset 239 Pickering....3222
121 Parking Lot 01....3223
122 Parking Lot 02....3224
123 Parking Lots 1 and 2 and Amenity Ctr Lot....3224
125 Pebble Creek Stone Wall....3226
126 Phases Feb 1997....3227
127 Plat 160 at 79 Clubhouse Location....3228
128 Plat 197 at 171 Glens HC Planning....3229
129 Plat 197 at 171 Glens Notes: 2010/11/12....3230
130 Plat 197 at 171 Glens Plat Title....3231
132 Plat Book 192 Page 245 from Am Ctr Park Lot 2 Deed....3232
133 Plat Book 197 Page 171 Glens....3233
134 Pool Parking Sign....3234
135 Tournament International Club Dr GIS....3235
136 03/18-2011 HOA ANSWERS TO INTERROGATORIES....3236
137 06/02/2012 Plaintiff Request for E-Financial Documents....3249
138 07/02/2012 HOA Response to 6-2-2012 Request for Docs....3252
254 HCC 18-0004 Sec 2 Site Plan Design Stds.doc....3257
267 IRS Announcement 2002-18 (3-11-2002) Cash Rebates....3260
300 2002 09 10 Board Minutes....3262
301 2003-09-03 Board Minutes....3264
302 2003-10-30 HTC HOA Contract....3266
303 2003-11-20 Board Minutes....3276
304 2004-01-13 Board Minutes....3279
305 2004-07-30 Board Minutes....3283
306 2004-11 Year End....3288

307 2005-01-18 Board Minutes 3291
308 2005-06-10 Board Minutes 3295
309 2005-11-14 Board Minutes 3300
310 2005-11 Year End Bulletin 3304
311 2005 08 19 Board Minutes 3306
312 2005-12-31 Financial Report 3312
313 2006-03-09 Board Minutes 3323
314 2006-05-24 Board Minutes 3324
315 2006-08-16 Board Minutes 3328
316 2006-11-16 Board Minutes 3336
317 2006-11 Year End 3341
318 2006-12-04 Board Minutes 3344
319 2006-12-31 Int Club General Ledger (Golf Course) 3345
320 2007-09-17 Election Announcement 3346
321 2007-10-10 Board Meeting 3351
322 2007-12-12 Board Meeting 3353
323 2007-12-31 Financial Statement 3355
324 2007-12-31 General Ledger (Golf Course) 3358
325 2007 09 19 Annual Meeting 3359
326 2007-11-14 Board Meeting 3364
327 2008-01-01 to 2008-12-31 General Ledger (Golf Course) 3366
328 2008-03-11 Board Minutes 3368
329 2008-06-10 Board Minutes 3373
330 2008-06-25 Bldg-Grounds Committee Presentation 3377
331 2008-06-25 HOA Grounds Maintained Cost Breakout 3390
332 2008-07-08 Board Minutes 3391
333 2008-07-24 To HOA Request for Vote List 3394
334 2008-09-17 Annual Membership Meeting 3398
335 2008-10-14 Board Minutes 3402
336 2008-10-28 Villas to Pat O'Dea - Letter 3406
337 2008-11-11 Board Minutes 3408
338 2008-12-10 letter to Pat O'Dea - Letter 3411
339 2008-12-18 RJ Letter To Toth for minutes 3413
340 2008-12-17 Toth Letter to RJ (actually 12/18) 3414
341 2008-12-19 Board Letter to RJ 3415
342 2008 Budget 12-7-2007 3416
343 2008 Diehl Contract 3421
344 2008 HOA Financial And Audit (Golf Course) 3429
345 2008 Landscape Contract 3432
346 2008 HOA Property Tax Discrepancies 3437
347 2009-01-02 Pat O'Dea to Steve Ouverson 3438
348 2009-01-01 Diehl Contractor Program 3442
349 2009-02-10 Board Minutes 3447
350 2003-05-16 Developer Agreement 3450
351 1/19/2009 O'Dea to Tracy Fisher (Wilcox Buyck) 3460
352 1/13/2009 O'Dea to Charles Flynn (Sunbelt) 3462
353 2009-02-12 Pat O'Dea to Ouverson 3464
354 2009-02-16 Ouverson to Pat O'Dea 3465
355 2009-03-12 Board Minutes [ARB - Parking] 3467
356 2009-03-24 Board Minutes 3474

357 2003-11-03 Golf Course Agreement 3476
359 5/12/2009 Board Minutes 3481
360 8/6/2009 Special Members Meeting Minutes 3484
361 2009-09-03 RJ To Diehl Voter List 3486
362 9/17/2009 Annual Member Meeting Minutes 3487
363 11/4/2009 Board Minutes 3491
364 "2009-11-06 2010 Budget. [Carolina Mail House 2009] 3494
365 2009 General Ledger sort / filter for Carolina Mail House 3499
366 2009-11-20 Nov Newsletter 3500
367 2009-01-07 2009 Diehl Contract. 3502
368 2008-12-22 2009 Landscape Contract.Checklists 3514
369 4/19/2010 Special Board Meeting Minutes 3523
370 2010-05-05 BoD Minutes (p3 ARB Hearings) 3526
371 July 2010 ARB Guidelines (revised w/o Board Approval) 3531
372 2010-09-27 Diehl Violation Letter to RJ 3542
373 2010-09-29 RJ ARB Fine Chk 3543
374 2010-09-30 Violation Fine Receipt 3544
375 2010-09-30 RJ ARB Fence Request 3545
377 2010-10-08 Fence Dis-Approval 3556
378 2010-10-11 Fence Appeal 3557
379 2010-10-21 HOA Ltr to RJ 3560
380 2010-10-23 RJ To HOA 3562
381 2010-11-15 HOA to RJ (acct shortage) Ltr 3565
383 2010 Diehl Contract 3567
384 2011-02-11 Board Minutes (incl ARB Guideline Revisions) 3579
385 2011-11 ARB Guidelines (revised) 3584
386 2011-11-21 special board meeting minutes 3593
387 2011 Budget (Nov 16 2010) 3595
388 2012 Budget 3600
389 2012-07 Revised Computation of Golf Course Debt to HOA 3604
390 2004 HOA General Ledger Golf Course 3606
391 2005 HOA General Ledger Golf Course 3610
392 2009 HOA General Ledger Golf Course 3611
393 2010 HOA General Ledger Golf Course 3612
394 2011 HOA General Ledger Golf Course 3614
395 2011 HOA General Ledger Villas Settlement 3615
396 2012-CP-26-1740 Complaint IHOA v Golf Course 3616
397 Diehl Vendor Agreement 3625
398 Diehl Vendor Program Summary Page 3626
399 Diehl Vendor Certification Web Page 3627
400 3/7/2012 2012-03-07 Horry FOIA to RJ 3628
401 1/21/2003 R008-03 Pebble Creek (inc Castlebridge) 3629
402 1/20/2009 R012-09 Links 3631
403 1/20/2009 R013-09 Links 3635
404 2/15/2011 R014-11 Highlands (Feb 15 2011) 3639
405 2/21/2006 R018-06 Intl Club Dr - Pickering Dr 3642
406 5/15/2007 R068-07 Links 3644
407 5/15/2007 R070-07 Links 3647
408 5/18/2004 R073-94 Pebble Creek 3650
409 6/5/2001 R076-01 Tournament Drive 3652

410 6/19/2007 R104-07 Highlands 3654
411 6/19/2007 R105-07 Highlands 3657
412 10/20/2009 R153-09 (Meadows) 3660
413 10/15/2002 R155-02 Pebble Creek 3664
414 11/13/2007 R185-07 Pebble Creek (Nov 13 2007) 3667
449 Horry County Planning Commission Book 3670
450 2/1/1997 MIGPA Approval Planning Commission 3672
451 5/14/1999 Lantana Approval Planning Commission 3673
452 7/16/1998 Plat 156 @ 155 3674
453 10/22/1998 Plat 158 @ 155 3675
454 1/15/1999 Plat 160 @ 079 3676
455 8/17/1999 Plat 164 @ 199 3677
456 5/5/2000 Plat 169 @ 114 3678
457 5/5/2000 Plat 169 @ 115 3679
458 5/5/2000 Plat 169 @ 116 3680
459 7/28/2000 Plat 171 @ 149 3681
460 6/19/2003 Plat 181 @ 089 Golf Course 3682
461 6/19/2003 International Club PUD - Planning Commission 3683
462 9/17/2002 Plat 185 @ 165 3684
463 4/29/2003 Plat 189 @ 154 3685
464 6/6/2003 Plat 190 @ 079 3686
465 10/30/2003 Plat 192 @ 245 Amenity Center 3687
466 5/25/2004 Plat 197 @ 171 The Glens - Planning Commission 3688
467 Plat 214 @ 005 - 5/15/2006 3689
468 Plat 215 @ 191 Grand Vista - 7/25/2006 3690
469 Plat 215 @ 199 Grand Vistas - 7/25/2006 3691
470 Plat 237 @ 296 - 5/9/2008 3692
471 Planning Commission Fairways Approval Plat - 9/21/2006 3693
507 WV State Register (Krolczyk) - 7/27/2003 3694
509 HOA Year End Bulletin (Home Count) 11/1/2004 3700
511 "Jarmuth Federal Personnel File Extracts, 1998 - 2006" 3701
513 2008-11 Number of Homes From 2008 Budget 3702
514 Board Minutes (Templeton on Board) - 2/10/2009 3703
515 """List of Lawsuits Associated with"" Plaintiff - 5/27/2009" 3704
517 "2009-05-27 Butryn Statement (""May 27 2008"")" 3706
518 2009-05-27-28 Response Emails 3707
521 BoD Templeton Email to 200 on HOA email list - 4/20/2009 3709
522 Carolina Mail House Mail Package Material - 5/11/2012 3711
525 2009-05-28 Julie Case Defamatory Email Count #4406 3721
530 2009-05-31 Defamation Impact Police Reports 3722
533 2009-06-04 Jane Pizzi Statement 3726
540 Deed 2082 @ 0456 Grand Vistas - 10/22/1998 3727
544 Deed 2117 at 1413 99 Yr Golf Deed - 1/29/1999 3728
545 Deed 2117 at 1401 Sunbelt Deed - 1/29/1999 3733
547 1999-02-08 Covenants 3737
548 1999-02-08 Internationals Club Bylaws Unrecorded 3768
551 2000-05-10 Covenant Amendment 1 3786
552 IHOA Charter w Sec of State - 3/1/2001 3788
553 Deed 2450 at 1073 Ken Willard home - 2/7/2002 3790
555 2003-04-29 Covenant Amendment 2 3791

556 "Deed 2588 at 1437 Plantation to Horton: Grand Vistas, Links, Highlands, Glens, Tournament Drive - 4/29/2003".....3795
557 Horton / Sunbelt agreement Unrecorded - 5/16/2003.....3799
558 Horton /Golf Course / HOA Agreement (see #357) - 11/20/2003.....3808
559 2004-03-29 Covenant Amendment 3.....3815
560 Deed 2771 @ 1490 Second Amenity Center Park Lot - 8/4/2004.....3818
561 2004-12-28 Covenant Amendment 4.....3823
562 Deed 3311 @ 2294 Horton Common Area to HOA - 1/30/2008.....3829
563 2008-06-20 Covenant Amendment 5.....3831
564 Deed 3406 at 1694 Intl Club Dr - 6/18/2009.....3836
565 4/19/2010 - HOA Central Electric Special Meeting Minutes.....3839
567 HOA Name Transposition Worksheet.....3842
568 Murrells Inlet Golf Plantation Inc Incorporated - 9/30/2010.....3843
569 Int'l Club Assoc. Fictitious Name Horry County Bk 3484 @ 1188 - 10/5/2010.....3845
570 International Club Association Inc Incorporated - 12/1/2010.....3846
571 Articles of Merger: ICA into MIGPA - 3/7/2010.....3849
600 8/1/2008 Swingset in ARB Guidelines.....3851
601 2009-07-21 ARB Swing Appl.....3861
602 2009-08-05 ARB denial.....3870
603 2009-11-18 Toth to SC Human Rights Re Swing set.....3871
604 2011-03-17 HOA Interog Ans Page 11.....3872
605 2011-03-17 HOA Interog Ans Page 1.....3873
606 2011-11 ARB Guidelines MU.....3874
609 "Planning Commission - Accessory Structures 1997 MIGPA Plat Approval - 2/1/1997".....3883
610 Pathfinder Swing set.....3884
611 Robert Sobczyk House Front - 1/1/2012.....3885
612 Robert S Sideyard w Playset - 1/1/2012.....3886
613 Swing Footprint.....3887
614 "Aug 25, 2009 Housing discrimination Complaint".....3888
620 2010-09-03 Photo Cartman Hypodermic Needle Left on Jarmuth lawn3891
621 2010-09-03 Photo Cartman Installing Stakes in Jarmuth Sprinklers3892
622 2010-09-03 Photo Cartman with Saw.....3893
623 2010-09-03 Photo Cartman Stakes on Jarmuth Sprinkler Heads...3894
624 2010-09-03 Photo Warner Surveyor Front of Power Box.....3895
625 2010-09-10 Photo Cartman damage to Jarmuth property.....3896
626 2010-09-10 To diehl Cartman Violations.....3899
627 2010-09-27 diehl Violation Letter.....3900
628 2010-09-29 ARB Fine Chk.....3901
629 2010-09-30 ARB Fence Pkg.....3902
630 2010-09-30 Violation Fine Rcpt.....3913
631 2010-10-08 Bed Approval.....3914
632 2010-10-08 Fence disapproval.....3915
633 2010-10-11 Fence Appeal.....3916
634 2010-10-21 HOA Ltr to Me.....3919
635 2010-10-23 To HOA.....3921
640 2012-02-13 FRIEBOTH deposition extracts.....3924
641 2012-02-17 Rosemary Toth deposition extracts.....3930
642 "2012-02-27 Palm Request Package to ""ARB""".....3937

643 2012-03-05 diehl emails re ARB hearing 3941
644 "2012-03-16 ""ARB ""Response "" Extortion / Exaction""""....3943
645 "2012-01-30 HOA Letter ""Late Notice"" with Plaintiff Account" 3944
700 "2012-04-30 DR Horton Common Area Expense Summary" 3947
701 2012-04-18 Developer Horton Capital Contributions 3948
702 CAI Get A New Member Incentive Program 3959
703 HOA Supplied Capital Contributions Ledger #4480-4489 3961
704 "Computation of Horton Capital Contributions not Booked into HOA Ledger by Diehl" 3971
705 2006 HOA General Ledger Golf Course 3972
706 2007 HOA General Ledger Golf Course 3973
707 2008 HOA General Ledger Golf Course 3974
708 Abel / Diehl / HOA 2010 Budget 3975
709 2009-12-31 2009 Financial Statement 3984
754 4/6/2010 Minutes of Special Meeting of Directors (also 753) 3998
755 5/17/2011 Consent Settlment Order Villas v IHOA lawsuit 4000
758 3/18/2011 IHOA Answers to Interrogatories (also 759) 4025

60. Defendant's Exhibits

2 Declaration of Special Covenants Highway 17 4026
3 Declaration Covenants Restrictions for Murrells Inlet Golf 4085
4 Amendment 1 to Declaration of Covenants 4133
5 Waste Industries, Inc. Service Agreement 4135
6 Quitclaim Deed from Plantation Golf 4137
7 Amendment 2 to the Declaration of Covenants 4141
8 Developers Agreement dated May 16, 2003 4145
11 Golf Course Agreement dated November 20, 2003 4152
12 Minutes of the HOA Board January 13, 2004 4160
13 Amendment 3 to Declaration of Covenants 4163
16 Deed from Plantation Golf A.D., LLC to the HOA 4167
17 Amendment 4 to Declaration of Covenants 4170
18 Minutes of the HOA Board January 18, 2005 4175
19 Right of Way Easement dedication from D.R. Horton, ...4189
20 Right of Way Easement dedication from D.R. Horton,....4190
23 Horry County Warranty Agreement with D.R. Horton, ...4191
25 Warranty Deed from Cheryl Tucker Essex 4192
28 Architectural Guidelines amended April 2008....4196
29 Emails Beckie Abel & Jarmuth June 2008 4216
30 Emails Beckie Abel & Jarmuth June 2008....4218
31 Email from Rosemary Toth June 18, 2008.... 4223
32 Amendment 5 to Declaration of Covenants 4225
33 Email from Rosemary Toth June 28,2008....4230
34 Email from Rosemary Toth July 15, 2008 4231
35 Email from Beckie Abel August 8, 2008 4233
36 Email from Rosemary Toth October 4, 20 2008 4234
37 Email from Rosemary Toth October 5, 2008 4237
38 Email from Rosemary Toth October 12, 2008 4238
39 Email from Jarmuth October 16, 2008 4239

40 Email from Jarmuth November 17, 2008 4240
41 Letter from Jarmuth December 12, 2008 4241
42 Letter from Jarmuth December 12, 2008 4246
43 Letter from Rosemary Toth December 17, 2008 4254
44 Letter from Jarmuth December 23 19, 2008 4255
45 Emails Jarmuth, Toth, & Abel December 19, 2008 4257
46 Letter from Jarmuth January 26, 2009 4260
47 Emails Jarmuth & Abel February 17, 2009 4261
48 Emails Jarmuth & Abel regarding February 17 / 18 2009 4263
49 Emails Jarmuth & Abel February 18, 2009 4267
50 Email from Abel February 18, 2009....4271
51 Letter from Jarmuth February 20, 2009 4272
52 Email from Larry Sherman March 16, 2009....4276
53 Email from Jarmuth April 28, 2009 4277
54 Quit Claim Deed from D.R. Horton, Inc.June 19, 2009 4279
55 Email from HOA June 22, 2009 4282
58 Jarmuth's ARB Application July 21, 2009 4283
59 Disapproved dated August 5, 2009 - swing set 4293
60 Email from John White August 22, 2009....4294
61 Horry County Letter August 24, 2009 4295
62 HOA Check #2469 October 15, 2009....4298
63 SC Human Affairs Letter....4299
70 HOA Notice of Special Meeting April 6, 2010....4304
72 HOA Board Minutes April 19, 2010....4306
75 HOA Friday Facts April 23,13 2010....4309
76 Landscaping Mitigation Agreement....4312
77 HOA Board Minutes May 5, 2010....4316
79 HOA Check #2732 dated June 10, 2010 4326
80 Architectural Guidelines July 2010....4327
81 HOA Board Minutes August 11, 2010....4337
82 Violation Notice from DiehlSeptember 27, 2010 4338
83 Jarmuth ARB Application September 30, 17 2010 4340
84 ARB Meeting Minutes - October 5,21 2010....4350
85 Approval from ARB - flower bed & edging October 8, 2010 4352
86 Disapproved from the ARB - vinyl fence dated October 8, 2010 4353
87 Letter from Jarmuth to HOA Board October 13, 2010 4354
88 ARB Meeting Minutes - December 7, 2010 4358
89 HOA Parking Rules 2011 dated July 1, 2011 4360
91 HOA Board Minutes July 25, 2011 4363
92 Horry County Planning & Zoning Letter September 13, 2011 4366
94 Architectural Guidelines November 2011 4367
95 Jarmuth ARB Request February 27, 2012 4376
96 Diehl Email March 5, 2012....4381
97 Diehl Letter March 16, 2012 4384
99 Golf Course Financial Summary December 17, 2010....4385
100 Golf Course Financial Summary August 2013....4396
101 Glens Condo Financial Summary August 2013 4398
102 Golf Course Accounting Records 4400
105 SC HOA Incorporation Documents 4402
106 SC HOA Incorporation Documents (Web)....4404

107 Butryn Motiont to Intervene in Golf Course case....4406
108 SC HOA Incorporation Documents (Duplicate of 105)....4411
Poster A Plat 158 at 155....4413
Poster B Plat Lantana (Planning Commission)....4414
Poster C Plat 160 at 79....4415
Poster D Plat 169 at 115....4416
Poster E Plat 171 at 149....4417
Poster F Plat 181 at 89....4418
Poster G Plat 189 at 154....4419
Poster H Plat 237 at 296....4420
Poster I International Club Tax Map....4421
Poster J Maps....4422

61. August 20, 2012 Plaintiff's Post Trial Brief Supporting Proposed Order....4425

62. Certificate of Appellant....4649
63. Proof of Service....4650

2010 OCT -1 PM 2:20

STATE OF SOUTH CAROLINA)	IN THE MAGISTRATE COURT
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CASE NO.: 2010-CV261072943
Ronald Jarmuth,)	
)	
Plaintiff,)	
)	
vs.)	ORDER TRANSFERRING CASE TO CIRCUIT COURT
)	
The International Club Homeowners)	
Association, Inc.)	
)	
Defendant.)	
)	

Plaintiff filed this action in Magistrate Court asserting four claims against the Defendant. The Plaintiff's claims are premised upon the legality of the Defendant Association to contract for such things as cable television and garbage collection, as well as to assess the Plaintiff as a homeowner in the International Club community. The Plaintiff seeks to recover monies he and his predecessor in title paid to the Defendant, as well as injunctive relief seeking to bar the Defendant from future assessments and fines.

The Defendant filed a Motion to Dismiss, as well as an Answer. One basis of the Motion to Dismiss is that there is an action pending in the South Carolina Court of Common Pleas, Civil Action No.: 2009-CP-26-3596 in which the Plaintiff and the Defendant are parties and the Plaintiff asserts claims in this action that are the same claims in the Civil Action pending in the Court of Common Pleas for Horry County. Additionally, the Defendant contends that this Court does not have jurisdiction for the Plaintiff seeks injunctive relief and his claim is in excess of $7,5000.00.

Based upon the arguments made before Court and the pleadings in this action, I find that the above entitled action must be transferred to the Court of Common Pleas in that the Magistrate

Court does not have jurisdiction. Further, before any Court can determine if the Plaintiff is entitled to the relief he is seeking, Plaintiff's claim in the Civil Action No.: 2009-CP-26-3596 must be decided. Therefore,

IT IS ORDERED, ADJUGED AND DECREED that the above entitled action is hereby transferred to the Court of Common Pleas for Horry County.

IT IS SO ORDERED.

Magistrate Court Judge

Dated: 11/30/10

Conway, South Carolina

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CIVIL ACTION NO.: 2009-CP-26-3596
Ronald Jarmuth,)	
)	
Plaintiff,)	
)	
vs.)	
)	**ORDER GRANTING DEFENDANT'S MOTION TO CONSOLIDATE CASES**
The International Club Homeowners)	
Association, Inc.,)	
Rosemary Toth,)	
And K.A. Diehl & Associates,)	
)	
Defendants.)	

FILED
2011 SEP 16 PM 1:14
COUNTY
CLERK OF COURT

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CASE NO.: 2010-CP-26-11320
Ronald Jarmuth,)	
)	
Plaintiff,)	
)	
vs.)	
)	
The International Club Homeowners)	
Association, Inc.)	
)	
Defendant.)	

This matter came before the Court on August 11, 2011 upon the motion of the Defendant, The International Club Homeowners Association, Inc. (hereinafter "Defendant"), in Civil Action No. 2010-CP-26-11320 to consolidate the above captioned matters pursuant to Rule 42(a) of the South Carolina Rules of Civil Procedure. Present at the hearing were the Plaintiff, Ronald Jarmuth ("Plaintiff"), and the attorney for the Defendant, Alicia E. Thompson.

The Plaintiff is a property owner in Pebble Creek, a residential subdivision located within the International Club community. As a property owner, Plaintiff is a member of the Defendant.

The aforementioned cases arise out of disputes between the Plaintiff and the Defendant regarding the validity of the Declaration of the Covenants and Restrictions for the International Club ("Declaration") and the amendments to the Declaration, as well as the validity of assessments levied by the Defendant against the International Club homeowners. Plaintiff asserts other causes of action against the Defendant in Civil Action No. 2010-CP-26-11320 and against the Defendant, Rosemary Toth, and K.A. Diehl & Associates in Civil Action No. 2009-CP-26-3596.

"[C]onsolidation may be ordered whenever actions involving a common question of law or fact are pending before the court." *Ellis v. Oliver,* 415 S.E.2d 400, 401 (1992); *see also Creighton v. Coligny Plaza Ltd.*, 512 S.E.2d 510, 522 (Ct. App. 1998), *reh'g denied,* (1999), *Keels v. Pierce,* 433 S.E. 2d 902 (Ct. App. 1993). Rule 42 (a) of the South Carolina Rules of Civil Procedure addresses consolidation and specifically states: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the action; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." The above actions involve common questions of law and fact. The claims in both actions are dependent upon the legal issue of whether the Declaration is valid. Accordingly, under South Carolina law, these two cases should be consolidated for the sake of judicial economy.

THEREFORE, IT IS ORDERED that Civil Action Number 2010-CP-26-11320 is consolidated under Civil Action No. 2009-CP-26-3596 pursuant to Rule 42(a) of the South Carolina Rules of Civil Procedure, meaning that Civil Action Number 2010-CP-26-11320 shall be tried at the same time and in the same proceedings as Civil Action No. 2009-CP-26-3596.

IT IS SO ORDERED.

The Honorable Larry B. Hyman, Jr.
Chief Administrative Judge

Dated: 8-24-2011
Conway, South Carolina

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COUNTY
12 MAY 17 PM 1:56
MELANIE WILLIAMS-WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY) FIFTEENTH JUDICIAL CIRCUIT

CASE NO: 2009-CP-26-3596

Ronald Jarmuth vs. The International Club

PLAINTIFF(S) DEFENDANT(S)

ORDER
DISPOSITION OF MOTIONS

Pursuant to the motions hearing held on May 16, 2012 and the agreement of the parties, the Court declares that all outstanding motions in the above matter have been disposed of as of the below date.

IT IS SO ORDERED.

The Honorable Steven H. John
Chief Administrative Judge
Court of Common Pleas

May 16, 2012 CONWAY, SC

Ronald Jarmuth, Pro Se — ATTORNEY(S) FOR PLAINTIFF

Henrietta Golding, Esq. — ATTORNEY(S) FOR DEFENDANT

STATE OF SOUTH CAROLINA COUNTY OF HORRY Ronald Jarmuth, Plaintiff, vs. The International Club Homeowners Association, Inc., Rosemary Toth, and K.A. Diehl & Associates, Defendants.	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2009-CP-26-3596 **CONSENT ORDER OF REFERENCE**
STATE OF SOUTH CAROLINA COUNTY OF HORRY Ronald Jarmuth, Plaintiff, vs. The International Club Homeowners Association, Inc., Defendant	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2010-CP-26-1320

FILED
HORRY COUNTY
12 JUN 15 PM 1:48
MELANIE WEBER-WARD
CLERK OF COURT

This matter came before the Court upon motion of the undersigned Defendants, International Club Homeowners Association, Inc. ("HOA"), Rosemary Toth, and K.A. Diehl & Associates, Inc. to refer the above entitled actions to Ralph Stroman, as Special Referee.

The claims of the Plaintiff, Ronald Jarmuth ("Plaintiff"), include a declaratory judgment action seeking an order as to the validity of provisions contained in the restrictive covenants for the International Club and amendments thereto, the authority of the HOA to govern the International Club, the validity of the HOA's contracts with third parties, and the validity of the

restrictive covenants regulating parking in light of the Developer's dedication of International Club streets to Horry County, as well as claims for breach of fiduciary duty and defamation.

The undersigned Plaintiff and Special Referee Ralph Stroman consent to the referral of the above entitled actions.

It appearing that pursuant to Rule 53(b) SCRCP the herein actions are appropriate to be referred to Ralph P. Stroman, as a Special Referee, with authority to enter a final judgment in the cases:

IT IS ORDERED that the above entitled actions are referred to Ralph P. Stroman who, pursuant to Rule 53(b) SCRCP, shall exercise all the power and authority that a circuit judge sitting without a jury would have, including but not limited to, hearing pre-trial and post trial motions, making findings of fact and conclusions of law, directing entry of final judgment in these actions under Rule 53(b) SCRCP, and issuing any and all Orders necessary.

Pursuant to Rule 53(b) SCRCP, any appeal from the final judgment entered by the Special Referee shall be to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

Mr. Stroman's hourly charge is $250.00. By agreement of the parties, the HOA shall pay the hourly charges of the Special Referee for the Special Referee's time expended in trying these actions, together with any additional court costs, such as the cost of the court reporter and court personnel in attendance, if charged by the Court at the trial of these matters. The parties agree that the South Carolina Appellate Court Rules shall determine the party responsible for the costs of any appeal that may be filed.

The trial shall commence on Wednesday, August 8, 2012 at 9:00 A.M. at the Horry County Government and Judicial Center and shall continue until concluded.

IT IS SO ORDERED.

Conway South Carolina

Dated: 6/13/2012

The Honorable Steven H. John
Chief Administrative, Judge Fifteenth Judicial Circuit

I SO MOVE:

Henrietta Golding, Esq. SC Bar #2173
Alicia E. Thompson, Esq. SC Bar #77056
McNair Law Firm, P.A.
P.O. Box 336
Myrtle Beach, SC 29578-0336
Ph: (843) 444-1107 Fax: (843) 443-9137
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athompson@mcnair.net

Attorneys for the Defendants

Myrtle Beach, South Carolina
June 12, 2012

I SO CONSENT:

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
Ph: (843) 314-4355
Email: ronaldjarmuth@hotmail.com

Pro Se Plaintiff

Murrells Inlet, South Carolina

June 6 2012

I SO CONSENT.

Ralph P. Stroman, Esq.
8 Red Squirrel Lane
Pawleys Island, SC 29585
Ph: (843) 237-1030
Email: rstroman@sc.rr.com

Pawleys Island, South Carolina
June 4, 2012

COPY

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	CIVIL ACTION NO.: 09-CP-26-3596
Ronald Jarmuth,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER OF RECUSAL
	)	AND SENDING CASE
The International Club HOA, et al,	)	BACK TO CIRCUIT COURT
	)	
Defendants.	)	

Plaintiff Ronald Jarmuth, a self-represented litigant, has made post-trial motions and has mailed several letters to the Honorable Steven H. John, Chief Administrative Judge for the 15th Judicial Circuit, Civil Court, with copies to defense counsel and the undersigned requesting that Judge John preside over all post trial motions in this matter instead of the undersigned who served as the trial judge. Specifically, Mr. Jarmuth makes what I consider to be unfounded and general accusations that this Court is biased against him and has committed other acts of misconduct in the trial of this matter. While not admitting any bias towards Mr. Jarmuth, and in fact, wholeheartedly denying any such bias and/or misconduct, this Court finds and concludes that it is in the interests of justice and judicial economy that I recuse myself from further involvement in this matter and that the matter be sent back to the Circuit Court for further proceedings.

I, THEREFORE, FIND AND CONCLUDE that this matter be referred back to the Honorable Steven H. John, Chief Administrative Judge for the 15th Judicial Circuit, Civil Court, for further proceedings in this matter.

AND IT IS SO ORDERED.

FILED
HORRY COUNTY
2012 OCT 17 PM 1:28
MELANIE HUGGINS-WARD
CLERK OF COURT

RALPH P. STROMAN
Special Referee for Horry County

Oct 17, 2012

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2009-CP-26-3596

Ronald Jarmuth,

Plaintiff,

vs.

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

Defendants.

ORDER DENYING PLAINTIFF'S POST-TRIAL MOTIONS

CIVIL ACTION NO.: 2010-CP-26-11320

Ronald Jarmuth,

Plaintiff,

vs.

The International Club Homeowners Association, Inc.

Defendant.

FILED
HORRY COUNTY
13 MAR 11 PM 12:08
MELANIE HUGGINS-WARD
CLERK OF COURT

On February 4, 2013 the Court held a hearing on the post-trial motions dated September 19, 2012 filed by the *pro se* Plaintiff Ronald Jarmuth ("Plaintiff"). His motions seek a new trial and relief from the Final Order dated September 10, 2012 ("Final Order"). The Final Order dismissed Plaintiff's claims and awarded judgment against him in the amount of $7,326.00 as well as granted injunctive relief.

Appearing at the February 4, 2013 hearing were Henrietta U. Golding and Alicia E. Thompson, counsel for the Defendants International Club Homeowners' Association, Inc. (the "HOA"), Rosemary Toth, and K.A. Diehl & Associates, Inc. ("K.A. Diehl") (collectively

10/13

hereinafter "Defendants"), and the Plaintiff. Having duly considered the record of the trial, being the trial transcript and the numerous exhibits admitted, the briefs filed by the parties, and after listening to the arguments presented at the February 4, 2013 hearing, I hereby conclude as follows and issue the following Order.

PROCEDURAL HISTORY

Consolidated Civil Action Numbers 2009-CP-26-3596 ("2009 Lawsuit") and 2010-CP-26-11320 ("2010 Lawsuit") (collectively hereinafter "Consolidated Cases") were filed by the Plaintiff seeking declaratory judgments that the HOA does not have the authority to perform a plethora of functions, including enforcing the Declaration of Covenants and Restrictions for the International Club ("Declaration") and the Bylaws of the HOA as well as the HOA's other governing documents. A Consent Order referred the Consolidated Cases to a special referee, Ralph Stroman ("Special Referee"), and scheduled the non-jury trial for August 8, 2012 through August 10, 2012.

The trial began, as scheduled, on August 8, 2012 at 9:00 a.m. and concluded on August 10, 2012 at 5:30 p.m. At the beginning of the trial, the Special Referee ruled that all evidence would be entered subject to the parties' objections, including the parties' trial exhibits. The Special Referee also stated that, at the conclusion of the trial, the parties must submit proposed orders and that he would sign one order. No objections were made to the Special Referee's rulings. After the trial, the parties submitted proposed orders as instructed.

The Final Order was signed and filed on September 10, 2012 and the Plaintiff was served with a copy. On September 19, 2012, the Plaintiff filed his Post-Trial Motions. The Special Referee recused himself from hearing the Post-Trial Motions as a result of the Plaintiff's

accusations that he was biased. As a result, the Consolidated Cases came before me, as the Chief Administrative Judge, by an Order dated and filed on October 17, 2012.

In his Post-Trial Motions, the Plaintiff sets forth the following grounds for setting aside and/or amending the Final Order and for a new trial: (1) the Defendants' proposed order constituted fraudulent material and ex parte communications with the trial court, and the Special Referee was biased by executing the Defendants' proposed order; (2) the award of attorneys' fees to the Defendants was improper; (3) the trial court lacked subject matter jurisdiction over the 2010 Lawsuit; (4) the HOA's Architectural Review Board ("ARB") cannot be awarded a judgment, because it was not a party to the Consolidated Cases; (5) procedural irregularities warrant a new trial; and (6) Defendants' exhibits were not produced in discovery.

LEGAL CONCLUSIONS

Plaintiff's Argument Regarding Procedural Irregularities Is Not Grounds For Altering The Final Order.

1. The Plaintiff seeks to set aside the Final Order and requests a new trial based on the following procedural irregularities: a) taking the Defendants' witnesses out of order; b) not permitting summation; c) the time limitation on trial barring Plaintiff from calling Defendant Ms. Toth; d) the Defendants' revision of their first pre-trial brief submitted in January to include additional witnesses and exhibits; and e) Plaintiff did not receive hard copies of the Defendants' exhibits before trial.

2. The Plaintiff did not object to the Special Referee's ruling on taking all but one of Defendants' witnesses out of order, not permitting summation, and the time limitation on trial. Because the Plaintiff is raising these arguments for the first time, even though he had an opportunity to object at the time of trial, the arguments are not preserved. See South Carolina Coastal Conservation League v. South Carolina Dept. of Health and Environmental Control, 380

S.C. 349, 380, 669 S.E.2d 899, 915 (Ct. App. 2008), overruled on other grounds, 390 S.C. 418, 702 S.E.2d 246 (2010). A party cannot use a Rule 59(e) motion to present an issue to the court that could have been raised prior to judgment but was not so raised. Fields v. Reg'l Med. Ctr. Orangeburg, 363 S.C. 19, 27, 609 S.E.2d 506, 510 (2005).

3. With respect to the Plaintiff's objections regarding the Defendants' revision to their January 2012 pre-trial brief listing witnesses and exhibits, the Defendants listed all witnesses called and previously produced all exhibits to the Plaintiff. During discovery, the Plaintiff was provided CDs with electronic copies of the Defendants' documents some of which became exhibits. The Plaintiff also did not object to the Defendants' witnesses at the time that they were called. Because all of Defendants' exhibits and witnesses were disclosed before the initiation of trial, this Court declines to amend the Final Order based on discovery issues.

4. Additionally, the Special Referee's ruling that the Defendants' witness, Chris Sullivan, be taken out of order was not in error and did not prejudice the Plaintiff. The Defendants' direct examination of Chris Sullivan was brief and did not limit the Plaintiff's ability to present his case. Although Plaintiff argues that he did not have enough time to call Defendant Ms. Toth as a result of Mr. Sullivan's testimony out of order, the record reflects that Plaintiff made no attempt to call Ms. Toth; nor did the Plaintiff make any objections to not having sufficient time to present his case when he rested. It should also be noted that Plaintiff presented Ms. Toth's deposition to the Special Referee.

The Special Referee's Execution Of The Final Order Does Not Evidence Bias.

5. The Plaintiff contends that the Defendants' proposed Final Order constitutes an ex parte communication, includes fraudulent material, and evidences the Special Referee's bias towards the Defendants.

6. The Plaintiff was copied on the cover letter to the Special Referee enclosing the Final Order. Because the Plaintiff was copied on the letter to the Judge, the Final Order is not an ex parte communication.

7. The Plaintiff argues that the Final Order is fraudulent because: a) the findings of fact do not conform to the evidence; and b) the Final Order includes new post-trial arguments and case citations.

8. The findings of fact challenged by the Plaintiff are supported by the evidence. Additionally, the Final Order is consistent with the record, the pleadings, the legal arguments made at trial and in the parties' pre-trial and post-trial briefs. The Court notes a typographical error in Paragraph 19, wherein the Plaintiff's attendance at Board of Director meetings should be since 2009, not 2007.

9. Because the Final Order accurately reflects the evidence, I decline to amend the Final Order or grant a new trial based on the Special Referee's execution of the Defendants' proposed Final Order.

The Trial Court Has Jurisdiction Over The 2010 Lawsuit.

10. The Plaintiff states that the trial court does not have jurisdiction over the 2010 Lawsuit because the magistrate transferred the case to the circuit court in violation of S.C. Code Ann. § 22-3-30 (2007), which requires the magistrate to transfer cases to the circuit court that exceed the civil jurisdictional limit of $7,500.

11. S.C. Code Ann. § 22-3-20 specifically provides that the magistrate court does not have jurisdiction over any case where real property title may come into question. Because the Plaintiff's lawsuit deals with restrictive covenants in his chain of title, the magistrate properly

determined that he did not have jurisdiction to hear the matter and transferred the case to this Court.

12. The Plaintiff also consented to the transfer of the Consolidated Cases to the Special Referee. Therefore, the Special Referee had jurisdiction to hear this case.

The Trial Court's Judgment Against The Plaintiff Is Proper.

13. At the February 4, 2013 Motions hearing, Plaintiff contended that the Final Order erred because: a) if you accept the Defendants' argument that the ARB fined the Plaintiff, an award of fines is to the ARB instead of the HOA, which is not a party to the Consolidated Cases; and b) the attorneys' fees are not recoverable under the Declaration, because they were not incurred in enforcing the Declaration.

14. The Final Order does not hold that the ARB is a separate legal entity from the HOA, nor does it refer to the ARB as a Defendant. The ARB is an arm of the HOA, and therefore, it was proper for the trial court to award fines to the HOA levied by the ARB.

15. The award of attorneys' fees to the HOA was also proper. Sections 8.1 and 8.9 of the Declaration and Section 13.4 of the Bylaws provide that the HOA is entitled to attorneys' fees for enforcing the Declaration. In the Consolidated Cases and the complaint filed with the South Carolina Human Affairs Commission, Plaintiff disputed the validity of the Declaration. As a result, the HOA was forced to pay $5,000 in attorneys' fees to enforce the architectural restrictions contained in the Declaration against the Plaintiff. Therefore, an award of attorneys' fees was proper in the Consolidated Cases. See Sea Pines Plantation Company v. Wells, 294 S.C. 266, 271, 363 S.E.2d 891, 894 (1987).

Plaintiff's Property Is Subject To The Declaration.

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16. The Plaintiff's Post-Trial Motions dispute the Special Referee's holding that Plaintiff's Pebble Creek lot is subject to the Declaration.

17. The Plaintiff's deed states that his property is subject to the Declaration. Consequently, the Special Referee did not err in holding that the Plaintiff's Pebble Creek property is subject to the Declaration. See Charping v. J.P. Scurry Co., Inc., 296 S.C. 312, 315, 372 S.E.2d 120, 122 (Ct.App.1988) (holding that a restrictive covenant is enforceable if there is "an indication that the parties intended for the covenant to run with the land").

The HOA Is The Governing Body Of The International Club.

18. Another ground for amending the Final Order, according to the Plaintiff, is that the true association under the First Amendment to the Declaration is International Club Association, not the HOA. He requests that the Final Order be amended to hold that the International Club Association, a South Carolina corporation incorporated by the Plaintiff, is the appropriate governing body.

19. The record reflects that the HOA was incorporated in 2001 by the original developer, and since that time, the HOA has continually acted as the governing organization for the International Club. The HOA provides services, levies assessments, and owns the Common Area within the neighborhood. As a result, I decline to amend the Final Order to hold that the entity formed by the Plaintiff is the governing body of the International Club, since the Defendant HOA is the proper association for the International Club community.

The Declaration Is Consistent With The Non-Profit Corporation Act.

20. At the February 4, 2013 hearing, Plaintiff argued that the Declaration's requirement that all homeowners within the International Club be members of the HOA violates

the South Carolina Non-Profit Corporation Act, S.C. Code Ann. § 33-31-620 stating that members may resign at any time.

21. The Plaintiff may resign from the HOA at any time by selling his International Club property. Because the Plaintiff has the ability to resign, the Declaration is not in violation of the South Carolina Non-Profit Corporation Act.

Plaintiff Does Not Have Standing To Challenge The HOA's Actions That Occurred Before October 23, 2006.

22. The Plaintiff argues that the Special Referee erred by holding that the Declaration and Bylaws filed in 1999 as well as amendments thereto filed between 2000 and 2004 and the Declaration of Special Covenants for the Highway 17 Connector Road Maintenance District filed in 1998 are valid. He also asserts that the Waste Industries Contract dated May 24, 2001, the HTC Contract dated October 30, 2003, and the Golf Course Agreement dated November 20, 2003 are invalid.

23. These transactions were entered into before the Plaintiff purchased his International Club property on October 23, 2006. Accordingly, the Plaintiff does not have standing to challenge these arrangements. Furthermore, the evidence presented shows that the Waste Industries Contract of May 24, 2001, the HTC Contract of October 30, 2003, and the Golf Course Agreement of November 20, 2003 were properly entered into by the representative body, the Defendant International Club Homeowners Association, Inc. Therefore, I decline to amend the Final Order to hold that the above documents are invalid.

The Special Referee Did Not Err By Holding That The Streets Are Subject To The Declaration.

24. Next the Plaintiff contends that the Final Order's reference to the Janet Carter letter stating that Horry County does not interfere with a homeowners' association's enforcement

of restrictive covenants in the chain of title of dedicated roads is inappropriate because the letter is not in evidence.

25. Ms. Carter's letter was admitted as Defendants' Exhibit Number 92. Because the letter was in evidence, the Special Referee did not err by referring to the letter in the Final Order.

26. The record also reflects that the roads in the International Club community were dedicated to Horry County. Therefore, I decline to amend the Final Order to state otherwise.

The HOA's Grant Of An Easement To Central Electric Power Was Not An Ultra Vires Act Under Sections 4.10 And 7.23 Of The Declaration.

27. The Post-Trial Motions contend that the Special Referee erred by holding that the HOA had the power to grant an easement to Central Electric Power to install above ground utilities.

28. Pursuant to Sections 4.10 and 7.23 of the Declaration, the Board has the power to grant easements for above ground utilities. Therefore, I decline to amend the Final Order to hold that the HOA was outside of its authority by granting the easement to Central Electric Power.

The Board Members Did Not Violate The Non-Profit Corporation Act By Refunding Assessments To Its Members.

29. At the February 4, 2013 hearing, Plaintiff asserted that the HOA's payment of $75.00 to each member of the HOA was an unlawful distribution and violated S.C. Code Ann. § 33-31-1301. He also argues that the trial court erred in failing to hold liable the board members who voted in favor of the transaction.

30. The record reflects that the funds were paid to the HOA members to return an overcharge for services, and accordingly, the payment is not a distribution pursuant to S.C. Code Ann. § 33-31-1302.

The ARB Did Not Waive Its Architectural Review Rights.

31. The Special Referee was correct in holding that the ARB did not waive its right to exercise architectural control under Article VII of the Declaration and the Architectural Guidelines. Plaintiff's argument is two-fold: a) the First Amendment to the Declaration waives architectural review rights; and b) the ARB inconsistently applied the restrictions and guidelines by allowing fences and swing-sets.

32. Although South Carolina courts strictly construe restrictive covenants in favor of free use of the property, the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 864 (1998). The fact that the Developer, the drafter of the First Amendment, continued to exercise architectural review powers is convincing evidence that it did not intend to waive all rights under Article VII when it filed the amendment. Id. ("The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution.")

33. Secondly, the HOA's consistent disapproval of fences on the property line since the early 2000's supports the conclusion in the Final Order that the HOA did not waive its right to enforce Section 7.4. Additionally, the ARB's approval of a swing-set on one owner's property while denying the Plaintiff's application for a swing-set based on aesthetic reasons was proper under Section 7.2 of the Declaration and does not waive the ARB's right to deny Plaintiff's application. See Sea Pines Plantation Company, 294 S.C. at 271, 363 S.E.2d at 894 (holding that a refusal to approve plans for aesthetic reasons will be upheld where the covenant has provided guidelines for enforcement and expressed the purpose of the covenant); see also, Palmetto Dunes Resort v. Brown, 287 S.C. 1, 2, 336 S.E.2d 15, 16 (Ct.App.1985) (holding that the Board has a

right to disapprove plans that would mar the general appearance of the subdivision and thus diminish the overall quality of the development).

34. This Court declines to amend the Final Order to hold that the HOA waived its right to enforce Article VII of the Declaration.

K.A. Diehl Did Not Violate Plaintiff's Privacy Rights.

35. The Plaintiff contends that the Final Order should be amended to hold that K.A. Diehl violated his invasion of privacy rights by disclosing his account information and past violations to the ARB.

36. As an arm of the HOA, the ARB is entitled to information related to the Plaintiff's violations and fines. Accordingly, K.A. Diehl did not publicize the Plaintiff's private affairs justifying an amendment to the Final Order. See Meetze v. The Associated Press, 230 S.C. 330, 335, 95 S.E.2d 606, 608 (1956).

The ARB's Deferral Of Plaintiff's Application Was Proper.

37. Next, the Plaintiff asserts that the ARB's deferral of his 2012 application for improvements was improper for the following reasons: a) the ARB does not have the authority to defer applications; and b) Charles Roche, the Defendant Ms. Toth's husband, voted in favor of the deferral making it a conflict of interest transaction under S.C. Code Ann. § 33-31-831.

38. The record reflects that the ARB had no choice but to defer the Plaintiff's application because a quorum did not exist without Mr. Roche's vote. Because the result would have been the same whether Mr. Roche voted or not, the deferral was "fair" as defined by the Act and cannot be the basis for imposing liability. See S.C. Code Ann. 33-31-831 ("[a] conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction was fair to the corporation at the time it was entered into ...").

The ARB Has The Authority To Enforce The Architectural Restrictions And Impose Fines Without A Hearing.

39. The Plaintiff argued that the HOA violated § 13.3 of the Bylaws by imposing fines on him without a hearing.

40. Section 13.3 of the Bylaws states that the Board "may" hold a hearing before imposing fines. Further, I find that the Plaintiff waived his right to a hearing. Accordingly, Plaintiff's argument that the HOA violated Section 13.3 of the Bylaws by failing to hold a hearing is not a basis for amending the Final Order.

The HOA Used And Accounted For The Capital Contributions In Accordance With The Declaration.

41. Plaintiff argues that the Final Order is in error because it does not hold that the Board's use of the contributions was an ultra vires act under the Declaration.

42. First, Plaintiff attacks the use of capital contributions for allegedly paving the amenity center parking lot. Although the record is devoid of evidence that the funds were used for this purpose, Section 6.2 specifically grants the HOA the authority to assess for improvements to the Common Area. Therefore, the HOA would have been within its authority if it paid for the paving of its Common Area with capital contributions.

43. Secondly, the Plaintiff argues that the HOA maintained the entranceway to the Community with capital contributions in violation of Section 1.6 of the Declaration, which defines Common Area as property owned by the HOA. Even if the HOA maintained the entranceway before it owned the property, it is within its rights to do so pursuant to Section 3.1 of the Declaration.

44. Accordingly, the Special Referee did not err by holding that the capital contributions were properly used by the HOA.

The Defendants Did Not Defame The Plaintiff.

45. The Plaintiff argues that the Special Referee erred by holding that the letter and attachment from Defendants' attorney to the homeowners is not defamatory. Because the Plaintiff stipulated at trial that the letter is not defamatory and the letter was sent for litigation purposes, I decline to amend the Final Order to hold Defendants liable for defamation.

46. The Plaintiff also failed to prove that the HOA slandered the Defendant when William Fletcher allegedly called the Plaintiff a child molester. No evidence exists that Mr. Fletcher was an agent of the Board at the time of the alleged statement.

K.A. Diehl Properly Performed Its Duties As Property Manager.

47. Plaintiff testified that his Exhibit Numbers 701, 703, and 704 evidence that K.A. Diehl stole $16,063.00 in capital contributions. Based on the testimony of the HOA president and property manager, K.A. Diehl did not steal funds. As result, I decline to amend the Final Order to hold that K.A. Diehl misappropriated the HOA's funds.

CONCLUSION

Therefore, it is

Ordered that the Plaintiffs' Post-Trial Motions are denied.

The Honorable Steven H. John
Resident Judge
Fifteenth Judicial Circuit

March 11, 2013
Conway, South Carolina

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

HORRY COUNTY
12 SEP 10 AM 10:52
MELANIE HUGGINS-WARD
CLERK OF COURT

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

2. The Bylaws are Valid and Binding.

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

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

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

The Declaration Recitals, as amended, state:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Street and Amenity Center Parking.

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

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

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

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

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

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

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

b. Declaration Section 7.25 was not Deleted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. The Architectural Guidelines are valid.

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

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

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

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

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

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

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

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

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

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

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

Section 7.4 of the Declaration specifically regulates fences:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Separate Accounting for Capital Contributions.

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

b. Equitable Ownership of Capital Contributions.

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

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

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

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

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

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

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

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

e. Collection and Use of Capital Contributions.

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

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

f. Validity of the Third Amendment.

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

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

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

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

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

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

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

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

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

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

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

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

g. Validity of the Fourth Amendment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. The Defendants' statements are privileged.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25. Plaintiff must remove the brick foundation.

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

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

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

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

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

IT IS SO ORDERED.

The Honorable Ralph P. Stroman
Horry County Special Referee

Conway, South Carolina
Dated: Sept 10 2012

STATE OF SOUTH CAROLINA) **COUNTY OF HORRY)**	**IN THE MAGISTRATE'S COURT**
Ronald Jarmuth , **249 Pickering Drive** **Murrells Inlet, SC 29476** **843-314-4355**	**Case No.: 2010CV261072943**
Plaintiff	**COMPLAINT** **(NON-JURY)**
vs	
The International Club **Home Owner's Association, Inc.,** **c/o K.A. Diehl,** **Registered Agent** **11740 Highway 17S Bypass** **Murrells Inlet, SC 29576** **843-357-9888**	
Defendant.	

PARTIES 1
PROPERTY 2
CONTROLLING ISSUE OF FACT – "THE ASSOCIATION" 2
COUNT I – RETURN OF "CABLE TV ASSESSMENTS" UNLAWFULLY TAKEN FROM PLAINTIFF BY DEFENDANT BY FRAUD OR OTHERWISE 4
COUNT II – RETURN OF "WASTE MANAGEMENT ASSESSMENTS" UNLAWFULLY TAKEN FROM PLAINTIFF BY DEFENDANT BY FRAUD OR OTHERWISE 6
COUNT III -- RETURN OF ASSESSMENTS IN GENERAL 6
COUNT IV – UNLAWFUL IMPOSITION OF FINES BY DEFENDANT AGAINST PLAINTIFF FOR ALLEGED VIOLATION OF NON-EXISTENT COVENANT PROVISIONS AND NON-EXISTENT ARCHITECTURAL REVIEW BOARD RULES - INTERFERENCE WITH ALLOWED USES OF PROPERTY 9
FURTHER REQUEST 13

The Plaintiff, complaining of the Defendant, would respectfully show and allege unto this Honorable Court as follows:

PARTIES

1. The Plaintiff is a citizen and resident of Horry County and at all times relevant to this action is the owner of a home identified as Lot #12 located in the Pebble Creek residential

subdivision of a planned unit development (PUD) denominated by the Horry County Planning Commission as the "International Club Planned Unit Development" The street address is 249 Pickering Drive; Murrells Inlet; SC 29576.

2. Defendant, **The International Club Home Owners Association, Inc.** ("**International HOA**"), is a non-profit corporation organized and existing under the laws of the State of South Carolina, on or about March 1, 2001.

PROPERTY

3. The property that is the subject of this action is located in Horry County, South Carolina.

4. The International Club PUD consists of multiple residential communities of which several are multi-family communities and the rest are single-family neighborhoods. It was originally approved by Horry County as the "Murrells Inlet Golf Plantation", with approval granted to the "Murrells Inlet Golf Plantation, LLC." ("Plantation LLC") on or about February, 1997. Subsequently Plantation LLC's successor, "Plantation AD LLC" ("Plantation AD") sought and received approval of modifications to the PUD approval plan, with the PUD referred to as "Lantana PUD" (September 14, 1999). Modifications were further sought as to the PUD under the name "International Club PUD" was sought and obtained under the name "International Club PUD" on or about July 30, 2001 by Plantation AD.

5. The Plaintiff is the owner of a home located in the Pebble Creek Subdivision of what the Covenants (Deed Book 2117 Page 1353) refer to as the "Murrells Inlet Golf Plantation" (PUD) or alternatively as "The International Club" (Deed Book 2258 Page 1453).

CONTROLLING ISSUE OF FACT – "THE ASSOCIATION"

6. The Association.

a. On or about February 8, 1999 covenants were recorded with the Horry County Recorder of Deeds beginning at Deed Book 2117 Page 1353. These applied to land originally denominated as the "Murrells Inlet Golf Plantation" PUD.

b. On Page 1353 (page 1 of) the Covenants contemplated that a South Carolina non-profit corporation denominated as the "**Murrells Inlet Golf Plantation Association, Inc**" would exercise the powers granted it, and only it, through the covenants.

c. On Deed Book Page 1356 (page 2 Section 1.3) the phrase "**Association**" is defined as the "**Murrells Inlet Golf Plantation Association, Inc.**" ("**MIGA**").

d. On Deed Book Page 1361 (page 7 Article III) the covenants provide that "the Association" (as denominated in the Covenants) will exercise all the powers of the developer and any others identified to the "Association" in the Covenants.

e. On Deed Book Page 1362 (page 8, Section 3.3) "Membership" the Covenants provide that "Every person who is an owner of any unit ... shall be a member of the Association".

f. Defendant has held itself out to be "The Association" as contemplated in the Covenants, although it is not the "**Murrells Inlet Golf Plantation Association, Inc**" as specified in the Covenants and one can not arrive at Defendant's name by any name transformation based on the Amendments to the Covenants, however tenuous.

Through acts which can only be likened to some form of extortion or exaction, Defendant has unilaterally contacted homeowners notifying them that Defendant is "The Association" as referred to in the Covenants and acting as a bully has demanded payment of sums to Defendant under putative "assessments" on pain of imposition of liens and other substantial penalties / costs on homeowners for non-compliance. The procedures used are not even in compliance with the Covenants or Defendant's purported Bylaws. Upon information and belief, Defendant has no legally enforceable bylaws although required to have same by statute.

g. Upon information and belief, no homeowner has ever voluntarily joined Defendant association. Membership in the ""**Murrells Inlet Golf Plantation Association, Inc**", however, is mandatory by Covenant. This plaintiff never voluntarily joined said association but exercised dependent reliance upon representation by Defendants that they are the legitimate mandatory association of the PUD with powers to compel submission to Defendant's will upon pain of severe monetary sanctions.

7. There thus exists two homeowners associations claiming pendency over the PUD: the "International Club **Home Owners** Association" incorporated by one of the developers and the "**Murrells Inlet Golf Plantation Association, Inc**" ("MIGA") incorporated by homeowners as a South Carolina non-profit corporation – as contemplated by the Covenants. The MIGA

association is on record with the Horry County Recorder of Deeds as doing business as (DBA) / alternately known as (AKA) the "International Club Association". Plaintiff is a willing member of the "**Murrells Inlet Golf Plantation Association, Inc"** and rejects involuntary membership in Defendant association. Plaintiff asserts that there is no legally sufficient contractual instrument creating any obligation by Plaintiff to Defendant nor giving Defendant any rights relative to Plaintiff or Plaintiff's property. Plaintiff asserts that the only legitimate homeowner association is the "**Murrells Inlet Golf Plantation Association, Inc".** Plaintiff asserts that Defendant has no representative capacity as to Plaintiff or Plaintiff's property to bind plaintiff in any way to the consequences of contracts entered into by Defendant.

ACTS BY DEFENDANT COMPLAINED OF FOR WHICH RELIEF IS SOUGHT

COUNT I – RETURN OF "CABLE TV ASSESSMENTS" UNLAWFULLY TAKEN FROM PLAINTIFF BY DEFENDANT BY FRAUD OR OTHERWISE

8. All of the preceding and succeeding paragraphs are incorporated as if stated within this Count.

9. Plaintiff demands the return of all cable tv charges ever collected by Defendant from Plaintiff or from the prior owner of Plaintiff's property, whose rights Plaintiff has inherited. For purpose of computation this sum is incorporated into a later demand for repayment of assessments, since the cable tv charges were aggregated into and collected as part of assessments levied by Defendant.

a. On October 30, 2002 Horry Telephone Cooperative, Inc ("HTC") entered into a contract with "**The International Club Master HOA**, Owner" ("Master HOA") which represented that "it is the sole owner or sole representative of "**premises**" "known as The **International Club Master HOA**". The contract provided "that service shall be made available to" homeowners. While it is not a controlling fact, the contract did not have a representation that the Master HOA would or could compel acceptance of cable tv services originated with HTC.

b. There is no such corporate or unincorporated entity as "The International Club Master HOA". There is no PUD approved by Horry County as "The International Club Master HOA".

c. Both HTC and Defendant have asserted, in writing on numerous occasions, that this contract for cable tv services is between HTC and Defendant; that HTC's customer is Defendant, and that homeowners are Defendant's customers. Defendant has asserted on numerous occasions that Defendant has the power to turn off cable tv service to homeowners.

HTC has asserted that homeowners are not entitled to return of "excess profits / capital contributions" which HTC otherwise returns to it's customers, since homeowners are not HTC's customers. Further, the cable tv channels provided through the contract are controlled by the contract's provisions and were not negotiated to or agreed to by homeowners. These all add up to the conclusion that Defendant is the cable tv provider,

d. Defendant does not hold a franchise or license to provide cable tv services. As a matter of law, entities and individuals are not entitled to demand payment for rendering of services they are not permitted to provide. Per the definitions of the FCC, defendant is an illegal cable tv provider.

e. Further, Defendants insist that homeowners must buy cable tv services through Defendant exclusively from HTC. This violates several FCC orders which holds that any contract for cable tv service which has an exclusivity provision is null, void, and unenforceable. This has been brought to the attention of Defendant by Plaintiff as long ago as 2007. Defendant asserted and continues to assert that FCC rulemaking does not pre-empt Defendant's Contract.

f. Defendant is not "The Association" specified by the covenants and thus has no representative capacity to enter into contracts on behalf of Plaintiff nor derivative contractual capacity to enforce contracts Defendant enters into upon Plaintiff.

g. Irrespective of the above, the contract is further unenforceable since Defendant is not a named party to the contract ("Master HOA"), since Defendant was never the owner of any building lot in the PUD, and since Defendant at all times lacked representative capacity to bind the homeowners.

h. Per SC Statute 33-31-612 (Non-Profit Corporation Act) homeowners are not **"personally liable for the acts, debts, liabilities, or obligations of the corporation",** If the cable tv contract is binding between Defendant and HTC, homeowners are not obligated to satisfy any debt arising under that contract.

10. Wherefore Plaintiff asks for the relief of return of all sums collected from Plaintiff or Plaintiff's predecessor owner of Lot 12 (Pebble Creek) for cable tv services; and for an Order barring Defendant from any future acts attempting to enforce said cable tv contract against Plaintiff.

COUNT II – RETURN OF "WASTE MANAGEMENT ASSESSMENTS" UNLAWFULLY TAKEN FROM PLAINTIFF BY DEFENDANT BY FRAUD OR OTHERWISE

11. All of the preceding and succeeding paragraphs are incorporated as if stated within this Count.

12. In a like manner Defendant entered into a contract with, upon information and belief, Waste Management Services for removal of garbage / trash from individual dwellings. In a like manner individual homeowners are not the customer of Waste Management Services and said services are billed directly by Defendant to the homeowners. Also as in the case of cable tv services, while not expenses for the maintenance of the common property or true common expenses, these expenses are billed as assessments with the threat of use of liens without bothering to go through court for a judgment for non-payment. Such a collection device is not available for non-payment for goods or services in general not otherwise specifically provided for by statute (e.g., mechanics liens). Also in a like manner, garbage collection services is regulated by Horry County and Defendant is not a licensed provider. In addition, if the contract is binding between Defendant and Waste Management, the provider, per SC Statute 55-51-612 the homeowners are not obligated to pay against that debt.

13. Wherefore Plaintiff asks for relief consisting of the return of all sums collected from Plaintiff or Plaintiff's predecessor owner of Lot 12 (Pebble Creek) for waste management services; and for an Order barring Defendant from any future acts attempting to enforce any obligation for waste management services against Plaintiff.

COUNT III -- RETURN OF ASSESSMENTS IN GENERAL

14. All of the preceding and succeeding paragraphs are incorporated as if stated within this Count. Defendant HOA lacks a basis founded in the covenants or an agreement consensually entered into by Plaintiff to entitle Defendant to demand the payment to Defendant of any assessment at all.

15. Assessments in General.

a. Since Defendant billed for cable tv and waste management services as part of the assessments, and since Defendant has no capacity to collect any assessments at all, computations include cable tv and waste management services.

b. On September 27, 2001 Plaintiff's lot was conveyed to his predecessor homeowner, the original occupant by the Developer, Sunbelt. Upon information and belief, it

was not until January 2004, however, that Defendant commenced to demand assessments from the homeowners. In 2004 the assessment rate was $65 per month in 2004 and 2005, thus Defendant collected by fraud, exaction, extortion or otherwise $ 780.00 per each of those two years as to Plaintiff's property.

c. In 2006 through 2008 Defendant likewise demanded and received from Plaintiff or his predecessor (through September, 2006) $ 70.00 a month, totaling $ 840.00 for each of those three years.

d. In 2009 Defendant likewise demanded and received from Plaintiff $ 75.00 per month, totaling $ 900.00 for 2009. In 2010 Defendant raised the assessments demanded to $ 88.00 per month, which will total $ 1,056 through the end of 2010.

e. The total assessments demanded and collected despite having no authority grounded in the covenants through the end of 2010 will be $ 6,036.00.

f. Defendant is not "The association" specified in the covenants. Defendant has no agreement or arrangement with "The Association" specified in the covenants to collect said sums on the proper association's behalf.

g. In communications from Defendant to the homeowners within the last two weeks, Defendant has threatened to impose liens, late fees, fines, and other costs against homeowner property if Plaintiff and other homeowners do not pay the sums demanded by Defendant, who lacks actual legal authority to make such demands or to take such actions in collection. Defendant has also threatened to "cut off" cable tv services if the sums demanded by Defendant are not paid to Defendant, who asserts the authority to demand such payment without having to first prove the debts in court.

h. After closely examining the minutes of Defendant association, the records of the Horry County recorder of deeds, and what Defendant asserts is it's corporate Bylaws, Plaintiff asserts that no Bylaws were ever legally adopted by Defendant corporation nor recorded with the Horry County Recorder of Deeds indexed to Defendant. Thus, arguendo, even if Defendant had the proper capacity, it has no mechanism permitting it to take the actions it attempts, nor even a structure for it's organization, elections, etc, rendering all acts of purported Directors not legally effective.

i. What Defendant represents are it's Bylaws provides for elections of the board to be held in March, as is stipulated by statute. The putative bylaws have a provision, permitted by

statute, to hold the annual meeting of an association at another date. For the last several years Defendant has held it's Annual Meeting in September. While elections for it's board may be held prematurely, the terms of office of the board begins and ends in March.[1] The recent actions of Defendant represent the decisions of a board including two individuals whose term of office does not begin until next March. Two board members who the "new two" will replace prematurely stepped down and have not participated in decisions of Defendant association's board. Thus until March, 2011, any actions of the current defendant board, including appointment of committee members, imposition of penalties, etc, are legally void because of the defect in board composition. Since at least as far back as the **2008** "Annual Meeting of Members" of Defendant HOA held in September, **2007** this scenario took place, thus the budgets / assessments for 2008, 2009, 2010 and 2011 have not been legally adopted and the consequence is that Defendant association, if arguendo it is "The association", can not collect assessments for those four years.[2]

j. From 2004 through 2008, Defendant collected Assessments made payable to the **"International Club Property Owners' Association"** [3] This fictitious name was never registered as being synonymous with "International Club Home Owners Association", and was certainly **not** the "**Murrells Inlet Golf Plantation Association, Inc**" ("MIGA"). Based upon accounting records of Defendant it is certain that the assessments unlawfully and involuntarily collected were deposited into Defendant's accounts and were used by Defendant for it's own purposes.

16. Wherefore Plaintiff asks for relief consisting of the return of all sums collected from Plaintiff or Plaintiff's predecessor owner of Lot 12 (Pebble Creek) for assessments in general; and for an Order barring Defendant from any future acts attempting to enforce any obligation by Plaintiff towards Defendant as to the payment of any assessments or charges of any nature.

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[1] The parallel is federal, state and municipal elections in November with successful candidates taking office in February. The date of an election is not necessarily the date the winner takes office.

[2] The budgets and rate of assessments have been adopted by Defendant's Board in September each year immediately after the annual meeting with election of board members for the following year.

[3] The payment coupons read "**International Club POA**".

COUNT IV – UNLAWFUL IMPOSITION OF FINES BY DEFENDANT AGAINST PLAINTIFF FOR ALLEGED VIOLATION OF NON-EXISTENT COVENANT PROVISIONS AND NON-EXISTENT ARCHITECTURAL REVIEW BOARD RULES - INTERFERENCE WITH ALLOWED USES OF PROPERTY

17. All of the preceding and succeeding paragraphs are incorporated as if stated within this Count.

18. The "Violation" and "Fine".

a. On or about September 29, 2010 Defendant mailed Plaintiff a "Violation Notice" backdated to September 28, 2010, stating that **Defendant has "fined" Plaintiff $50 (fifty dollars)** for allegedly violating certain provisions of the Covenants which run with Plaintiff's house and for allegedly violating Defendant's By-Laws and Architectural Review Board ("ARB") Rules. [4]

b. On September 30, 2010 Plaintiff paid the "fine" under protest – **Defendant's receipt numbered 107443 "ARB Fine"**. Defendant lacks lawful authority to demand obedience to the restrictions Defendant asserts because amendments to the Covenants have explicitly deleted any restriction as to fences as well as any Architectural Controls. Defendant association has no legally effective By-Laws and arguendo, if they exist, they are not binding on Plaintiff. There are no legally effective Architectural Review Board Rules and, arguendo, if they exist at all they are pre-empted by the clear intent of the Covenants.

c. On October 5, 2010, Defendant association convened an ARB meeting at which it determined after – the – fine that Plaintiff was in violation of the non-existing covenant restrictions / requirements.

d. By letter dated October 8, 2010 the ARB, not Defendant's Board, determined to order this Plaintiff to remove the foundation of the fence and threatened Plaintiff with further "fines" of $100 (one hundred dollars) per month for non-compliance. Since MIGA is the controlling home owner association, this threat constitutes a form of exaction / extortion / fraudulent demand.

19. **Covenants**.

a. Original Covenants. The covenants as recorded on or about February 8, 1999 had a requirement that proposed modifications to grounds and buildings first be submitted to an

[4] Defendant stated that Plaintiff had built a flower bed along the curb and set in place the foundation of a fence without seeking prior ARB approval.

ARB: Section 7.2, Prior Review of All Plans (Section 7, Use Restrictions). Section 7.2 had a provision that none-the-less no restriction applied to any builder or developer, thus there was no need to delete this section if and when any builder or developer desired to proceed in any way at all.

b. Prior Review by ARB. On or about May 10, 2000 Paragraph #11 of Amendment No. 1 to the Covenants deleted Section 7.2. Defendants have argued that this deletion was done only to allow developers and builders to not be burdened by Section 7.2. This is none-sense because the last sentence of Section 7.2 as originally enacted explicitly waived this requirement as to builders and developers. Clearly the deletion expanded the waiver to all homeowners by deleting Section(s) 7.2 in their entirety.

c. Fence Restrictions. Section 7.4, Fences of the original covenants required prior approval of the ARB before erecting any fence. Paragraph #11 of Amendment #1 to the Covenants deleted Section 7.4 in it's entirety. If it was the desire of the Declarant to impose a lesser measure of control then Declarant (the developer), who had the benefit of the assistance of retained attorneys and years of experience in "the business" would have substituted alternative text for Section 7.4 instead of simply deleting it. It is clear that it was the intent of the Declarant to have no controls what-so-ever over fences.

d. It is clear that there is no provision in the Covenants requiring homeowners in general, and certainly not the Plaintiff, to seek prior ARB approval as to fences (or anything at all). The general rule adopted by the South Carolina Supreme Court of Appeals is that no restrictions on the free use of property will be enforced unless such restrictions are explicitly and unambiguously found in the Covenants. Covenants control the use of property. The authority of homeowners associations flows directly from covenants and is no more than is explicitly stated in the covenants. Restrictions on the free use of property can not be imposed by homeowner rule which go beyond those imposed in the covenants.

e. Defendant HOA lacks standing to enforce the use restriction provisions of the covenants, whatever they may be, since the covenants extend such authority only to MIGA.

f. The By-Laws putatively represented by Defendant as applicable has a provision in Section 13.2, Enforcement, which provides that only Defendant's Board of Directors may impose sanctions or enforce the provisions of the covenants. Further, Defendant's putative By-Laws provide, per it's Section 13.3, Enforcement, that no fine may be imposed until after

exhausting an extensive set of procedures which do not mention either the Association's contractor management firm nor an ARB. The "fine" was imposed unilaterally by the contractor and vetted by a meeting of Defendant's ARB approximately a week later, on October 5, 2010. Despite the explicit provisions of the South Carolina Non-Profit Corporation Act, the ARB conducted it's determinations as to the putative "violations" in secret (no attorney was present). Mr. xxxxxx, who was elected (to Defendant's Board) in September to the term beginning next March (2011), never-the-less was present and participated.[5] Numerous fences and flower beds exist around the PUD with the approval and "blessing" of Defendant.

g. Arguendo that Defendant had lawful authority to enforce (arguendo existent) restrictions on fences and requirements to proceed to an ARB in advance, Defendant's actions in instant respect is capricious, selective and arbitrary enforcement specifically banned by applicable case law determinations of the South Carolina Supreme Court and Court of Appeals, and waived by prior approvals of fences and flower beds.

20. **Bylaws**.

a. It has previously been shown that Bylaws can not impose a restriction on the use of property which use is not limited by the Covenants. Where the Covenants have been amended to delete any use restriction, this is controlling that a homeowners association may not re-impose the restriction by rule or By-Law.

b. It has been shown that Defendant association has no legally enforceable By-Laws at all nor legally enforceable authority to enforce it's By-Laws over the PUD and Plaintiff.

c. Arguendo if said Defendant has legally perfected By-Laws, they do not apply to the homeowners in the PUD, who are bound by the By-Laws of MIGA. Upon information and belief, MIGA has no provision at all in it's By-Laws for the operation of an ARB.

21. **ARB Rules**

a. At no time has Defendant provided Plaintiff with a set of the alleged current ARB

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[5] Mr. xxxxx and perhaps more ARB members were illegally present because the putative By-Laws prohibit a single household from being represented on more than one committee / and / or the Board. Defendant has represented that Mr. xxxxxx is a simultaneous member of the Board (although not legally seated) and at least two committees. Mr. xxxxxx participated as an ARB member although he is admittedly biased against this Plaintiff, having told at least one fellow homeowner (Mr. Lou Astorino) words to the effect that Plaintiff is a bad person and not to have anything to do with Plaintiff – apparently because Plaintifff has been exposing financial mis-

Rules. It is well settled that in a relationship founded in contract, all of the applicable controls must be explicitly known to the participants in advance of any attempt at enforcement.

b. Defendant maintains that it publishes it's rules on it's web site, but to use said web site requires that (1) a homeowner have access to the internet, which has never been a requirement of home ownership in the PUD; (2) a homeowner install on his computer certain software which has licensing restrictions and waivers of rights to which a homeowner might not want to agree, and which waiver is not a condition of home ownership; (3) a homeowner obtain a user-id and password from Defendant association's contractor in California, which requires that a homeowner waive certain rights and grant the contractor (Community Associates Institute, Inc) waivers of privacy rights of the homeowner and grant ownership of all data related to the homeowner found on contractor's server – which waivers / agreements are not conditions of home ownership. [6]

c. MIGA has no ARB rules.

d. The October 8, 2010 letter on behalf of Defendant signed by Julie Case, a contractor of Defendant (no employee or contractor of Defendant HOA is a licensed property manager nor realtor) stated:

> "This request has been denied due to it's **direct conflict with the covenants**. Any materials that exist on your property pertaining to this addition, specifically the brick foundation (to the fence), must be removed within 15 days from the date of this letter."

e. Defendant HOA's letter never stated what covenant provision Plaintiff's action was in "direct conflict" with. Materially, **Defendant never claimed that Plaintiff had violated any ARB guideline nor By-Law**.

22. The actions of Defendant constitute **harassment and tortious interference with Plaintiff's lawful use of his property**.

23. Wherefore Plaintiff asks for relief consisting of:

a. the return of the $50.00 (fifty dollar) fine;

b. for an Order barring Defendant from any future acts attempting to restrict

---

management and apparent statutory violations of fiduciary duty by members of Defendant Board.

Plaintiff's use of his property or requiring him to have any dealings at all with Defendant regarding any matter; and

c. Contingent on any party appealing a judgment bearing on this Count to the Circuit Court / Court of Common Pleas, a demand for punitive damages in the amount of $25,000.00 (twenty-five thousand dollars). This demand for punitive damages is effectively waived before the Magistrate's Court because of statutory limits on jurisdiction, but is contingently stated to conform with rules of pleading, should the matter proceed to a higher court.

FURTHER REQUEST

24. Plaintiff further requests that the Court award the costs of this action as provided by statute and for such other and further relief as this Court may deem just.

I state under the penalty of perjury that the above is correct and truthful, except those based upon my information and belief.

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

October 12, 2010

[6] Community Associates Institute's server none-the-less has been provided by Defendant with private financial and other information relating to all homeowners in the PUD, regardless of whether or not said individual homeowner has agreed to the release to CAI of said private information.

STATE OF SOUTH CAROLINA	)	IN THE MAGISTRATE COURT
COUNTY OF HORRY	)	CASE NO. 2010-CV-26-1072943
RONALD JARMUTH Plaintiff,	)	
vs.	)	**ANSWER**
THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC. Defendants.	)	

The International Club Homeowners Association, Inc. (hereafter "Defendant"), specifically reserving its rights under its Motion to Dismiss, answers the Complaint filed by Ronald Jarmuth (hereafter "Plaintiff") as follows:

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified, or qualified is denied and strict proof demanded thereof.

2. The answering Defendants deny any and all allegations contained in the Complaint.

SECOND DEFENSE

3. Paragraphs 1-2 above are incorporated herein by reference and made a part and parcel to Defendant's Second Defense.

4. By answering this Complaint, Defendant in no way abandons the motion it filed on November 9, 2010 with this Court to dismiss the Complaint pursuant to Rule 12(b)(8) of the South Carolina Rules of Civil Procedure.

5. The Defendant specifically reserves all rights and arguments set forth in its motion dated November 9, 2010.

6. This Court should dismiss the Complaint in its entirety in accordance with Rule 12(b)(8) of the South Carolina Rules of Civil Procedures because there is currently a pending civil action filed by the Plaintiff against the Defendant before the Court of Common Pleas for the County of Horry, State of South Carolina, Civil Action No.: 2009-CP-26-3596.

THIRD DEFENSE

7. Paragraphs 1-6 above are incorporated herein by reference and made a part and parcel to Defendant's Third Defense.

8. This Court should dismiss the Complaint in its entirety because this Court lacks subject matter jurisdiction to hear this dispute under section 22-3-10 of the South Carolina Code (2007), as the amount in controversy, or the relief sought in this case by the Plaintiff, exceeds seven thousand five hundred dollars and no/00 ($7,500).

FOURTH DEFENSE

9. Paragraphs 1-8 above are incorporated herein by reference and made a part and parcel to Defendant's Fourth Defense.

10. This Court should dismiss the Complaint in its entirety because this Court lacks subject matter jurisdiction to declare the contracts entered into by the Defendants as void and return any monies collected under the contracts to Plaintiff. See S.C. Code Ann. § 22-3-10(1) (stating the magistrate court has jurisdiction "in actions arising on contracts for the recovery of money **only**") (emphasis added).

FIFTH DEFENSE

11. Paragraphs 1-10 above are incorporated herein by reference and made a part and parcel to Defendant's Fifth Defense.

12. The Plaintiff lacks standing to bring the claims asserted in his Complaint, and therefore, his claims should be dismissed.

SIXTH DEFENSE

13. Paragraphs 1-12 above are incorporated herein by reference and made a part and parcel to Defendant's Sixth Defense.

14. The Plaintiff's claims should be dismissed because his Complaint and the causes of action asserted therein are barred by the doctrines of Res Judicata and Collateral Estoppel.

SEVENTH DEFENSE

15. Paragraphs 1-14 above are incorporated herein by reference and made a part and parcel to Defendant's Seventh Defense.

16. The answering Defendants assert the Doctrines of Estoppel, Waiver, and Laches as complete affirmative defenses to the allegations contained in the Complaint.

EIGHTH DEFENSE

17. Paragraphs 1-16 above are incorporated herein by reference and made a part and parcel to Defendant's Eighth Defense.

18. The Defendant has immunity as to the claims asserted by the Plaintiff as the Defendant has abided by its governing documents and South Carolina State Law in undertaking the actions complained of.

NINTH DEFENSE

19. Paragraphs 1-18 above are incorporated herein by reference and made a part and parcel to Defendant's Ninth Defense.

20. All actions of the Defendants were undertaken in good faith and in accordance with the business judgment rule.

TENTH DEFENSE

21. Paragraphs 1-20 above are incorporated herein by reference and made a part and parcel to Defendant's Tenth Defense.

22. The Plaintiff's claims are barred by the doctrine of equitable estoppel.

WHEREFORE, having answered the claims of the Plaintiff, the Defendants hereby prays as follows:

a. that the Complaint be dismissed; and

b. for such other and further relief as this Court deems just and proper.

Respectfully submitted,

McNAIR LAW FIRM, P.A.

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Attorney for the Defendant

Myrtle Beach, South Carolina
November 17, 2010

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CASE NO.: 2010-CP-26-11320
Ronald Jarmuth,)	
)	
Plaintiff,)	
)	
vs.)	**DEFENDANT'S AMENDED ANSWER TO COMPLAINT AND COUNTERCLAIM**
)	
The International Club Homeowners)	
Association, Inc.)	
)	
Defendant.)	
)	

HORRY COUNTY
11 OCT 24 PM 1:13
CLERK OF COURT
WARD

The International Club Homeowners Association, Inc. (hereinafter referred to as "Defendant HOA"), answers the Complaint filed by Ronald Jarmuth (hereinafter referred to as "Plaintiff") as follows:

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified, or qualified is denied and strict proof demanded thereof.

2. The Defendant HOA denies any and all allegations contained in the Complaint.

SECOND DEFENSE

3. The allegations of the First Defense are incorporated herein and made a part and parcel hereof.

4. This Court should dismiss the Complaint in its entirety in accordance with Rule 12(b)(8) of the South Carolina Rules of Civil Procedures because there is currently a pending civil action filed by the Plaintiff against the Defendant HOA before the Court of Common Pleas for the County of Horry, State of South Carolina, Civil Action No.: 2009-CP-26-3596.

THIRD DEFENSE

5. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof.

6. The Plaintiff lacks standing to bring the claims asserted in his Complaint, and therefore, his claims should be dismissed.

FOURTH DEFENSE

7. The allegations of the First, Second, and Third Defenses are incorporated herein and made a part and parcel hereof.

8. The Plaintiff's claims should be dismissed because his Complaint and the causes of action asserted therein are barred by the doctrines of Res Judicata and Collateral Estoppel.

FIFTH DEFENSE

9. The allegations of the First, Second, Third, and Fourth Defenses are incorporated herein and made a part and parcel hereof.

10. The answering Defendant HOA assert the Doctrines of Estoppel, Waiver, Consent, and Laches as complete affirmative defenses to the allegations contained in the Complaint.

SIXTH DEFENSE

11. The allegations of the First, Second, Third, Fourth, and Fifth Defenses are incorporated herein and made a part and parcel hereof.

12. The Defendant HOA has immunity as to the claims asserted by the Plaintiff as the Defendant HOA has abided by the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (later amended to the Declaration of Covenants and Restrictions for International Club) (hereinafter "Declaration") filed in the Horry County Register of Deeds Office, Deed Book

2117, Page 1353 on February 8, 1999 and the Defendant HOA's Bylaws, as amended (collectively hereinafter referred to as "Governing Documents") and South Carolina State Law in undertaking the actions complained of.

SEVENTH DEFENSE

13. The allegations of the First, Second, Third, Fourth, Fifth, and Sixth Defenses are incorporated herein and made a part and parcel hereof.

14. All actions of the Defendant HOA were undertaken in good faith and in accordance with the business judgment rule.

EIGHTH DEFENSE

15. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Defenses are incorporated herein and made a part and parcel hereof.

16. The Plaintiff's claims are barred by the doctrine of equitable estoppel.

NINTH DEFENSE

17. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Defenses are incorporated herein and made a part and parcel hereof.

18. The Plaintiff's claims are barred, in whole or in part, by the Plaintiff's payment of assessments and fines to Defendant HOA.

TENTH DEFENSE

19. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Defenses are incorporated herein and made a part and parcel hereof.

20. The Plaintiff's claims are barred by the doctrine of unclean hands.

ELEVENTH DEFENSE
AND FIRST COUNTERCLAIM

21. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Defenses are incorporated herein and made a part and parcel hereof.

22. The Defendant HOA is a non-profit corporation organized under and existing by virtue of the laws of the State of South Carolina.

23. Upon information and belief, the Plaintiff, Ronald Jarmuth, is a citizen and resident of the State of South Carolina.

24. Upon information and belief, the Plaintiff, Ronald Jarmuth, owns Lot 12 of the Pebble Creek at the International Club ("Property").

25. The Property is located in Horry County, South Carolina, and this Court has jurisdiction over both the Property and the parties to this action.

26. As the owner of the Property, the Plaintiff is subject to the Governing Documents.

27. The provisions of the Governing Documents provide that the Defendant HOA governs the International Club subdivision.

28. Section 7.2 of the Declaration provides:

> "Prior Review of All Plans. No building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement...shall be commenced, erected, or maintained upon any portion of the Subdivision, nor shall any exterior addition or change be made until the plans and specifications...showing the grading, filling nature, kind, size, shape, height, materials, color and location of the same shall have been submitted to and approved in writing as to the harmony of the exterior design and location in relation to the surrounding structures and topography by the Developer...Provided however, that upon Developer's selling of not less than 3,650 of the Units in the Subdivision, this right of approval shall be transferred to an Architectural Review Board of the Association."

29. The Architectural Review Board for the Defendant HOA holds the architectural review rights pursuant to the Governing Documents. All Owners within the International Club apply to the Architectural Review Board for approval of plans and specifications for improvements constructed within the International Club.

30. The Defendant HOA enacted Architectural Guidelines in 2005 and has amended them from time to time.

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

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

33. The Defendant HOA, through its Architectural Review Board, sent notice to the Plaintiff that he violated the Governing Documents and the Architectural Guidelines by constructing improvements on the Property without approval from the Architectural Review Board and that the violation subjected him to fines.

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

35. Pursuant to Section 7.4 of the Declaration:

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

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

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

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

39. Although the Plaintiff's application for the fence and the brick wall were denied and the Defendant HOA directed the Plaintiff to remove the brick wall, the Plaintiff failed and refused to remove the brick wall constructed.

40. The brick wall is a continuing violation of the Governing Documents and the Defendant HOA's Architectural Guidelines, and the Plaintiff has been fined accordingly.

41. Moreover, the Plaintiff has failed and refused to acknowledge the validity of the Governing Documents, the Architectural Guidelines, and the authority of the Defendant HOA and the Architectural Review Board to enforce the same.

42. Pursuant to the provisions of the Governing Documents, Plaintiff is responsible for paying assessments, fines, late fees, interest and other related charges to the Defendant HOA.

43. Provisions of the Governing Documents further provide that if the Plaintiff does not pay the assessments, fines or other related charges, Plaintiff is responsible for all costs of collection, including reasonable attorney's fees, that are incurred by the Defendant HOA.

44. The Plaintiff, as owner of the Property, was and is assessed regular assessments, fines, late fees, interest and other related charges. As of August 26, 2011, the Plaintiff owes One Thousand One Hundred Thirty Two and 00/100 ($1,132.00) Dollars plus the costs of collections for his continuing violation of the brick wall, which the Plaintiff has not paid despite due demand being made upon him to pay said assessments and fines.

45. The Plaintiff, as current owner of the Property, continues to incur fines, fees and additional related charges throughout the pendency of this case during his continued ownership of the Property.

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

47. Plaintiff breached the terms of the Governing Documents and the Architectural Guidelines, and therefore, the Defendant HOA is entitled to a judgment in an amount to be determined by this Court, together with costs and attorney's fees incurred in bringing this action as well as an order requiring the Plaintiff to comply with the Governing Documents and the Architectural Guidelines and to remove the brick wall from the Property.

WHEREFORE, having answered the claims of the Plaintiff, the Defendants hereby prays as follows:

a. that the Complaint be dismissed;

b. judgment against the Plaintiff in an amount to be determined by the Court;

c. an order requiring Plaintiff to comply with the Defendant HOA's Governing Documents and Architectural Guidelines and to remove the brick wall from the Property in violation of the Governing Documents and Architectural Guidelines;

d. this Court award reasonable attorney's fees and costs to the Defendant HOA; and

e. for such other and further relief as this Court deems just and proper.

Respectfully submitted,

McNAIR LAW FIRM, P.A.

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athompson@mcnair.net
Attorneys for the Defendant HOA

Myrtle Beach, South Carolina
October 24, 2011

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2010-CP-26-11320
	)	
Ronald Jarmuth	)	
	)	
Plaintiff	)	PLAINTIFF'S ANSWER
	)	TO COUNTER-CLAIM
vs.	)	OF DEFENDANT'S AMENDED
	)	COMPLAINT
The International Club	)	
Homeowners Association, Inc.,	)	AND ASSERTION OF
	)	COUNTER – CLAIM BY
Defendant	)	PLAINTIFF
	)	

Plaintiff / Counter-Defendant Ronald Jarmuth (hereafter referred to as "C-Def") answers the Counter – Complaint stated in Defendant / Counter – Plaintiff's (hereafter referred to as "C-Pl") Amended Answer with Counter-Complaint filed with the Court on or about October 24, 2011, which Counter – Complaint was addressed at a hearing held December 7, 2011 on C-Def's SCRCivP Rule 12(b)(6) Motion – and for which, as of the date of the filing of this pleading, no Order of Court has yet issued. [1]

The Counter – Complaint is set out in paragraphs 22 through 47 of the Amended Answer, thus no response is required to the allegations of the earlier paragraphs which are not part of the Counter – Complaint as stated. To the extent that any earlier paragraphs can be read as being part of the Counter – Complaint, the allegations of the earlier numbered paragraphs are denied.

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified, or qualified is denied and strict proof demanded thereof.

2. Plaintiff admits that "the Defendant HOA is a non-profit corporation organized under and existing by virtue of the laws of the State of South Carolina" as stated in paragraph 22 of the Counter – Complaint. Plaintiff admits the allegation of paragraph 23

[1] The Court, from the bench, stated it's intention to deny C-Def's Rule 12(b)(6) motion – and directed that counsel for C-Pl prepare and submit to the Court an Order following the December 7, 2011 hearing. No such order has been served on C-Def to-date (December 20, 2011).

that "the Plaintiff, Ronald Jarmuth, is a citizen and resident of the State of South Carolina". Plaintiff admits the allegation of paragraph 24 that "the Plaintiff, Ronald Jarmuth, owns Lot 12 of the Pebble Creek at the International Club ("Property")" but clarifies that said lot is within the "International Club Planned Unit Development, formerly known as Lantana Planned Unit Development, and formerly known and initially approved as the Murrells Inlet Golf Plantation. Plaintiff admits the jurisdictional allegations of paragraph 25.

3. Plaintiff admits the allegations of paragraph 26 that "as the owner of the Property, the Plaintiff is subject to the Governing Documents" but clarifies that the use of the property, not the person, is subject to the Covenants running with the land, as amended, specifically including those amendments to the Covenants which were properly enacted. C-Def explicitly rejects any allegation that the putative Bylaws of the International Club Homeowners Association have any legal effect, asserting that no Bylaws of C-Pl HOA exist with any legal effect, and further asserting that any acts of C-Pl HOA purporting to rely on any such Bylaws or rules are ultra-vires. C-Def asserts that Amendments two (2) through five (5) were enacted in violation of the South Carolina Non-Profit Corporation Act and of the Covenants, and are thus ultra-vires and ineffective.

4. C-Def denies and rejects the allegation of paragraph 27 that "the provisions of the Governing Documents provide that the Defendant HOA governs the International Club subdivision" asserting instead that the Murrells Inlet Golf Plantation Association, Inc (MIGPA) is the HOA which properly governs the PUD per the legally effective covenants. C-Def demands strict proof.

5. C-Def denies the allegation of paragraph 28 that "Section 7.2 of the Declaration provides" for anything, since said Section was "waived" by the First Amendment to the Covenants (the only legally effective Amendment to the Covenants). Plaintiff states further that, per Black's Legal Dictionary, first and any later editions, "waived" equates to "deleted" and alternatively means that any rights or obligations anyone might suffer per Section 7.2 became ineffective and legally incapable of being raised as of the date of the First Amendment. C-Def demands strict proof.

6. C-Def denies and rejects the allegations of paragraph 29, since those allegations depend on the legally non-existent Section 7.2 of the Covenants.

7. C-Def denies and reject the allegations of Paragraph 30 that Defendant HOA legally enacted any "Architectural Guidelines" prior to the dates of the events complained of in the Counter – Complaint: September through October, 2010 and demands strict proof.

8. C-Def admits the allegations of paragraph 31 to the extent that C-Def filed "Courtesy" applications to the C-Pl putative Architectural Review Board (ARB), said courtesy applications explicitly clarifying that there was no provision under the Covenants requiring such application. C-Def further states that the application in question began with the statement that

> "This document set is provided the ARB of the International Club HOA without waiving any objections as to the authority of said ARB or said HOA in this matter. This qualification is made so as not to implicate potential HOA assertions of "waiver" or "estoppel". ... I note that Amendment #1 of the Covenants removed all "Architectural Controls" as well as the requirement to seek prior approval from and ARB for any modifications. I also note that the same Amendment explicitly deleted all controls over fences".

9. C-Def denies the allegation of paragraph 32 that C-Def

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

C-Def asserts that there is no "brick wall" upon the property and that the lawn edging was explicitly applied for and approved as "red brick edger's for both (the area upon which a fence would ultimately be erected, which did not happen, and in the flower bed, which was built. C-Def asserts that the landscape drawing overlaying a survey of the property, which was submitted as required, depicted a line of "Brick Edging" running from the curb to C-Def's rear property line. Said Brick-Edging was approved by C-Pl's ARB thus C-Pl is complaining about the erection of a line of Brick Edging which C-Pl approved and calling it a "Fence" because the "Fence" was not approved – disregarding that neither a wall nor a fence was ever built.

10. C-Def asserts that the allegations of paragraph 33 violate the requirements of SCRCivP Rule 9(f) in that no specific date of the alleged correspondence is stated in the counter – complaint. Answering further, C-Def denies that he received any letter relating to any "wall or fence" prior to the courtesy meetings of the ARB. C-Def asserts that the situation on the ground remains the same as before that courtesy application and act of the ARB which on October 8, 2010 approved what is actually on the ground. C-Def denies

that the ARB

> "sent notice to the Plaintiff that he violated the Governing Documents and the Architectural Guidelines by constructing improvements on the Property without approval from the Architectural Review Board and that the violation subjected him to fines.".

11. C-Def denies the allegations of paragraph 34 that he applied to the ARB for approval of anything, stating further that, as explained supra, a "courtesy" set of documents was submitted.

12. C-Def denies the allegations of paragraph 35, since that paragraph asserts the legal viability of Section 7.4 of the Covenants, which section was "waived" in paragraph #11 of Amendment #1 to the Covenants, dated May 10, 2000, at Deed Book 2258 Page 1454. C-Def demands strict proof.

13. C-Def admits the allegations of paragraph 36 to the extent that it states that "The Architectural Review Board approved the Plaintiffs request for the flower bed and edging". Again, paragraph 36 is defective in that if fails to allege the date of the alleged event as required by SCRCivP Rule 12(f). C-Def denies that the ARB denied any request to construct a "wall" as no such request was ever lodged. C-Def denies that he received, at any time, any correspondence which asserted that any disapproval was founded on the basis that any C-Def request of action "did not comply with the general scheme of development for the International Club." C-Def demands strict proof.

14. C-Def denies the allegation of paragraph 37 than C-Pl "demanded that the brick wall be removed from the Property". C-Def demands strict proof.

15. C-Def admits the allegations of paragraph 38 to the extent that he paid, "under protest", a fine so as to give C-Def "liquidated direct damages" under which he could sue C-Pl. C-Def further states that said "fine" was never demanded for constructing any "brick wall" or "fence". C-Def denies that he "attempted to sue the Defendant HOA", stating the he "did" sue the C-Pl.

16. C-Def denies the allegations of paragraph 39, in as much as they are directed at the existence of a disapproved "brick wall". C-Def further states that he never "refused" to do anything; he merely ignored C-Pl and sued to enforce his rights and to enjoin C-Pl from asserting non-existent rights. Likewise C-Def denies the allegations of paragraph 40 because it too construes the approved "brick edging" as a "brick wall" which was never

applied for nor disapproved.

17. C-Def admits the allegations of paragraph 41 that he has "failed and refused to acknowledge the validity of the Governing Documents, the Architectural Guidelines, and the authority of the Defendant HOA and the Architectural Review Board to enforce the same" which is not an actionable position but rather protected speech under the First Amendment to the United States Constitution and protects C-Def from allegations of "waiver and estoppel".

18. C-Def denies the allegations of paragraph 42 and demands strict proof.

19. C-Def denies any allegation of paragraph 43 that the Covenants provide for "attorneys fees" and "costs of collection" for anything other than the enforcement of an explicit provision of the covenants, and further explains that the rules which the Covenants provide for are limited to "regulations governing bodies of water, water courses and other Common Areas".

20. As to the allegations of paragraph 44, C-Def denies the capacity of C-Pl HOA to exercise any right granted by the Covenants to the Murrells Inlet Golf Plantation Association, the HOA for the PUD. Answering further, C-Def admits that the legitimate HOA has the authority under the Covenants to determine and collect assessments for the operation of the common property. As to any other matter, C-Def denies it and demands strict proof. C-Def denies any allegation that he owes C-Pl anything. C-Def likewise denies the allegations of paragraph 45. As to the allegations of paragraph 46, the prior and current Board of the C-Pl HOA is the direct cause of any expense to the HOA because it is frivolously attempting to enforce non-existent ("waived") covenants putatively prohibiting an action ("brick wall") which never took place and relating to "brick edging" which said C-Pl's ARB approved. C-Def asserts further that said former and current Board Members of the HOA should be held personally liable for said expenses.

21. C-Def denies the allegations of paragraph 47 that he "breached the terms of the Governing Documents" which are the legally effective covenants. C-Def further asserts that at the time of the alleged events there were no legally effective ARB Guidelines. C-Def demands strict proof to the contrary. That being the case, C-Def denies that "the Defendant HOA is entitled to" anything.

SECOND DEFENSE

22. Res Judicata. C-Def demands that the Court dismiss the Counter – Complaint in it's entirety because the events complained of are part and parcel of Plaintiff's under-lying Complaint and the Rules provide that any damage which Defendant might have suffered from the same events must be plead as a Counter – Complaint at the time the original answer is filed, or shall be lost forever through res-judicata.

THIRD DEFENSE

23. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof. The C-Pl lacks standing to bring the claims asserted in the Counter- Complaint, in that the Defendant is not the HOA for the PUD per the covenants.

FOURTH DEFENSE

24. The allegations of the First through Third Defenses are incorporated herein and made a part and parcel hereof. The C-Pl's claims should be dismissed because they are barred by the doctrines of Collateral Estoppel and further that the C-Pl has failed to follow it's own putative rules.

FIFTH DEFENSE

25 The allegations of the First through Fourth Defenses are incorporated herein and made a part and parcel hereof. The answering C-Def asserts the Doctrines of Estoppel, Waiver, Consent, and Laches as complete affirmative defenses to the allegations contained in the Counter - Complaint.

SIXTH DEFENSE

26. The allegations of the First through Fifth Defenses are incorporated herein and made a part and parcel hereof. There is no underlying contractual basis which grants the C-Pl any rights under the Covenants since what would have been the applicable covenants were "waived" through the First Amendment to the Covenants filed with the Recorder of Deeds on May 10, 2000 at Deed Book 2258 Pages 1453 et seq. Further, there is no relief which the Court can grant to the C-Pl because the alleged "brick wall" does not exist and thus the Court can nor require it's removal. The C-Pl has not plead for a restraining order either.

SEVENTH DEFENSE

27. The allegations of the First through Sixth Defenses are incorporated herein and

made a part and parcel hereof. All actions of the C-Def were undertaken in good faith and in accordance with the Covenants. C-Def strictly complied with the existing and legally effective covenants and rules.

EIGHTH DEFENSE

28. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Defenses are incorporated herein and made a part and parcel hereof. The C-Pl's claims are barred by the doctrine of equitable estoppel.

NINTH DEFENSE

29. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Defenses are incorporated herein and made a part and parcel hereof. The counter – claim is barred by the doctrine of Novation through the action of the First Amendment to the Covenants.

TENTH DEFENSE

30. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Defenses are incorporated herein and made a part and parcel hereof. The C-Pl's claims are barred by the doctrine of unclean hands.

ELEVENTH DEFENSE

31. The allegation of the First through Tenth Defenses are incorporated herein and made a part and parcel hereof. The Counter – Complaint is barred by the doctrine of laches.

TWELFTH DEFENSE

32. The allegation of the First through Eleventh Defenses are incorporated herein and made a part and parcel hereof. The Counter – Complaint was filed to harass the Plaintiff and for other improper purpose, in further violation of the South Carolina Rules of Ethical Practice applicable to Defense Counsel.

COUNTER – CLAIM BY PLAINTIFF

33. Plaintiff asserts a compulsorily counter – claim as required by SCRCivP Rule 13(a) and as allowed by Rule 15(a). Plaintiff was effectively served an Answer / Counter – Claim ("pleading") following the denial of Plaintiff's Rule 12(b)(6) Motion. Rule 15(a) provides that

> "A party may amend his pleading ... within 30 days after a responsive pleading is served"

34. Through the service on April 13, 2009 of Plaintiff's Complaint styled Jarmuth v HOA et al in this Court, 2009-CP-26-3596, Defendants have been on actual notice of the deletion of those provisions of the Covenants upon which Defendants depend for the filing of their Counter – Complaint. Since at least 2006 the Defendants have posted that First Amendment to the Covenants on it's web-site and have referred to it on numerous occasions. The knowing assertion of rights through a Counter - Complaint which rights were obviously deleted years prior to the assertion of those rights constitutes a Frivolous Proceeding as defined by the South Carolina Frivolous Civil Proceedings Sanctions Act, Sections 15-36 et seq of the Code.

35. The Counter – Complaint was filed to harass the Plaintiff and for other improper purpose, in further violation of the South Carolina Rules of Ethical Practice applicable to Defense Counsel.

36. In accordance with SC Code 15-36-10(G) Plaintiff requests the following sanctions:

(1) an order for the Defendant to pay the reasonable costs and attorney's fees of the Plaintiff

(2) an order for the attorney to pay a reasonable fine to the court; and

(3) a directive of a no monetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

WHEREFORE, having answered the Counter - Claims of the Counter - Plaintiff, the Counter - Defendant hereby prays as follows:

a. that the Counter - Complaint be dismissed;

b. sanctions as requested per paragraph 36 above.

c. for such other and further relief as this Court deems just and proper.

Respectfully submitted,

Ronald Jarmuth
Plaintiff / Counter – Defendant Pro Se
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

Ronald Jarmuth,)
)
Plaintiff,)
)
vs.)
)
The International Club Homeowners)
Association, Inc.)
Rosemary Toth,)
And K.A. Diehl & Associates,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2009-CP-26-3596

DEFENDANTS THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC.'S AND ROSEMARY TOTH'S ANSWER TO SECOND AMENDMENT TO COMPLAINT

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

Ronald Jarmuth,)
)
Plaintiff,)
)
vs.)
)
The International Club Homeowners)
Association, Inc.)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2010-CP-26-11320

FILED
HORRY COUNTY
2012 MAY 30 PM 1:17
MELANIE HUGGINS-WARD
CLERK OF COURT

The Defendants, The International Club Homeowners Association, Inc. and Rosemary Toth ("Defendants"), hereby answering the Second Amendment to Complaint styled as "Plaintiff's Answer to Counter-Claim of Defendant's Amended Complaint and Assertion of Counter-Claim by Plaintiff" dated December 20, 2011 would respectfully show and allege unto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified or qualified is denied and strict proof demanded thereof.

2. The allegations contained in paragraphs 1 through 32 do not necessitate a response, however to the extent that a response is required, the Defendants deny the allegations contained therein and demand strict proof thereof.

3. The Defendants deny the allegations contained in paragraphs 33, 34, 35, and 36.

SECOND DEFENSE

4. The allegations of the First Defense are incorporated herein and made a part and parcel hereof.

5. The governing documents of the International Club community may be ambiguous and therefore, the Defendants assert ambiguity as a defense.

THIRD DEFENSE

6. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof.

7. The Defendant HOA acted reasonably, in good faith, and in accordance with the governing documents of the International Club community in asserting a claim against the Plaintiff for Breach of the Covenants and Injunctive Relief, and therefore, the Plaintiff's action is barred by the business judgment rule.

FOURTH DEFENSE

8. The allegations of the First, Second, and Third Defenses are incorporated herein and made a part and parcel hereof.

9. The Defendant HOA's claim was clearly warranted under the facts alleged, and therefore, the Plaintiff's action is barred.

FIFTH DEFENSE

10. The allegations of the First, Second, Third, and Fourth Defenses are incorporated herein and made a part and parcel hereof.

11. The Plaintiff's breach of the governing documents of the International Club community bars the Plaintiff's action.

WHEREFORE, having answered the Second Amendment to Complaint, the Defendants pray that the same be dismissed and that the Court issue an Order directing that the Plaintiff be solely and totally responsible and liable for all attorney's fees, costs and expenses in the defense of this action, and for such other and further relief as this Court may deem just and proper.

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Attorneys for the Defendants
The International Club Homeowners
Association, Inc. and Rosemary Toth

Myrtle Beach, South Carolina
May 30, 2012

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	**Civil Action No. 2009-CP-26 -3596**
	)	
Ronald Jarmuth	)	
	)	
Plaintiff	)	**COMPLAINT**
	)	**(NON-JURY)**
vs.	)	
	)	**(DECLARATORY JUDGMENT)**
The International Club	)	**(AND EQUITABLE RELIEF)**
Homeowners Association, Inc.,	)	
	)	**(DERIVATIVE ACTION BY SHAREHOLDERS)**
And	)	
	)	
Rosemary Toth	)	
	)	
Defendants	)	
	)	

09 APR 7 PM 3:49

Ronald Jarmuth ("Jarmuth" complaining of the Defendants, The International Club Homeowners Association, Inc ("HOA") and Rosemary Toth, putative President of the HOA, respectfully shows and alleges unto this Honorable Court as follows:

1. The Plaintiff is a citizen of South Carolina, a resident of Horry County, a member of the HOA and is an owner of a lot in the International Club Planned Unit Development ("PUD") and which lot is subjected to certain covenants which allegedly apply to all properties within the PUD.

2. The Defendant HOA is a non-profit corporation organized and existing under the laws of the State of South Carolina by virtue of its non-profit corporation Articles of Incorporation filed with the Office of the Secretary of State of South Carolina on or about March 1, 2001.

3. Rosemary Toth is the putative President of the HOA. She is the co-owner (with Charles Roche) of a lot in the HOA subject to the same certain covenants under dispute.

4. The property that is the subject of this action is located in Horry County, South Carolina and lies within the PUD. The events that are the subject of this action took place in Horry County, South Carolina.

5. This is an action for declaratory judgment relief pursuant to the Uniform Declaratory

Judgment Act of South Carolina as set forth in S.C. Code Ann. §15-53(1976) as amended, et. seq., to determine:

a. Whether the **covenants** originally made applicable to all property within the PUD (and thereafter amended) are still legally viable – whether they have long ago been **declared null, void, and unenforceable**.

b. Whether the owners of homes in the Pebble Creek Subdivision ("Pebble Creek") of the PUD were fraudulently or otherwise improperly deprived of their **equitable title to the (now) HOA Amenity Center, Swimming Pool, and Playground** when one of the developers, DR Horton, Inc, transferred title to same to the HOA. This was done without recognizing the standing of or acknowledging equitable claims to said property collectively held by the Pebble Creek homeowners to determine the extent of their equitable ownership and control over the Amenity Center, Swimming Pool, and Playground built on their behalf subject to obligations acknowledged to in writing by the Pebble Creek Developer, Sunbelt Homes (Charles Flynn).

c. IF the covenants were not amended out of existence, a declaration as to what the **cumulatively amended covenants** consists of.

d. Whether a **bulk cable television contract** negotiated on behalf of the PUD without the express consent of the PUD homeowners is null and void due to –

(1) A Pre-emptive decision and implementing guidance issued by the US Federal Communications Commission ("FCC") which voided any and all bulk cable agreements affecting centrally managed communities and / or condominium communities effective on or about November 13, 2007 with supplemental implementing guidance issued on or about May 9, 2008;

(2) Lack of capacity of the putative representative of the HOA to enter into a contract on behalf of the homeowners in the PUD; and the absence of any approval by the putative Board of the HOA for said contract;

(3) Breach of contract towards the HOA by the bulk cable tv provider, Horry Telephone Cooperative, Inc ("HTC");

(4) the fact that the HOA is operating an un-franchised cable tv utility in violation of federal and state laws;

e. How **much money the homeowners in the PUD are entitled to as refunds**;

(1) from the HOA since the HOA fraudulently – and through threat of liens – collected **cable TV charges** it was not entitled to AND

(2) from the HOA since, upon information and belief, HTC provided the HOA **cable TV refunds / return of excess capital contributions** which were never passed on to or credited to the homeowner cable tv accounts and, upon information and belief, were paid by HTC to the HOA but were never deposited into the HOA accounts.

f. Whether the **HOA putative Board** has fraudulently and in breach of fiduciary responsibility and the provisions of the bylaws and covenants (in so far as they were believed to exist and upon which the putative Board expressed dependent reliance for their authority) refused to do their duty to collect golf course assessments due and payable under the covenants, and **mis-spent monies held in trust for the common expenses** of the homeowners by:

(1) Using MOST of the funds which were collected under express provisions of the covenants solely for the purpose of maintaining "Common Areas" (owned by the HOA) to maintain property owned by the International Club Golf Course, by DR Horton, and by private landowners when these property owners have an obligation under the covenants to maintain their own property and the recourse of the HOA under the covenants is to compel the private landowners to fulfill their obligation;

(2) Expending money collected through assessments by the compulsion of the covenants and threat of liens, which should only have been expended on HOA property, to landscape and maintain land belonging to Horry County which is part of the International Club Drive public road right of way and for which the HOA has / had no obligation under law or under contract to maintain (specifically including all amounts collected after the FCC voided bulk cable agreements at centrally managed or gated communities or containing condominiums);.

g. **How much money the putative HOA Board has mis-spent** by breach of their asserted capacity and accepted fiduciary duty.

h. **Whether "The Glens", a town house development, is a multi-family area OR Townhouse development** within the meaning of the Covenants and if so, whether The Glens is

excluded from the use of the Amenity Center / Pool / Playground, given that the Covenants exclude from such use any multi-family area or town house area.

i. Whether "The Grand Vistas", a condominium multi-family association, is a member of the PUD subject to the covenants and entitled to membership and a vote in the HOA.

HOA Structural Issues

j. Whether the present **HOA Board of Directors is wrongfully holding office**, as a matter of fact , equity, and of law, since:

(1) In both the September 2007 and September 2008 HOA Board elections hundreds of HOA members (specifically the homeowners living in The Villas and The Cambridge) were not on the list of eligible voters, were not sent ballots, and were denied participation in those elections;

(2) The owner of the International Club Golf Course, who by covenants is supposed to pay 50 full assessments (i.e., the same amount that a homeowner pays who is eligible to use the Amenity Center and Pool)) was in 2007 $ 231,687 in arrears on assessments and in 2008 was $259,816 in arrears based on strict application of the provisions of the covenants applicable to the Golf Course. None the less the Golf Course was permitted to vote in both elections, casting the deciding votes as to who was "elected" to the HOA Board. Per the Covenants the Golf Course was not permitted to vote while in arrears.

(3) The owner of the Golf Course was not on the list of eligible voters provided this Plaintiff at his request prior to both elections, yet was permitted to vote in violation of statutes applicable to non-profit corporations in South Carolina.

(4) At both elections additional ballots were freely handed out to individuals who had already (and in advance) mailed in their proxies. This included handing multiple proxies to each person living in a home unit (e.g., a husband and wife) disregarding that only one vote may be cast for each home unit. These ballots were collected at each general meeting and included in the tally.

(5) Despite a demand made in writing prior to these general meetings / elections, the incumbent board and it's management company (KA Diehl) did not allow Plaintiff to inspect the counting of the votes, to compare each proxy / ballot received by mail against the voter list (such

as it was), nor to oversee the distribution of additional paper ballots at the meeting so as to insure that duplicate ballots were not issued.

(6) Copies of the "vote tally" sheets were not provided this Plaintiff despite Defendant being asked for same, preventing a numeric comparison against the ostensible number of persons mailing ballots, appearing in person, or on the "voting list".

(7) At the September 2007 election, when Plaintiff challenged the voting results and asked the management company representatives to inspect the ballots and tally sheets, an employee of the Developer stated openly that there was no point to this as "the Developer just picked who he wanted on the board, and that was that". It was admitted that at least the 2007 election was "rigged".

k. Whether the awarding of the **grounds maintenance contract in 2009 to "Amazing Blades" was a violation of fiduciary duty"** because

(1) Upon information and belief, a potential bidder, Southern Landscaping, was told by a Board member not to even bother to bid as the outcome had already been decided;

(2) Upon information and belief, the previous contractor offered a lower bid;

(3) Upon information and belief the Board has directed that the contract to "Amazing Blades" be increased ostensibly to maintain additional areas where (1) the additional property was already in the specification and had been maintained within the 2007 and 2008 contracts; and (2) approximately two thirds of the grounds maintained and a greater proportion of cost is to maintain property owned by the Golf Course (who pays less than his owed assessments and even less than the cost of maintenance services he receives) and by the former Developer, DR Horton, who pays NOTHING in assessments, as well as several other areas of private property.

(4) Upon information and belief, Rosemary Toth in particular, and other Board members in general, have been shown documents and given presentations by the Buildings and Grounds committee supporting these allegations. Her response has been to mow / maintain even more private property at additional HOA cost.

l. Whether the Board has abused its fiduciary duty by allowing the **Golf Course to escape paying the assessments** specified by the Covenants, specifically, and by falsely telling the homeowners that the Golf Course has been paying more and more when in fact it has been

paying less and less – and never even half of it's contractual obligation.

m. **Whether an agreement between the Golf Course and the Developer Controlled HOA Board** (which ostensibly allowed the Golf Course to ignore the obligations set out in the Covenants) **should be set aside**. At the time the Developer, DR Horton, appointed the Board which consisted almost entirely of employees of Developers (Horton and Sunbelt) and / or the Golf Course because:

(1) The agreement signed by a putative HOA representative, Doug Brown, was made without representative capacity or in violation of the guidance given him and in violation of the approval by the HOA board, as the minutes of the HOA Board approved an entirely different agreement more favorable to the HOA which agreement was largely ignored. They directed that two months of golf course assessments would be traded for half an acre of golf course property to be used for added Amenity Center Parking. The agreement signed by Doug Brown defied his direction as he agreed to one quarter acre and forgiveness of all prior assessment debt and reduction of years of future golf course assessments.

(2) The agreement was in direct violation of the South Carolina Non-Profit Statute, the duties of a fiduciary, and the Covenants and Bylaws of the HOA as Doug Brown, the person signing for the HOA received a free multi-year golf course membership as part of the agreement; and that free golf course membership is currently held by Rosemary Toth the putative President of the HOA – likewise in violation of statute, covenants and bylaws.

(3) Likewise, the agreement provided that the employer (DR Horton) of the person signing on behalf of the HOA (Doug Brown, the Horton appointed "HOA President") received 20 (twenty) free rounds of Golf per month for many years to use for Horton's business purposes AND 75 (seventy five) OR MORE highly discounted golf course memberships which was to enable Horton to use this to entice individuals to buy Horton housing units by giving these to purchasers of Horton homes as part of the cost of the Horton homes.;

(4) Likewise, as a consideration for Horton directing his appointed HOA president / salesperson employee to sign the agreement, Horton got the free use of Golf Club offices to sell real estate from and a highly discounted price of $50 per day to rent the entire club house for Horton sales events.

(5) The consideration given the HOA, ostensibly 0.25 acres to be used for additional parking space for the HOA Amenity Center, was not a consideration at all to the HOA as by written agreement and acknowledgement Horton had an absolute obligation to buy sufficient land for sufficient parking so as to satisfy the Horry County Ordinance requirement as to parking; it was not an obligation of the HOA to deal with inadequate parking space.

(6) The HOA got the additional cost of paying $150 per month to irrigate DR Horton owned property along International Club Drive, which is a cost that Horton, not the HOA, had an obligation to bear. This cost also was towards irrigating Golf Course owned property at the Golf Course main entrance, where the Golf Course was obligated to maintain / irrigate it's own property.

(7) The HOA thus received nothing in exchange for forgoing past and future assessments from the Golf Course and the only entities that received anything of value in exchange were the Golf Course, the Horton employee ostensibly representing the HOA, and the Developer DR Horton. All this conduct amounted to much more than excusable self dealing since the value of this exceeded $ 5000, upon information and belief, this conduct constituted a felony by Horton and his appointed board and employee who signed the agreement ostensibly for the HOA but actually for everyone's benefit but the HOA.

n. That the putative HOA Board has violated it's obligations to maintain to open meetings, agendas, and minutes by holding unannounced or Closed (to HOA members) Board Meetings ostensibly as "workshops" or "executive sessions" where no minutes were kept and where decisions were made, such as appointing replacement members of the Board, approving contracts, or discussing budget issues. At the end of the March 2009 meeting the Board ostensibly went into "executive session" to "discuss matters with their attorney" but the attorney left before the executive session was held.

o. That the putative HOA Board has violated its obligations to maintain minutes as the minutes never identify any matter discussed without resolution, never give the votes and voters for matters put to vote, and ignore (as new business) matters submitted in writing by homeowners as "new business". Likewise that the putative board has violated it's obligations to the HOA by refusing to allow any homeowner to question the Board or ask questions of the Board at Board meetings. The Board stated (March 2009) that Board Meetings are "Our"

Meetings – not the homeowner meetings, and homeowners are entitled to put anything before the Board only at general meetings of the membership.

p. That the Board and it's managing agent, KA Diehl, has ignored demands to inspect and copy documents in violation of the Covenants, Bylaws, and the SC Statute as to Non-Profit Corporations. Plaintiff still has pending document requests lodged in 2008 as well as document requests lodged in writing in prior months of 2009. Upon information and belief, various requested contract documents have either been destroyed (although they apply to contracts active and payable in 2008) or removed from the registered agent's files by Rosemary Toth, putative Board President, or have simply been hidden.

q. That the putative Board and it's employee, KA Diehl, has acted in breach of it's fiduciary duty by

(1) **demanding that prospective vendors of goods and services pay Diehl** what can only be described as a "bribe" of **$200 to be even informed** of HOA requests for goods and services; and likewise

(2) by **requesting prospective contractors to join the Community Association Institute** (CAI) which has nothing to do with plumbers, groundskeepers, pool maintainers, etc, but upon information and belief which results in CAI giving KA Diehl consideration for every contractor signed up; and

(3) likewise that the putative **Board and Diehl have defrauded the HOA** by Diehl **charging for and the Board approving payment to Diehl for use of the (free) SmartStreet website** Diehl did not own and which was in fact provided by RCB Bank to the HOA FREE as a consideration of use of RCB Banks depository services for assessments (approximately $860 in January of 2007 and $860 in January 2008).; and

(4) Likewise by permitting Diehl to arbitrarily select vendors, without competing a bid or searching for a lowest cost source, on requirements for goods and services under $2000 – which constitutes most of the HOA business; and likewise

(5) By beginning in 2009 allowing Diehl to keep for itself (as added to the 2009 Diehl Contract but missing from earlier Diehl contracts) rebates, refunds, discounts, or other payments by sources related to providing goods or services to the HOA through Diehl.

r. The putative Board has breached it's fiduciary duty towards the HOA by paying Diehl $75 per Diehl employee per meeting – and by having Diehl provide 2 employees (Julie Case and Beckie Abel) at $75 per hour per employee whereas for contract years prior to 2009 the contract provided payment to Diehl at $75 (or less) on a per MEETING hour basis, not a per DIEHL EMPLOYEE hour basis. Thus the putative Board **knowingly allowed the HOA to be over-billed by double** for this.

s. That the putative Board has violated Section 2.1 of the Covenants by selectively imposing $ 35 user fees on some, but not all homeowners, for the use of the Amenity Center for which they already pay an annual assessment. Section 2.1 reads

> "The Developer and the Association, as the case may be, shall have the right to assess and collect reasonable fees and charges for the use of Recreational Amenities."

The $35 fee ostensibly is to pay Diehl, the managing agent, to inspect the Amenity Center to assure that all is in order after use – but the same homeowners are not charged the $35 fee if they are part of a group (e.g., "hand and foot card game") selectively favored by the putative Board. There is no provision in the prior or current management (Diehl) contract providing for the payment to Diehl of those fees and, upon information and belief, these "inspection cost recovery fees" are simply put into the general income of the HOA. Upon information and belief, per 26 USC 277 the income from "furnishing services, insurance, goods or other items of value to members" is non-exempt income subject to taxes and per 26 USC 528 the only non-exempt income is annual membership dues, fees or assessments. A cost directly related to furnishing services (the use of the Amenity Center) is taxable at a 30 percent rate – and the HOA Board has directed that these fees not be reported to the federal or state IRS and that no tax be paid. The Court is asked to hold that the HOA Board may not collect funds it is hiding from the IRS and fraudulently claiming as exempt income.

t. **That all existing contracts are null and void** which were entered into by the HOA after March, 2002, at which time (per statute) it was mandated that a board elected by the homeowners take office.

u. **That neither the Covenants nor the HOA rules may be Amended by the Developer** ("Declarant") **or the HOA** to add additional burdens on homeowners such as –

(1) Charges upon sale of a unit to a successor owner not related to services in connection with the sale of a unit (e.g.: document production or certification of accounts);

(2) Charges for reserves for maintenance of roads no longer owned by the HOA for which no obligation of maintenance exists anymore;

(3) Charges for capital contributions for recreational facilities to which particular homeowners (i.e., residents of multi-family tracts) are not eligible to use; for additional recreational facilities not approved by the homeowners or which can not be build because of lack of available land;

(4) Making after – the – fact additional housing tracts eligible to use the Amenity Center complex where the developer has not made an equitable contribution for same to the original cost of the complex, and which would burden the complex with additional users beyond it's planned or legal occupancy limits or parking capacity (the builder shifting his obligation if any to provide recreational facilities for the new tracts from himself to the HOA).

v. **That the Covenants and Developer Agreements relating to the Amenity Center** complex bar town house or condominium tracts within the PUD from the use of the Amenity Center complex.

w. **That the HOA Board has failed in it's fiduciary responsibility** to diligently collect the debts of the HOA owed by the golf course and by the various developers.

EQUITABLE RELIEF

6. This is also a derivative action for equitable relief against Rosemary Toth in her asserted capacity as President of the HOA and as a self-proclaimed fiduciary to the HOA to recover from her

a. the funds she mis-spent to maintain golf course, DR Horton, and other private property after

(1). being advised numerous times by the Buildings and Grounds Committee that said land was not HOA property, that the HOA had no obligation to maintain same, that the property owners were obligated under the Covenants to maintain same enforceable by lien;

(2). being advised of the approximate cost of her mis-management decisions; and

b. the assessments she has refused to allow to be collected from the golf course, aka the International Club LLC, (a South Carolina for-profit corporation whose registered agent is W. Jack Davis), prior to December 10, 2008 being owned by Davis Mining & Manufacturing, (whose registered agent was also W. Jack Davis) and before April 21, 2006 the Plantation Golf AD LLC, a South Carolina for-profit corporations still in good standing.

7. Plaintiff asserts that he has been directly harmed by all this as an individual and is thus entitled to sue in his individual capacity because as a consequence

a. He has been denied a seat on the HOA Board;

b. His assessments have been higher than they would otherwise have been had the Golf Course been compelled to pay the 50 full assessments mandated by the covenants and had HOA monies not been mis-spent maintaining non-HOA property, particularly the property of the golf course which benefited to a greater degree than the very reduced assessments Ms. Toth permitted it to get away with;

c. He has been compelled, under threat of lien, to pay for cable television services he did not contract for under a class of contract which the FCC has held to be void and unenforceable;

d. His equitable share in the Amenity Center complex has been improperly transferred to the HOA without notation of Plaintiff's ownership share; and homeowners who did not pay, directly or on their behalf, a capital contribution stake in the construction of the Amenity Center complex have been allowed to use said facility, creating illegal over-capacity situations at times;

e. With the consent or inaction of Ms. Toth, the Joe Bernat Golf Academy [1] (PO Box 14187; Myrtle Beach, SC 29587-4187; 888-513-5928) has been allowed to use the HOA swimming pool parking lot, which at time results in no parking for Plaintiff;

f. Plaintiff has been subjected to covenants which do not exist in their entirety or to sections which have been deleted by amendment.

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[1] Upon information and belief, the Joe Bernat Golf Academy is not licensed to do business in South Carolina nor in Horry County – thus functioning as an unlicensed business - nor does it have it's own parking faciliities – thus violating the related Horry County ordinance,

8. The conditions have been met for Plaintiff to sue as a representative of a class in a Derivative Action by Shareholders of the HOA and of a class of homeowners wrongfully subjected to the voided or amended covenants.

a. The class is so numerous that joinder of all members is impracticable. The HOA includes 483 single family homes, 71 town houses, 204 condominium units, and one business, the golf course, with 50 votes per the covenants (but none when in arrears).[2]

b. All questions of law or fact are common to all class members.

c. Plaintiff's claims are typical of the claims of the class.

d. Plaintiff will fairly and adequately protect the interests of the class.[3]

e. The amount in controversy for each member of the class (except the golf course) exceeds one hundred dollars.[4]

RELIEF SOUGHT

9. The Plaintiff is informed and believes that he individually and as Class Representative is entitled to an Order of this: Court to cure the above cited problems, and Plaintiff asks the Court to Order the following:

a. To remove the existing Board from Office;

b. To void all contracts entered into by the HOA after March 2002.

c. To void the "Golf / Assessment" agreement / contract made between the HOA, Horton, and the Golf Course on or about November 3, 2003;

d. To order that upon the agreement between Plantation AD, DR Horton, and Sunbelt Inc, entered into on May 16, 2003, all prior covenants running with the land within the International Club Planned Unit Development ("PUD") which same land is arguably subject to

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[2] Single Family Homes: Pebble Creek - 222; Highlands - 98; Links - 103; Meadows - 60. Townhouses: Glens – 47; Cambridge – 24. Condominiums: Villas – 140; Grand Vistas – 64. Golf Course – 50.
[3] Plaintiff has since 2007 effectively been the spokesman for the disenfranchised or wronged homeowners against the board which has wrongfully seized control and which has mismanaged the HOA affairs.
[4] $80,000 – 2007 + 2008 maintaining non-HOA grounds; $290,000 through 2009 in uncollected golf assessments: 2008- 2009 void / collected cable charges = $ 500.40 per unit; 2006 -2007 overcharges = $53.58 per unit.

the Defendant International Club HOA, ceased to exist and thereafter no authority existed to resuscitate or amend the covenants without the unanimous agreement of all property owners within the PUD;

e. In the alternative to 5(d), if the Court does not so order, to codify the cumulative effect of the amendments to the covenants;

f. To appoint a Special Master under the direction of the Court and at the expense of the HOA to

(1) Organize a new election of the Board;

(2) To gather, hold and control the records, books, and finances of the HOA;

(3) To manage the affairs of the HOA, himself or through a property manager licensed by the South Carollina Department of Licensing and Regulation (i.e., the Board of Realtors) likewise at the expense of the HOA;

(4) To identify instances of waste, fraud, abuse or fiduciary misconduct by the now current putative board and / or it's employees and to refer instances where it is believe to constitute criminal conduct to the Prosecutor for further action, and where such misconduct does not warrant criminal action, to sue Board members and employees or contractors on behalf of the HOA and at the expense of the HOA to recover money disbursed fraudulently or in abuse of fiduciary responsibility;

(5) To sue on behalf of the HOA to recover debts due the HOA, specifically assessments owed by the International Club Golf Course and by various private landowners (e.g., Golf Course, DR Horton, and others) for the cost of maintaining the private property of same;

(6) To cause a forensic audit of the accounts of the HOA to take place, at the expense of the HOA, so as to restate the records in accordance with genrerally accepted accounting principals, to separate and segregate money improperly within common accounts, to issue to the homeowners individual statements of account, and to restate the tax filings of the HOA in recognition of the mis-labelling of non-exempt income as exempt income; and to pursue by criminal and civil means any misconduct uncovered through said forensic audit;

(7) To identify the equitable interest of the homeowers in Pebble Creek in the Amenity Center / Pool / Playground and related parking lots, and to prepare and file an Amended Deed with the authority of this Court so reflecting; to prepare and put to the vote of the homeowneres in Pebble Creek a suggested regime to represent these homeowners' interest in said facility;

(8) To determine what refunds or rebates were or should have been issued to the HOA by the Horry Telephone Cooperative in connection with provision of cable television services to the HOA, and to take such action to collect such refunds or rebates and credit them to the appropriate homeowner accounts; to identify, collect and refund to homeowners any excess between funds collected for cable television services and the legal and equitable amounts which were actually due on those accounts;

g. To order the exclusion from use of the facility of any homeowner living in a town house / town home, or condominium homeowner unit;

h. To void the HTC / HOA bulk cable television agreement;

i. To order that all meetings of the Board or of any Committee whether termed "social events", "workshops" or otherwise with the exception of when an attorney is actually addressing ONLY privileged attorney – client matters -

(1) must be open to the homeowners;

(2) must be perpetuated with adequate minutes as described in the South Carolina Non-Profit Corporation Statute; and the minutes must promptly be made available;

(3). must accept onto the agenda as new business any matter put before it by a PUD homeowner;

(4) must permit any homneowner to question the board or committee in a reasonable length of time and must reasonably attempt to answer such questions when the answers to do not compromise instances where courts have accepted claims of privilege for like circumstances;

j. To hold Rosemary Toth personally responsible for the excess costs to the HOA (October 2007 through the termination of this suit) to maintain non-HOA property, said sum to be repaid to the HOA.

k. To hold Rosemary Toth personally responsible for the assessments she allowed the golf course to avoid paying, while allowing the golf course to vote in elections and directing that golf course property be maintained, said sum to be repaid to the HOA.

l. To hold Rosemary Toth and the HOA jointly liable to Plaintiff and the homeowners for the cable tv charges they paid in 2006 and 2007 in excess of the permitted rate increases, and for the cable tv charges forcibly collected at Ms. Toth's direction through assessments under threat of lien after the FCC voided all such contracts in November, 2007.

m. To hold that the only consequence of late payment of an assessment (apart from collection costs allowed in the covenants) is, per Section 6.8 of the Covenants,

> "interest from the due date a rate equal to the lesser of (a) eighteen percent (18%) per annum or (b) the maximum rate provided by applicable law"

which is the exclusive and complete remedy provided for in the covenants.

n. AND such other orders as are necessary to achieve the declarations and equitable relief sought by Plaintiff.

CHRONOLOGICAL HISTORY

10. On **October 22, 1998** Plantation AD LLC a South Carolina corporation, filed the deed of sale of **9.79 acres** in Deed **Book 2082 Page 456** from Stella Vereen and others to Plantation AD which land subsequently became "The Grand Vistas", whose membership in the HOA and subjection to the covenants is in contention. This land is described at **Plat Book 158 Page 155** which also relates to the **5.42 acres** separately purchased (see below) and which later became International Club Drive (from what became The Grand Vistas down to Kaminski Boulevard aka Tournament Boulevard).

11. On **January 15, 1999** Plantation AD LLC, filed a plat of what was to become the core of the PUD – **Book 160 Page 79**, 459.22 acres in Socastee Township. This related to land Plantation AD owned between McDowell Shortcut Road, south east of Route 707, and north of what on December 29, 1999 had been dedicated as Kaminski Boulevard, later renamed Tournament Boulevard. Upon information and belief and upon inspection of this Plat, the land described includes "**The Fairways**" (which has been wrongfully excluded from the HOA and wrongfully exempted from assessments), "**The Villas**" which has been deprived of voting rights

in the HOA while being subjected to assessments – and which has separately sued Defendant HOA, "**The Cambridge**" which like "The Villas" has been deprived of a vote but subjected to assessments, as well as the current International Club Golf Course.

12. On **January 19, 1999** Plantation AD owned the land which ultimately became the golf course as well as most of the land which became the PUD. This is perpetuated in a "**Golf Course Membership Rights Agreement**" filed that day in Deed Book 2112 at Page 19. The Golf Course Membership agreement was stated as "a covenant running with the land and shall be binding upon all future purchasers of the Plantation Tract Golf Course Property". This agreement has since been repudiated (and it's very existence denied) by the current / successor International Club Golf Course, Inc, owned until December 2008 by Davis Mining and Manufacturing. It has never been honored. Exhibit B to that document at Deed **Book 2112 Page 22** refers to the same plat recorded at Plat Book **160 Page 79** to make this golf agreement applicable to the entire area and adds reference to the plat at Book **158 Page 155** explicitly applying it to the 5.42 (International Club Drive) and 9.79 acres (Grand Vistas) referred to above.

13. On **January 19, 1999** Plantation AD recorded at Deed Book 2112 Page 5 the deed of sale of **5.42 acre**s bought from the Kaminski 17 Limited Partnership which was later subjected to the covenants at issue referring to Plat Book 158 Page 155. This land was later sold to DR Horton and has an easement on it providing for use by all homeowners who bought lots in the PUD originally owned by Plantation AD. The road through the center of the property is currently named International Club Drive.

14. On **January 29, 1999, Plantation AD sold to Plantation Golf** AD three (3) tracts of land described on the aforesaid Plat in exchange for cash and membership interests for Plantation AD (and it's successors) in the Plantation AD Golf course (and its successors) further subjecting the golf course to a restriction that for 99 years it could only be used as a golf course. Upon information and belief, the Horry County Planning Commission's requirements for open space for the planned unit development (PUD) contemplated by Plantation AD required this in partial satisfaction of the open space requirements imposed on housing developments such as the PUD. The property was made subject to certain easements for the use by the golf course of planned and existing roads in the PUD AND the covenants simultaneously filed. This deed was actually

recorded on **February 8, 1999** at Deed Book **2117 Page 1413**.

15. On **February 8, 1999** (the same day) Plantation AD filed a **Declaration of Covenants** applying to the entire PUD, at **Deed Book 2117 Page 1353.** These are the covenants (and it's later amendments) subject to contention in this suit. **These ARE THE ONLY COVENANTS BETWEEN Plantation AD, Sunbelt, and DR Horton and their successors** and assigns.

16. The **covenant**s for the PUD were made applicable to the PUD and to any additional land later subjected to the covenants by amendment to the covenants. The golf course was subjected to these covenants as was the land described in Exhibits A and B therein. The golf course and it's successors are subject to the same covenants as the homeowners.

a. The Declaration of the **February 8, 1999** (original) Covenants used the following text to state what land was to be subject to the Covenants:

> **"NOW, THEREFORE, the Developer hereby declares that all of the Property described in Exhibit "A" and the Additional Property described in Exhibit "B" ... shall be ... subject to the following easements, restrictions, covenants, charges, liens and conditions"**

b. **Exhibit A** referred to Plat Book 160 page 79 (October 12, 1998, revised through January 13, 1999) and listed the following property:

(1) 76.08 acres – Parcel 1; this is the "Pebble Creek" group of single houses sold to and developed by Sunbelt.

(2) 192.52 acres – Parcel G-1; this is the Golf Course.

(3) 9.07 acres – "Clubhouse"; this is the Golf Course clubhouse.

(4) 13.08 acres – Parcel 4; this is currently empty land to the north east of the golf club house;

c. **Exhibit B** referred to the same Plat Book 160 Page 79 and listed 449.22 acres further qualifying it as the property conveyed by the Murrells Inlet Golf Plantation LLC to Plantation AD in Deed Book 1996 at Page 1104. which sale included the above tracts AND

(1) Parcel 2, 50.18 acres; this is "The Meadows", "The Highlands", and part of "The Links" single family homes;

(2) Parcel 3, 45.72 acres; the remainder of "The Links" single family homes are here

as well as "The Glens" townhouse development.

(3) Parcel 5, 7.95 acres; this is where the Bally Castle condominiums are currently being constructed; and

.(4) Parcel 6, 56.45 acres; this is "The Villas" condominium development.

d. **Exhibit B** also refers to the property on Plat Book 158 Page 155 filed October 22, 1998, specifically including:

(1) 5.42 acres which is the main entrance of the PUD, more particularly the stretch of road (plus wetlands and parallel adjoining land) called "International Club Drive running from Tournament Drive (formerly Kaminsky Blvd) to The Villas; and

(2) 9.79 acres which is "The Grand Vistas" condominium development.

Thus the areas in the PUD subjected to the covenants and entitled to votes and privileges in the HOA are Pebble Creek, The Golf Course, The Meadows, The Highlands, The Grand Vistas, The Villas, and The Glens.

17. Also on **February 8, 1999 Plantation AD sold to Sunbelt Associates** (Charles Flynn) the tract of land which became the Pebble Creek subdivision of the PUD. This was recorded at Deed Book 2117 Page 1401 and was subjected to the Declaration of Covenants referred to above.

18.. Also on **February 8, 1999** in connection with the aforesaid sale of land to Sunbelt, **Plantation AD assigned to Sunbelt Golf Course Membership** rights it held as a consequence of it's placing same in a covenant relating to the sale by Plantation AD to Plantation Golf of the golf course tract. This "**Golf Course Membership Agreement**" was recorded in Deed Book 2117 at Page 1408 and was redundant to the previous Golf Course Membership Agreement between Plantation AD and Plantation Golf. This agreement provided Pebble Creek homeowners single annual golf course memberships for $690 and $1035 for family memberships.

The Glens

19. On May 10, 2000 Plantation AD recorded the First Amendment to the Covenants.

a. It changed the name of the PUD from "Murrells Inlet Golf Plantation" to

"International Club". This applied to the entire PUD, demonstrating that Amendment 1 is an Amendment of General Application to the entire PUD.

b. Parcel 6, "The Villas", was redundantly subjected to the Covenants; Plantation AD also noted that said parcel was being conveyed to a new owner / developer, International Club Villas. This second paragraph clearly referred only to Parcel 6.

c. The third paragraph, referring only to Parcel 6, stated that Parcel 6 has no common areas *belonging to the HOA.*

d. Section 3.7 of the covenants was "hereby deleted in its entirety". The amendment did not say "does not apply to Parcel 6", and the failure to limit the application of the deletion clearly deleted Section 3.7 from applying to any area subject to the Covenants. This paragraph (4) of the amendment went on to say that "property management firms used to operate any multi-family association" in Parcel 6 shall have no limitations. Clearly where a sentence was meant to apply to a multi-family development, not to the entire PUD, the Declarant said as such.

e. Paragraph 5 of the amendment denied owners of multi-family units the right to use any PUD / HOA recreational facilities, which includes the Amenity Center / Swimming Pool / Playground. At the time there were no recreational facilities in the PUD.

> "The owners of Dwelling Units within the Multifamily Parcel shall not *have* the right to use any Recreational Amenities, if any, owned by the International Club Homeowners Association, ` Inc. (the "Master Association"), nor will such owners be assessed any of the cost of operating, constructing, repairing, or replacing any such Recreational Amenities."

f. Paragraph 8 of the amendment required separate calculation and segregation of funds / budgets for the recreational facilities (and their reserves) and other general PUD maintenance obligations.

g. Paragraph 9 was an unqualified amendment of general application obviously meant to apply to the entire PUD. It deleted ('waived") the obligations of sections 4.10, 4.12, 4.16, and 4.17 of the covenants without qualification or reservation. There was no qualifying phrase stating that this waiver was limited to the multi-family parcel.

h. Paragraph 10 was qualified as applying only to the multi-family parcel, stating that the payment required by covenant section 6.7 could be deferred, in the multi-family parcel,

until a unit was sold.

i. Likewise in Paragraph 11 Amendment 1 made a general unqualified deletion "waives" of covenant sections 7.2, 7.4, 7.25, and 7.31. Lacking was the specific qualification made when referring (in paragraph 10) to section 6.7.

j. Paragraph 12 of the Amendment likewise made a general and unqualified waiver of Section 7.37 of the Covenants.

20. On **March 1, 2001** the Homeowners Association referred to in the Covenants was registered with the South Carolina Secretary of State as a non-profit corporation subject to SC Code 33-31 et seq. specifically being subject to dissolution under section 33-31-1404.

21. On **April 29, 2003** Plantation AD recorded the Second Amendment to the Covenants.

a. Plantation transferred to DR Horton its status as developer / Declarant.

b. It excluded from annexation without Plantation's consent land owned by Plantation AD (which had not been incorporated into the PUD) to the north and south of the main entrance (International Club Drive).

c. Plantation declared that it, not Horton, owned the roads and streets in the PUD and that same could only be transferred to the HOA.

22. Also on **April 29, 2003** Plantation sold to Horton the land which Horton later used to build The Links, The Highlands, The Meadows, The Glens, and the Grand Vistas, together with the property which included the lower end of International Club Drive (5.42 acres) connecting to Tournament Drive, over which all homeowners in the PUD had an easement of use.

23. On **May 11, 2003** Plantation AD, DR Horton, and Sunbelt Associates signed a tri-partite "**Developers Agreement**". These parties included the former and current Declarant of the Covenants (for the PUD) and between the three owned all property in the PUD with the exception of the Golf Course (which upon information and belief, was owned by Plantation Golf, a subsidiary of Plantation AD). The ONLY COVENANT between these three was the covenant filed with the Recorder of Deeds on February 8, 1999, as later amended. These parties had the power to amend the Covenants and, by the ultimate form of amendment, to amend the covenants out of existence. The agreement abolished the Covenants, set in place a non-competition regime between Horton and Sunbelt, and provided for the joint construction of the (eventual) Amenity

Center / Pool / Playground for the exclusive benefit of single family homes and to the absolute exclusion of townhouse and condominium owners.

a. The paragraph titled "1. Contract with Plantation AD LLC" contained the following text which could relate ONLY to the PUD Covenants since these covenants, referred to in the contracts for sale of real estate, were the only covenants between Plantation and Horton and / or between Plantation and Sunbelt, and which were also simultaneously applicable to both Sunbelt, Horton, and Plantation.:

> "Further, said parties, their heirs, executors, administrators and successors, mutually remise, release and forever discharge DRH, Sunbelt and Plantation, its or their heirs, executors or administrators **or its successors or assigns**, as the case may be, of and from all, and all manner of action and actions, cause and causes of actions, suits, debts, sums of money, accounts, reckonings, bonds, bills, specialties, **covenants**, …."

Thus as of May 11, 2003 the Covenants as Amended thereto ceased to exist. With that went the power to further Amend or to resuscitate the Covenants without the unanimous consent of all property owners (such resuscitation would be a "new" covenant") in the PUD – which was never sought nor achieved.

b. In Paragraph 2 Horton and Sunbelt contracted for the creation of what is now the Amenity Center / Pool / Playground.

(1) It was to be constructed on land then owned by Plantation Golf AD, specifically on Parcel D of Plat Book 189 Page 89.

(2) It was to have a 2000 square foot pool plus deck; a 3000 square foot clubhouse with bath and shower areas, a workout facility, and a common room for community functions with a kitchenette. It was also to have an outdoor children's playground area.

(3) The contract provided that the recreational facility

> **"shall be for the sole and exclusive use of the owners of Single Family Residences** within the Planned Unit Development known as the International Club or any other Planned Unit Development ".

c. In this agreement Sunbelt recognized it's obligation to purchasers of single family homes in Pebble Creek to provide them a similar recreation facility, which obligation was undertaken by Sunbelt to sell Sunbelt homes. As a consequence, the contract provided for Sunbelt to pay Horton $1000 per Pebble Creek home, upon information and belief totaling

$222,000. Sunbelt owned no other property in the PUD.

d. On Page 4 Paragraph 3 of the Agreement ("No Competition") Horton and Sunbelt further qualified single family homes to mean "detached single-family homes". The non-competition agreement was that

> "DRH shall not market or sell detached single-family homes which are larger than 1900 heated / cooled square feet, … (and) that Sunbelt shall not market or sell detached single-family homes which are smaller than 1200 heated / cooled square feet,"

e. In Paragraph 10 (b) "Interpretation" Horton and Sunbelt declared that "the parties .. intend the plain meaning of the provisions herein."

f. As part of the Agreement Horton and Sunbelt attached a model "HUD Settlement Statement" (Form HUD-1) which provided (Line 518) that $1000 of the purchaser's funds will be used to purchase a $1000 interest in the Amenity Center to be built by Horton in part for the Pebble Creek Homeowners.

g. There is no provision in the Agreement that the Amenity Center be DEEDED to the HOA. Upon information and belief, Sunbelt had promised each Pebble Creek homeowner to build, as a representation related to the sale of houses in Pebble Creek, a recreation complex for the exclusive use of Pebble Creek homeowners.

24. The Glens and The Cambridge are clearly multi-family areas within the meaning of the Covenants which states that

> "Section 1.18. Multi-Family Area shall mean and refer to any portion of the Subdivision designated as such by the Developer in which **common elements are owned** by either the Owners of Units in such Multi-Family Area as tenants-in-common or **by the Multi-Family Association composed of such Owners**, pursuant to a Horizontal Property Regime **or other multi-family legal structure** within the Subdivision upon which there shall have been or will be constructed **either attached or detached townhouses**, condominium units, apartment units, cooperative units, cluster homes, patio homes or similar multi-family structures."

a. The townhouses in The Glens are members, by their additional covenants made applicable to their deeds, of "The Glens @ International Club Homeowners Association, Inc", incorporated November 8 2004, and constituted as a sub-HOA. It owns common areas apart from the master HOA. These common areas consist of Parcels 1944301060 and 072. The Glens HOA is responsible for the maintenance of the front of the townhouses as well as the

parking lots. These townhouses do not have garages nor even driveways. The zoning ordinances of Horry County contemplates only single family detached houses, duplexes, and townhouses. Duplexes can consist of no more than two attached (by a common wall) units.

b. The "multi-family legal structure within the Subdivision" was recorded as covenants and attached bylaws on November 8, 2004 at the Courthouse in Deed Book 2818 Page 1282 et seq. Page 7 Paragraph 5.1 of the Covenants provides that the townhouse association is responsible to maintain not only the common areas, but also "the exterior of the Units, including but not limited to the landscaping around and in front of the Units". This is typical of a multi-family association but not of single family homes, where the homeowner is responsible to maintain the landscaping on his property as well as his individual structure. In exactly the same manner as condominiums, the sub-HOA, not the homeowner, shall peridically treat all exterior walls and foundations of the individually owned units for Termites. Peculiarly, Article XI of the Glens covenants provides for The Glens to have it's own Architectural Review Board (ARB) with it's own distinct standards, which further sets The Glens townhouses apart from the single family houses which are subject to a common and different set of standards and which is administered by the master HOA's own ARB.

c. In attempting to avoid filing this suit Plaintiff engaged in discussions with members of The Glens, particularly Maureen Sullivan, an officer of The Glens HOA and a putative (but never elected and illegallyappointed member of the master association HOA). The Glens has claimed that they are permitted to have their own independent ARB because multi-family associations are so allowed. Upon information and belief, The Glens has altered it's landscaping and built structures in the common areas without applying for permission from the master association ARB.

d. The Glens units lack the standard black mail boxes which are required under the covenants for each individual single family residence. They instead use a multi-box assembly typical of condominium and town house developments.

e. The deeds of individual Glens townhouses do not provide an expectation or right in any recreational facility. The rights conveyed by deed of individual townhouses is only for the use and enjoyment of Glens common areas.

f. Amended Section 7.2 of the master HOA covenants provided that Sunbelt had

contributed $1000 per home through a "Developer's Agreement" for the capital cost of the Amenity Center and required that a separate developer's agreement be constituted which included the contribution of $1000 per unit towards the same capital costs (which agreement has been discussed supra, and which provides exclusively for construction and use of the Amenity Center complex). Upon information and belief, no developer's agreement and no payment of $1000 per unit was made on behalf of The Glens.

g. The Glens is thus a multi-family area ineligible to use the Amenity Center Complex.

h. Pebble Creek homeowners have a collective $222,000 [5] equity ownership in the Amenity Center complex independent of the HOA.

Golf Course "Agreement"

25. Paragraph 8.5 of the Covenants provides the sole and exclusive mechanisms to amend the Covenants. Simply put, the board of the HOA may not alter the express terms of the HOA by amendment, letter, agreement, handshake, contract, or nod. The strict letter of the covenants applies until amended.

26. This is further subject to Article 10 of Title 33 Section 21 (33-31-10xx) of the South Carolina statutes. Per 33-31-1002 of the Code, the only variations from the letter of the covenants that Directors are permitted to make are -

"(1) to extend the duration of the corporation if it was incorporated at a time when limited duration was required by law;
(2) to delete the names and addresses of the initial directors;
(3) to delete the name and address of the initial registered agent or registered office, if a statement of change is on file with the Secretary of State;
(4) to change the corporate name by substituting the word "corporation", "incorporated", "company", "limited", or the abbreviation "corp.", "inc.", "co.", or "ltd.", for a similar word or abbreviation in the name, or by adding, deleting, or changing a geographical attribution to the name; "

27. The statutes applicable to non-profit (33-31-831 et seq) corporations prohibit transactions where a director has a conflict of interest. The minutes of the Board of Directors for the period from September 2003 through November 2003 do not perpetuate and disclosure of a conflict of

[5] In 2003 dollars.

interest between one or more HOA Board members, Horton, and the Golf Course regarding the subsequent "Golf Course Agreement" nor do said minutes perpetuate any before or after approval of any such conflict of interest. In point of fact numerous conflicts of interest and self-dealing related to the 2003 "Golf Course Agreement".

"**SECTION 33-31-831. Director conflict of interest.**

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

(b) A transaction in which a director of a public benefit or religious corporation has a conflict of interest may be:

(1) authorized, approved, or ratified by the vote of the board of directors or a committee of the board if:

(i) the material facts of the transaction and the director's interest are disclosed or known to the board or committee of the board; **and**

(ii) the **directors approving the transaction in good faith reasonably believe that the transaction is fair to the corporation**; or ...

(c) A transaction in which a director of a **mutual benefit corporation** has a conflict of interest may be approved if:

(1) **the material facts of the transaction and the director's interest were disclosed** or known to the board of directors or a committee of the board and the board or committee of the board authorized, approved, or ratified the transaction; or

(2) the material facts of the transaction and the director's interest were disclosed or known to the members and they authorized, approved, or ratified the transaction.

(d) **For purposes of this section, a director of the corporation has an indirect interest in a transaction if:**

(1) another entity in which the director has a material interest or in which the director is a general partner is a party to the transaction; or

(2) another entity of which the director is a director, officer, or trustee is a party to the transaction.

(e) For purposes of subsections (b) and (c) a conflict of interest transaction is authorized, approved, or ratified if it receives the affirmative vote of a majority of the directors on the board or on the committee who have no direct or indirect interest in the transaction, but a transaction may not be authorized, approved, or ratified under this section by a single director. If a majority of the directors on the board who have no direct or indirect interest in the transaction vote to authorize, approve, or ratify the transaction, a quorum is present for the purpose of taking action under this section. The presence of, or a vote cast by, a director with a direct or indirect interest in the transaction does not affect the validity of any

action taken under subsections (b)(1) or (c)(1) if the transaction is otherwise approved as provided in subsection (b) or (c).

(f) For purposes of subsection (c)(2), a conflict of interest transaction is authorized, approved, or ratified by the members if it receives a majority of the votes entitled to be counted under this subsection. Votes cast by or voted under the control of a director who has a direct or indirect interest in the transaction, and votes cast by or voted under the control of an entity described in subsection (d)(1), may not be counted in a vote of members to determine whether to authorize, approve, or ratify a conflict of interest transaction under subsection (c)(2). The vote of these members, however, is counted in determining whether the transaction is approved under other sections of this chapter. A majority of the voting power, whether or not present, that are entitled to be counted in a vote on the transaction under this subsection constitutes a quorum for the purpose of taking action under this section. "

"**SECTION 33-31-842. Standards of conduct for officers.**

(a) An officer with discretionary authority shall discharge his duties under that authority:

(1) in good faith;

(2) with the care an ordinarily prudent person in a like position would exercise under similar circumstances; and

(3) in a manner the officer reasonably believes to be in the best interests of the corporation, and its members, if any. "

"**SECTION 16-13-230. Breach of trust with fraudulent intent.**

(A) **A person committing a breach of trust with a fraudulent intention** or **a person who** hires or **counsels another person to commit a breach of trust** with a fraudulent intention **is guilty of larceny**.

(B) **A person who violates the provisions of this section is guilty** of a:

(1) **misdemeanor** triable in magistrate's court if the **amount is one thousand dollars or less.** Upon conviction, the person must be fined or imprisoned not more than is permitted by law without presentment or indictment by the grand jury;

(2) **felony** and, upon conviction, must be fined in the discretion of the court or imprisoned not more than five years if the amount is **more than one thousand dollars but less than five thousand dollars**;

(3) **felony** and, upon conviction, must be fined in the discretion of the court or imprisoned not more than ten years if the amount is **five thousand dollars or more**."

28. Section F of the Bylaws of the HOA provides that

"The Association shall not pay compensation to its members, directors or officers for services rendered."

29. Section 6.5 of the Covenants provides that

> "the owner of the golf course shall pay an assessment which equals **fifty (50) times the rate of Unit owners who also pay for the costs of the recreational amenities**;

30. In 2003 the full assessment for owners who pay for the costs of the Amenity Complex was **$65 per unit**. Thus per the covenants the **Golf Course owed $3,250 per month** in assessments.

31. In 2003 no member of the Board of the HOA had been elected. Each and every one of them had been appointed, were removable on demand by, and owed allegiance to Horton, the developer. Per the information cited supra, Horton also had an absolute responsibility to pay for the cost of the Amenity complex either through his own funds or through funds from Developers Agreements with builders of single family homes. The HOA had NO obligation or responsibility to pay anything for the Amenity Complex. Title to the Complex was not held by the HOA.

32. Per the September 3, 2003 minutes of the HOA Board meeting:

a. Horton through Doug Brown appointed his employee / salesperson Doug Brown as member and president of the board; together with his employees Rick Ryan, Russ Carson and Ron Peoples. He also appointed Charles Flynn, President of Sunbelt, to the Board. Between Doug Brown and Charles Flynn, there was complete knowledge of the obligations of the Golf Course to pay assessments per the covenants and of Horton to build the Amenity Center at the cost of Horton and Sunbelt, but at no cost to the HOA.

b. The September 3, 2003 minutes perpetuate that on that day, **through the end of August 2003**, the Golf Course was **$15,000 in arrears**. The vote of the Board was that the golf course **arrears of $ 15,000 through August 2003** be

> "written off in exchange for a parcel of land approximately **½ acre** to be given to the association for the purpose of completing a **parking area for the recreational facility**. The motion passed unanimously".

This of course was an illegal abuse of fiduciary responsibility because Horton and Sunbelt, not the HOA, was obligated to acquire sufficient parking. There was no board authorization for any further forgiveness of golf course debt nor reduction in future golf course obligations. In recognition of the requirements of the covenants, the board minutes noted that any approved alteration to the golf course future assessment "would be incorporated into an amendment to the

master deed". No such amendment was ever recorded. It is also believed that the $15,000 itself was fraudulent because upon information and belief, it was not computed at the $65 per unit rate but upon approximately $20 per unit, the rate paid by units NOT having access to the amenity center (which had not been built). According to a letter dated January 19, 2004, signed by Tracy W Fisher, an attorney with the law firm of Willcox, Buyck & Williams, the golf course did not pay any assessments for September, October, November or December of 2003, accumulating a new assessment arrearage of $13,000 on top of the admitted debt through August 2003 of $15,000..

33. The minutes reflect that at the September 3 3003 meeting the Board also approved a contract between the HOA and the golf course to buy water to **irrigate International Club Drive** which runs from the intersection of Pebble Creek / golf course entrance to Tournament Drive, and that the board approved a contract specifying **$100 per month**. The minutes scheduled the next meeting for September 10 2003 in Horton's offices but this apparently did not take place as there are no minutes for such a meeting (and hence no "off-the-minutes" approvals have any validity).

34. Instead of carrying out the very flawed and unlawful agreement as approved by the Board, Horton's salesman / employee and putative "Board President" Doug Brown put in place a very different agreement between Horton (who should have had no place in the contract, since Horton was not owed anything by the golf course), Plantation Golf, and ostensibly the HOA with Brown in questionable representative capacity. Recall that Horton and Sunbelt had an obligation to provide parking satisfying the applicable Horry County ordinance – at their expense – and that the Board had an obligation to collect the debts owed it per the covenants and that no board member could negotiate a contract benefiting himself or his employer.

35. Section 1104 of the Horry County Ordinances governs parking for Indoor / Outdoor recreational facilities. For a community / recreation center (C)(1) there must be "1 **space per 50 sq. ft of useable seating area"**. The contract between Horton and Sunbelt provided for a 3000 square foot facility – **60 spaces**. Combining both the "new" parking (1/4 acre) lot bought through this objectionable agreement with the parking spaces near the pool, there are no wheres near the mandated 60 spaces. Perhaps if Doug Brown had obeyed the board and added ½ acre of parking, this might have happened. Section 1104(C)(2) provides that for a swimming facility

there must be "**1 space per 75 sq. ft. of gross water area**". The Developer's Agreement provided for a 2000 square foot pool, hence a requirement for **27 more spaces**, or a total requirement of **87 parking spaces**. Instead of fulfilling his fiduciary duty or at least nominally obeying the Board's mandate, Doug Brown and Horton (a representative of Horton signed this ugly agreement) lined their own pockets at the expense of the HOA – which got nothing out of the agreement and stood to lose approximately $423,000 through 2014 from this illegal agreement.

a. Doug Brown agreed to accept ¼ acre for parking from the golf course, not the 1/2 acre the Board demanded. The minutes of the board did not give him negotiating powers. Per the documents on file at the Courthouse, the ¼ acre transferred was declared to have a value of $5,000, according to documents filed with the Deed at Bood 2771 Page 1480 and the assessment records of Parcel 1940002107 for 0.258 acres dated August 4, 2004 (this late transfer of the deed invalidated the agreement which required full performance (Agreememt Paragraph 6, Real Property) "within seven (7) days of this Agreement, the Golf Course shall convey the real property ... free and clear of all liens to the HOA". As noted, while the date of the Agreement was November 3, 2003, the deed was not conveyed until August 4, 2004, invalidating the entire agreement.

b. In Parfagraph 1, Forgiveness of Debt, Doug Brown overstepped his authority and forgave golf course debt through the end of December, 2003, not just the $15,000 (questionable) debt through the end of August, forgiving an additional $13,000. This additional money is owed the HOA by the Golf Course (as is the prior debt).

c. In paragraph 2 (Future Assessments), without any authority and in direct violation of the covenants, Brown agreed to allow the golf course to pay 20 full assessments ($65) a month, $1300 not $3250. at 50 assments in 2004. He also agreed that the golf course would pay 23 full assessments in 2005, and 3 more each year through 2014. Upon information and belief the golf cousre never paid even these reduced (ultra vires) amounts.

Here are the figures: The golf course had been paying at $35 per unit, not the "full assessment" amount thus the true arrearage in 2003 was $116,000 (estimated).

Year	Golf Course Assessable Units	Paid Per Year at $35 per Unit	Payable Per Year at Full Assm't Per Unit & 50 Units	Loss to HOA	Mo/per Golf unit Paid	Full Assm't
Thru 2003	50	-	-	$116,000	$35.00	$65
2004	20	$8,400	$39,000	$30,600	$35.00	$65
2005	23	$9,660	$39,000	$29,340	$35.00	$65
2006	26	$10,920	$42,000	$31,080	$35.00	$70
2007	29	*$17,333*	$42,000	$24,667	*$45.14*	$70
2008	32	*$13,871*	$42,000	$28,129	*$36.12*	$70
2009	35	$14,700	$45,000	$30,300	$38.28	$75
2010	38	$15,960	$45,000	$29,040	$41.56	$75
2011	41	$17,220	$45,000	$27,780	$44.84	$75
2012	44	$18,480	$45,000	$26,520	$48.13	$75
2013	47	$19,740	$45,000	$25,260	$51.41	$75
2014	50	$21,000	$45,000	$24,000	$54.69	$75
Cumulative Assessment Loss to HOA				$422,716		

Note: Full Assessment is $75 beginning in 2009
Note: Italicized is actual from General Ledger
Note: $ 35 from 11/03/2003 Agreement admitting $1,750 debt per mo on 50 units
Note: In 2003 the golf course owed $3250 per month.

d. For November 2003 through September 2007, **Doug Brown**, the Horton salesperson / employee / HOA president provided in the contract that he personally would receive a **FREE GOLF COURSE MEMBERSHIP** valued at $4,500 which makes Doug Brown's self-dealing a felony and further invalidates the entire agreement (Paragraph 3(B) of the agreement – "Board Memberships."). Per the bylaws, no Board member is allowed to get any consideration as a consequence of service and such is also a conflict of interest and a breach of fiduciary responsibility under the statutes.

e. Paragraph C. Marketing Memberships, **gives Horton 20 free rounds of golf per month**, continuing into the indefinite future with a **value of $180,000** through 2014, making this yet another felony count and further invalidating the contract. Horton, of course, traded nothing for this consideration. But the self-dealing didn't end there.

f. The agreement also provided that Horton would buy Seventy Five (75) reduced price golf memberships to be included with houses Horton was selling as buyer incentives. Paragraph A "Third Party Purchaser Memberships" were to be sold to Horton at $400 or $700 (single or family) per renewable (at same rate) membership, far below the public rates of $900 or $1650. Depending on the mix, the value to Horton was between $450,000 and $855,000. We are stating major crime and abuse of fiduciary responsibilities here.

g. From November 2003 through February 2004 Horton got free use of facilities in the golf club house to sell houses from. Value unknown.

h. From November 2003 through the distant future, Horton also gets to rent the golf club house for sales or any other event at the very reduced rate of $50 per evening. Value unknown.

i. The Doug Brown agreement overstepped his authority to the benefit of Horton and the golf course even further. The Board authorized payment of $100 a month to irrigate International Club Drive, which in fact was and is Horton property. Horton has never paid a single cent in assessments. The Doug Brown agreement set the HOA's payment at $150 per month and added that the HOA will irrigate, at HOA expense, the golf course's main entrance. Paragraph 5, Irrigation. It also provides that the HOA will (per agreement Paragraph 7, "Ponds") maintain, improve and repair the two GOLF COURSE water retention ponds installed for golf course rain water drainage, (upon information and belief) said ponds being required by the County in connection with approval of the golf course construction.[6]

j. To recap, the HOA was not responsible for the parking lots; Horton and Sunbelt were, thus the HOA got nothing it was obligated to buy. Horton and Sunbelt got out of their obligation (unless the Court intervenes) to provide parking, and in any event provided only a fraction of the parking mandated by Horry County Ordinance. The HOA lost approximately $423,000 in assessments and in exchange Horton and Doug Brown and the Golf Course got lots of stuff. The HOA got nothing. This was clearly a case of felonious abuse of fiduciary responsibility and cries out for relief from the Courts and for referral by the Court to the County

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[6] Prior to filing this suit Plaintiff, per SC FOIA statutes, had requested a copy of the drainage plan for the golf course from the Horry County Planning Commission, which request has not yet been satisfied.

Prosecutor.

36. Since the current putative HOA President (Defendant) Rosemary Toth's assumption to HOA Presidency in September 2007 she has lied to the HOA about the status of golf course assessments. She has falsely claimed that each year the golf course has been paying at the (invalid) 2003 schedule of full assessments whereas the golf course has never paid full assessments at that rate and has in fact, under Rosemary Toth's ascendancy, actually been paying less. There is no reason to believe that the "budgeted" golf course assessment number of $14,700 will be paid. Per the actual HOA ledgers, prior budgeted numbers were not met in 2007 and 2008 – and in any event these "reductions" were illegally granted and are prohibited per the covenants. Upon information and belief, Defendant Toth has now stated her intention to allow the golf course to continue it's disregard of it's obligations under the covenants and she has personally declared that the Board will not seek to collect the full assessments required by the covenants. Note Bene" The golf course was allowed by the Board to cast 50 votes in the 2007 and 2008 elections, the second of which was under Toth's ascendancy. Toth has also directed that golf course property be maintained by the HOA, the value of which is far in excess of the assessments the golf course actually pays. Grounds maintenance of private property is a responsibility of the golf course.

37. On **April 29, 2004** Horton recorded the **Third Amendment** to the Covenants at Deed Book 2714 at Page 551.. Plaintiff contends that after May 11, 2003 there were no longer any covenants and any further attempts to amend the covenants were null and void, ultra vires..

a. It added (Paragraph 1) to the PUD and covenants tracts 2 and 3 which were already subjected to the covenants and incorporated into the PUD – the Links, The Meadows, and The Highlands. It also likewise added Tract I-2, The Cambridge, 3.88 acres from Plat Book 169 Page 116 which apparently was already in the PUD / Covenants.

b. In an amendment (Paragraph 2) of general application Horton amended Section 1.9 to require that no builder might build anything unless he was a "Designated Builder" which implies having a "Developer's Agreement" and contributing $1000 per unit into the capital construction fund.

c. Paragraph 3, in an amendment of general application, Horton deleted covenant section 3.5 "in its entirety" and instead required a "Capital Contribution" of two months

assessments per unit from a new original owner or from a purchaser from another homeowner..

(1) It is asserted vy Plaintiff that this is an illegal additional burden on property because it modifies an original existing contract relating to property to add a burden which the original purchaser had not agreed to and could not contemplate. The Supreme Courts of other states have held that an existing contract / covenant on land may be modified to REDUCE the burdens of property with a super-majority (e.g., seventy five percent (75%) as provided for in the covenants, but that an increased burden requires 100 percent (unanimous) agreement of all existing owners of property, which was never even sought. The Developer simply imposed an additional burden, which Plaintiff argues is contrary to the South Carolina Common Law as to Contracts.

(2) The case on point is Hazelbaker v County of St. Charles and Highland Trails Community Assoc., 235 S.W.3d 598, Court of Appeals of Missouri, Eastern District Division 1, No. ED89060, ED89061; October 16, 2007.

d. Paragraph 4 likewise deleted in its entirety Section 6.7 of the Covenants and substituted a new Section 6.7 mandating the collection of the same Capital Contribution as was set out in the new Section 3.5 supra; the same objections of law are raised against this additional burden without the unanimous consent of the existing homeowners.

e. Paragraph 5 was a general amendment recognizing Sunbelt as a "Designated Builder" and acknowledging the Developer's Agreement previously addressed in this Complaint.

(1) The Amended (in this Amendment) Covenants having prohibited building by other than a "Designated Builder", now stated in an Amended Section 7.2 mandating the $1000 capital improvement contribution by a builder to be a "Designated Builder" so as to be permitted to build at all.

(2) These requirements apply to ALL builders, thus DR Horton was required to contribute $1000 per unit to the Capital Improvement Fund.

(3) In an abuse of fiduciary capacity, Horton's appointed Board neglected to collect from Horton (the employer of all Board Members except Charles Flynn from Sunbelt, the $1000 per house Horton sold. Horton thus has a credit for what Horton spent on the Amenity Center – less the $ 222,000 from Sunbelt, and owes $47,000 for the Glens, $98,000 for the Highlands,

$103,000 for houses sold in The Links, $60,000 for homes sold in The Meadows, $64,000 for condominiums sold in The Grand Vistas, and $24,000 for homes sold in the Cambridge.

(4) This information has been hidden from the knowledge of the homeowners because KA Diehl, the management agent appointed by Horton, failed to include the existence of any amendment to the covenants when it disclosed to home buyers (in the disclosure package it charged $100 for) relating only the existence of the original un-amended covenants. Plaintiff became aware of this when on or about September 3, 2008 he did a search of the records of the Recorder of Deeds looking for all documents indexed to the party name "International Club" in category "Deeds". Horton's appointed management agent, KA Diehl maintained an HOA Community Web site called "SmartStreet" which represented that it had a complete set of all documents relating to the homeowners. That web site contained only the original un-amended covenants and the HOA bylaws.

(5) In September 2008 and later, multiple times, Plaintiff has made the putative Board aware of these cumulative amendments and has been met by denials. Much of this correspondence took place on "ICBUZZ", a "news / conversation" "Blog" maintained for the HOA members which was created to transmit pertinent information to homeowners in the PUD. The putative ultra-vires Board clearly is dedicated to protecting the Builder, and the Golf Course, against the interests of the HOA and the homeowners in abuse of their fiduciary duty.

38. On **August 4, 2004** Horton and Plantation Golf finally recorded the **deed for the ¼ acre parking lot** for the Amenity Center – nine months after the putative agreement was signed and eight months after performance was to have been accomplished.

39. On **December 28, 2004** Horton recorded the putative **Fourth Amendment** to the Covenants at Deed Book 2840 Page 740.

a. The Villas had previously been incorporated into the PUD and made subject to the covenants by the Original Covenants. The land was owned by Horton.

b. The Villas was eventually built by Seacoast Associates. Seacoast had never executed a "Developers Agreement" and had never contributed the $1000 per unit and thus should not have been permitted to build in the PUD. The $1000 capital contribution is an obligation of Seacoast and not of the purchasers of units in The Villas. At this time Horton

controlled / appointed all Board members of the HOA Board and had a fiduciary duty, which it ignored, to collect the capital contribution from Seacoast. Horton had only recently recorded Amendment 3 which had this requirement.

c. Paragraph 1 added the Villas to the PUD, which was redundant to the original covenants.

d. Paragraph 2 recognized that Seacoast was going to build a condominium development in The Villas. Paragraph 3 recognized that The Villas, as a multi-family development, would not be eligible to use the Amenity Center complex and hence would not pay the "full assessment" related to same. Clearly Horton enforced this provision against multi-family developments built by other builders, but not against itself when it built The Glens which was a multi-family townhouse development.

e. Paragraph 4 required all original and transfer owners of units in The Villas to pay two months of assessments into the general fund. Plaintiff again asserts that this violates the South Carolina common law as to adding additional burdens to property without the unanimous consent of all homeowners in the PUD. Plaintiff has standing to assert this because Plaintiff was charged this when he purchased his dwelling in Pebble Creek from an original homeowner.

f. Paragraph 5 required a $150 contribution to the "road fund" upon the sale of a unit in The Villas by Seacoast to an original homeowner. Plaintiff asserts that this is fraudulent because the HOA does not own the roads and has no responsibility to maintain same; the roads are dedicated to Horry County, which accepted same.

g. Paragraph 6 granted the Villas an easement to use the roads, which is peculiar because the roads are available to all members of the PUD per the terms of the sale from Plantation AD to Horton.

h. Paragraph 7 observed the self-evident fact that all covenants of the Villas are subject to the over-riding covenants of the master HOA. Horton apparently failed to uniformly apply this to the multi-family townhouse development it built in The Glens as it and the successor boards have permitted The Glens to escape accountability to the master HOA ARB.

40. On **April 21, 2006** Plantation Golf sold the golf course to Davis Mining and Manufacturing, subject to all the existing covenants and obligations of Plantation Golf and

inheriting it's debts to the HOA and obligations to the homeowners in the PUD together with the golf course assets as perpetuated in Deed Book 3083 Page 805. Under the Davis regime the golf course, through it's membership sales personnel in the club house, through it's Superintendent, and through it's resident professional, has in person and by e-mail multiply denied the existence of discounted golf membership contracts available to the PUD, has in effect repudiated those contracts which run with the land, has failed to pay the assessments required in the covenants, and has failed even to abide by the ultra-vires and illegal golf course agreement of 2003.

41. **From January 2006 through the end of December, 2008**, the HOA and it's managing agent Diehl issued to the homeowners eligible to use the Amenity Center assessment coupon books which stated a **monthly combined assessment** in the amount of $70 and a late fee of $35 (the coupon book said the $105 was payable after the last day of the month in which the assessment was payable). A flat (or $35) late fee is not within the exclusive consequences of late payment of an assessment provided for in the covenants (see supra) and constitutes both usury and an interest rate - fifty percent (50%) if paid the following month – not allowed in the covenants.

a. On December 7, 2007 the HOA mailed the homeowners a letter which stated that

> "A one time late charge of **$10.00 per month** will be added to the homeowners' account for each month in which the management agent receives the dues payment after the 30th day of the month in which it is due."

b. Even after that, the HOA and Diehl continued to issue the same assessment coupons for 2008 which stated a flat $35 late fee (payment of $105). The $10.00 per month charge violates the covenants which does not provide for late fees as a consequence of late payment of an assessment, and is in fact a not too hidden interest charge in excess of the interest charge allowed by the covenants and which is likewise usury under existing law.

c. Beginning with the January 2009, the assessment coupons were changed to show only the $10.00 late charge, which still violates the provisions of the covenants and which is ambiguous as to whether it is a one time charge or a monthly charge.

42. On **January 30, 2008** Horton **deeded the Amenity Center complex** to the HOA thorugh a Quit Claim Deed recorded in Deed Book 3311 Page 2294 a transfer of ownership which in form and content was not a quit claim deed in that it did not purport to release only Horton's

equitable interest in the Amenity Center complex but rather to transfer total title to the land and improvements to the HOA, while omitting the existing claim in equity on said complex that the homeowners in Pebble Creek have on said complex. Plaintiff, individually and on behalf of the homeowners in Pebble Creek, asserts equitable ownership in part or in whole of the complex together with the right to have a say in controlling it's use independent of the HOA.

43. On June 20, 2008 Horton attempted to make a fifth amendment to the covenants by recording same in Deed Book 3344 Page 2065.

a. The amendment stated it's intention "to remove Section 3.7 of the Declaration in its entirety" which is a phrase of general application, whatever the motivating reason.

b. The amendment purported to be an annexation into the PUD and the covenants of 14.10 acres described on Plat Book 237 Page 296 which in reality was the same Parcel 4 which had already been incorporated into the PUD in the original declaration of Covenants, Exhibit B. The Amendment stated that Parcel 4 would be used as a multi-family development.

c. It acknowledged that per Section 6.5 of the covenants this additional multi-family tract would be ineligible to use the Amenity Center and would thus not be an additional burden on the existing homeowners eligible to use same.

d. It subjected the purchasers of units in Parcel 4 to a capital contribution fee as provided for in putative sections 3.5 and 6.7 of the covenants which required such purchasers to pay two months of the (non-amenity center computed) assessments (perhaps $56) as capital contribution and $150 "towards the maintenance of the entrance and roads". The roads are owned by and maintained by Horry County and there are no capital projects. Per Sections 6.3 and 6.4, Assessments for capital improvements may not be arbitrarily applied by the developer, through amendment or otherwise, but only by the properly notified homeowners on a 60 percent vote of approval and only for that particular year. There are thus conflicting provisions in the covenants and since Sections 6.3 and 6.4 specifically apply, these should govern and the amendments to 3.5 and 6.7 were illegally made by the Developer, apart from the question as to whether the covenants have existed since May, 2003.

e. Kinsale Contracting LLC was made a "Designated Builder" under paragraph 7 of the Amendment, but the existing putative HOA Board, led by Rosemary Toth, has failed to

demand the "Developers Agreement" and payment of $1000 per unit as mandated elsewhere in the already amended covenants. It would seem that said Defendants are servants of the developers in spite of their fiduciary duty to the homeowneres.

44. On **October 17, 2008** Plaintiff went to the Golf Club House and inquired about special rates for homeowners in Pebble Creek. Plaintiff was told by the manager on duty that there were no special rates for anybody. Later that day Plaintiff asked the question on ICBUZZ – whether anyone knew of any special rates for homeowners (knowing the answer in advance).

45. On **October 18, 2008** Plaintiff emailed "Jamie Roderick" who had earlier that day responded to Plaintiff and had identified himself as "the Head Professional at International Club". In Roderick's earlier email he had identified himself as the golf course person who had a hand in setting rates and was the go to person on the matter. Plaintiff "copies" this to ICBUZZ so that the exchange of information would be public. Plaintiff asked:

> *"My question is simple: (1) Is the golf course offering a reduced price individual and / or reduced price family membership to International Club HOA members, and if so, for how much? This has nothing to do with prospective Bally Castle owners. (2) Are there any International Club homeowners who have bought golf memberships at the "public" price posted by the Golf Course, that is, no special homeowner discount? "*

Mr. Roderick responded that same day as follows:

> "There is no homeowner discount...never has been. Everyone pays the same rate."

On **October 19, 2008** Mr. Jim Knaffle, the Golf Course "Superintendent", wrote to the collective PUD (on "ICBUZZ") that "I don't have any idea where people come up with" the idea that there is a reduced price golf agreement.

ELECTIONS

46. The HOA was incorporated on **March 1, 2001** as a non-profit corporation. By the Covenants and Bylaws of the HOA, every homeowner became a member of the HOA as soon as said homeowner purchased a unit.

47. On **September 27, 2001** Plaintiff's unit in Pebble Creek with completed home was purchased from Sunbelt Homes, which had previously purchased said tract from Plantation AD. On that day the HOA had at least one homeowner member. Upon information and belief, at the time there were many other homeowner members of the HOA in Pebble Creek.

48. SC Code 33-31-701 mandates that

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

49. Section 3(a) of the HOA Bylaws provides that

> **"The annual members' meeting shall be held** at the office of the Association or such other place as may be designated by the Board of Directors, **on the second Saturday in March of each year".**

Upon information and belief, no annual members' meeting was held in 2001 or 2002. Upon examination of the minutes of board meetings for the years 2003 through 2006, no such meeting was held those years either. Upon information and belief prior to September 2003 the then Developer / Declarant Plantation AD appointed every member of the HOA Board. Upon examination of the minutes of the meetings of the HOA Board for the years 2003 through 2006, beginnin with September 3, 2003 DR Horton simply appointed the Board of the HOA. The first attempt at an election was the flawed election held in September 2007 which Plaintiff alleges was "rigged" by Horton and did not conform to the requirements of statute or bylaws.

50. SC Code Section 33-31-804 mandates that the Board of a non-profit corporation such as the HOA with members "must be elected at the first annual meeting of members" which per SC Code 33-31-701 was required to have been held in March, 2002 if not earlier.

51. Chapter 4, Sections 1 and 2 of the Bylaws of the HOA permitted the Developer to appoint an interim board "until the first annual meeting of the members" which again could be no later than March, 2002. First Plantation AD and later Horton as Developers ignored the mandate of law and covenants and continued to appoint an ultra-vires Board until a putative board was "elected" in September, 2007. The minutes of the various board meetings between September 3 2003 and through 2006 document that the "selection" for Board members in those years was made by Horton without the election and secret ballot required by Bylaws Section 7 of Chapter 4 (Board of Directors).

52. Accordingly, the Board of Directors of the HOA between March 2002 and September 2007 was illegaly constituted and all acts, contracts, and decisions made by them were ultra-vires, null and void. This included the fraudulent "Golf Course Agreement" of November 2003, the putative Cable TV Contract with HTC entered into on or about October 30, 2003, the acts and decisions of all committees appointed by the putative HOA Boards during that period, and

likewise the contract with and acts of KA Diehl during that time period. All "fines" levied on homeowners during that period are likewise ultra-vires and must be returned to the homeowners.

53. It has been shown that in September, 2007 the owners of units in Pebble Creek, The Glens, The Highlands, The Links, The Meadows, The Grand Vistas, The Cambridge, and The Villas were proper voting members of the HOA. It has been shown that the Golf Course, very much in arrears on it's assessments, should not have been allowed to vote in any election

a. The **September 2007 election** was announced on **August 8, 2007** in a "Notice to International Club Homeowners" which was not mailed to homeowners in The Villas, The Cambridge, or The Grand Vistas. The mailing included a proxy ballot and the homeowners were urged to return it to Diehl in a postage paid return envelope. The proxy ballot listed seven homeowners "running" for the Board of which this Plaintiff was one.

b. After receiving the August 8 election announcement, Plaintiff went in person to Diehl and demanded a copy of a voting list conforming to Section 33-31 of the Code. None was ever provided Plaintiff, which flawed the election. Plaintiff stated his desire to inspect the accouting for ballots received by mail (to be sure that each was from a voter and no "extras" were added to the pile) as well as the issuance of ballots at the meeting (to be sure that no voter received a ballot who had already mailed a ballot in).

c. Plaintiff noted and objected to the fact that ballots were freely handed to anyone who asked for them at the meeting, with no regard as to the restriction that only one vote may be cast for any unit irrespective of how many owners or residents there are for a given unit. Ballots were handed out without checking whether a person given a ballot was an owner or had already mailed a ballot (or whether another person from the unit had already been given a ballot). All such ballots were counted.

d. The golf course was allowed to vote 50 ballots.

e. Plaintiff nominally "lost" the election although (a) Plaintiff's "straw count" of homeowners showed that he had won; (b) discounting the golf course vote which was stated by the golf course representative as voted against Plaintiff, Plaintiff had a majority of votes cast; (c) when Plaintiff objected to the entire election in the presence of Beckie Abel of Diehl and other board members, the Horton representative flat out admitted that he had "picked the board he

wanted and that is that" – that he had rigged the election.

f. Including the 228 units from the disenfranchised multi-family tracts there was no quorum at the September 2007 election. Subtracting the golf course's 50 votes made this even more so. The "board" elected in 2007 was illegally seated and it's acts thereafter and those of it's agents are ultra vires, null and void.

54. On **June 23, 2008** the "Board" announced elections for two vacancies which was to take place at the general meeting to be held on September 17, 2008. On August 21, 2008 Diehl sent out an announcement listing 8 homeowners running for the Board; that mailing included (as in 2007) a proxy ballot. As in 2007, neither of these mailings went to the Cambrdige, The Villas, or The Grand Vistas. At the time, collections from all three were present in the general ledgers of the HOA.

55. On **July 24, 2008** Plaintiff hand carried to the HOA registered agent, Diehl a letter which demanded per SC Code 33-31 the "voters list" as of that moment as specified in the statute, the voters list as it exists on the day of the election to be used to validate ballots dirstributed / counted at the election, and that Plaintiff or his representative be allowed to "observe the validation" of the distribution / counting of the ballots at the election, including demanding proof of identity of anyone participating in the election or asking for / casting a ballot.

a. This request was answered only by an emailed list of homeowners which did not contain the number of votes each unit owner was entitled to vote; the list did not contain any of the unit owners in The Villas, Grand Vistas, or Cambridge – and it did not list the Golf Course as an eligible voter. None-the-less the golf course, very much more in arrears than in 2007, was permitted to vote 50 votes.

b. Plaintiff was not permitted to inspect / verify / qualify the issuance / receipt of ballots or the counting of same. Once again, there was no true quorum and the election was fraudulent. Once again ballots were freely given out (and later counted) to anyone asking for same and there was no cross checking between mailed ballots and handed out ballots (at the election). There was no checking to be sure that duplicate ballots were not mailed nor that ballots were mailed from non-owners.

c. While Plaintiff did not vote them, both Plaintiff and his wife were handed

additional ballots although a ballot for Plaintiff's unit had been mailed in previously.

d. Once again, after discounting the golf course vote (which was stated as against Plaintiff), Plaintiff had sufficient "admitted" votes to win a seat on the Board. By Plaintiff's "straw vote" survey of voters, Plaintiff had more votes in his favor than Diehl had admitted.

e. Immediately after the vote was announced, Plaintiff demanded that Diehl provide Plaintiff a copy of the vote tally sheets. Diehl agreed to do this but never provided same.

56. No true quorum having been present and the 2007 and 2008 elections having been so flawed, it is clear that the HOA has never had a legally elected board. All actions of the board from September 2007 and thereafter, together with the acts of their agents and committees, and all contracts and undertakings approved by them, are thus ultra-vires, null and void.

CABLE TV CONTRACT

57. Plaintiff incorporates the attached "Cable TV Addendum to Complaint" to be served jointly with this Complaint.

58. On October 30, 2003 the same Doug Brown described supra entered into and signed a contract [7] with Horry Telephone Cooperative (HTC) to provide cable television service to the PUD, asserting that he had representative capacity to bind each and every homeowner to this contract. This is false as far as his representative capacity as well as his capacity as a member of the Board. The minutes of the prior meeting of the putative board (September 3, 2003 do not reflect the subject of a cable tv contract even being discussed, let alone approval having been granted to enter into such a contract. The minutes of the meeting of the putative board held after the ultra-vires signing of this contract (November 20, 2003) likewise is silent on the matter. No decision of this significance can have legal weight unless and until the board, however putative it is, votes approval or delegates authority to enter into such a contract.

59. The contract is further defective in that it sets the HOA up as an unfranchised cable tv operator. HTC is on record (to Plaintiff) that the homeowners in the PUD are NOT cable tv customers of HTC; HTC asserts that the HOA is it's customer. The homeowners must then be cable tv customers of the HOA, which owns the cable tv infrastructure in the PUD, controls the

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[7] He claimed to be "Vice President" of the HOA. He was never appointed to that capacity by the

turn on/off of individual service, and is thus an unfranchised cable operator. This by itself invalidates the contract, or at least the obligation of homeowners to pay the HOA for said service collected as part of assessments and subject to lien on property.

60. The contract as implemented violates the contract itself, state and federal law as to the extent of permitted rate incrases. In 2008, for example, there were two increases totalling over 9 percent whereas the contract permits only one increase, in April of each year, limited to 7 percent per Schedule A of the contract. Thus HTC breached the contract and it is void. In addition HTC has billed (and been paid) for "phantom" houses which do not exist. While houses tend not to appear and disappear, the bills examined by Plaintiff show the number of units billed for to fluctuate from month to month.

61. In addition the HOA has consistently billed the HOA homeowners significantly in excess of what the HOA paid HTC. This is another token that the contract is not a "pass through" but that the HOA is an unfranchised operator; the HOA is also defrauding the homeowners as it falsely claims it is billing, through assessments, only for what HTC charges. While HTC increases it's rates ostensibly only in April of each year, the HOA imposes rate increases on the homeowners beginning on January 1 of each year.

62. Each year HTC refunds to it's subscribers, both corporate and indivdidual, a percentage of the annual collections. The HTC official in charge of bulk cable operations informed Plaintiff that such refunds were issued to the HOA on account of the cable subscription in the PUD – but refused to provide any details since HTC asserts that Plaintiff lacks the legal capacity to demand same from HTC. The HOA, upon multiple demands from Plaintiff for copies of all financial and correspondence documents between the HOA and HTC, has not produced any related documents. The general ledger of the HOA does not reflect the deposit of said HTC refund / rebate checks. Since HTC does not consider the homeowners to be customers of HTC, they are not invited to the HTC annual meetings and thus are deprived of a chance for a drawing of prizes and further consideration in the form of free entertainment and food.

63. Irrespsective of the niceties of the contract and it's performance, on October 31, 2007 the Federal Communications Commission (FCC) on it's pre-emptive authority issued a change to

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Developer, Horton.

Subpart X of the FCC rules holding that contracts such as the HOA – HTC contract are "null and void". FCC Director Jonathan Adelstein wrote into the record a statement condemning the involuntary / exclusive / non-competitive bulk cable contracts of which instant contract is a representative sample. On May 9, 2008 the FCC issued an "Enforcement Guide" specifically aimed at bulk cable contracts administered by homeowner associations, reminding such entities that these contracts are null, void, and unenforceable.

64. Thus for any number of reasons the HOA cable tv contract is null, void, and unenforceable.

LANDSCAPE CONTRACTS

65. The **2007 and 2008 landscape contract** was held by Sunbelt Landscape Services. It ostensibly provided for the maintenance of the Front Entrance area at Tournament Boulevard and International Club Drive; International Club Drive (the land adjacent to the road actually being owned by Horton and the maintenance thereof being Horton's responsibility; Horton paid NOTHING to the HOA in assessments or other payments); the area at the entrance to The Cambridge (adjacent to International Club Drive; this land is owned by The Cambridge Townhouse Association; they collectively are responsible to maintain this property, not the HOA); HOA common property in The Links and The Highlands; property belonging to The Glens @ International Club HOA Inc, a townhouse subcommunity whose covenants provide the obligation of same to maintain said property, such maintenance of private property not being an HOA obligation); grounds around The Amenity Center complex, which is the responsibility of the HOA; and ostensibly HOA common property in the Pebble Creek area.

66 The putative Board had prepared a **2009 Landscaping / Grounds Maintenance Contract** (upon information and belief, the details of same were dictated by Defendant Toth) which used the 2007 / 2008 contracts to describe to prospective bidders what work was to be performed but which 2009 contract omitted the specifications of what was to be maintained.

67. Two prospective bidders submitted bid proposals: "Amazing Blades" and "Sunbelt Landscape Services". Upon infrormation and belief, Rosemary Toth personally told the owner of Southern Landscaping not to bother to submit a bid, as the contractor had already been chosen by her.

68. On **June 25, 2008** the Buildings & Grounds Committee made a presentation to the putative Board regarding the forthcoming 2009 Landscape contract to be awarded. The presentation addressed the two bids submitted as well as the specifications as to what property was to be maintained per Rosemary Toth's instructions to the contractors.

69. The Buildings & Grounds.Committee presentation pointed out that only 38 percent of the area to be maintained was actually HOA property or the HOA's obligated responsibility. Ms. Toth was instructing that the winning vendor maintain golf course property (38 percent of the contract area to be maintained), property owned by Horton (22 percent of the contract area), and property owned by residents for which the residents were responsible (2 percent of the contract area). Thus of the estimated cost for the contract which the Buildings & Grounds committee prepared, **only $24,700** of the $65,000 **was for HOA property**. Upon information and belief, Ms. Toth demanded that the contractor maintain the Horton and golf course property.

70. The **Sunbelt** bid to maintain the HOA property was **$30,496** plus $43,904 to maintain the golf course and Horton property. The **Amazing Blades** bid to maintain the HOA property was **$34,896**, substantially higher than the Sunbelt bid as to HOA property. Amazing Blades offered to maintain the golf course and Horton property for an additional $42,499, making Amazing Blades the high bidder -- $74,400 for Sunbelt v $77,395 for Amazing Blades – including the non-HOA property. Southern Landscaping's bid, having not been submitted, was not evaluated.

71. The landscaping contract was awarded to the high bidder, Amazing Blades, upon information and belief upon the demand of Defendant Toth, and likewise per her demand included maintenance of golf course and Horton property.

72. In 2009 when performance occurred, upon information and belief Toth approached the Buildings and Grounds committee and demanded that they amend the landscaping contract to pay Amazing Blades even more, ostensibly to maintain the property privately owned by The Cambridge residents (outside of the HOA). Upon information and belief she was informed that said property had been in the bid specification and had been maintained by whatever contractor for many years. Upon information and belief, Toth insisted none-the-less that the contract be increased as she demanded.

73. On **March 12, 2009** at a regularly scheduled meeting of the putative HOA Board, the Buildings & Grounds Committee made a public presentation to the Board pointing out the facts

of maintaining golf course, Horton, and private property at the HOA's expense without an obligation to do so. At said meeting Plaintiff heard Toth demand that the maintenance be continued as she had directed. Upon information and belief, since that time Toth has demanded that the Buildings & Grounds Committee amend the contract further to have Amazing Blades maintain even more private property – at an increased cost to the HOA.

74. Upon information and belief, in 2007 and 2008 the landscape contractor Sunbelt maintained Horton and golf course property at the behest of the Board, more specifically at the direction of Rosemary Toth. Because the Board and Diehl have refussed numerous written demands for a copy of the 2007 contract the exact loss to the HOA is not yet known. Per the 2009 Sunbelt bid, it's 2008 contract to maintain the same property was 15 percent less than the 2007 contract amounts. Given that in 2007, 2008 and 2009 (original specification) approximately 61.3 percent of the maintained area was private / non-HOA property, **$47,443** of the $77,395 **2009 landscape contract** was spent wastefully, fraudulently, abusively and intentionally in disregard of fiduciary responsibility by Toth despite the expert opinions and advice of the Buildings & Grounds Committee; and likewise 61.3 percent of the **2008 contract** (for the period March 1, 2008 through December 31, 2008), **$34,256** out of $55,883 was likewise mis-spent; and for the **2007 landscaping** year approximately **$40,301** out of approximately $65,674 was wasted (the 2007 contract was the legacy of the putative last "Developer Board"; per Sunbelt's documents the 2008 contract numbers were 15 percent less than in 2007).[8] The loss to the HOA because of Toth's abuse of her fiducairy responsibilities in 2008 and 2009 (ignoring the latest increases in the contract per Toth's demands to maintain either non-HOA property already in the maintenance specification or to maintain even more private property, as will become known in discovery) amounts to $81,699 on "Toth's watch".

75. This is an outrageous abuse of fiduciary responsibility and constitutes a fraud on the HOA by Defendant Toth personally and the putative Board in general.

DOCUMENT REQUESTS

76. On **December 12, 2008** Plaintiff in writing asked the HOA Board to explain and remedy the problems with the cable television contract which Plaintiff complains about herein. No

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[8] The Board and Diehl having ignored many written demands for the 2007 landscaping contract.

answer was received and no relief afforded. Separately on **December 12, 2008**, by certified mail, Plaintiff asked the HOA Board to explain inconsistencies and irregularities in the 2009 budget, including maintaining non-HOA property and other financial issues raised in this complaint. No explanations or substantive answers were ever provided. On December 17, 2008 Rosemary Toth responded in writing saying "The Board will take it under advisement as soon as we can". On December 19, 2008 Plaintiff received a letter signed by Beckie Abel of Diehl on behalf of the HOA Board which said in part: "Since we are so near the Holidays, it will take some time to respond to your letter in detail, but be assured that we will get to it as soon as possible." That was never.

77. On **January 26, 2009** Plaintiff hand served a written demand for a copy of the minutes of a formal meeting which was scheduled to be held later that week between the putative HOA Board and the Board of the Villas, at which two Diehl employees were to be paid to attend and take notes. That went unanswered. The meeting indeed took place on Thursday January 29, 2009 and HOA business was addressed in a context not entitling a claim of privilege. The complaints of The Villas eventually matured into a parallel lawsuit filed by them March 30, 2009, against the HOA Board.

78. On **February 12, 2009** Plaintiff emailed Beckie Abel another demand for the "Minutes of Meeting between Intl Club & the Villas Boards", writing that

> "I note that I have not received, by email, a copy of the notes from the recent "non-meeting" between the boards of the Intl Club HOA and the Villas HOA. I understand that both you and Julie were there and that one or both of you took "notes". In our conversation today you told me that you would email me the notes of that meeting. When can I expect to see them?:

79. On **February 13, 2009** Abel responded by email, writing "As soon as Julie Case, my assistant, has an opportunity to send them to you."

80. On **February 17, 2009** Plaintiff served (by email on the registered agent, Diehl) a "Third Request" for copies of the minutes of the January 29th Board meeting. It was noted that two Diehl employees, Beckie Abel and Julie Case, were in paid attendance, in part to take notes and prepare the minutes. Later that day (February 17, 2009) Beckie Abel responded as follows:

> "Mr. Jarmuth, We are in the process of compiling the notes **from the meeting** and making certain that the Board agrees with our version as is necessary prior to handing them out. As soon as that is done, you will be forwarded a copy."

Plaintiff almost immediately responded

> "Re - notes /minutes: I thought this is supposed to reflect what was said, the good bad and ugly, not the sanitized version. Perhaps an audio recorder is appropriate to get an accurate record of what everyone's view points and thoughts were."

Beckie Abel (for the Board, then responded:

> "This "meeting" as you call it was **simply a get together between the two Boards**. Both Boards agreed that this was not a meeting, but simply a way to clear the path for future discussions. Both Boards agreed not to take notes, but allow management to jot down action items that they were asked to complete. Quite frankly, most sanctioned Board meetings minutes do not reflect discussions, but simply the action and the vote on each action.
>
> The two items that we were asked to accomplish were to request the owners names and contact information for the Villas. Also, I was asked to send the Villas the current Budget information.
>
> This was the jest of this session."

Upon information and belief, having talked to members of The Villas board after reading this (and reflecting back on the initial responses received from Diehl) this was a formal meeting, there was a formal agenda (set by The Villas), notes were taken, there was no agreement not to take notes, and the matters discussed went far beyond those admitted to by Diehl for the Board.

81. On **February 18, 2009** Plaintiff emailed the Board through it's registered agent, Diehl, and demanded the **2007 landscaping contract** as had been orally promised a few days before. Plaintiff also rejected the "no meeting / cheese and crackers" characterization of the January 29th board meeting and reiterated his demand for the minutes. It is noted that it is unusual that no "formal" Board meeting was held (and minutes made available) on any other day in January (and the Board refused to post minutes of at least one Board meeting in February, 2009). Plaintiff has never received any response regarding the **2007 landscaping contract**.

82. Later that day on **February 18, 2009** Beckie Abel responded, stonewalling on the minutes in absolute defiance of Plaintiffs rights per statute applicable to non-profit corporation records (which includes notes of meetings). She wrote:

> "There are no minutes or notes for the **get together** with the Villas Board and **none will be provided to you now or in the future**. This was simply a **social get together** at which my assistant Julie and I were invited. No charges were invoiced to the association. I do not know why you want our version of this event as it sounds like you have been given explicit details as to the discussions that took place here."

83. Plaintiff responded writing

> "Re the 2007 (landscaping) contract which was in force in early 2008, month to month - if it is in your archives why don't you have access to it.
>
> Late Wednesday today HTC faxed over copies of some letters dealing with the 2008 rate increase. Please make me a copy of same or make them available. My name should have been on the cover page of the fax from HTC to you.

When Plaintiff went to pick up the incriminating material about cable tv rebates faxed HTC Diehl, Diehl denied ever receiving same from HTC.

84. On **February 20, 2009** Plaintiff mailed another document request to Diehl and emailed same to most members of the HOA board, including Defendant Toth. In it Plaintiff demanded to inspect and copy the 2007 Landscape Contract which was actually in effect through March (and payable through April) of 2008, less than a year prior to the document request. Plaintiff also requested the HOA 2006, 2007, and 2008 tax returns, the 2006, 2007 and 2008 year end account balance sheets (for each account, not the journals or ledgers), the cable tv correspondence for 2007 and 2008 (a few scattered documents were eventually produced), AND the minutes / notes of the January 29, 2009 Board Meeting, Except as noted Defendants have defied their obligations under SC Code 33-31 et seq and have ignored all requests to inspect and copy (with Plaintiff's own copy machine) said documents. It is plainly clear that the only time the incumbent putative board will fulfill it's obligations under the law is when they are handed an Order of Court and then only if threatened with contempt of court for disobedience.

85. On **March 7, 2009** Plaintiff wrote Diehl and Defendant Toth by email and US mail, requesting to speak at the March 12, 2009 meeting. By email the putative board had let it be known that unless one filed a written demand in advance, one would not be able to speak or ask questions from the floor. Plaintiff also posed a list of questions that he desired public answers to.

86. On **March 12, 2009** a burly man with unconcealed handgun was present, paid ($120) by the board to intimidate the homeowners present and to throw out anyone who dared question the board. A board – paid attorney ($600 estimated) was there, ostensibly to particpate in a closed / privileged "executive session" later, as well as two Diehl employees ($150 per hour for the two, times two hours). Plaintiff and the assembled homeowners were plainly told by the putative board that this was "their" meeting and that the homeowners had "no right" to speak or question the board outside of the annual membership meeting, which was "seconded" by the attorney –

his only action for the evening (he also stated that Roberts Rules of Order do not apply to Board Meetings). Buildings and Grounds publicly challenged the board about spending HOA funds on private property and about increasing the contract to pay for areas already in the specification; this was ignored. The homeowners were then told to leave immediately so the Board could go into privileged session with the attorney; however, the attorney left with the homeowners and did not attend this "executive session". Among the issues Plaintiff set before the board was a request that the Board adopt a code of ethics which was nothing more than a restatement of the statutory obligations of boards and officers of non-profit corporations as already set forth in statute. They refused to do so.

87. Plaintiff and other homeowners (Buildings and Grounds) have plainly made heroic efforts to resolve these and other issues to no avail. The putative board, led by Defendant Toth, are deteremined to act wastefully, fraudulently, and abusively in intentional disregard of their fiduciary status. This Plaintiff and the homeowners have no recourse except to seek relief from the Courts.

By: _____

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

April 7, 2009

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY) VERIFICATION
)

PERSONALLY appeared before me, Ronald Jarmuth who, being first duly sworn, deposes and says that he is a homeowner in Pebble Creek, a member of the International Club Homeowners Association, Inc, and is the Plaintiff in the above-captioned matter, and that he has read and knows the contents of the within and foregoing **Complaint** and that the contents are true and correct to the best of his own knowledge, save and except those matters and things therein based upon information and belief and as to those he verily believes them to be true.

Ronald Jarmuth, Plaintiff Pro Se

SWORN AND SUBSCRIBED before me, this 7 day of April, 2009.

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires:

My Commission Expires June 12, 2010

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2009-CP-26-3596
	)	
Ronald Jarmuth	)	
	)	
Plaintiff	)	CABLE TV ADDENDUM
	)	to COMPLAINT
vs.	)	
	)	
The International Club	)	
Homeowners Association, Inc	)	
	)	
And	)	
	)	
Rosemary Toth	)	
	)	
Defendants	)	
	)	

CABLE TV ADDENDUM TO COMPLAINT

1. Description of Entities Involved in Contract

a. Plaintiff Ronald Jarmuth owns and resides in a home within the PUD which includes the Pebble Creek subdivision. The PUD includes approximately 750 housing units including approximately 204 condominium units, 71 town house units in centrally managed multi-family regimes, all being within a centrally managed regime established by covenants running with the property. There is a separately owned golf course (The International Club LLC) which is also part of the homeowner's association (HOA) regime.

b. The HOA is a South Carolina non-profit corporation which is located in the unincorporated area of Horry County. It does not hold a franchise from any local government, from Horry County, nor from the South Carolina Public Service Commission ("PSC").

c. HTC is a South Carolina corporation organized as a cooperative. It holds a non-exclusive franchise in Horry County for the provision of cable television service as well as ground and cellular telephone service. Time-Warner Cable holds a non-exclusive franchise for the same cable services in the same area.

II. LAW

3. **Definitions.**

a. Horry County Code Sec. 6.5.1 defines a "Basic cable rate" as "the monthly charges for a subscription to the basic service tier and the associated equipment."

b. Horry County Code Sec. 6.5.1 defines a "Cable Operator" as

> "any person or group of persons:
> (1) Who **provides cable service over a cable system** and **directly** or through one (1) or more affiliates **owns a significant interest in such a cable system**; or
> (2) Who otherwise **controls or is responsible for, through any arrangement**, the **management** and operation of such **a cable system**."

c. Horry County Code Sec. 6.5.1 defines the "Initial basic cable rate" as "the **rates that the cable operator is** [actually] **charging** for the basic service tier… ".

4. **Rate Rules.**

Horry County Rate Rules

a. Horry County Code Sec 6.5.2(g) provides that the cable rates **when service is first provided**

> "shall become the initial basic cable rates and the cable operator's **rates will be capped at that level**"

if the initial rate for cable service is at or below the FCC benchmark or 90% of the cable providers rates as they were on September 30, 1992 if the cable provider's rates at the time of rate review exceed the FCC benchmark.[1]

b. Horry County Code Sec 6.5.3(a) provides that

> "A cable operator in the county who wishes to **increase** the rates of the basic service tier … shall **file a request** with the county and **notify all subscribers** at least thirty (30) days **before** the cable operator

[1] The HOA began to provide mandatory cable TV services no sooner than October 2003. The initial basic tier service charge was $ 14.83.

> desires the increase to take effect. This notice may not be given more often than annually and **not until at least one (1) year after the determination of the initial basic cable rates."** [2]

c. Horry County Code Sec 6.5.3(g) provides that government must deny any "rate increase [which] exceeds the price cap established by the FCC" and an order shall be entered limiting the increase to one that "is in compliance with the price cap" set by the FCC. See Table 1 at end-note [A]. Rate increases imposed by the respondents have at all times exceeded the caps which would have controlled had defendants properly applied for changes to the initial basic cable rates (or in any later year, to the illegally increased rates) imposed on the homeowners in the PUD.

d. Horry County Code Sec 6.5.3(j) provides for "refunds of subscriber's rate payments with interest" if the cable operator has **not obtained a properly filed and properly justified application for a rate increase.**[3] The HOA and HTC have never filed an application for the rates charged the PUD.

e. Horry County Code Sec 6.5.3 does provide for automatic rate increases without application or approval - but only if a cable operator applies that rate increase to it's **approved and "capped base per channel rate** for the basic service tier" and only to the extent permitted "annually by the final **GNP-PI** index". See Table I at end-note. A rate increase **may NOT be applied** unless the cable operator complies with the notification and review provision of Horry County Code Sec 6.5.5(c) which provides that

> "The cable operator shall notify the county at least thirty (30) days in advance of a rate increase based on automatic adjustment items. The county shall review the increase to determine whether the item or items qualify as automatic adjustments. If the county makes no objections within thirty (30) days of receiving

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[2] The homeowners in the PUD were never notified of any of the proposed rate increases over the years as required by the rule. The first rate increase occurred on April 2 2004 less than 5 months after the initial rate was set on October 1, 2003. No request to set the initial rate nor to increase the rate was ever filed with the County at any time, nor with the PSC.

[3] The rates were increased without applying for approval and in excess of the applicable FCC caps on rate changes.

notice of the increase, the increase may go into effect." [4]

The HOA and HTC have not satisfied this notice mandate in relation to the rates charged in the PUD.

f. Horry County Code 6.5.6 provides for refunds to subscribers if a rate change was made in excess of a **permitted charge**, plus a $ 500 per day fine for each day an **unapproved rate was imposed** on homeowners OR in the event that a **rate was imposed in violation of the applicable rate setting procedures**. Both pre-conditions justifying a fine are present here.

"Sec. 6.5-6. Enforcement.
(a) Refunds.
The county may order the cable operator to refund to subscribers a portion of previously paid rates under the following circumstances:

(1) A portion of the previously paid rates have been determined to be in excess of the permitted tier charge or above refund order, the cable operator shall be subject to a fine of five hundred dollars ($500.00) for each day the cable operator fails to comply.

(2) The cable operator has failed to comply with a valid rate order issued by the county."

South Carolina Rate Rules

5. State Regulation of Cable Operators lacking franchises or permits and oversight of all cable operators.

a. SC Code 58-12-5 pre-empts all subsequent franchising by lesser authorities than the state. The regulation of un-franchised / un-permitted cable operators thus lies with the PSC.

6. Definitions. South Carolina has adopted the definitions established by the Federal Communications Commission ("FCC").

b. SC Code 58-12-300 (1) defines **"Cable Service" as**

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[4] Since Respondents never notified any rate setting authority prior to changing the rates, no automatic rate increase was allowable - assuming the rates conformed to the FCC's caps, which they did not.

"defined as set forth in 47 U.S.C. Section 522(6)."

47 U.S.C. Section 522(6) states that "the term **"cable service"** means -

(A) the **one-way transmission to subscribers of**
(i) **video programming**, or
(ii) other programming service, and

(B) **subscriber interaction, if any, which is required for the selection or use of such video programming** or other programming service;" [5]

The HOA is providing cable service to the homeowners in the PUD.

c. SC Code 58-12-300 (2) defines a **"Cable Service Provider"** as "a person or entity who is a cable operator, as defined in 47 U.S.C. Section 522(5), throughout the area it serves pursuant to Section 58-12-310, and is subject to Section 58-12-350."

47 U.S.C. Section 522(5) states that

"(5) the term **"cable operator"** means any person or group of persons

(A) who **provides cable service** over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or

(B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;" [6]

---

[5] The HOA provides one-way transmission to homeowners of video programming in such a manner that subscriber interaction is required (via tuners for the selection of desired video programming. The HOA thus is a cable service provider.

[6] The HOA is a Cable Operator because it provides cable service to homeowners over a cable system. The HOQ owns at least a substantial part of the infrastructure as well.

The HOA has complete control over the cable system. It alone communicates with homeowners about charges and programming. It alone collects cable use fees. It alone controls the turning on and off of cable service to individual homeowners subject to it's own exclusive discretion.

HTC operates in the context of a "bulk service originator".

The HOA is a cable operator.

d. SC Code 58-12-300 (3) adopts the definition of "**Cable System**" "as set forth in 47 U.S.C. Section 522(7)."

47 U.S.C. Section 522(7 states that

"(7) the term "**cable system**" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include

(A) **a facility that serves only to retransmit the television signals of 1 or more television broadcast stations;**

(B) a facility that serves subscribers without using any public right-of-way;

(C) **a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter**, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent **such facility is used in the transmission of video programming directly to subscribers**, unless the extent of such use is solely to provide interactive on-demand services;

(D) an open video system that complies with section 573 of this title; … "

The HOA operates a cable system.

Federal Rate Regulations

7. On October 31, 2007 the Federal Communications Commission (FCC) issued a decision on **Docket No. 07-51**, titled "**In the**

The HTC charges to the HOA are a bulk fee. While the HOA bases it's fees in part on what HTC charges (in bulk) the HOA charges differ in that for at least 3 months of each year, the charges collected by the HOA exceed the amounts paid in turn by the HOA to HTC.

Matter of exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments". The Order was released November 13, 2007. On page 48 of that Order the FCC issued a new rule:

> ***"Subpart X -Access to Multiple Dwelling Units and Centrally Managed Real Estate Developments. 47 C.F.R. §76.2000. Exclusive Access to Multiple Dwelling Units Generally***
>
> *(a) Prohibition. No cable operator or other provider of MVPD service subject to 47 U.S.C. § 548 shall enforce or execute any provision in a contract that grants to it the exclusive right to provide any video programming service (alone or in combination with other services) to a MDU.* ***All such exclusivity clauses are null and void.***
>
> *(b) Definition. For purposes of this rule, MDU shall include … any other centrally managed residential real estate development (such as a gated community … ."*

The exclusivity provisions of the HOA - HTC cable contract are void and the homeowners in the PUD are entitled to reject that contract and to obtain cable services from Time Warner, from satellite providers, or to obtain their signal over-the-air. [7]

8. The FCC Commissioners wrote statements explaining their action and urging action to enforce their decision.

Attached to the Order was the **Statement of Commissioner Jonathan S. Adelstein**, which read in part:

> ***"… I am pleased to support this Order which should lower barriers for the entry of new competitors and expand the options for video services available to the millions of Americans who live in … condominiums … and other centrally-managed real estate developments. … Too often, the landlord gets paid off while the tenants are stuck with no choice or bad service …. This Order addresses the use of exclusive agreements between multichannel video programming distributors (MVPDs) and private real estate developers and owners of MDU properties for video services. Significantly,***

[7] The HOA-HTC contract is further void because the HOA is operating an un-franchised cable system charging unapproved and illegal rates. There was also no agency to bind the homeowners.

> ***the Order finds that exclusive access arrangements amount to anticompetitive practices that prevent or greatly hinder providers from providing MDU residents video programming."***

9. Federal Rate Setting. The FCC pre-empts all other authority to grant any rate increases in excess of those permitted by the FCC. This likewise pre-empts all private contracts. No contract is enforceable which directly contradicts a federal statute.[8]

a. In document **DA 08-2252** on October 9, 2008 the FCC issued an Order relating to **rate changes** allowable by Cable TV Providers which stated in part:

> "Pursuant to 47 C.F.R. § 76.922(d)(2) and § 76.922(e)(2) of the Commission's rules, **cable operators** may adjust … their rates for inflation. … All adjustments are based on changes in the Gross National Product Price Index (GNP-PI) as published by the United States Department of Commerce, Bureau of Economic Analysis (BEA). The [FCC] Media Bureau obtained the chain-type price indexes from the BEA news release dated September 26, 2008…"

b. It has been shown that the HOA is a cable operator - and HTC certainly is as well.

c. The FCC attached a table listing the permissible maximum rate changes back through 2001.

Table I (at end) incorporates the initial 2003 rate charged the homeowners in the PUD by HTC and the HOA, the FCC allowable maximum rate changes, applies them to the initial rate, and compares them to the most recent actual charges. Clearly the PUD has been systematically overcharged.

II. FACTS

10. The HOA owns the cable TV distribution infrastructure in at least a major are of the PUC.

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[8] The HOA / HTC arrangement directly contradicts the FCC, state and local regulatory schemes and is an illegal attempt to circumvent regulation of cable rates. The rate setting in the arrangement is pre-empted and void.

11. The HOA completely manages and controls the provision of cable television service to the homeowners in the PUD. It is a cable operator operating an un-franchised cable system.

12. The HOA solely determines whether to turn on or off cable services to any homeowner and there is no provision for review of this outside of the HOA.

13. The HOA attempts to regulate erection of outside antennas or satellite dishes on private homeowner property used to obtain alternate television programming. It has in the past ordered individual homeowners not to erect satellite dishes and at other times to change how and where the dish was erected on homeowner owned private property. This conduct, of course, is pre-empted and prohibited by FCC rule.[9]

14. The HOA has never held an election of the Board of Directors subject to the vote of all homeowners it purports to govern and who are subjected to the HOA's cable television regime.

15. No attempt has ever been made to obtain explicit representational agency (to contract for cable television services) from the homeowners.

16. There is no contractual authority between the homeowners and the HOA under which agency can be claimed, nor any provision in the HOA corporate documents which empowers the HOA to provide cable services, let alone provide them in an exclusive manner. The HOA collects the cable system charges in the form of an assessment and attempts to enforce cable TV fees as a lien on property under the property covenants to sidestep having to obtain a judgment from a court. There is nothing which even remotely resembles a cable TV agreement between the homeowners and the HOA and HTC.

a. Section 11(a) of the HOA bylaws allows for assessments "to defray the cost of the Common Areas and facilities of the Subdivision" and "maintenance, care, upkeep, repair, replacement, operation, surveillance and management of the Common Areas, the Recreational Amenities and other services and facilities of the Subdivision."

---

[9] The HOA has likewise attempted to regulate or prohibit flag poles, which is likewise conduct prohibited by South Carolina statute.

In a separate amendment to the covenants it was stated that there are no common areas of the PUD. A cable TV system is not a facility of the subdivision, and the cable service did not exist when the covenants and bylaws were imposed in January 1999. The cable TV agreement between the HOA and HTC was signed in September 2003 and the mandatory / exclusive service was provided (and fees collected) at the end of 2003.

b. Section 7 of the bylaws provides for assessments to be used to

> "maintain and keep in good repair and have jurisdiction over the … (iii) such security systems and utility lines, pipes, plumbing, wires, conduits and related systems which are a part of the Common Areas and which are not maintained by a public authority, public service district, public or private utility or other person;"

which does not constitute grant of agency by homeowners to enter into an exclusive cable TV contract binding the homeowners without their comment or consent, especially when the arrangement is illegal. Using this logic the HOA and HTC could insist on being the provider of electric power, since electricity is a utility.

17, The HOA has never applied for nor been granted a franchise to provide for any telecommunications service.

18. The HOA owns at least a substantial part of the cable TV infrastructure within the PUD.

19. The homeowners within the PUD have never individually granted agency to anyone to act on their behalf in formulating a cable contract. The homeowners have never individually been solicited as to whether they consent to any such contract.

20. The cable television regime is provided outside of the filed and approved tariffs and are adjusted without regard to the annual FCC rate declarations.

21. In the Section 12.1 of the HOA Bylaws the complete and exclusive "Purpose of Assessments" is described as being for the:

> "purposes of promoting the recreation, health, safety, welfare, common benefit and enjoyment of the Owners

and occupants of the Subdivision, and maintaining the Subdivision and improvements therein".

a. It has long been held that a general contract provision can not be used to construe a specific provision which is not otherwise present in a contract where it would be expected that the specific provision would have been included if intended.

b. Section 12.32 of the HOA Bylaws includes in assessments the cost of utilities for the common areas and amenity center, describing them as

> "12.3.2 Utility charges for utilities serving the Common Areas and charges for other common services for the Subdivision, including trash collection and security services"[10]

22. Section 2.4 of the HOA Covenants gives the DEVELOPER the right to **own** utility infrastructure, but does not require homeowners to obtain utility services from the DEVELOLPER. This entire area of the Covenant is pre-empted by state franchising law and is void. The section reads:

> "Developer … may retain ownership of the telephone, master television antennas and/or cable system facilities serving the Subdivision, including all lines, plugs, conduits, outlets, pipes, cables and wires, and other systems related thereto which are located within the Subdivision."

Elsewhere in the section the obligation of the developer to pre-wire and provide the PUD with certain utility infrastructure is stated:

> "Telephone, master television antennas and/or cable system services shall be **provided** to the Subdivision pursuant to the terms of agreements between the Association and Developer, its affiliates, successors or assigns."

The text never states that homeowners must accept such services. That this section is construed as "offering" or "provisioning"

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[10] The context of "security services" is closed circuit and intruder detection systems at the amenity center and swimming pool.

and not "operating" is supported by the text which follows that above -

> "Notwithstanding the foregoing, Developer … owning such telephone, master television antennas and/or cable system facilities … shall have the right, but not the obligation, to **convey** at any time all or any part of such **facilities** to either the Association as a portion of the Common Areas or to a municipality, public authority, governmental agency, public service district or a public or private utility." [emphasis added]

23. Section 6.2 of the HOA Covenants echoes the bylaws in clearly stating the allowable purposes of the involuntary assessments against homeowners, stating that they are

> "exclusively to promote the recreation, health, safety, and welfare of the Owners in the Subdivision (and their respective families, guests, tenants and invitees) and for the improvement, protection, replacement, operation, and maintenance of the **Common Areas and the Recreational Amenities".**

This can not be construed as empowering the HOA to use the assessment mechanism to involuntarily collect cable TV fees for services to private homes.

The Putative Cable Contract

24. On or about October 30, 2003 Mr. Doug Brown, upon information and belief a salesman employed by the Developer DR Horton, signed a contract with HTC purporting to be on behalf of the HOA. He signed in the asserted capacity of "Vice President" of the HOA. Upon inspection of the records of the HOA at it's official offices of it's official registered agent, the copy in the possession of the HOA lacks a signature of the other party to the putative contract, HTC. See Exhibit A, Contract. Further, at the time the contract was signed no officer of the board had been elected in conformance with the requirements of South Carolina Code 33-31 et seq to hold a meeting of the members and an election with all members voting. The board in power at this time simply seated itself without a meeting of the members and without an election.

25. Upon inspection of the records of the HOA, in so far as they have been made available to Complainant, there was no

recorded meeting of the HOA Board nor recorded vote authorizing entering into the HOA-HTC Cable Contract.

26. In the contract Mr. Brown made a false assertion as to ownership and representative capacity, writing (that the HOA, as "Owner")

> "**Owner** represents and warrants that it **is the sole owner or sole representative of certain real property** located at Tournament Boulevard, McDowell Shortcut Road and Highway 707 in the (County of) Horry **for the purpose of constructing residential and/or multiple dwelling units** and known as the International Club Master HOA ."

27. In point of fact at the end of 2003 hundreds of homes were individually owned. As shown previously, the HOA was and is not the "sole representative" of the private homes for purposes of binding the homeowners to an exclusive cable television arrangement. Further, at the time, on information and belief, DR Horton did not own property which is now known as "The Villas", a condominium development which is putatively "bound" by the HOA-HTC Contract. That development, together with The Grand Vistas, The Cambridge, The Bally Castle, and The Fairways, have never been allowed to vote in any manner or for any officer of the HOA. The HOA enforces the cable TV contract as an assessment enforced by threat of a lien.

28. The contract provides for the HOA to "**provide the Service** to residents, and other persons residing at or on the Premises ("Home Owners and/or Tenants"" and lacks a provision mandating home owners to accept said service. It is a statutory aspect of all utility franchisees (including those for cable television) that a franchise public utility (cable provider) can not force a homeowner to accept service. The Cable TV contract at bar goes further, it bars any other provider from offering services - an exclusivity arrangement - and also sets the HOA up not as the middle man to negotiate the contract but to be the actual cable TV system operator. In negotiated arrangements the negotiator steps out of the picture after a contract is signed and the franchisee manages the cable service, collects the monthly charges, and makes turn on / turn off decisions. These attributes of cable operation are performed by the HOA, not HTC.

29. In paragraph 1 of the contract it states that the intent is to "**make the Service available** to dwelling units in the Premises." The contract lies between the HOA and HTC and makes

payment for services the obligation of the HOA, not of individual homeowners. The contract does not require the HOA to pay HTC ("pass through costs") for cable TV service for all homeowners, only for the homes "activated" for service originating with HTC. The contract text is that the

> "**HOA** is responsible for fees based on 100% **of the total units activated for cable television services,** regardless of occupancy".

However, the HOA forces the contract on all homeowners through an indistinguishable part of the mandatory assessments, as an exclusive, mandatory contract with the HOA for cable services. That the arrangement is with the HOA and not with HTC is supported by the fact that HTC does not send homeowners (who do not obtain telephone service from HTC) any of the mailings it sends individuals who buy telephone service from HTC - or who obtain cable service from HTC for homes outside the PUD. **The homeowners in the PUD are not provided notices from HTC or allowed to vote in the affairs of the HTC cooperative, and are excluded from participating in rebates of excess HTC earnings afforded all HTC members**[11].

30. The HOA, not HTC, maintains all the information about "individual cable customers" - as set forth in the contract which states that the HOA

> "shall keep accurate and complete records of individual homeowner accounts, including customers' names, service addresses, telephone numbers and other pertinent account information as may be requested by Company. Such records shall be available for inspection and audit by an authorized agent of Company on reasonable notice".

31. This violates privacy rights of the homeowners, as no disclosure has been made to homeowners about information sharing between the HOA and HTC. There is no document signed by homeowners which permits information sharing. The above arrangement explains why HTC customer service personnel have no knowledge of individual PUD homeowner accounts when service calls are made by homeowners to HTC.

32. This is a further regulatory violation by the HOA as it

---

[11] Any individual or business obtaining services from HTC is a member of HTC.

does not maintain a service call desk as is required of all cable operators.

33. Section 2 of the Contract provides for an exclusivity arrangement. It states that the HOA

> **"will not compete with Company, nor take any action permitting others to do so,** as long as company is performing in good faith according to the terms of the Agreement".

34. Section 4 of the contract perpetuates that there is an existing cable infrastructure system installed earlier by the Developer and now owned by the HOA. It reads that as to the:

> "existing Distribution System, ownership of such Distribution System shall remain in Owner "

35. This is significant because one of the alternative attributes identifying a cable operator is ownership of cable infrastructure used to distribute cable TV programming.

36. Subordination of Contract to government regulation. The Contract admits that the arrangement is subject to local, state and federal regulation and subject to pre-emption by same, but ignores the regulatory scheme. The contract writes:

> "17. **Governmental Rules**. This Agreement shall be governed by the laws of the state in which the Premises are located except where the laws of the United States have precedence. **This Agreement and the obligations of the parties shall be subject to all applicable laws, regulations, court rulings, administrative orders, and presidential decrees,** as they may be amended from time to time"

Refunds

A. Rate Increases Imposed January 1 Not Due Until April 2

37. **Rate Increases Prematurely Imposed and Fraudulently Collected.**

a. The monthly cable tv charge is incorporated into the monthly assessments levied by the HOA on the homeowners.

b. The monthly assessment is determined by the HOA Board

at the end of each year. The computation of the assessment is represented to the homeowners by the HOA Board as being the monies required for the maintenance of common areas, including the amenity center and swimming pool, plus as a "pass through" the charges from the garbage collection company and from HTC. Each fall the next year's garbage and cable tv charge is announced, typically in December. The following year's new monthly charge by HTC (which always includes a rate increase) is incorporated into the overall monthly assessment.

c. The HOA board's monthly assessment computation is reflected in payment coupons (1 per month) mailed to each homeowner. The coupon / assessment payable amount is the same for each month, with the new rate effective January 1 of the new year. Again, the HOA Board represents that the new cable tv rate is effective the first month.

d. If one does not pay the new cable tv rate beginning with the January assessment the HOA will attempt to impose a lien and late fees on a homeowner.

e. Schedule A of the void HTC contract provides that the first rate period (which began October, 2003) expired on April 1, 2004 and thereafter annual increases were permitted. Thus each year's new rates are effective April 2 of that year - not January 1.[12]

f. Rate increases have been applied 3 months before they are permitted under the (void) HOA - HTC cable contract (January 1 instead of April 2). As a matter of law rate increases are only allowed October 2 since the first rate period began October 1, 2003.

g. Since HTC allegedly uses the cable contract as the basis for excluding Time-Warner from providing cable tv service to the PUD, as the basis for it's bulk billing to the HOA, and as the basis for allowing it to impose up to a 7 percent annual rate increase (far in excess of that permitted by county, state, and federal law), HTC is estopped by the terms of that contract from applying the new rate increases prior to April 2. As a

---

[12] Since the previously referenced statutes prohibit rate increases more frequently than once per year, the effective date of each annual increase, assuming that HTC has a legally enforceable contract, is October 1 of each year. Using this observation each year the higher rates are imposed nine months before the new rates are contractually allowed.

franchised cable operator HTC is prohibited by law from imposing a rate increase on the PUD prior to October 2, disregarding the overall illegal aspects of the contract and the rates.

h. The HOA has justified the increase in the cable portion of the assessment on the fraudulent representation that it is a pass through of the HTC rate increase. In signing the contract for the homeowners Mr. Doug Brown putatively represented (which is disputed) that he was acting as an agent for the homeowners. The HOA's dependence on the putative contract binds the HOA from collecting the HTC rate increase prematurely (before April 2).

i. See Endnote B, attached at end, for referenced text of contract. [B]

j. The rates increases were collected by the HOA beginning on January 1 of 2004 and January 1 of each successive year.

B. Annual HTC Rebates to HTC Customers Withheld from PUD Customers

38. HTC is organized as a Cooperative. Any individual or business which obtains service from HTC is a member, be it telephone, internet service, or cable tv.

a. Each year HTC normally has an excess of revenues over expenses. A portion of that excess is refunded to members / customers in the form of a check. This coincides with HTC's annual meeting, normally held in October.

b. PUD homeowners are customers of HTC in a variety of capacities: they receive combinations of cable tv, cellular phone, "ground" phone, intruder detection ("security"), and internet service (singly or in any combination).

c. In 2008 HTC announces it's annual meeting in a letter to it's customers (but not PUD homeowners who obtain cable services from HTC) sent sometime prior to the annual meeting. In that letter the candidates for the HTC board are announced. Customers are told that they will be paid a sum ($ 4.00 in October, 2008) to show up and vote. Customers who show up have a further benefit - they get a chance to win various valuable prizes.

d. HTC has never mailed such an announcement to PUD cable

tv (alone) customers; such homeowners have been denied the "show up" payment, the opportunity to vote for board members, and the chance to win one of the valuable pries.

e. HTC has likewise never mailed a share of the excess profits to PUD customers who receive cable tv services from HTC.

f. In 2008 HTC returned over $ 5 million to HTC members / customers in the form of approximately 105,000 checks averaging $ 48 each. None of those checks were mailed to PUD members who subscribed to Cable TV or Cable TV plus internet service. The same situation exists for each of the previous years of the contract, 2003 through 2007.

By:

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
832-314-4355

[A] Table I - **Rate Changes, Permitted and Actual**

	Contract Rate	FCC Rate Factor	Allowable Rate	Actual Rate
2003	$14.83	1.00%	-	14.83
2004	-	3.23%	$14.83	
2005	-	2.57%	$15.31	
2006	-	3.31%	$15.70	17.66
2007	-	2.65%	$16.22	18.73
2008	-	1.11%	$16.65	20.34
2009	-	-	$16.84	21.36
	Effective April 2 each year	Applies to following year	Using FCC Rate Factor	Actual Charge

No data available to Complainant at time of filing as to actual rate imposed in 2004 and 2005. Cumulative rate increases from 2003 through 2005 exceeded the cumulative FCC rate cap as reflected in data for 2006.

[B] Endnote B **Cable Contract Extracts**

"**Owner shall pay to Company** for the Service fee set forth in **Schedule "B"** attached hereto for each and every unit located on the Premises. HOA or Owner cannot charge more than the current residential rate." [Contract para 1 Page 2 top]

"Schedule A
Legal Description

The Bulk service fee for Basic and Cable Plus service shall be **$13.99** plus franchise fees and applicable taxes (currently 1% franchise fee and 5% state tax) multiplied by the total number of activated units. Cable services billed may not exceed the current HTC residential rate, which is $31.53.

Service Fee Calculation:

$13.99 ÷ 1% (franchise fee) + 5% (state tax) = $14.83 per month / per *unit*. This above service fee is effective until **April 1st, 2004.** Should HTC experience a rate increase, your service fee would be subject to a maximum **annual rate increase** not to exceed seven (**7%**) **percent."**

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CIVIL ACTION NO.: 2009-CP-26-3596
Ronald Jarmuth,)	
)	
Plaintiff,)	
)	
vs.)	DEFENDANTS' ANSWER AND COUNTERCLAIM
)	
The International Club Homeowners)	
Association, Inc. and)	
Rosemary Toth,)	
)	
Defendants.)	
)	

The Defendants, The International Club Homeowners Association, Inc. and Rosemary Toth, answering the Complaint would respectfully show and allege unto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified or qualified is denied and strict proof demanded thereof.

2. The allegations of Paragraph 1 are admitted except that Plaintiff's International Club property is subject, without qualification, to the Declaration of Covenants and Restrictions (hereinafter "Declaration") for The International Club, as amended.

3. The allegations of Paragraphs 2, 3 and 4 are denied as stated, but it is admitted that the Defendant, The International Club Homeowners Association (hereinafter referred to as "Defendant HOA") is non-profit corporation, organized under the laws of the State of South Carolina, the Defendant, Rosemary Toth is the elected President of the Defendant HOA and she is a co-owner of International property subject to the Declarations, and that said property is located in Horry County.

4. The allegations of Paragraphs 5, 6, 7, 8 and 9 are denied and strict proof demanded thereof.

5. The allegations of Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 are denied in that the documents referred to therein speak for themselves.

6. The remaining allegations in the Complaint are denied and strict proof demanded thereof.

SECOND DEFENSE

7. The allegations of the First Defense are incorporated herein and made a part and parcel hereof.

8. The Answering Defendants assert the applicable statutes of limitation as a complete defense to Plaintiff's claims.

THIRD DEFENSE

9. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof.

10. The Answering Defendants assert waiver, estoppel and laches as complete defenses to Plaintiff's claims.

FOURTH DEFENSE

11. The allegations of the First, Second and Third Defenses are incorporated herein and made a part and parcel hereof.

12. Any and all actions undertaken by the Answering Defendants were undertaken in good faith and therefore, subject to the business judgment rule.

FIFTH DEFENSE

13. The allegations of the First, Second, Third and Fourth Defenses are incorporated herein and made a part and parcel hereof.

14. The Answering Defendants assert unclean hands on the part of the Plaintiff as a complete defense to Plaintiff's claims.

SIXTH DEFENSE

15. The allegations of the First, Second, Third, Fourth and Fifth Defenses are incorporated herein and made a part and parcel hereof.

16. The Answering Defendants assert consent and/or novation as a complete defense to Plaintiff's claims.

SEVENTH DEFENSE

17. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Defenses are incorporated herein and made a part and parcel hereof.

18. The Defendant, Rosemary Toth, at all times, has acted and continues to act within the powers and authorities given to her by the governing documents for the Defendant HOA and therefore, is immune from any claims asserted by the Plaintiff.

EIGHTH DEFENSE
AND COUNTERCLAIM

19. The allegations of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses are incorporated herein and made a part and parcel hereof.

20. Upon the dismissal of Plaintiff's claims, the Defendants seek an Order of the Court declaring that the Plaintiff is totally and solely liable for all attorney's fees, costs and expenses associated with the defense of this action and therefore seek a judgment against the

Plaintiff for all attorney's fees, costs and expenses incurred in this action to defend the claims of the Plaintiff.

WHEREFORE, having answered the Complaint, the Defendants pray that the same be dismissed and that the Court issue an Order directing that the Plaintiff be solely and totally responsible and liable for all attorney's fees, costs and expenses in the defense of this action, and for such other and further relief as this Court may deem just and proper.

McNair Law Firm, P.A.

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Attorneys for the Defendants

Myrtle Beach, South Carolina
May 12th, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2009-CP-26-3596
	)	
Ronald Jarmuth	)	
	)	
Plaintiff	)	PLAINTIFF'S ANSWER
	)	TO COUNTER-CLAIM
vs.	)	
	)	
The International Club	)	
Homeowners Association, Inc.,	)	
and	)	
Rosemary Toth	)	
	)	
Defendants	)	
	)	

1. Ronald Jarmuth ("Jarmuth") Plaintiff Pro Se, and COUNTER-DEFENDANT, ANSWERS Defendant's Counter-Claim stating the following Defenses and Objections:

2. In paragraph 19 of Defendants' "Answer and Counter-Claim" they demanded

> "an Order of the Court declaring that the Plaintiff is totally and solely liable for all attorney's fees, costs and expenses associated with the defense of this action" and they sought "a judgment against the Plaintiff for all attorney's fees, costs and expenses incurred in this action to defend the claims of the Plaintiff".

3. Plaintiff denies committing any actionable tort against Defendants or failing to take any action (causing harm to Defendants) which Plaintiff was obligated to take. Defendants have not even alleged that Plaintiff committed any actionable tort nor failed to take any action Plaintiff was required to take relating to Defendants nor have they alleged that they have been harmed by such "not plead" "non-event".

4. Plaintiff states as a Defense the SC Rule of Civil Procedure mandatory Defense 12(b)(6), that Defendants' Counter-Claim Rule 12(b) failed "*to state facts sufficient to constitute a cause of action*".

5. There is no contractual basis providing for Plaintiff to pay attorney fees,

even if Plaintiff were to lose all aspects of this case. The only contracts which exist between the Parties is the putative Homeowners' Association (HOA) Covenants[1] and the HOA Bylaws.

a. The Covenants provides that the HOA is entitled to attorneys fees and court costs ONLY in conjunction with a successful lawsuit to collect unpaid assessments. The Defendants have not asserted such a counter-complaint and Plaintiff denies owing any unpaid HOA assessments. The operational part of the Covenant is quoted below:

> **"ARTICLE VI - COVENANT FOR MAINTENANCE ASSESSMENTS**
>
> **Section 6.1. Creation of the Lien and Personal Obligation of Assessments. ... The annual and special Assessments, together with interest, costs of collection, and reasonable attorney's fees for the collection thereof, shall be a charge on the Unit and shall be a continuing lien upon the Unit and improvements thereon against which each such Assessment is made. Each such Assessment, together with interest, costs of collection, and reasonable attorney's fees for the collection thereof".**

b. In exactly the same manner the HOA Bylaws likewise provide a basis for a homeowner to bear the attorney and court costs ONLY for lawsuits to collect unpaid assessments. The operational part of the Bylaws is quoted below:

> **"12.2 Creation of Lien and Personal Obligation of Assessments.**
>
> **...any such Assessments, together with late charges in an amount to be determined by the Board, from time to time, together with interest, court costs and reasonable attorneys' fees incurred to enforce or collect such Assessments"**
>
> **"12.7 Liens.**
>
> **... all sums assessed against any Unit pursuant to the Declaration, together with court costs, reasonable attorneys' fees, ... The continuing lien and equitable charge of such Assessment shall include ... all costs of collection (including reasonable attorneys' fees and court costs) and any other amounts provided or permitted here under**

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[1] Which Plaintiff's complaint argues ceased to exist as of November 3, 2003 per a signed agreement between the Declarants Plantation AD and the successor developers DR Horton and Sunbelt (Charles Flynn). Plaintiff's Complaint asks the Court to so rule in a Delcaratory Judgment.

or by law."

"13.4 Enforcement.

... Each Owner shall comply strictly with the By-Laws and the published rules and regulations of the Association adopted pursuant to the Declaration ... Should the Developer or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, including court costs and reasonable attorneys' fees, shall be paid by the violating Owner"

6. There is no statutory or common law basis to obligate Plaintiff to pay Defense attorneys fees and costs. SC Rule of Civil Procedure Rule 8(a) requires Defendants, in their Counter-Claim, to provide "(2) a short and plain statement of the facts showing that the pleader is entitled to relief". Defendants instead have asserted a demand bare of any grounds, facts, or legal basis. Lacking any "meat", this demand fails even to state a new and untested legal theory for relief.

a. Defendants have not alleged that Plaintiff's complaint constitutes a frivolous lawsuit, and thus they have no entitlement to costs per SC Statute 15-36. They have not denied that a contract exists to which the parties to this lawsuit are parties to the contract (Covenants), and the very existence of the Declaratory Judgment Statute is proof per se that the Legislature has deemed a request that the Court interpret a contract to be "non-frivolous". Unlike Defendants' answer, the Complaint in detail states facts with exactitude, including time and place.

b. Attorneys fees are not allowable costs to the prevailing party per South Carolina Statute 17-37. Since Plaintiff initiated this case, he has already paid the initial court costs. Even if Plaintiff were to lose through summary judgment, there are no costs taxable to him under 17-37. The taxable costs are exclusively amounts paid into court or to non-parties.

c. The Common Law (which adopts the "American System" of litigation costs) lacks a basis to tax such costs on Plaintiff. The exceptions are where there is a contractual provision – lacking here – or a statutory provision – also lacking.

WHEREFORE, having answered the Counter-Claim, the Plaintiff / Counter-Defendant prays that the same be dismissed, and for such further relief as this Court may deem just and proper.

By: _____

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

May 15, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2009-CP-26-3596
	)	
Ronald Jarmuth	)	
	)	
Plaintiff	)	PLAINTIFF'S REPLY
	)	TO DEFENDANTS' ANSWER
vs.	)	
	)	
The International Club	)	
Homeowners Association, Inc.,	)	
and	)	
Rosemary Toth	)	
	)	
Defendants	)	
	)	

1. Ronald Jarmuth ("Jarmuth") Plaintiff Pro Se, replies to "Defendants Answer" (to Plaintiff's Complaint), stating the following as to Defendants' Defenses and Objections:

2. The Authority is SC Rule of Civil Procedure (SCRCP) Rule 8(c) which provides that "A party may file a reply to any of the foregoing affirmative defenses".

3. Prefatory. Rules of Pleading Affirmative Defenses in Answer which Defendants' Answer ignored.

a. Time. SCRCP Rule 9(f) requires that, when asserting anything depending on time (and place), the time and place is material and must be stated with specificity. Limitations of actions are among the defenses requiring the pleading of what specific causes of action are dependent on time, the times such events occurred, the applicable limitations with a citation to the controllling statute, and when the time for the particular cause of action expired.

b. Law and Facts. SCRCP Rule 12(b) requires that mandatory defenses be supported by citations to applicable law and FACTS.

c. Facts Required to Support Affirmative Defenses. SCRCP Rule 8((b)

(Defenses; Form of Denials))requires that

> "A party shall state in short and plain terms the facts constituting his defense to each cause of action asserted and shall admit or deny the averments upon which the adverse party relies
>
> ... Denials shall fairly meet the substance of the averments denied. "

d. Effect of failing to deny specific allegations in Complaint. SCRCP 8(b) (supra) requires ("shall") a Defendant to admit or deny each specific allegation in a complaint. SCRCP Rule 8d provides that if a Defendant fails to deny an allegation it is deemed admitted. SCRCP Rule 8(b) subjects denials to the provisions of SCRCP Rule 11, which means that "blanket" denials unsupported by a factual or legal basis for ALL the allegations denied arae not only prohibited, but are subject to sanctions on the attorney signing (affirming that there are "good grounds to suppport") the pleading as well as the Defendants.

4. Regarding the First Defense - Categorical Denials. In paragraph 5 of Defendants' Answer they categorically "deny the allegations of paragraphs" 10 through 24. which denial violates SCRCP Rule 11 and SCRCP Rule 8 (supra). Denials, of course, are inapplicable to a Demand for Declaratory Judgment to interpret a Contract and to Demands for the Court to Intervene to require a non-profit corporation to produce a voting list or other documents per the expllicit provisions of the Non-Profit Corporation Statute.

a. In the Complaint these paragraphs are within a section titled "Chrnological History" and they quote (citations to specific book / page or document date / paragraph) from documents either on file with this Court's Recorder of Deeds or from documents obtained by Plaintiff from Defendants. Defense Attorney had a Rule 11 obligation to inquire and such an inquiry would have revealed the accurate citation of the contents of the referred to documents. Such a denial by Defense Counsel on behalf of Defendants is clearly meant to harass, delay, or increase the cost of litigation.

b. Likewise Complaint paragraphs 25-34 refer to documents on file with the registered agent of Defendant HOA – from whom Plaintiff obtained copies – and a blanket denial of the contents of such documents is likewise a Rule 11 violation.

Since Defendants have possession of the originals of these documents, either they previously provided Plaintiff forged or altered documents or Defense Counsel failed to fulfill her Rule 11 obligation to inquire and was required to state what citations to the documents in the Complaint are erroneous. A similar deficiency in denials applies to Defense blanket denial through Complaint paragraph 45. There are further such blatant ethical violations and violatoins of the rules of pleading as relating to the later paragraphs. For example, Complaint paragraph 46 states the date of incorporation of the HOA with the South Carolina Secretary of State. Not only is this a public document readily accessible (over the internet) but the articles of incorporation are in the hands of Defendants.

c. The Complaint includes a "Cable TV Addendum" which is read as part of the Complaint. This document likewise includes quotations of federal, state, and county law and rules. A Court is generally expected to take judicial notice of the existence and contents of law and rules. For Defendants to deny the contents of paragraphs which have such citations is to allege that Plaintiff has misquoted the law and rules – and requies specific citation to the paragraphs in error and counter – quotations of the correct language (Plaintiff affirms that the citations are correct in that they accurately are "cut and paste" of US Library of Congress on-line data sets and likewise those of Horry County and the South Carolina state legislature.

d. To categorically deny the date of incorporation and demand "strict proof" merits sanctions by the Court on Defendants and their Counsel.[1] The later paragraphs in the Complaint, through paragraph 86, likewise describe correspondence or documents in the hands of Defendants and for them to "deny" the contents when they have original documents is a violation of the rules of pleading. Defendants affirmative denial defense should be "categorically" stricken by the Court for a violation of the rules of pleading and answer – which the Court is empowered to do. All allegations will thus be considered admitted.

5. Regarding the Second Defense – Statutte of Limitations. This, of course, is

likewise inapplicabale to a request for declaratory judgment or to order the release of documents. In Paragraphs 8 of their Answer Defendants state that "the applicable statute of limitations is a complete defense to Plaintiff's Claims.

a. Defendants have failed to state which claims are governed by which limitations and which specific action (with dates) by Defendants are outside the limitations of actions.

b. Applicable Statutes of Limitations.

(1) SC Statute 15-3-530(1) provides a three (3) year statute of limitations on actions upon a contract. The Covenant and Bylaws are in the nature of a contract.

(2) Subsection (2) likewise provides a three (3) year limitation on actions against directors – but that is limited to actions relating to

> "a monied corporation or a banking association to recover a penalty or forfeiture imposed or to enforce a liability created by law"

and Defendant HOA is not a "monied corporation ..." but a non-profit corporation. The statute is instructive because it echoes the rule that limitations of actions can not be plead as a defense by defendants who actively hide facts / documents which would have revealed the existence of tortious conduct, or whose published documents lie about the facts. This statute states the "cause of action in the case not considered to have accrued until the discovery by the aggrieved party of the facts".

(3) Defendant Rosemary Toth and the current putative Board took office no earlier than September, 2007, which is less than two (2) years prior to the filing of this Complaint.

(4) The complaint has several dimensions.

(a) The first is a demand for the court, through a declaratory judgment, to interpret the contract which exists between the parties. No statute of limitation applies to this – since it is plainly obvious that Defendants by their denial of

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[1] Plaintiff is pointedly not "moving" for such sanctions, but rather will leave this

Plaintiff's allegation that the covenants ceased to exist in 2003 consider the contract as operative today. A three (3) year statute of limitations applies to enforce a losses under a contract occurring more than 3 years prior to the date of the complaint, but the demand for an interpretation of the contract is still viable at all times that the contract is still operative and for three (3) after it ceases to exist.

(b) The second is to enforce damages which the homeowners and class plaintiffs suffered by action or inaction by the putative board as far back as three (3) years ago. In September 2007, when Defendant Toth's putative tenure began, she and the other putative board members had a fiduciary duty to sue out or otherwise seek to collect the debt (through six years ago) of the golf course for failing to pay assessments – through 2004. Because the "pass" on the assessments was achieved by fraud, that reach conceivably goes back even further, to the beginning of 2003. The covenants, which the putative directors had a fiduciary duty to enforce, left no latitude or discretion to the board as to how to deal with the golf course. Upon information and belief, the Board has turned collections of much (unpaid assessments) smaller sums over to attorneys thus they were aware of the legal tools available and chose to allow a major loss to the HOA, in breach of their financial duties. While limitations of actions preclude [2] suing the Golf Course for unpaid assessments for periods prior to May, 2006 there is no such preclusion of suing the Directors for failing to take reasonable and obvious action in 2007 to collect golf course debts back to 2004. A similar situaton exists with regard to the cable tv contract. As to the waste, fraud and abuse of funds entrusted to the putative board in relation to grounds maintenance, this entire matter was plead as occurring during the term of the current directors – within the 3 year limitation.

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with the discetion of the Court.

Improper charges by the Board to homeowners and failure to return rebates are contract issues (subject to the running of limitations being held up by fraud – Defendants have issued fraudulent financial documents which never stated the existence of rebates or that the HOA was paying Horry Telephone Company less than the HOA was collecting from homewners, supposedly as a "pas through").

(c) The third is for Pebble Creek homeowners to assert their equitable interest in the Amenity Center which arises from when Pebble Creek homeowners paid $1000 each for said complex. The applicable statute is 15-3-34 (Action by individual for recovery of real property) which has a ten (10) year limitation of actions. The statute reads:

> "No action for the recovery of real property or for the recovery of the possession of real property may be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within ten years before the commencement of the action. "

(4) The misconduct of Defendants is NOT a contract issue but a tort created by statute. The Non-Profit Corporation Act sets a standard of conduct for directors and the legistlature has crated a criminal dimension through statute to abuse of fiduciary duty and financial crimes (as cited specifically in the Complaint). These are thus subject to a different statute of limitations. South Carolina Statute 15-3-600 (Action for other relief) provides that

> "An action for relief not provided for in this chapter must be commenced within ten years after the cause of action shall have accrued. "

Since the earlier citged 3 year limitation of Section 15-3-530(9) on actions against directors "of a monied corporation" does not apply

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[2] This is subject to extension because of collusive fraud by the Horton appointed Board and the Golf Course and hiding the facts from the homeowners. These facts were only discovered by class lead Plaintiff Jarmuth through documents obtained from the HOA registered agent in October, 2008. Upon information and belief, these documents were never made available to the homeowners prior to that date, and most homeowners are still unaware of the existence or contents of the relevant documents. In point of fact, as is stated in the Complaint, the golf course still denies

to suits against directors of a non-profit corporation, such suits are governed by the ten (10) year statute of limitations, which reaches back to all actions of all boards since the March 1, 2001 registration of the HOA with the Secretary of State (only eight years ago).

(5) Homeowner Current Accounts Limitation of Actions accrue from current (May, 2009) month.

(a) The demand for refund of old cable tv charges on over-assessments is a demand on a current account. Assessments are charged monthly and statements of deficiencies determined monthly. Upon information and belief, the Defendant HOA has now posted homeowner "current account" information on an "Association Voice" website. South Carolina Statute 15-3-610 (Action upon current account) provides that all transgressions relating to a current account are actionable so long as the account is active:

> "In an action brought to recover a balance due upon a mutual, open and current account when there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side. "

(b) In March, 2009, Defendants billed Plaintiff for $50 in unpaid assessments which in fact were not in fact due. Plaintiff has in response demanded payment of the running balance (in Plaintiff's favor) in his current account, which Defendants have ignored. This creates a 10 year statute of limitations applicable to the entire matter.

6. Regarding the Third Defense – Waiver, Laches, Estoppel. In paragraph 10 of Defendants' Answer they state that "The Answering Defendants assert waiver, estoppel and laches as complete defenses to Plaintiff's claims."

a. As plead by Plaintiff supra, a bald faced assertion of these affirmative defenses without reference to specific acts (with dates and times) of Plaintiff is insufficient and should be disregarded by the Courts. This is clearly another Rule

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the existence of or falsely states the contents of the relevant documents.

11 violation by Defense Counsel for improper purpose, to delay or otherwise increase the cost of ligitation. It fails to meet the requirements of pleading already cited.

b. Waiver in general is the

(1) Expressed or implied voluntary and intentional relinquishment or abandonment of a legal advantage, claim, requirement, or right. (2) Document (instrument) by which a such abandonment or relinquishment is effected.

In pleading Waiver Defendants are required to cite what specific acts of Plaintiff are relied upon so that Plaintiff can adequately counter such an assertion. Rather than assert that Defendants' Answer constitutes an insufficient pleading, Plaintiff sees this claim by Defense Counsel on behalf of Defendants as having incorporated all the facts known or suspected by Defendants – which are none. Since Defense Counsel can not cite a single actual Plaintiff act or document constituting "waiver", the Court must reject this defense. Reference to the Complaint will adequately document that Plaintiff has doggedly sought to enforce the rights of the Homeowners, rather than undertaking any act to waive same. Since this action is plead as a class action, Defendants defense argues that each and EVERY homeowner "waived" his / her rights, which quire frankly is absurd.

c. Estoppel in general is the

Legal rule of evidence (and not a cause of action) which

(1) prevents a party from making an allegation or denial that contradicts what it had previously stated, or what has been legally established, as the truth,

(2) supports a claim for damages of the party that had a good-faith reliance on a misleading representation of another party.

In pleading "estoppel" Defendants are required to state what contradicts a prior legal finding to which Plaintiffs [3] were / are a party. Upon information and belief, there has never been any prior litigation involving the parties OR the causes resulting in findings of fact or of law announced in an Order of Court or Judgment.

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[3] Plaintiffs as a class.

The only "truth" is that which this forum will find in this case. In addition, in a Complaint a Plaintiff is allowed to argue contradictorily "in the alternative" – however Defendants have not shown any of this. If anything, the second definition of Estoppel supports the Plaintiff claims against Defendants, because the homeowners have not been required to execute due diligence but, since the Defendants are fiduciaries, the homeowners have been allowed to rely on that fact and to accept as true the bald faced lies stated by Defendants.

d. Laches in general is

> **Neglect and unreasonable delay in the assertion of one's claims or rights. Courts expect reasonable diligence from a claimant, in addition to conscience and good faith. Under the legal doctrine of laches, they may refuse to enforce or recognize an individual's rights if he or she waits more than a reasonable length of time to assert them. Unlike the statute of limitations this doctrine, however, does not define 'reasonable time' but leaves its determination to the courts.**

It can be seen from the chronological history set out in the Complaint that Plaintiff has exercised due diligence AND has attempted to resolve these matters short of litigation, only to be turned back by the absolute arrogance of Defendants who style themselves as absolute monarchs unanswerable to anyone. Defendants have not asserted what alternative actions Plaintiff(s) should have done, and when, to enforce their rights. This is, of course, inapplicable to the matter of declaratory judgments.

7. Regarding the Fourth Defense – "Good Faith".

a. In paragraph 12 of their Answer Defense Counsel wrote, for Defendants, that

> **"Any and all actions undertaken by the Answering Defendants were undertaken in good faith and therefore, subject to the business judgment rule".**

b. The Business Judgment Rule, in general, is the

> **Legal presumption that the management of a firm is acting in the firm's best interest and, therefore, its decisions are protected from judicial review. It protects the management from decisions that result in loss or turn out to be wrong. If the management is found, however, to be in violation of its fiduciary duties, the rule does not apply and its activities come under the scrutiny of the courts.**

c. The HOA is NOT a "for profit" corporation. Per statute, the Directors are required to exercise a higher standard of care than the directors of a "for profit" or "privately owned" corporation. In exchange for their largely tax-exempt status, they are subject to additional rules and controls under the Non-Profit Corporation Act which do not apply to other corporations.

d. Defendants assert that "ALL" of the actions complained of were undertaken in good faith. The Court is reminded that on many occassions the Buildings and Grounds Committee (see Complaint) presented plats and other legal documents to demonstrate that Rosemary Toth personally and the Board had directed the maintenance of private land and that she personally chose to disregard all evidence with the statement, upon information and belief, "mow it anyway". In a Board meeting held on or about March 12, 2009 (attended by Jarmuth and other class plaintiffs) Rosemary Toth told the homeowners that the golf course agreement had expired (upon recollection, she said in 2007) and that a new one needed to be negotiated. In the May 12, 2009 meeting Plaintiff recalls her saying again that a new golf course agreement needed to be negotiated. Why then was she refusing to collect the full assessments REQUIRED by the covenants? She was presented, by Plaintiff, documents showing that, per Horry County Ordinance, the 3000 square foot Amenity Center and 2000 square foot (water area) swimming pool requires eighty seven (87) parking spaces – far more than were provided by Horton. Why then did she say at the March and May board meetings that she / the Board was negotiating with Horton on various [4] matters – but left out the matter of inadequate parking which was supposed to have been supplied at the total expense of the builder, DR Horton.

e. "Good Faith" is not a grounds for exemption from the obligations of a fidudiary under the Non-Profit Corporation Act. The fiduciary is required to actively find the facts and alternatives and if the board member is supplied

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[4] About terms to admit non-homeowners to the Amenity Center and Pool to let developer DR Horton "off the hook" as far as unfulfilled promises by Horton to provide same to non-HOA homeowers (The Grand Vistas).

information (as is alleged in the Complaint) that a course of action is unwise, "good faith" which is an unprovable state of mind will not avail the tort feassor. The determination of violation of fiduciary duty does not include inquiry into the fiduciary's state of mind but what any other reasonable person would have done given the fiduciary status and availability of information and expert advise.

8. Regarding the Fifth Defense – "Unclean Hands of Plaintiff.

a. In paragraph 14 of the Answer Defense Counsel writes, for Defendants, that

> "The answering defendants assert unclean hands on the part of the Plaintiff as a complete defense to Plaintiff's claims."

b. The Unclean Hands Doctrine is also known as the Dirty Hands Doctrine. In general this is the

> Legal principle that a participant in a wrongful act may not recover damages resulting from it (may not sue the other participants in the wrongful act).

The problem with Defendants pleading this is that Plaintiffs "never had the power" and were never even consulted in any decisions or acts by the putative Board. In point of fact, per the Complaint, Defendants disregarded and the suggestions and protestations of the class of Plaintiffs, specifically Jarmuth. Defendants never plead, in their answer, which wrongful act Plaintifff allegedly particpated in. To plead this Defense Counsel must describe with specificity as to time and place the facts. Since Defendants are not appearing pro se but have learned counsel, the Court is entitled to presume that the absence of such facts in their pleading is proof that they have no such supporing facts and that pleading this doctrine as an Answer is frivolous.

c. Unclean Hands is sometimes mistakenly cited where the "in pari delicto doctrine" applies, which is related. That doctrine is the

> Legal principle that if two parties in a dispute are equally at fault then the party in possession of the contested property gets to retain it (courts will not interfere with the status quo). It implies that if a party whose action (or a failure to act) precipitates breach of a contract, or which fails to take appropriate action (or takes inappropriate action) to limit or recoup a loss, may not claim damages.

By the nature of the doctrine this can apply only to the equitable stake in the Amenity Center. Claims as to title in property are not subject to the 3 year statute of limitations. To invoke "in pari delicto" Defendants must plead with particularity the facts as to time and date how Plaintiffs are at fault for any and all of the causes of action against Defendants. Clearly the failure to so plead is indicative that this defense is inapplicable and was plead only becaue the signing attorney found it in her preliminary objections model from a class she slept through or failed to attend, thus not recognizing the nature of it's application.

9. Regarding the Sixth Defense – "Consent and / or Novation".

a. In paragrpah 16 of their Answer Defense Counsel wrote for Defendants that they "assert consent and / or novation is a comlete defense to Plaintiff's claims".

b. Consent. In general, consent is the doctrine that a plaintiff made an informed decision to agree to a specific act by a defendant which could / would potentially injure the Plaintiff in some way. As with the other defenses, Defense Counsel has not met her burden to plead with specificity what this consists of and the absence of plead facts must be taken by the Court as an absence of facts, meriting the disregard by the Court of this defense. This defense is absurd because the putative board acting as an imperial tribunal did not ask opinions, let alone permssion or agreement, by the homeowners. In general they acted and continue to act in secret.

c. Novation in general is

> **The substitution of a new contract for an old one; or the substitution of one party in a contract with another party.**

This defense constitutes contradictory pleading by the Defendants. Not only have they denied the termination of the old covenants but they have failed to state with particularity when new ones were substituted and how the new covenant absolved Defendants of their fiduciary duties to Plaintiffs. The Rules of Pleading requires such specificity. In point of fact the first Defense of Defendants, a general denial, is an assertion that the original covenants were never even amended – because the

cumulataive amending of the original covenants is among the paragraphs they specifically deny. The Court must disregard this absurd defense. The Court is asked, on it's own, to consider whether Defense Counsel in this defense has committed a Rule 11 violation.

10. Regarding the Seventh Defense – Immunity.

a. In paragraph 18 of the Answer Defense Counsel writes that

> **"The Defendant Rosemary Toth at all times has acted and continues to act within the powers and authorities given to her by the governing documents for the Defendant HOA and therefore is immune from any claims asserted by the Plaintiff".**

b. First, it is a matter of disputed fact whether Toth is legally even a board member. Another parallel suit, The Villas v International Club Homeowenrs Association Inc (same defendant) also alleges that the board is illegally seated and all acts are "void or ultra vires".

c. Second, the interpretation of the covenants is a question of law and of fact by the Court, not by Defendant. It has been alleged that Toth exceeded or ignored the explicit mandate of the covenants as to assessments (what they can be used for and how they are to be computed and the obligations of the golf course).

d. Third, the abuse of fiduciary duty does not require that an officer or director acted "outside the powers and authorities given to her by.." but that she did so unwisely, in a manner that a reasonable person would not have done. Thus the matter of authority is not material to immnity when the issue is breach of fiduciary responsibility. If an officer acted outside of their authority the act then is a financial crime (SC Satute 16-13), an another matter – and one which is likewise never immunized and which is a misdemeanor or felony.

e. The immunity referred to is stated in SC Statute 33-31-834. Immunity from suit. It, however, removes that immunity when "the conduct amounts to wilful, wanton, or gross negligence" as has been asserted by Plaintiff.

f. It is noted that Defense Counsel has not asserted "immunity" for the second Defendant, the HOA itself. The statute explicitly precludes this as a defense

to the non-profit HOA, the statute reading:

> "Nothing in this section may be construed to grant immunity to the not-for-profit cooperatives, corporations, associations, or organizations."

11. Regarding the Eighth Defense – "Eighth Defense and Counter-Claim".

In paragraphs 19 and 20 of the Answer Defense Counsel states the Counter-Claim for attorney fees and costs. This is no defense as recognized in statute or common law, and is not stated in a grammatical form which can be interpreted as a defense. The Court is asked to take judicial notice that there is NO EIGHTH DEFENSE!

WHEREFORE, Plaintiff having considered each and every Defense asserted by Defense Counsel on behalf of Defendants, and having shown that for various reasons they are either without merit or are legally insufficient, the Plaintiff prays that the same be disregarded and that this case proceed.

By: _____

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

May 15, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2009-CP-26-3596
	)	
Ronald Jarmuth	)	
	)	
Plaintiff	)	COMPLAINT
	)	(NON-JURY)
vs.	)	
	)	(DECLARATORY JUDGMENT)
The International Club	)	(AND EQUITABLE RELIEF)
Homeowners Association, Inc.,	)	
	)	(DERIVATIVE ACTION BY SHAREHOLDERS)
Rosemary Toth	)	
	)	(DEFAMATION AND INVASION OF PRIVACY)
Henrietta Golding	)	
	)	
And	)	
	)	
K.A. DIEHL & ASSOCIATES INC	)	
	)	
Defendants	)	
	)	

FIRST AMENDMENT TO COMPLAINT

In accordance with Civil Rule 15(a), the Original Complaint of Plaintiff Ronald Jarmuth is INCORPORATED BY REFERENCE AND ADDITIONALLY AMENDED as follows:

88. The Original Defendants served their Answer and Counter-Claim on Plaintiff on May 13, 2009, thus this amendment is amended "within 30 days after a responsive pleading is served".

89. Additional Defendant.

a. The additional Defendant Henrietta Golding ("Golding") works in Horry County with a business address of "McNair Law Firm, P.A; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164 (843) 444-1107;

b. The additional Defendant K.A. Diehl & Associates, Inc ("Diehl") has an office at 11740 Highway 17S Bypass, Murrells Inlet, SC 29576 which is in Horry County (843-357-9888). Diehl was chartered by the South Carolina Secretary of State on March 1, 2002, and is a domestic "for profit" corporation "in good standing". Vicki Gallagher is the Vice President of Diehl and directly supervises Rebecca "Beckie" Abel, who in turn

supervises Julie Case ("Case"). Diehl is under contract from the HOA defendant to provide community management [1] services to the Homeowners' Association. Abel is the Diehl employee with primary responsibility for this task. Case is also responsible for HOA community management. Abel and Case are co-conspirators and joint tort-feasors with Golding as to the added Allegations / Claims. Because Abel and Case are employed by added defendant Diehl, complete relief can be afforded without separately adding Abel and Case. The corporate defendant Diehl is responsible for the acts of Abel and Case either because they were negligent in supervising Abel and Case or because Diehl actively supported and endorsed the effort. All acts of Abel and Case were done in their capacities as Diehl employees and depended on the extensive use of Diehl's resources.

Abel is the Diehl employee who has direct responsibility

90. The events that form the basis for the additional claims took place in Horry County, South Carolina.

91. The additional claims are for

a. Defamation;

b. Invasion of Privacy;

c. Intimidation / Harassment with the objectives of

(1) inflicting emotional distress; and

(2) intimidation to interfere with occupation, expression of political opinion, exercise of political rights and privileges;

d. Breach of the Contract constituting the HOA Covenants because of breach of the implied contractual obligation to "act in good faith and with fair dealing".

e. Failure to Produce the Voter / Member list of the HOA.

ADDITIONAL RELIEF SOUGHT

92. Additional Relief Sought.

a. For Defamation. $ 1000 in direct damages per publication by any form of

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[1] Diehl holds itself out on it's web site and on the sign on the front of it's Murrells Inlet Office as a Provider of Property Management Services although neither Diehl, it's President Kellie Diehl, it's CEO Robert E Barlow, it's CFO Jack Boselli, it's Vice President Vicki Gallagheer, nor Abel or Case hold ANY license issued by the SC Board of Realtors. Upon information and belief, Diehl, by advertising Property Management, as well as Abel and Case by stating they are property manageres, are in violation of SC law by illegally using the term Property Maanager or Property Management without holding a license for same.

technology and $ 1000 in punitive damages per publication counted the same way. That is, if the same defamatory material was sent to 100 individuals by mail that is counted as 100 publications of the defamatory material.

b. For Invasion of Privacy. $ 1000 in direct damages per publication and $1000 in punitive damages per publication counted the same way as for Defamation.

c. For Intimidation / Harassment. $50,000 in direct damages and an amount to be determined by the finder of fact for punitive and exemplary damages.

d. For Failure to Produce the Owner / Voter List: Assessing against defendants individually or collectively the cost of bringing and supporting this lawsuit.

e. For Breach of the implied contractual obligation to "act in good faith and with fair dealing an Order of the Court that the Plaintiff is no longer bound by the contract (covenants) and punitive and exemplary damages of $ 50,000 awarded to Plaintiff and $1.00 (one dollar per) to the non-profit HOA for each homeowner separately subject to the covenant to be assessed against and paid by each of the putative HOA board members claiming board status on the date this Amended Complaint was filed.

f. The removal of any material relating to Plaintiff from any web page or publication under the ownership, access or control of any Defendant and an Order requiring said Defendants to provide this Plaintiff an advance copy of anything dealing with this Plaintiff at least 2 business days prior to it's publication.

g. An Order requiring Defendants to fully comply with the records disclosure provisions of the S.C. Non-profit Corporation Act, and the HOA covenants and bylaws.

ADDITIONAL GENERAL FACTS

Refusal to Provide HOA Owner / Voter List

93. On April 13th, 2009 a copy of the Summons and Complaint was served on each original Defendant.

94. On April 28, 2009 (at 1:39 PM), citing SC Code Sections 31-720, 1601(c), 1602, and 1604, which continue to be applicable and enforceable while litigation is in progress, Plaintiff demanded a copy of the HOA Voter list incorporating e-mail, postal, and telephone information so that Plaintiff could communicate to his fellow homeowners in exactly the same manner as the board continued to do, particularly to gather information in support of this lawsuit AND in support of a campaign to impeach the putative board and

to replace them with a new board. This Plaintiff was a named candidate for the replacement board. This demand was served by email on Rebecca ("Beckie") Abel, lead Property Manager for K.A. Diehl, the company which by contract manages the HOA and which is also the corporate registered agent for the HOA. The request stated, by data element, what information was requested.

95. On that day no attorney had filed an appearance on behalf of the Defendants.

96. On that same day, April 28, 2009, at 3:58 PM, [2 hours and 19 minutes later] this Plaintiff received a response (by email) from Carole Koerner, assistant to Defendant Henrietta Golding which read:

> "My name is Carole Koerner, legal assistant to Henrietta U. Golding. With regard to the above subject matter, attached is a letter dated April 28, 2009 from Attorney Henrietta Golding"

Goldings's letter said in part:

> "this firm has been retained to represent the International Club Homeowners Association, Inc. and Rosemary Toth with respect to the above legal action. ... I have been provided a copy of an emailed letter dated April 28, 2009 with the subject being "Request for Copy of HOA Voter List".
>
> "Due to the allegations in your Complaint, I question whether your demand is made in good faith, and further, you do not set forth with reasonable particularity the purpose. Additionally, in your letter you are seeking information other than the membership list, such as email address, telephone numbers, etc, and you want to know the "arrears" status. Obviously, you are seeking information which is beyond the statutory provisions relating to a membership list and this, of course, is additional evidence that your request is not in good faith. In conclusion, your request for the membership list is denied.

97. The statutes I cited in the letter to the HOA provide that, if a request for a voter / member list are denied, this Court has the jurisdiction and the obligation to expeditiously and summarily order the defendants to produce said list, and to assess all costs in accomplishing same to the defendants.

Conspiracy to Commit Defamation, Invasion of Privacy, and Intimidation / Harassment resulting in Breach of Contract

98. The Answer and Counter – Claim of the Original Defendants was served on May 13th, 2009.

99. Upon Information and Belief, on or before May 8th, 2009 the original defendants, their contractor KA Diehl ("Diehl") and Diehl's employees Rebecca "Beckie" Abel

("Abel") and Abel's Diehl subordinate, Julie Case ("Case") and additional defendant Golding entered into a conspiracy to disregard the law as to Harassment (SC Statute 16-17-560), the Rules of Attorney Ethical Practice (Rules 3.6, 3.7, 4.1, 4.4, and 8.4), and the Common Law as to Defamation and Invasion of Privacy with the objectives of intimidating the Plaintiff (a) from occupation as a Member of the HOA Board, (b) on account of political opinion, (c) from the exercise of political rights and privileges in violation of SC Statute 16-17-560. Golding framed a plan of attack on Plaintiff concentrated on embarrasing, humiliating, and defaming Plaintiff before his neighbors in the Homeowner Association (HOA) so as to intimidate Plaintiff. Upon information and belief, their purpose was to get Plaintiff to sell his house and move away, thus losing standing in this complaint.

100. On that date Golding (and perhaps her subordinate employees at Golding's law firm) began searching for "dirt" on Plaintiff – specifically searching subscription sources unavailable to Plaintiff's fellow homeowners (Westlaw) because of the requirement for a paid subscription (and because said homeowners would have no reason to subscribe to Westlaw) search services, and to use Westlaw results to facilitate Web Searches to find additional matters involving Plaintiff using phrases which would not occur to ordinary homeowners regarding Plaintiff. Golding also initiated a plan which involved Diehl, Abel and Case and which was authorized and paid for by the original defendants which plan included –

a. Building or altering a web page ("Documents") on the HOA web site (where owners must go to determine their account status, to learn about HOA events, and to obtain contact information about fellow homeowners) anticipating posting defamatory material unrelated to the litigation in such a way that it would be thrust at homeowners who had not sought said material. The caption settled on was "Lawsuit" but it was never intended (and to date does not) that this would contain any of the pleadings in this or the parallel law suit filed by The Villas at International Club HOA against the original defendants.

b. As defamatory material was found or written by Golding, providing short titles to the web builders (upon information and belief working under the direction and control of Abel, and certainly of Diehl and thus the original defendants) to use in setting up the web page and building (URL) web links to where the documents would be found

(requiring establishing a data structure to make the links work);

c. Golding authoring material construed with in such a manner so as to intentionally convey a defamatory meaning to a homeowner reader; and Golding providing the summary and defamatory material to the web builder in a manner appropriate for a web site data source (that is, a part of the web site with material not directly reachable but accessible only by "clicking" on a web page "hotlink".) In anticipation of publishing this defamatory material by actual mail, Golding also endeavored to provide the material she authored or collected in "hard copy".

d. Golding authored the material (1) with utter disregard for the truth or accuracy of what she wrote, especially with regard to the document she authored titled "Jarmuth associated List of Lawsuits" and (2) with the intent to enflame Plaintiff's neighbors against Plaintiff by instilling a false fear of Plaintiff and to cause said neighbors to disassociate themselves from Plaintiff and to inflame them into, in turn, making further defamatory statements against Plaintiff based on an false assumptions and outright lies.

e. The enterprise made Golding and her firm a co-conspirator against Plaintiff, and the use intent put the works outside attorney work product and it's intended publication deprives everything around it of attorney – client privilege. The project involved Abel and Case who are not direct employees of Golding or the HOA, and unknown futher web authoring technicians with an even more tenousou relationship to Golding.

f. Sometime between May 8th and well before May 27th, 2009 Golding wrote a letter ostensibly dated May 27th, 2009 and ostensibly to the original defendants, in an attempt to hide liability behind attorney – client privilege, but it's intent was publication to every homeowner by email (estimated at approximately 450 separate emails) and by US first class mail to all households / neighbors in the HOA (an estimated 700 separate publications) besides having the material thrust at homeowners on the web page of the homeowner web site. Upon information and belief the letter was provided the web site builders long before May 27th so that they could incorporate it into the web page linkage system, and so that an email could be prepared for release on May 28th with "hot links" built into the email (leading to the web page) and with the Golding May 27th letter AND ALL OTHER MATERIAL available in "hard copy" in over 700 copies for a mass mailing

on May 28th.

g. The web page, the email to approximately 450 individuals, and the mass mailing to over 700 households is nothing that could have been accomplished between sometime on May 27th and noon on May 28th. Many homeowners in "The Villas" who over years had never received a single mailing from the HOA (although paying members) received the mass mailing.

h. Sometime before May 28th Golding authored the aforementioned email and postal mail for Abel to sign. The email was constructed so that if a recipient chose to "reply to" the reply would be sent to Julie Case, Abel's assistant at Diehl.

i. The publication included phrases or statements about Plaintiff that are so inflamatory that they are defamatory per se and the publication of one such defamation has already been held by the US District Court for the Northern District of West Virginia to be so in inflamatory that it is defamatory per se as a matter of law – and Golding read that holding of law prior to deciding to publish the material unredacted. The publication included other outright lies about what Plaintiff had done or about government decisions relating to Plaintiff which lies were made with outright disregard for their truth and which were calculated to give the false impression that Plaintiff had committed "bad" acts – the whole to embarrass and humilate Plaintiff and to inflame his neighbors against him.

j. In the entire enterprise, Diehl, Abel, and Case (not employees of Golding's law firm and not under any contractual relationship with Golding in the endeavor they jointly participated in) were acting under the guidance and control of Golding.

100. Upon information and belief, the web page became operational on May 27th, 2009.

101. On May 28th, 2009 at 12:55 pm the email was sent directly to the approximately 450 neighbors of Plaintiff by the conspirators, ostensibly from Diehl but prepared under the direction and control of Golding and upon information and belief, authored by her.

a. The email contains the banner "FOR THE BOARD OF DIRECTORS" implicating their approval, sponsorship, culpability, and responsibility for damages, to each homeowner.

b. The email was sent from "International Club HOA (Messenger@AssociatoinVoice.com)".

c. The email had Goldling's putative May 27th letter to the board attached.

d. The email had the byline of "*Beckie Abel*" (italics / bold in original) with the autority line beneath her name "Senior Community Manager, K.A. Diehl & Associates, Inc".

e. At the bottom of the page is the statement: "This message has been sent to ronaldjarmuth@msn.com" – which is Plaintiff's email address. Upon information and belief, each recipient's email was customized so as to have the individual recipient's email address substituted on the bottom – a fancy piece of programmng requiring pre-planning.

f. Upon information and belief, no homeowner is known to have requested Defendants to send them any material regarding Plaintiff, as homeowner or otherwise.

g. The email includes an area in red with very oversize font, many times the size of any other words on the email, which invites a recipient to "CLICK HERE", and which is preceded by the phrase "For all associated infromation to this lawsuit" – but clicking on the phrase / hot spot leads to the offending web page which has NO information about either lawsuit – except for the Golding letter which was already provided as an enclosure to the email – thus linking to the webpage for that was unnecessary. The link leads to the defamatory / inflamatory material regarding Plaintiff.

102. Also on May 28th, 2009 the defendants mailed a paper copy of all material assembled and authored by Golding to an estimated 700 neighbors of Plaintiff.

a. They had already pre-printed over 700 9" x 12" OVERSIZE flat white envelopes with individual names and addresses of Plaintiff's neighbors.

b. Well over 100 of these neighbors (homeowners in "The Villas") had never, over many years, ever gotten a single mailing. At the time of the mailing the enclosures had also been pre-printed and "stuffed".

c. Upon infomration and belief, this mailing was commercially out-sourced, meaning the defamatory material was available for additional unknown people to read and spread.

d. The envelopes were preprinted with the following provision for postage: "PREPAID 1st Class US POSTAGE PAID Permit #21 Murrells Inlet SC 29576" at an estimated postage cost of $ 1.39 per envelope; together with the cost of envelopes, paper, printing, assembly (separate stapling of many enclosures) and envelope stuffing, this required expending a substantial amount of money and the pre-approval, hence pre-

plannng, of the Defendants.

e. The letter, upon information and belief authored by Golding, was signed "FOR THE BOARD OF DIRECTORS" and bore the italicized – printed byline of "*Beckie Abel*".

f. For all prior mailings to homeowners made by Defendants (and received by Plaintiff) defendants have used "peel off" labels pre-printed with homeowner names and addresses. This is the first time pre-printed large envelopes have ever been used to mail material to homeowners in the HOA.

g. The letter stated that the following were enclosed:

(1) "Attorney letter to International Club Directors";

(2) "List of associated lawsuits with Ronald Jarmuth";

(3) "Jarmuth vs. Cox";

(4) "Jarmuth vs. Frinzi";

(5) "Jarmuth vs. Reynolds";

(6) "Jarmuth vs Waters".

g. Upon information and belief, the entire enterprise wasted thousands of dollars of scarce HOA money, was spent with utter disregard for the board's fiduciary duty to expend monies responsibly, brought no benefit to the homeowners, and the publication of same was made with disregard to bringing infamy to the neighborhood.

THE HOA BOARD ELECTION

103. On or about May 18th, 2009 a committee of "Concerned Homeowners" of which Plaintiff was one began circulating a Petition which demanded a Special Meeting of the Homeowners whose stated purpose was (a) to recall / impeach the (Defendant) HOA Board and (b) to elect a replacement HOA Board. The Petition was presented to the putative HOA Board / defendant on May 22nd, 2009. The clear intent of the initiative included removing Diehl as the HOA contract management company.

a. Plaintiff was listed as one of the homeowners (there were five listed).

b. The defamatory material authored, prepared, and published by the Defendants was published by email, webpage, and US Mail between May 27th and May 28th, 2009, and upon information and belief was seen by almost all of Plaintiff's neighbors no later than May 30, 2009. While the purported intent of the publications was to

"inform" about the lawsuits advocated by this Plaintiff (this suit) and The Villas at International Club, the timing and content make it clear that It's purpose was to interfere with the first amendment, political and civil rights of Plaintiff to complain and petition about grievance in the quasi-governmental structure and to exercise Plaintiff's occupational rights to a fair chance on the board of directors of the HOA.

c. The publications of Defendants were calculated to impart a false and very negative notion of Plaintiff to his neighbors, and to do so incorporated material which would be so taken as well as material which is defamatory per se as a matter of law.[2]

> **"A statement may be defined as defamatory if it tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." Jarmuth v Frinzi, USDC-ND-WV, August 25, 2006 at p12. citing Crump, 320 S.E.2d at 77, also citing the Second Restatement of Torts at 558 (1977).**

The Order went on to hold that

> **"'publication' applies to both slander and libel and means any form of intentional or negligent communication of a defamatory statement to a third person"**

which by the common law applies to republication of defamatory material. The text of the Order of August 25, 2006 included a provision that "the Docket remain SEALED from public view" which was agreed upon by all litigants and representatives from the US Department of Justice and the US Federal Bureau of Investigation (who appeared at a hearing which led to the Order) to avoid a future defamatory impact on this Plaintiff by the public reading the defamations (in the case documents) which the Court had found had been made by the defendants in that case.

d. Defendants had no legitimate purpose to republish this document. In that document which Defendants can be presumed to have read, and which they republished with the very defamatory phrases.

e. The publications had the intended effect and did indeed have the effect on Plaintiff's neighbors which the WV federal court quoted from Crump.

f. On May 28, 2009 on the HOA discussion "blog" fellow homeowner Tom

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[2] Jarmuth v Frinzi, #1:04CV63 in the USDC-ND-WV at pp 12-13 the same document which Defendants circulated with the defamatory statements against Plaintiff and which statements were held to be defamatory per se as a matter of law.

Reagan wrote:

> "Julie, my hope is that Mr. Jarmuth's lawsuit does not involve individual homeowners. I do not expect to have to help fund such an asinine action on behalf of a person who spends half his life suing people (just do a Google on him). ..." [clearly implicating the invective of Julie Case of Defendant Diehl].

The chain leading back to Julie Case included another blog later that same day from homeowner Ron Bolka, which read"

> "Tom - I totally agree. He will not get any money from me either. I am so tired of all this crap he has nothing better to do with his time than to stir up controversies"

Later on May 28th Aine Hukezalie another homeowner continued the thread started by Defendants in their defamatory e-mail of that same day, May 28th, writing --

> "...I agree with both you and Tom...surely they have medication for people like him??? I'm sorry if that seems like a somewhat personal thing to say but his constant stirring and trouble making behaviour has caused so many people so much stress. Why does he not take all his negative energy and do some good for some people could use his help?"

The following day homeowner Carl Dilorenzo picked up the thread, writing –

> "Sorry to be the bearer of bad news but our HOA insurance has a $2500 deductible for legal fees so, Mr. Jarmuth's lawsuit will probably cost us at least that much ... I have also been informed by a Realtor that if you are planning to sell your home you must notify the buyer that there is a lawsuit pending against the HOA. Guess how well that news will be received by the buyer. ... if we vote for Ron Jarmuth and company the lawsuit will go away. Does this sound like blackmail to you?"

Based on how it was received, the Defendants documents imparted the negative notion (when one is running for an HOA board seat, that Plaintiff was a non-resident of the HOA he sought to be on the board for. Homeowner Kathie Reagan later on May 29th chimed in (again on the thread leading back to the Defendnats) writing:

> "Is Mr. Jarmuth a full-time resident? I was under the assumption that you had to be a full time resident of the community to be on the board. Could someone clue me in on this matter?"

g. This reaction from certain neighbors clearly was brought on by Defendants' Defamations. For many weeks Plaintiff had purposely been silent on the "blog". During that period Plaintiff sent several emails announcing that he had negotiated special reduced price season pass prices for the homeowners (which was answered with thanks and acclaim by many homeowners and back through May 11, Plaintiff had only published a satellite

picture of a wooded area (as requested) where a supplementary swimming pool was being considered for location. Clearly Defendants' defamations, and nothing else, brought on the responses from the neighbors.

h. On May 29th, 2009, Plaintiff observed and was so advised by his fellow candidates (to replace the putative board) that because of the defamations Plaintiff's continued candidacy would harm the efforts of the other candidates, and that Plaintiff's chances of success were harmed. On May 30th, 2009 Plaintiff issued a statemend that he was withdrawing from candidacy, taking care to state that he was compelled to do this because of the misconduct of Defendants, Plaintiff writing in part

> "I take this step because Henrietta Golding and Beckie Abel have been misusing the resources of the HOA to raise bogus issues and defamatory claims involving me to create a "strawman" so as to confuse the issue of installing fiscally and operationally sound and responsible management for the HOA. The issue at hand is to hold the existing board accountable for what they have or have not done and to install a board which will hold itself accountable to the electorate. Thomas Jefferson said that when the population fear their government you have tyranny, and when the government fears the people you have democracy. It is not hard to find neighbors who have horror stories to tell about how they have been mis-treated by the Board or by it's employees working for KA Diehl. In coming to the conclusion to cease running for the Board I noted that after Henrietta Golding and Beckie Abel published their defamations on May 27th, both directly to every homeowner using a list they have refused to share with anyone else (in blatant violation of law, covenants and bylaws) and on an expensively created (at your expense, several thousand dollars for their web site page) many homeowners "took the bait" and focused their comments on the Golding / Abel strawman instead of the serious issues which have been raised by many homeowners over a period of two years, not just by me, and which the putative board has steadfast refused to answer or fix."

i. The defamations had done so much damage that even this did not bring a halt to the invective from neighbors inflamed by Defendants' defamatory and inflamatory tortious behavior. Prior to this Plaintiff had never met, did not know of, had never spoken to, or written to homeowner Aine Hukezalie and had never mentioned her by name. Yet on May 31, even after Plaintiff withdrew, neigbor Aine Hukezalie continued the dialog on the HOA blog initiated by Defendants conduct, writing –

> "... why not go door to door and found out just how much stress and anguish he has caused a huge portion of our community. Life is way too short to have someone as negative, vindictive and combative as him. He has finally pushed me to the limit, and I certainly have enough going on without contending

with him. I and 25 others are now going to take action against him in person, but come hell or high waters, I will not have a big bully do this to me and my son. How dare he...surely they have medication or clinics for people like him! How dare he cause such pain and stress to people he has not ever even met. Enough is enough!!!

j. Clearly the defamations caused Ms. Hukezalie to behave irrationally, because she conceded Plaintiff had "not ever even met" her; yet she was so stirred by what Defendants published that she was led to make a threat to gather a mob and to do something to Plaintiff "in person". Plaintiff was so afraid for his person and property that he found it necessary to file a police report about Hukezalie's threat, turning a copy of her e-mail over to the Police.

ADDITIONAL COUNT: DEFAMATIONS

103. All of the preceding as well as the Original Complaint are incorporated into this Count of Defamation.

104. A "Google" Search using the phrase "Jarmuth v Frinzi" brings up two trial court cases captioned, on the results page, "Jarmuth v Waters et al". The other results are all benign citations of proceedings at the appeallate level. Both relate to a case in the US District Court for the Northern District of West Virginia, whose proceedings no neighbor would have any reason to inquire into and about which Plaintiff had every expectation would remail private from his South Carollina neighbors.

a. One result is an order dated August 31, 2005. That order was not used by Defendants in their enterprise against Plaintiff, and is believed to be Docket # 60 in that trial court. The other order which the Google results discloses is dated July 19, 2006, and is Docket # 310 at the trial court. No other trial court order resulted from that search.

b. Neither the docket nor any of the interlocutory orders are available to Plaintiff's neighbors through the "free search" legal engines, such as Lexis. In any event, the docket to the "Jarmuth v Waters" case is benign. That case was initiated on April 6, 2004 and ended by final order on August 11, 2006, docket #322. The only common access to interlocutory orders is through a subscription service.

c. As has been noted, Defendants published by web page, email and US first class mail an Interlocutory Order dated July 25, 2006, Docket # 313 at the trial court.

d. In her letter of May 27, 2009, Golding professed an interest in counting the number of cases Plaintiff advoccated Pro Se, and she stataed she wanted to identify the

outcome (win / lose) of those cases. In point of fact in her letter she claimed that every case where Plaintiff was a litigant Plaintiff was pro se – and lost every one (a lie).

e. The outcome status of prior cases involving Plaintiff has no relevance to instant case. It was also irrelevant to the question of fiscal and operational management skills which would have been an appropriate dialog in the context of a board election.

- BEGIN SECTION FILED UNDER SEAL –

"Jarmuth v Frinzi" Defamation

105. The facts and assertions stated above are incorporated here.

106. The selection of this document was made for it's defamatory messages specifically identifiable against Plaintiff. The document was not requested by the persons to whom Defendants published this (republished to many of said recipients three times using three forms of media) and it's existence was unlikely to ever be known to said recipients. The Defendants selected recipients for it's most negative impact on Plaintiff. Defendants, because of the USDC-ND-WV's commentary, knew that this document contained statements which were defamatory per se as a matter of law because of the impact of such statements and accusations (against Plaintiff) of the stataements. Defendants exercised editorial control over the overall project and had the opportunity to redact out offensive phrases if the true objective of publication was to prove the two premises of the letter written by Golding on May 27th, to wit, (a) that Plaintiff always advocated his cases pro se and (b) that Plaintiff never won a favorable judgment in the cases to which he was a party. In point of fact, the final order of August 11, 2006 would have been more appropriate to prove either, or better yet, just the docket of 1:04CV63 (USDC-ND-WV). And there was no legitimate reason to copy and publish 12 faces (pages) of this interlocutory document.

107. The Defendants intentionally republished statements of others with a defamatory meaning which accusations were clearly made identifiable against this Plaintiff. The republication was unprivileged and served no legitimate purpose. The accusations were false. The Defendants republished the accusations recklessly and made no attempt to verify the truth of the accusations. From the source document the Defendants knew that various law enforcement agencies had looked into the accusations against this Plaintiff and found no basis to those accusations. The Defendants can not pretend that they were acting in good faith to warn their neighbors about the supposed danger to them from Plaintiff since (a) Golding, Abel, and Case are not the neighbors of any of the recipients of the defamatory material; (b) the publication was represented as part of a status report on this case prior to it's amendment; no claim of privilege was made and the republication was made to neighbors and not to law enforcement authorities. In addition, Defendants have

absolutely no knowledge of any fact which would lead them to believe that the accusations they republish have any basis in truth or presented a clear and pressent danger to those to whom they republished the defamatory accusations.

108. The statements that Defendants republished which "tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" (Crump, ob cit)) are:

a. From Page 2 of the document –

"a. Having sex between him and the mother in plain view of the child.

b. Freely walking around nude in front of the child (accusation raised in October, 2000).

c. Teaching the child to masturbate, and gratifying himself with her doing so.

d. Exposing the child to sexually inappropriate material on TV, and imparting an inappropriate knowledge of sexuality. e. Being a hazard to the child's mental and physical health."

"RON ADMITTED TO REGULARLY HAVING SEX WITH ANGELA IN THE SAME BED WITH [the Frinzis' child]".

b. From Page 7 of the document

"RON ADMITTED TO REGULARLY HAVING SEX WITH ANGELA IN THE SAME BED WITH [the Frinzis' child" [statement written three times].

- END SECTION FILED UNDER SEAL –

"List of Lawsuits Associated with Ronald E. Jarmuth"

109. This document must be viewed under the proposition which Golding, the admitted author, states on page 5 (top) of her letter of May 27, 2009:

> "he was pro se in each one .. he was not ultimately successful in any of the thirteen (13) lawsuits".

This document must also be read in the context it is presented . The web page ostensibly purports to provide information on the status of THIS case and the parallel one filed by The Villas. As such the Defendants meant to convey a defamatory meaning to Plaintiff's neighbors – that Plaintiff filed THIS lawsuit pro se because it is so friviolous that no attorney would take it; that this Plaintiff is frivolously injuring the finances and reputation of the HOA; and that no homeowner should assist Plaintiff because he has no chance of success. The "list" document conveys absolutely no information about the status, aspects of, or chances of success of THIS lawsuit. It does not solicit information from the public to aid in the defense of THIS suit. It does not offer the details of THIS suit. It is a publication Golding is prohibited from making under Attorney Ethics Rule 3.6, Advocate – Trial Publicity and is actionable as a separate tort agamst Defemdamt Golding. Plaintiff asserts such a cause of action against Goldling.

110. Defendants listed the same case twice to inflate their count and to support their defamatory proposition.

a. Cases #1 and #10 are the same case, #1 in the trial court and #10 in the appellate court.

b. The text Golding wrote describing Case #1, "Fourth Circuit confirms dismissal of all Jarmuth's claims", obviated any informational value which separately stating the appeal as Case #10 might have.

c. This case was known to Goldiing as the progeny of a case of the same caption filed in the USDC for the Middle District of Pennsylvania – since the case Golding printed from Westlaw says not only that, but that Plaintiff was represented in that case by Mr. Joseph Schwerha III, who was at the time an Assistant Pennsylvania Prosecutor (allowed under PA rules to advocate civil cases outside of his prosecutorial territory). Relating this, of course, would diminish the false picture Defendants sought to "paint" about Plaintiff.

111. Case #2 on the list, "Jarmuth v Krolczyk ...and the Monongalia County Board of Education.

a. Plaintiff was represented by attorney Pamela Folickman, so the general statement of pro-se representation in all cases is a LIE.

b. The Board of Education was not a defendant, so this is a LIE. It is a defamatory lie because it is made to impute that Plaintiff recklessly sues Boards of Education and is a problem to the community at large.

c. A further search by Goldling would have brought up that the West Virginia Board of Examiners of Psychologist (administrative law tribunal) held that Krolczyk had committed unlicensed practice of psychology, and had falsely claimed expertise where it was lacking[3] – and in the only known instance ever, this finding was published (available over the internet) in the official West Virginia State Register. [4]

112. Case #3 on the List, "Jarmuth v Tara Patterson, Esq.

a. It is noteworthy that Defendants were unable to provide any citation. This is because Plaintiff never sued Patterson. This case was listed to "inflate" Defendants' list of cases.

b. Patterson's connection with this Plaintiff is through the "Frinzi" case, 1:04CV63, USDC-ND-WV. Patterson is a Pennsylvania attorney who filed motions in the "Frinzi" case in West Virginia, although not admited "pro hac" and likewise having failed to pay the West Virgina bar the required fees. She also failed to disclose to the federal court her unlicensed status (in West Virginia). This Plaintiff reported Patterson to the bar for the bar, not this Plaintiff, to take appropriate action against Patterson.

113. Case #4 on the List, "Jarmuth v Reno".

a. There is no difficulty finding the abstract in a web search. Here is the text of the abstract:

> "dismisses case without prejudice to the right of the plaintiff to exhaust his administrative remedies with respect to a waiver of the fees associated with his FOIA request and attorney fees"

b. This case does not prove Golding's premise under which it is presented, that Plaintiff "was not ultimately successful in any of the thirteen lawsuits". A dismissal without prejudice is not a final decision – and the citation itself indicates that an attorney was involved, because the citation notes attorney fees were requested. In point of fact, a

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[3] June 3, 2003, Ethics Inquiry #42, Ronald Jarmuth v Brian Krolczyk which Plaintiff WON.

group of attorneys were working with Plaintiff on a qui tam investigation of contracting corruption in the US Department of Justice's contracting section – which the investigation ultimately (through FOIA) found proof of (corrupt contracting official).

c. The FOIA nature of the proceeding should have been a "red flag" to attorney Golding that a legitimate inquity was involved, which actually reflected positively on this Plaintiff. Neither the case citation (which took less than 5 seconds to find) nor the true nature of the proceeding was related to Plaintiff's neighbors. The count, not the meaning of the case, was what Defendants sought.

114. Case # 6 on the List, "Jarmuth v McLemore" (Civil Action #93-MISC-293 (D.D.C.).

a. The premise of the Defendants was that every case on the list they editorially compiled (the list was a complete creation of the Defendants) was a separate case which was related to their premises and thus belonged with the cumulative count of cases they alleged fit the premises. Their defamatory message depended on creating an image in the minds of Plaintiff's neighbors that the premises were both true and carried a negative message as to Plaintiff.

b. The admitted author, Henrietta Golding, had sufficient technical knowledge of law to know that this was not the situation as to this particular case. The inclusion was a LIE.

c. A Google web search on June 8, 2009 brought back five result pages of which only the first page had results for both "Jarmuth" and "McLemore". The results did not show any true case where Jarmuth had sued McLemore.

d. The first case result, which was omitted completely, which could not possibly be overlooked because of it's numerous citation on the internet, and which would have devasted the premise of Defendants, was "Jarmuth v Turetsky" in the US DC-DC because (1) Plaintiff was represented by attorney Ern Reynolds; (2) Plaintiff prevailed; (3) the primary allegations were identity theft, forged power of attorney, theft of money and valuable goods; (4) it was decided by a federal jury; (5) it was sustained by the US Court of Appeals in DC; (6) it survived a number of consecutive bankruptcy filings by Defendant Turetsky, with a decision that it could not be discharged in bankruptcy because the verdict related to intentional torts. The February 25, 1993 final order, made available in the first

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[4] Volume XX, Issue 30, July 25, 2003,pages 1551-1554.

Google result, noted that McLemore was a co-defendant.

e. The third Google search result was "JARMUTH, RONALD E. v. NATALIZ MCLEMORE, Civil Action No. 93-Misc-293 (D. D.C.)". No other search results (in the five Google Pages) related to "Jarmuth" and "McLemore".

(1) First it is noted that this is the caption cited by Defendants on THEIR LIST as case #6.

(2) Following the Google link would have "brought up" a list titled "LIST OF FREEDOM OF INFORMATION ACT CASES RECEIVED IN 1993." As an experienced Attroney, Golding can be presumed to know two things:

(a) a "MISC" case identified would not have been used if Plaintiff had sued "McLemore". A "MISC" identifier is typically used to oppose a subpoena which has been issued in a "primary" case – and in this instance the "primary" case was "Jarmuth v Turetsky", the subpoena having been issued by Plaintiff's ATTORNEY!.

(b) In such a case the "MISC" case picks up the caption from the originating case in which the subpoena was issued. Thus in this case it was actually McLemore who brought the case to oppose a subpoena which had been issued (not on McLemore) but upon information and belief (it has been many years) to gather financial records (in accounds to which McLemore was a signatory) where "money laundering" of stolen funds was believed to be taking place.

(c) Thus "Jarmuth v McLemore" was not a case (1) brought by Plaintiff and was included for non-legitimate purposes – to defame Plaintiff.

f. Since Defendants asserted their use of powerful tools, WestLaw and Google, the Westlaw search would certainly have brought up another relevant case which would have also devastated their premise – "Jarmuth v McLemore" in USDC-ED-PA. In that case Plaintiff won a "by consent" order whereby McLemore was prohibited from participating in any way, forever, from money laundering activities or from having any financial dealings what-so-ever with Turetksy (McLemore's sister) who was found responsible by a federal jury of using forged documentes to steal from Plaintiff and hiding the funds through money laundering activities (in accounts with McLemore's name on them). The inclusion of this other easily found case was adverse to Defendants second premise, Plaintiff always loses his cases.

g. This should have inevitably led to "Jarmuth v Turetsky" in the Circuit Court for Prince George's County, MD where the federal case originated. The case was originated on Plaintiff's behalf by attorney John Beckman. While the complaint was decided in federal court, the counter-complaint remained in state court, and Plaintiff WON dismissal of all counts of the counter-complaint.[5]

115. Case # 7 in the List, "Jarmuth v Cox".

a. This was a West Virginia, not Virginia STATE case which was ultimately removed by Defendant Cox to federal court. The final orders of federal and state courts are easily available, but citing to those documents and providing them would have demonstrated the need and reasonableness of bringing suit.

b. More importantly, the editorial Defendants wrote, by omission, misrepresents the case. The state court docket would (and state orders carry over to federal court upon removal) relate that Plaintiff almost immediately won a "by consent" order that Cox turn over to Plaintiff all records relating to Cox' "examination" of Plaintiff.

c. Defendants purposely and with malicious intent provided an inaccurate narrative. An accurate case description would have stated that (1) In what should have been a simple procedure to merely check Plaintiff's occular pressure and do a vision field test, Cox was so careless that he seriously injured (and infection of) one of Plaintiff's eyes, requiring emergency treatment at a hospital and follow-up treatment by a retinal specialist; (2) that to assist in receiving appropriate treatment, Plaintiff requested and was refused a copy of Cox' records which would have shed light on how the injury; (3) Cox had signed an agreement guaranteeing the release to Plaintiff of the records – prior to Plaintiff allowing treatment, and Cox reneged on this written agreement (out of fear of malpractice suit); (4) in addition to documents Plaintiff sought reimbursement of ACTUAL medical costs; (5) Plaintiff sought to destroy NOT Cox's records but other medical records relating to Plaintiff that mysteriously were found in Cox's possession (perhaps to defend against a malpractice suit) – and which Plaintiff had never provided Cox; (6) the dismissal was not on merit but because Cox claimed an immunity (doing work for US-DOL) which the US-DOL never asserted on his behalf, and which was believed by the Court.

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[5] Upon information and belief (this was many yeas ago) Turetsky wanted to be paid a management fee for her efforts in managing the money she stole and never returned.

116. Case #8 on the List. "Jarmuth v Verizon". This was NOT a court case at all, but a Public Service Commission request for a technical decision as to whether an incumbent phone company could install bandwidth multiplexing equipment on a voice line [6] (never asserted a party line request) which made it impossible to install a DSL circuit – in a location where cable internet was also unavailable.[7] Further, since no proceedings, discovery, or participation by a complainant is permitted, a non-malicious presentation would have omitted this case because an attorney is irrelevant in a commission petition such as this. The case was not included nor presented in a legitimate way, but was done so for malicious purposes.

117. Case #10 on the list, "Jarmuth v Frinzi".

a. This is the SAME case as #1, being the appellate follow-on. It is not legitimately a "separately brought case" as the premise would lead Plaintiff's neighbors to believe.

b. More importantly, Defendants did not QUOTE from the case pleadings but editorialized and are thus responsible for every word they wrote, for false statements (LIES) and for defamatory meanings taken from said lies.

c. DEFAMATION / LIE: "Jarmuth ... alleged defamation by some of his co-employees at the FBI". (emphasis added)

(1) None of the defendants were Plaintiff's co-employees ANYWHERE ANYTIME.

(2) None of the defendants were ever "employees at the FBI" ANYWHERE ANYTIME, or even federal employees. Upon information and belief, they were never employees of ANY government entity.

(3) The clear intent was to paint Plaintiff as someone who can not get along with his co-employees. The implied message is that one does not get to work at the FBI unless one is reputable, and to make such an accusation against multiple FBI employees is an implied accusation of mental unfitness.

(4) Because the Defendants had an undeniable record of the true

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[6] This allowed Verizon to use the half of the bandwidth normally used for DSL to carry another subscriber's voice line, saving Verizon having to "string" another copper wire.

[7] Verizon ultimately pulled the multiplexing equipment out and provided DSL service, apparently

circumstances – they provided Plaintiff's neighbors an electronic and paper copy of an interlocutory order which addressed this in depth – these editorial LIES must be presumed to be intentionally made.

(d) DEFAMATION LIE: That Plaintiff's conduct led to "termination of his employment with the FBI on 4/21/01".

(1) The assertion by Defendants that Plaintiff was terminated by the FBI under the circumstances they presented in their editorial comment is a defamation by innuendo. It meets the Crump definition cited by Hon. Judge Keeler as to defamation per se as a matter of law. It is well known that federal employees can not be terminated except for cause, and that such termination is extremely difficult – termination must follow a significant really bad deed by an employee. In the federal system inadequate performance must be adressed by an "improvement effort" where the burden is on the supervisor to make it happen, not on the employee to figure it out. See further on "Jarmuth v Weiss".

(2) This Plaintiff has NEVER been terminated from any position by any employer. After the date asserted by Defendants, "4/21/01", Plaintiff continued to be a federal employee.

(3) The matter is irrelevant to the issue of the HOA "lawsuit" but served the illegitimate purpose of defaming an individual attempting to unseat the HOA defendants for waste, fraud, and abuse of fiduciary duty and to the Diehl co-defendant whose contract would likely be terminated after such a successful impeachment. The Defendants had motive, opportunity, and unquestionably published this "Crump" defamation. It was done with utter disregard for it's consequences and was written recklessly.

118. Case # 11 on the LIST, "Jarmuth v Reynolds".

a. The editorial description in "The List' is written with, and conveys, a defamatory meaning – to wit, that Plaintiff was so reckless in managing his finances that he had to file for bankruptcy protection, and thus can not be trusted with the affiars of the HOA.

b. Since the Defendants had the case abstract, they knew that –

(1) The case was actually the involuntary bankruptcy of the same

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due to embarrasment over this issue.

Turetsky who had stolen funds (per a federal jury) from Plaintiff;

(2) Reynolds was Plaintiff's attorney in the Turetsky case, and the nominal "defendant" Reynolds endorsed the appeal. This action was also endorsed by the attorneys for all other creditors which included Sears, several banks, and at least one stock brokerage firm – all with Turetsky unpaid debts.

(3) A fair report would have stated what was appealed – the refusal of the bankruptcy judge to honor the unanimous vote of the Creditors' Committee on their selection of a Bankruptcy Trustee. The judge ignored the vote and appointed an individual from what was known as the "bankruptcy bar".

(4) While the editorial caption says "the appellate Court's decision is attached", it is not attached or "hot linked" to the version of Defendant's List available through the web page (and it is tenousou to claim that they expect that all 700 or so recipients of the package by mail will read both the list and some "meaningless" case of several pages. As set forth in what Defendants wrote, the meaning conveyed is that the bankruptcy case is that of Plaintiff, which is a false meaning recklessly conveyed.

119. Case # 12 on Defendants' List, "Jarmuth v Weiss".

a. The false premise of the editorially written description is that a federal jury agreed that Plaintiff files frivolous cases, as, according to what Defendants wrote, a "Jury found against Jarmuth ... and the appellate Court confirmed the jury verdict". Since Golding downloaded (and separately provided) the appellate order, it is undeniable that Defendants wrote their description recklessly and with utter disregard for the truth.

b. Defendant's statement contains several BIG DEFAMATORY LIES:

(1) The case never went to the jury.

(2) The appellate court never "confirmed the jury verdict".i

c. The intent of the Defendants is to tell neighbors of Plaintiff that Plaintiff recklessly brings cases. Reading the case material (available from Pacer) would have brought out the fact that Plaintiff was ORDERED by the Solicitor General of the US Department of Labor to file the lawsuit against Weiss, and that the US Department of Labor and the US Department of Defense found that Weiss has in fact done everything he was accused of.

d. Having found "Jarmuth v Weiss", it is inexplicable – except for improper

purpose – that Golding omitted "Weiss v Jarmuth and Fuller" where Jarmuth and Fuller were represented by the Attorney General of the US, where the accusation was that Defendants improperly assisted (by testifying) the US Government in firing Weiss for attacking Jarmuth AND for attacking a more senior official (and for failing an improvement period). The representation by federal counsel is destructive to the defamatory premise of ALWAYS proceeding pro se, and that Jarmuth and Fuller won both at trial and in the appellate courts is likewise destructive to Defendants' depiction of Plaintiff to Plaintiff's neighbors.

120. Case #13 on Defendants' List, "Jarmuth v Turetsky" (interlocutory appeal).

a. The Defendants represented, through Golding's May 27th letter, that the 13 cases are all they could find in the period between May 8 [8] and May 27, 2009.

b. Performing a Lexis search, the "removal" appeal was not found. Likewise with a Google search on June 8, 2009. The very first case found by Google was, upon information and belief, the actual removal case, with a citation 986 F.2d 1413, referring to two interlocutory appeals (Nos. 92-2193 and 92-2218). These were the appeals relating to removal from the Circuit Court of Prince George's County, MD based on a "federal question or right". Defendants claim they are summarizing the appellate order (they recite that "Jarmuth appeals ..."),

c. The actual Order – which Google brings "straight up" -- reads:

> "Both Ronald E. Jarmuth and Oxana Turetsky appeal from the district court's order dismissing Jarmuth's 28 U.S.C.s 1442(a)(1) (1988) petition for removal and remanding the case to the Prince George's County Circuit Court. ... we dismiss these appeals for lack of appellate jurisdiction".

d. That both sides appealed the matter gives the appeal a different (more reasonable) twist and presents it in a more favorable light than the slant that Defendants present – frivolous proceedings.

e. The removal proceedings were irrelevant to this case as well as to the HOA impeachment proceedings, and were not mentioned for any legitimate purpose.

e. What is readily found is Jarmuth v Turetsky in the USDC-DC, (discussed in a prior paragraph) where Jarmuth was represented by counsel before a federal trial jury

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[8] Golding was searching at least as far back as May 8th, based on the day at the bottom of the "Cox" case extract she published.

and prevailed, and subsequently prevailed in the appelate court and in a subsequent bankruptcy case where Turetsky was the individual seeking protection. The omission of the major case and substitution of an interlocutory case which the Fourth Circuit wrote should not be cited (4th Circuit Rule OP 36.6) by a seasoned attorney, Golding, demonstrates the malicious intent of the Defendants.

The "Golding" May 27th Letter

121. No later than May 28th, 2009 the conspirators (the Defendants) published a letter signed by Defendant Golding, whose preparation and integration into a three – media publication effort has already been described and is incorporated by reference. As explained, it was written with Plaintiff's neighbors as the intended audience.

122. As Golding admitted on page 4 of the letter, she was intent on finding and publishing – to Plaintiff's neighbors – any defamatory she could find "primarily relating to his background" which was both irrelevant to this case and prohibited by Rule of Ethical Behavior Rule 3.6. In point of fact Golding's involvement in the entire scheme was prohibited by Rule 3.6 (as well as Rules 3.7, 4.1, 4.4 and 8.4). The information, if collected and kept private (it was not) was not likely to lead to any admissible evidence, even for impeachment, since the original allegations and requests for relief are expressed largely through documents which largely come straight from the Recorder of Deeds.

123. On page five (5) of the letter she stated with utter reckless disregard and malicious intent two lies (the basis for this statement having been demonstrated previously) -- that

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

and this statement was made to intimidate, harass, defame Plaintiff and interfere with his efforts to seek a seat on the HOA board. The defamatory effects of the combined materials defendants published is seen by it's effects, already cited. The Golding letter was "shoved" at neighbors who did not request it (using postal and e-mail), put out in front (attached to the email and in plain view in print) with the imprimature of Golding in her letter mis-used to give everything the look of truth and legitimacy,

The Diehl / Abel Email

124. On May 28, 2009 at 12:55 in the afternoon (as set forth previously, all reference above are incorporated herein for demonstrations of defamation or other improper

tortious conduct) "Beckie Abel", "For the Board of Directors", in her stated capacity as "Senior Community Manager, K.A. Diehl & Associates", using the Diehl controlled mechanism "Messenger@AssociationVoice.Com", sent an email to every homeowner in the HOA for whom they had an email address. All Defendants had previously refused this Plaintiff access to this list in violation of law.

125. The email was sent separately to each homeowner. Each homeowner's copy was customized with his email address on the page bottom (not done by the homeowner's own email agent) in addition to using the homeowner's email address for the "send to".

126. The email was, upon information and belief, written by Golding and Golding orchestrated the identification, preparation, and integration of all components to carry this off.

127. Abel stated that the reason she was writing was

> "We wanted to make sure that the membership gets the correct information on this matter and begin to dispel some of the speculation that has been started throughout our community". "Hopefully, this information will answer the many questions that we have been asked and to date, have not been able to answer"

a. The Defendants used "bait and switch" to tantalize Plaintiff's neighbors / fellow homeowners to read Golding's May 27th letter (attached) and to navigate to the web site "Click Here".

b. The email was titled "Litigation Details". None of the information about Plaintiff was "litigation details".

c. Upon information and belief, no HOA member had asked Diehl about Plaintiff's litigation history. What many homeowners HAVE asked for in "ICBuzz" was to see a copy of BOTH actual complaints and the HOA's answer – since the homeowners ARE the homeowner association, bear the costs of litigation, are impacted by the publicity (spread only by Defendants). Another reason that the homeowners have asked to see a copy of the pleadings is that the Board has tried to "spin" the allegations and it wold be appropriate for the homeowers to see how the published claims of the HOA stack up against the facts recited in the complaint.

d. On June 5, 2009 the Defendants sent out an email using the "Assocation Voice" mechanism controlled by Diehl (the same one used by Abel) titled "HOA Updates". In it they denied that they were providing information on the litigation and then proceeded

to address some of the issues raised in the original version of this complaint: (1) Board secrecy – documents and meetings; (2) Abuse of fiduciary duty by waste, fraud and abuse – spendng HOA money to landscape and maintain private property; (3) Election / Replacement of Board Members; (4) Financial unaccountability / mismanagement.

128. The May 28th email clearly was not sent for legitimate purpose but rather as the vehicle to induce Plaintiff's neighbors to see material prepared for it's expected defamatory and injurious effect --- not for the purported purpose for which neighbors were induced to enter the site.

Defendants' May 28, 2009 Letter

129. On May 28, 2009 Beckie Abel mailed a package to each homeowner by US First Class Mail. All prior references to this and to the contents thereof are incorporared by reference, as are allegations made in previous text.

130. Each publication was mailed in a separate envelope addressed to a specific homeowner / neighbor.

131. The letter implicated the Defendant Board because it was signed "FOR THE BOARD OF DIRECTORS". Upon information and belief, the Defendant Board was aware of and consented to this enterprise.

132. The letter was signed by "Beckie Abel" in her capacity of "Senior Community Manger; KA Diehl & Associates" and thus implicated Defendand Diehl, who had a responsibility to supervise and control Abel. Upon information and belief, the selection, preparation / production and mailing of the letters was done with the knowledge, support and consent of Defendant Diehl management.

133. The publication was aimed at defaming and harming this Plaintiff and had the intended consequence of stirring up neighbors against this Plaintiff based on holding this Plaintiff in a false and negaitve "light".

134. The letter campaign had been coordinated with the email and contained text identical to the email:

> "Hopefully, this information will answer the many questions that we have been asked and to date. ... We wanted to make sure that the membership gets the correct information on this matter "

Plaintiff's comments and assertions relating to the same text contained in the email, willful disregard and intent apply to the publication by mail.

135. The contact information was Diehl's email server, it's phone numbers, and it's office address. Clearly this was not an independent initiative by rogue employees.

Defendants' / "Association Voice" Website

136. The website to which Plaintiff's neighbors were sent to by a link on the email and by an invitation on the letter was under the ownereship, access and control of Diehl, is paid for by the HOA, and is ultimately built, maintained, and controlled by the HOA defendants. The address of the "front end" web page is "http://wwww.internationalclubhoa.com/doc" whick associates it to the HOA Defendant. The page has the logo and name (at the bottom) of "KA Diehl & Associates, Property Management Services" which ties it to the Diehl defendant. The web page instructs homeowners who have been brought to the page that

> "You can open any folder or document simply by clicking on the item. When you reach the document of interest, you can download it to your computer, print it, or view it on-line!"

clearly demonstrating that it was intended that the defamatory messages not be susceptible to "damage control" (by deleting offending material) as the material will have been replicated – as instructed by Defendants on this page – on the pc's of neighbors of Plaintiff. This is consistent with the additional mailing of the hard copy material published on the web page by defendants.

INVASION OF PRIVACY

137. All of prior material in this Complaint are incorporated by reference.

138. The publication to Plaintiff's neighbors, without their request or other legitimate purpose, constituted an invasion of the Privacy of Plaintiff in that it exposed to said neighbors an area of his life (and did it falsely) that Plaintiff had a reasonable expectation would remain private from said neighbors.

a. The invasion was done purposely, recklessly, and with disregard for Plaintiff's rights and was done with the intent of harming Plaintiff in occupation (as a prospective HOA board member) and to intimidate Plaintiff into withdrawing this lawsuit or into moving away and thus losing standing in this case.

b. As to Defendant Goldling, it was done in violation of the Rules of Attorney Ethical Behavior.

c. As to the Diehl defendant, it was done for a monetary purpose – to perpetuate their contract with the current putative board.

d. The material disclosed was not readily available or, for all practical purposes, was inaccessible to Plaintiff's neighbors.

e. Much of the "private material" presented was, in fact, either inaccurate or completely false, and this distortion was purposely done for malicious purpose.

INTIMIDATION AND HARASSMENT

139. Plaintiff incorporates by reference all the material preceding in this Comlaint.

140. The Intimidation and Harassment was initiated and carried out by all defendants acting as a joint conspiracy with the objectives of (a) inflicting emotional distress; and (b) intimidation to interfere with (1) the occupation of prospective board member and (2) because of (and to interfere with) the expression of political opinion (regarding the governance of the quasi-governmental HOA, (3) to interfere with the exercise of political rights guaranteed in the South Carolina Non-Profit Corporation Act, and (4) to interfere with the privileges of membership stated in that same statute, and in the HOA covenants and bylaws.

BREACH OF CONTRACT

141. Plaintiff incorporates by reference all the material preceding in this Complaint.

142. The Covenants constitute a Contract between this Plaintiff as owner of property within the Planned Unit Development subject to the Covenants (if they were not previously abolished).[9]

143. The HOA Defendant exercises the rights and obligations of the other parties to the Contract and is the "other" party to the contract (covenant). It has the power to act on the contract in the name of the HOA, and all other homeowners must act derivatively in the name of the HOA to enforce the contract.

144. Both parties to the Covenants have an implied contractual obligation to "act in good faith and with fair dealing".

a. The HOA Defendant's conduct of bad faith and unreasonable action impaired Plaintiff's exercise of his rights under the covenant and was so intended.

b. The HOA Defendant used the resources involuntarily collected from Plaintiff

[9] This lawsuit asks the Court to declare that the Covenants were abolished on May 11, 2003 by agreement of the entities entitled to amend same that being Plantation AD, DR Horton, and Sunbelt.

to tortiously injure Plaintiff, which is an unreasonable and bad faith use of the assessments.

c. There was an intentional failure on the part of the HOA party to the contract (covenants) to exercise an honest and informed judgment in dealing with Plaintiff, the other party to the contract. The HOA Defendant acted in bad faith because there was no reasonable basis to support it's decision to injure this Plaintiff.

d. The HOA Defendants have acted in a manner which is fraudulent, oppressive and unfairly prejudicial.

e. The duty of good faith and fair dealing is a fiduciary duty and the HOA Defendants acted outside that fiduciary standard.

f. There existed no reasonable basis to indicate to the Boarsd that their actions against this Plaintiff were "good faith" acts – the "Business Judgment Rule" has no place here.

g. The actions of all Defendants were aimed at interfering or preventing Plaintiff from exercising his rights under the contract and are so outrageous that they constitute a major and significant breach of the contract, justifying more than just the award of monetary damages – they justify severing the contractual relationship between the parties under the Covenant.

h. Plaintiff recognizes that in severing the contract he will have an obligation to pay his fair share of the operational and reserve costs of the recreational facility to which he has an independent right of use and claim of a degree of equity ownership in.[10]

i. Plaintiff demands that his obligations and rights under the contract between the parties styled as a Covenant be terminated, and that provision be made that Plaintiff pay the same annual charge for use of the Recreational Complex that is charged all other homeowners entitled to use the facility.

FAILURE TO PRODUCE THE VOTER / MEMBER LIST OF THE HOA.

145. Plaintiff incorporates by reference all the material preceding in this Complaint.

146. Plaintiff has been illegally refused access to the complete voter / owner / member HOA data base used by the HOA to communicate with the members by phone, mail, and email.

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[10] Plaintiff inherited the equity stake in the Amenity Center acquired independent of the HOA. See relevant portions of Original Complaint.

147. Plaintiff is entitled to full access to said data through the operation of SC Code 33-31-1601 (a) Permanent Records of a non-profit corporation; and SC Code 33-31-1602 Inspection of Records by Members of a non-profit corporation.

148. SC Code 33-31-1604 Court Ordered Inspection gives this Court authority to so order.

149. On April 28, 2009 Plaintiff served a written demand on the HOA's registered agent, KA Diehl, to inspect and copy the list of members as it exists in the permanent records of the corporation. This request satisfied the demand requirements of the Non-Profit Corporation Act, 33-31-1601 and 1602.

150. Within hours Plaintiff was emailed a reply from attorney Henrietta U. Golding stating

> "... this firm has been retained to represent the International Club Homeowners Association and Rosemary Toth with respect to the above legal action. ... your request for the membership list is denied."

151. Golding made the self-serving determination that the demand to inspect and copy was not made "in good faith" or for "proper purpose".

152. Golding wrote further, with the authorization of all Defendants, that

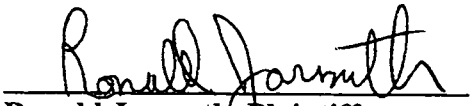
> "Neither the Association, nor Ms. Toth, will engage any further in communications with you until the litigation has ended".

which illegally interfered with Plaintiffs rights as a matter of law and covenants independent of this litigation to inspect and copy the records of the HOA, to discuss the status of his account, and to acquire a copy of the database of members. This decision was a further breach of the contract as well as a violation of the South Carolina Non-Profit Corporation Act.

153. SC Code 33-31-1604 vests subject matter jurisdiction over this matter in this Court, and also provides the authority for this court to summarily and expeditiously dispose of this matter. The statute also provides that if the Court finds that the applicant is entitled to a copy of the list of members, the corporation shall bear the complete expense of inspection and copying, and as well -- all court costs.

154. The Court is asked to Order the immediate Inspection and Copying of all elements of the list of members (electronic) as maintained by the HOA non-profit corporation at the expense of the HOA, plus court costs attributable to their illegal refusal. For the purpose

of this, all court costs borne by Plaintiff up to and terminating with an Order for Inspection and Copying are requested to be considered as taxable costs against the Defendant HOA.

By: 

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

June 9, 2009

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2009-CP-26-3596
Ronald Jarmuth,)) Plaintiff,)) vs.)) The International Club Homeowners) Association, Inc. and) Rosemary Toth,) And) Henrietta Golding,) And K.A. Diehl & Associates,) Defendants.)	DEFENDANTS THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC. AND ROSEMARY TOTH ANSWER TO FIRST AMENDMENT TO COMPLAINT

FILED
HORRY COUNTY
2009 JUN 19 PM 12:14
MELANIE HUGGINS
CLERK OF COURT

The Defendants, The International Club Homeowners Association, Inc. and Rosemary Toth, hereby answering the First Amendment to Complaint would respectfully show and allege unto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified or qualified is denied and strict proof demanded thereof.

2. The allegations of Paragraphs 88 and 89.(a.) are admitted.

3. In answering Paragraph 89.(b.), the answering Defendants admit the address of the Defendant K.A. Kiehl & Associates, Inc., that it is a corporation in good standing and that it has contracted with the Defendant The International Club Homeowners Association, Inc., but the remaining allegations are denied and strict proof demanded thereof.

4. With respect to the allegations in Paragraph 90, the Answering Defendants admit only that venue in Horry County is proper.

5. The allegations of Paragraphs 93, 95 and 98 are admitted.

6. The allegations of Paragraphs 91, 92, 94, 97, 99 are denied and strict proof demanded thereof.

7. In answering Paragraph 96, it is only admitted that the Answering Defendants' Attorney did email a letter to the Plaintiff and the letter speaks for itself.

8. In answering Paragraph 100, the Answering Defendants do not have sufficient information as to the date the web-page became operational and therefore deny the same.

9. The allegations of Paragraphs 101, 102 and each of the 103 paragraphs, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 133, 134, 135, 136, 137, 138, 139, 140, 141, 143, 144, 145, 146, 147, 149, 151, 152, and 154 are denied and strict proof demanded thereof.

10. With respect to the allegations in Paragraphs 130, 131, and 132, it is admitted that a letter was sent to homeowners in the International Club Community by K.A. Diehl and Associates.

11. In answering Paragraph 142, the said allegations therein constitute a legal conclusion but it is admitted that the Declaration of Covenants and Restrictions, as amended, constitutes a contract with the homeowners in the International Club community.

12. In answering Paragraphs 148 and 153, the statutory provisions referenced therein speak for themselves.

13. In answering Paragraph 150, the Answering Defendants admit that a letter dated April 28, 2008 was emailed to Plaintiff and the letter speaks for itself.

SECOND DEFENSE

14. The allegations of the First Defense are incorporated herein and made a part and parcel hereof.

15. The Answering Defendants assert the applicable statutes of limitation as a complete defense to Plaintiff's claims.

THIRD DEFENSE

16. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof.

17. The Answering Defendants assert waiver, estoppel and laches as complete defenses to Plaintiff's claims.

FOURTH DEFENSE

18. The allegations of the First, Second and Third Defenses are incorporated herein and made a part and parcel hereof.

19. Any and all actions undertaken by the Answering Defendants were undertaken in good faith and therefore, subject to the business judgment rule.

FIFTH DEFENSE

20. The allegations of the First, Second, Third and Fourth Defenses are incorporated herein and made a part and parcel hereof.

21. The Answering Defendants assert unclean hands on the part of the Plaintiff as a complete defense to Plaintiff's claims.

SIXTH DEFENSE

22. The allegations of the First, Second, Third, Fourth and Fifth Defenses are incorporated herein and made a part and parcel hereof.

23. The Answering Defendants assert consent and/or novation as a complete defense to Plaintiff's claims.

SEVENTH DEFENSE

24. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Defenses are incorporated herein and made a part and parcel hereof.

25. The Defendant, Rosemary Toth, at all times, has acted and continues to act within the powers and authorities given to her by the governing documents for the Defendant HOA and therefore, is immune from any claims asserted by the Plaintiff.

EIGHTH DEFENSE

26. The allegations of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses are incorporated herein and made a part and parcel hereof.

27. Any and all matters asserted as to the Plaintiff are absolutely privileged in that all matters published are contained in Court decisions and opinions.

NINTH DEFENSE

28. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eight Defenses are incorporated herein and made a part and parcel hereof

29. Any and all communications regarding the Plaintiff were made in good faith and thereby are privileged.

TENTH DEFENSE

30. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight and Ninth Defenses are incorporated herein and made a part and parcel hereof

31. Any and all statements with respect to the Plaintiff were fair comment and thereby protected.

ELEVENTH DEFENSE

32. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth and Tenth Defenses are incorporated herein and made a part and parcel hereof

33. Any and all statements with respect to the Plaintiff is neutral reportage and thereby protected.

TWELFTH DEFENSE

34. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth and Eleventh Defenses are incorporated herein and made a part and parcel hereof.

35. Any and all facts relating to litigation involving the Plaintiff is privileged.

THIRTEENTH DEFENSE

36. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth, Eleventh and Twelfth Defenses are incorporated herein and made a part and parcel hereof.

37. The Amended Complaint should be dismissed for the Plaintiff has failed to add indispensable and necessary parties.

FOURTEENTH DEFENSE

38. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Defenses are incorporated herein and made a part and parcel hereof.

39. Certain governing documents relating to the International Club community may be ambiguous and therefore, the answering Defendants assert ambiguity as a defense.

FIFTEENTH DEFENSE
AND FIRST COUNTERCLAIM

40. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Defenses are incorporated herein and made a part and parcel hereof.

41. Upon the dismissal of Plaintiff's claims, the Defendants seek an Order of the Court declaring that the Plaintiff is totally and solely liable for all attorney's fees, costs and expenses associated with the defense of this action and therefore seek a judgment against the Plaintiff for all attorney's fees, costs and expenses incurred in this action to defend the claims of the Plaintiff.

WHEREFORE, having answered the First Amendment to Complaint, the Answering Defendants pray that the same be dismissed and that the Court issue an Order directing that the Plaintiff be solely and totally responsible and liable for all attorney's fees, costs and expenses in the defense of this action, and for such other and further relief as this Court may deem just and proper.

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The International Club Homeowners
Association, Inc. and Rosemary Toth

Myrtle Beach, South Carolina
June 19, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2009-CP-26-3596
	)	
Ronald Jarmuth	)	
	)	
Plaintiff	)	PLAINTIFF'S REPLY
	)	TO DEFENDANTS' ANSWER
vs.	)	TO AMENDED COMPLAINT
	)	
The International Club	)	
Homeowners Association, Inc.,	)	
and	)	
Rosemary Toth	)	
	)	
Defendants	)	
	)	

1. Ronald Jarmuth ("Jarmuth") Plaintiff Pro Se, replies to "Defendants The International Club Homeowners Association, Inc And Rosemary Toth Answer to First Amendment to Complaint" stating the following as to Defendants' Defenses and Objections:

2. The Authority is SC Rule of Civil Procedure (SCRCP) Rule 8(c) which provides that "A party may file a reply to any of the foregoing affirmative defenses".

3. Prefatory. Rules of Pleading Affirmative Defenses in Answer which Defendants' Answer ignored.

a. Time. SCRCP Rule 9(f) requires that, when asserting anything depending on time (and place), the time and place is material and must be stated with specificity. Limitations of actions are among the defenses requiring the pleading of what specific causes of action are dependent on time, the times such events occurred, the applicable limitations with a citation to the controllling statute, and when the time for the particular cause of action expired.

b. Law and Facts. SCRCP Rule 12(b) requires that mandatory defenses be supported by citations to applicable law and FACTS.

c. Facts Required to Support Affirmative Defenses. SCRCP Rule 8((b) (Defenses; Form of Denials))requires that

> "A party shall state in short and plain terms the facts constituting his defense to each cause of action asserted and shall admit or deny the averments upon which the adverse party relies
>
> ... Denials shall fairly meet the substance of the averments denied. "

4. Regarding the Second Defense – Statute of Limitations (Def Para 14). In Paragraphs 8 of their Answer Defendants state that "the applicable statute of limitations is a complete defense to Plaintiff's Claims.

a. Defendants have failed to state which claims are governed by which limitations and which specific action (with dates) by Defendants are outside the limitations of actions. The defamation related claims in the Amended Complaint refer to events which occurred at most months, not years, before the amended complaint was filed. Asserting a statute of limitations against a defamation claim for events occurring less than a year before the filing of the complaint is a frivolous defense subject to Rule 11 and the Frivolous Lawsuit statute – especially when the pleading has been signed by an attorney.

b. Applicable Statutes of Limitations.

(1) SC Statute 15-3-550 provides a two (2) year statute of limitations on actions for libel and slander. Clearly the limitation is not applicable here.

(2) SC Statute 15-3-530(1) provides a three (3) year statute of limitations on actions upon a contract. The Covenant and Bylaws are in the nature of a contract. Demands for documents under the South Carolina Non-Profit Corporation Act are contractual in nature. All cited unsatisfied document demands were made within the last three years, thus this limitation is inapplicable.

(3) Subsection (2) likewise provides a three (3) year limitation on actions against directors – which this can be construed as -- but that is limited to actions relating to

> "a monied corporation or a banking association to recover a penalty or forfeiture imposed or to enforce a liability created by law"

and Defendant HOA is not a "monied corporation ..." but a non-profit corporation. The statute is instructive because it echoes the rule that limitations of actions can not be plead as a defense by defendants who actively hide facts / documents which would have revealed the existence of tortious conduct, or whose published

documents lie about the facts. This statute states the "cause of action in the case not considered to have accrued until the discovery by the aggrieved party of the facts". Also, the ADDITIONAL acts cited in the Amended Complaint occurred less than three years ago.

(4) Defendant Rosemary Toth and the current putative Board took office no earlier than September, 2007, which is less than two (2) years prior to the filing of this Complaint.

(5) The misconduct of Defendants is NOT a contract issue but a tort created by statute. The Non-Profit Corporation Act states obligations of non-profit corporations towards their members and imposes standard of performance and conduct for the entity and the directors. These are thus subject to a different statute of limitations. South Carolina Statute 15-3-600 (Action for other relief) provides that

> "An action for relief not provided for in this chapter must be commenced within ten years after the cause of action shall have accrued."

Since the earlier cited 3 year limitation of Section 15-3-530(9) on actions against directors "of a monied corporation" does not apply to suits against directors of a non-profit corporation, such suits are governed by the ten (10) year statute of limitations.

5. Regarding the Third Defense – Waiver, Laches, Estoppel. In paragraph 17 of Defendants' Answer they state that "The Answering Defendants assert waiver, estoppel and laches as complete defenses to Plaintiff's claims."

a. As plead by Plaintiff supra, a bald faced assertion of these affirmative defenses without reference to specific acts (with dates and times) of Plaintiff is insufficient and should be disregarded by the Courts. This is clearly another Rule 11 violation by Defense Counsel for improper purpose, to delay or otherwise increase the cost of ligitation. It fails to meet the requirements of pleading already cited.

b. Waiver in general is the

(1) Expressed or implied voluntary and intentional relinquishment or abandonment of a legal advantage, claim, requirement, or right.

(2) Document (instrument) by which such abandonment or relinquishment is effected.

In pleading Waiver Defendants are required to cite what specific acts of Plaintiff are relied upon so that Plaintiff can adequately counter such an assertion. Rather than assert that Defendants' Answer constitutes an insufficient pleading, Plaintiff sees this claim by Defense Counsel on behalf of Defendants as having incorporated all the facts known or suspected by Defendants – which are none. Since Defense Counsel can not cite a single actual Plaintiff act or document constituting "waiver", the Court must reject this defense. Reference to the Complaint will adequately document that Plaintiff has doggedly sought to enforce the rights of the Homeowners, rather than undertaking any act to waive same. Since this action is plead as a class action, Defendants defense argues that each and EVERY homeowner "waived" his / her rights, which quite frankly is absurd.

c. Defendants have failed to assert what ACTs (including time and place) of Plaintiff constituted a "waiver" of rights to recover against Defamation, Invasion of Privacy, Intimidation / Harassment, A Breach of the Contract because of failure to act in Good Faith and with Fair Dealing, and failure to produce records.

d. Estoppel in general is the

Legal rule of evidence (and not a cause of action) which

(1) prevents a party from making an allegation or denial that contradicts what it had previously stated, or what has been legally established, as the truth,

(2) supports a claim for damages of the party that had a good-faith reliance on a misleading representation of another party.

In pleading "estoppel" Defendants are required to state what contradicts a prior legal finding to which Plaintiffs [1] were / are a party.

(1) Upon information and belief, there has never been any prior litigation involving the parties OR the causes resulting in findings of fact or of law announced in an Order of Court or Judgment. The only "truth" is that which this forum will find in this case. In addition, in a Complaint a Plaintiff is allowed to argue

contradictorily "in the alternative" – however Defendants have not shown any of this. If anything, the second definition of Estoppel supports the Plaintiff claims against Defendants, because the homeowners have not been required to execute due diligence but, since the Defendants are fiduciaries, the homeowners have been allowed to rely on that fact and to accept as true the bald faced lies stated by Defendants.

(2) Defendants have failed to assert what prior legal proceedings invoke Estoppel (including actual Orders of Court – there are none) estopping Plaintiff from recovering against Defendants on the Defamation, Invasion of Privacy, Intimidation / Harassment, A Breach of the Contract because of failure to act in Good Faith and with Fair Dealing, and failure to produce records causes of action.

e. Laches in general is

> **Neglect and unreasonable delay in the assertion of one's claims or rights. Courts expect reasonable diligence from a claimant, in addition to conscience and good faith. Under the legal doctrine of laches, they may refuse to enforce or recognize an individual's rights if he or she waits more than a reasonable length of time to assert them. Unlike the statute of limitations this doctrine, however, does not define 'reasonable time' but leaves its determination to the courts.**

It can be seen from the chronological history set out in the Amended Complaint that Plaintiff has exercised due diligence in promptly asserting Plaintiff's rights. Defendants have not asserted what alternative actions Plaintiff(s) were available to Plaintiff and which would have been effective to enforce his rights.

6. Regarding the Fourth Defense – "Good Faith".

a. In paragraph 19 of their Answer to the Amended Complaint Defense Counsel wrote, for Defendants, that

> **"Any and all actions undertaken by the Answering Defendants were undertaken in good faith and therefore, subject to the business judgment rule".**

b. The Business Judgment Rule, in general, is the

> **"Legal presumption that the management of a firm is acting in the firm's best interest and, therefore, its decisions are protected from judicial review. It protects the management from decisions that result**

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[1] **Plaintiffs as a class.**

> in loss or turn out to be wrong. If the management is found, however, to be in violation of its fiduciary duties, the rule does not apply and its activities come under the scrutiny of the courts."

c. The Business Judgment rule applies to derivative suits by shareholders to recover losses to a business entity. It is an "inside loss" concept. It is inapplicable to "outside injuries" – wrongs and injuries inflicted by Directors / Officers / or the Corporation on outsiders. Defamation, Invasion of Privacy, Intimidation / Harassment, A Breach of the Contract because of failure to act in Good Faith and with Fair Dealing, and failure to produce records are torts inflicted on an "outsider". The rule is clearly inapplicable and is frivolous.

d. "Good Faith" applies only if limited immunity existed as a matter of law, such as when an INDIVIDUAL reports TO POLICE a suspicion of a crime (or a psychologist or an attorney reports that his client is likely to commit a crime). In the action at bar the acts complained of were not reports to police, did not apply to contemporaneous acts, and the defendants had no independent knowledge of any facts to support their allegations. Also, "good faith" does not apply to a corporation, only to individual actors. A sustained campaign of defamation involving numerous persons and resources of several corporations (KA Diehl & McNair) does not qualify. The concept is inapplicable to invasion of privacy, and harassment.

7. Regarding the Fifth Defense – "Unclean Hands of Plaintiff.

a. In paragraph 21 of the Answer (to the Amended Complaint) Defense Counsel writes, for Defendants, that

> "The answering defendants assert unclean hands on the part of the Plaintiff as a complete defense to Plaintiff's claims."

b. The Unclean Hands Doctrine is also known as the Dirty Hands Doctrine. In general this is the

> Legal principle that a participant in a wrongful act may not recover damages resulting from it (may not sue the other participants in the wrongful act).

The problem with Defendants pleading this is that Plaintiff "never had the power" and was never consulted in any decisions or acts by the defendants as to the Added Counts – or as to any act by Defendants at all. Defendants never plead, in their

answer, which wrongful act Plaintifff was "unclean". To plead this Defense Counsel must describe with specificity as to time and place the facts. Since Defendants are not appearing pro se but have learned counsel, the Court is entitled to presume that the absence of such facts in their pleading is proof that they have no such supporing facts and that pleading this doctrine as an Answer is frivolous.

c. Unclean Hands is sometimes mistakenly cited where the "in pari delicto doctrine" applies, which is related. That doctrine is the

> Legal principle that if two parties in a dispute <u>are equally at fault</u> then the party in possession of the <u>contested property</u> gets to retain it (courts will not interfere with the status quo). It implies that if a party whose action (or a failure to act) precipitates breach of a contract, or which fails to take appropriate action (or takes inappropriate action) to limit or recoup a loss, may not claim damages.

It is noted that the Counter-complaint is silent as to any accusations that Plaintiff defamed Defendants or invaded their privacy. The Civil Rules require all counter-claims which might be raised, where the circumstances are known to Defendants – to be raised. To state the defense specific acts must be known when the defense is stated – they can't state it up front and hope they will find something later. The "Unclean Hands" defense is friviolous.

8. <u>Regarding the Sixth Defense – "Consent and / or Novation"</u>.

a. In paragrpah 23 of their Answer Defense Counsel wrote for Defendants that they "assert consent and / or novation is a complete defense to Plaintiff's claims".

b. <u>Consent</u>. In general, consent is the doctrine that a plaintiff made an informed decision to agree to a specific act by a defendant which could / would potentially injure the Plaintiff in some way. As with the other defenses, Defense Counsel has not met her burden to plead with specificity what this consists of and the absence of plead facts must be taken by the Court as an absence of facts, meriting the disregard by the Court of this defense. It is noted that Plaintiff never agreed to any of the terms of use applicable to the Diehl / HOA "Association Voice" web site.

c. <u>Novation</u> in general is

> The <u>substitution of a new contract</u> for an old one; or the substitution

of one party in a contract with another party.

(1) No "new contract" has been proposed in place of the old Covenants and Restrictions (CC&R's) Plaintiff has never signed any document with Defendants which could constitute permission to defame him, intimidate him, invade his privacy, ignore obligations under the Non-Profit Corporation Act. If Defendants are referring to Plaintiff "stepping into the shoes" of the original owner of Plaintiff's residence, this is equally inapplicable because the CC&R's gave no right to the Defendants to abuse the original owner in the same manner they have abused Plaintiff.

(2) The Rules of Pleading requires such specificity. There are no facts stated to support this defense – which is one based on documents, if applicable at all. It is a frivolous defense.

9. Regarding the Seventh Defense – Immunity.

a. In paragraph 25 of the Answer Defense Counsel writes that

> "The Defendant Rosemary Toth at all times has acted and continues to act within the powers and authorities given to her by the governing documents for the Defendant HOA and therefore is immune from any claims asserted by the Plaintiff".

b. First, it is a matter of disputed fact whether Toth is legally even a board member. Another parallel suit, The Villas v International Club Homeowenrs Association Inc (same defendant) also alleges that the board is illegally seated and all acts are "void or ultra vires".

c. The phrase "immune" (or variants) is absent from the covenants and bylaws. Defamation (a crime in South Carolina), invasion of privacy, intimidation / harassment (a crime in South Carolina) are by definition intentional torts not dischargable in bankruptcy and they are likewise "wilful" and "wanton". The immunity from suit is a limited immunity stated in SC Statute 33-31-834, and is inapplicable if the act was one which is one "arising from the conduct of the affairs of (the) ,,, corporations". It does not apply if the acts are not legitimately and demonstrably central to the purposes of the non-profit corporation. Clearly defmaation, invasion of privacy, and intimidation are not among the purposes of a homeowner association. The statute explicitly states that under the present

circumstances, said immunity does not apply because the "This immunity from suit is removed when the conduct amounts to wilful, wanton, or gross negligence."

d. Neither the bylaws nor the covenants provide any "power" or "authority" to misuse the resources of the HOA for private purposes – defamation, intimdation / harassment, invastion of privacy. The acts complained of are not functions or acts which a homeowners association can legitimately perform and is outside of the functions of the non-profit. The authority to expend HOA resources is not absolute; in this instance the misuse of resources is an abuse of fiduciary responsibility – and a crime under the non-profit act. If an officer acted outside of their authority the act then is a financial crime (SC Statute 16-13-xx), one which is likewise never immunized and which is a misdemeanor or felony.

e. It is noted that Defense Counsel has not asserted "immunity" for the second Defendant, the HOA itself. The statute explicitly precludes this as a defense to the non-profit HOA, the statute reading:

> "Nothing in this section may be construed to grant immunity to the not-for-profit cooperatives, corporations, associations, or organizations."

10. Regarding the Eighth Defense – "Privilege".

a. In paragraph 27 of their Answer defendants assert that "*Any and all matters asserted as to the Plaintiff are absolutely privileged in that all matters published are contained in Court decisions and opinions* "

b. Defendants published by postal mail, by email, and by web page a document entitled "List of Lawsuits Associated with Ronald E. Jarmuth". This was not a court document. It was admittedly created, authored and edited by Henrietta Golding at the expense of the HOA defendants and was published using the resources and assistance of the Diehl and HOA defendants, with the approval of the management of the HOA (the putative board) and Diehl.. It is not a "Court decision and opinoin". Defendants are completely responsible for insuring the accuracy of the contents. It contained lies and defamatory innuendo. For example, Plaintiff was never "terminated" from any job. The "List" is not privileged. As stated in the Amended Complaint, the "facts" are wrong so many times that it is clear that the author, an attorney, acted intentionally to defame by false statement and by

omission.

c. The law of republication is well established with regard to newspapers which have a broader immunity than private individuals. Even they must exercise care when republishing material from any other source ; it is well taken that they must use qualifiers such as "alleged" when repeating defamatory material found elsewhere – and the material must be newsworthy and applied to a public figure in a public context. In a suit alleging defamation it is necessary to repeat the phrases which the tort-feasor has stated which are alleged to be defamatory. These are simply allegations unless the defendant has proven the truth of the matter. Where no such proof has been sustained the allegations remain defamatory, no matter where published – even in court proceedings.

d. There is no privilege to repeat, without qualification, an unproven defamatory statement of another. That is why a republication from any source is subject to a suit in defamation. In instant situation there is no legitimate purpose to repeat, unqualified, the earlier defamations – the publications were obviously meant to defame Plaintiff. In many jurisdictions the publication of a complaint whose words are defamatory to a defendant is actionable when the answer of the defendant has not been made available so that readers can see both sides of the situation. In the "cases" selectively reported on by defendants there was no publication of any pleading from those cases which would demonstrate the falsity of the defamatory assertions. Defendants are not a news organization thus they can not be claiming they were researching sources to report "news". They simply republished an earlier defamatory set of statements which had never been even remotely proven and which a court had ruled were defamatory towards Plaintiff as a matter of law.

11. <u>Regarding the Nineth Defense – A "Privilege of Good Faith"</u>.

a. In paragraph 29 of their Answer to the Amended Complaint defendants write "*all communications regarding the Plaintiff were made in good faith and thereby are privileged*".

b. There is no "good faith" privilege with regards to defamation, harassment / intimidation, or invasion of privacy.

c. The Defense of "good faith" is applicable to fraud, which has not been

alleged here.

> **"good faith on the part of the person is inconsistent with intent to defraud or willfulness which is an essential part of the charges. The burden of proof is not on the person to prove his good faith, of course, since he has no burden to prove anything. The Government must establish beyond a reasonable doubt that the person acted with specific intent to defraud as charged. One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent even though his opinion is erroneous or his belief is mistaken; and, similarly, evidence which establishes only that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent."**

d. The defense of "good faith" is raised in CRIMINAL cases to defeat the requirement to find "mens rea" – the criminal mind. Mens Rea is inapplicable to a civil proceeding. In instant case the question is whether the acts were in and of themselves defamatory, intimidation / harassment, and / or an invasion of privacy. If so, the only remaining question is damages. The "mind" of the defendant enters only in the question of punitive damages; actual damages flow from the act, whether intentional or not.

e. The defense of "good faith" exists in the context of defamation only in circumstances where it is related to an immunity "as a matter of law" – as discussed earlier with regard to reporting suspicion of crime to law enforcement authorities (e.g., psychologists, attorneys, psychiatrists; and not to the public at large). In such circumstances it is only a limited immunity. It is not present here. The defense is frivolous.

12. Regarding the Tenth Defense – "Fair Comment"

a. In paragraph 31 of their answer to the amended complaint defendants write that "***Any and all statements with respect to the Plaintiff were fair comment and thereby protected.***"

b. Plaintiff is not a public figure. Defendants are not a newspaper. Defendants were not commenting on a statement made by Plaintiff regarding the homeowner association.

c. What defendants chose to write about was not a matter of public interest for the target audience, Plaintiff's neighbors. It was not matters of legitimate interest or with which neighbors would be legitimately concerned about.

d. Defendants' publications contained imputations of corrupt or dishonorable motives, and said imputations went far afield of HOA matters.

e. The comments were made maliciously and the inclusion of the selected details did not comment on HOA matters but were chosen to comment on alleged (false) private conduct of the Plaintiff.

f. The "good faith" assertion does not meet the standard set out in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), (U.S. Supreme Court).

g. Plaintiff refers to further exposition in end notes as to why this defense is inapplicable. [A].

13. Regarding the Eleventh Defense – "Neutral Reportage"

a. In paragraph 33 of their answer to the Amended Complaint Defendants wrote: *"Any and all statements with respect to the Plaintiff is neutral reportage and thereby protected"* Plaintiff is not a public figure and Defendants are not a news reporting organization and the media they chose is not even a news publication or periodical. They chose a letter, an email, and a web site (dedicated not to news reporting, or even to gossip, but to the presentation of HOA documents and homeowner private accounts).

b. In South Carolina the "Neutral Reportage" defense has only been recognized when asserted by actual newspapers in defense of publications regarding actual and provable public figures on matters of public importance. The two cases on point on this are Marvin Boone, v. Sunbelt Newspapers, Inc., d/b/a The Times and Democrat, filed November 19, 2001 in the SC Court of Appeals, and Wayne Elder v.The Gaffney Ledger in the SC Supreme Court, filed June 19, 2000. The defense is not recognized in all states and all courts.

c. The Association of the Bar of the City of New York, Committee on Communications and Media Law states that "a limited privilege exists to report important accusations made by prominent and responsible organizations against public figures.

d. In a major blow to the earlier and limited recognition by the federal second circuit of the "Neutral Reporting Privilege" – to news organizations, the California Supreme Court in Khawar v Globe International Inc, declined to

recognize a neutral report privilege for journalists who republish the defamatory statements of others. Khalid Khawar sued the Globe, a supermarket tabloid, for libel after it republished allegations by author Robert Morrow that Khawar was Robert Kennedy's actual assassin. The Court ruled that Khawar was a private figure and therefore the privilege did not apply. The story summarized allegations, in a book by former CIA agent. The Globe claimed that the neutral reporting privilege--first articulated by the U.S. Court of Appeals for the 2nd Circuit and recognized in a handful of jurisdictions--should protect the story as an accurate report of allegations about a public controversy made in a book written by an authoritative source. It also argued that Khawar had become a public figure because of the book, The California Supreme Court said that publication of the book, which sold very few copies and attracted no media attention other than the Globe's story, had not turned Khawar into a public figure. Once the court decided that Khawar was a private figure, the Globe could not argue that its nonjudgmental report about the book should be protected by the neutral reporting privilege

e. The U.S. Supreme Court has never held that the First Amendment requires recognition of the privilege, the California court noted. Whatever merits the privilege might have in encouraging dissemination of information about public controversies, it wouldn't justify defamatory remarks about private figures. Khawar's right to a good reputation outweighed any public interest in learning about allegations made by a source.

f. The defense is only available when it is made by (1) a responsible, prominent organization or individual; (2) it makes a serious charge on a matter of great public interest; (3) it is made against a person who is actually a public figure or public organization; and (4) the charge is accurately and dis-interestedly reported. None of these necessary elements are available to the defendants.

g. Examples where the defense has been sustained are: (1) A newspaper report that a state auditor accused a town trustee of faking a snow emergency to gain access to emergency funds. Watson v. Leach, 1996 Ohio App. LEXIS 2474 (Ohio Ct. App. 1996); (2) A newspaper report that a political campaign brochure accused the county's Italian-American judges of having mafia connections.

Celebrezze v. Netzley, 1988 Ohio App. LEXIS 3153 (Ohio Ct. App. 1988); (3) A newspaper report of a land developer calling another developer "unscrupulous" during a town meeting -- McCracken v. Gainesville Tribune, Inc., 146 Ga. App. 274, 275 (Ga. Ct. App. 1978).

14. Regarding the Twelfth Defense – "Litigation Privilege"

a. In paragraph 35 of their answer to the amended complaint the defendants wrote: "*Any and all facts relating to litigation involving the Plaintiff is privileged.*".

b. Each and every publication complained of was outside the pleadings. None of the publications recited a single word or communicated a single document of an actual pleading. What is complained of did not state the claim, offense, or defense involved but had no direct bearing on the litigation. The publications gave an implied "warning of danger concerning the behavior of Plaintiff" but the defendants had no reason to believe that there existed the likelihood of harm to an individual or to the public interest in the matters that were published.

c. In instant case there is no counter-claim for tortious conduct. A demand for attorney fees is not such a claim. The matter at hand at the time of the defamations / invasion of privacy / harassment was a set of claims by this Plaintiff against defendants for declaratory judgment as to covenants and contracts, for access to records, for a decision as to equitable ownership of property, and for derivative recovery of losses suffered by the HOA on account of the conduct of the putative board payable to the HOA itself. As a result of the putative "legal inquiry / research" by Golding no refereral was made to law enforcement and the "inquiry" did not direct itself at potential choses in action available to the defendants against plaintiff. It strictly was a "hunting expedition" to find and publish "dirt" on the Plaintiff and to harass Plaintiff into moving away and losing standing in the original complaint.

d. The publications objected to did not constitute any request for information from the homeowners to whom it was published nor did it consitute direct communcation with potential witnesses on the torts asserted against defendants.

e. The limits of the use of the "litigation privilege" to attempt to excuse defamation was addressed by the Supreme Court of Appeals of WV. In Collins and Southworth v Red Roof Inns Inc, Filed June 7, 2002, Certified Question from the US District Court for the Southern District of WV, the Court wrote: The litigation privilege

> "does not give free reign to attorneys to defame; rather the litigation privilege applies only when the communication is (1) relevant or has some relation to a proposed proceeding and (2) circumstances surrounding the communication have some relation to the proposed proceeding." *Samson Inv. Co. v. Chevaillier*, 1999 OK 19, 988 P.2d 327, 330 (citation omitted). *See also Simon v. Navon*, 951 F. Supp. 279, 282 ("[A] party cannot exploit the privilege as an opportunity to defame because the privilege is only available when the challenged remarks are pertinent to the [proposed] judicial proceeding. . . . [T]he privilege may be lost if publication of the defamatory information is unnecessary or unreasonable."); *Blevins v. W.F. Barnes Corp.*, 768 So. 2d 386, 393 (Ala. Civ. App. 1999) (concluding that libelous statements to state attorney general were not privileged because they were not material to proposed litigation); *Harris v. NCNB Nat'l Bank of North Carolina*, 85 N.C.App. 669, 675, 355 S.E.2d 838, 843 (noting, in applying absolute privilege to pre-litigation publication of defamatory matter, that "[t]he statements were clearly relevant to the issues and subject matter of the anticipated litigation, as disclosed by the unfiled complaint, in that the statements expressed the legal and factual reasons for NCNB's position with respect thereto.").
>
> "Lastly, we note that, in addition to the aforementioned constraints on a pre-litigation absolute privilege, the privilege attaches only when it is demonstrated that the defamatory matter was indeed published in anticipation of seriously considered litigation. The Restatement defines what is meant by its reference to communications "preliminary to a proposed judicial proceeding" as follows:
>
> As to communications preliminary to a proposed judicial proceeding, the rule stated in this Section applies only when the communication has some relation to a proceeding that is *contemplated in good faith and under serious consideration. The bare possibility that the proceeding might be instituted is not to be used as a cloak to provide immunity for defamation when the possibility is not seriously considered.*" Restatement (Second) Torts § 587, cmt. *e* (emphasis added). "

f. In litigation in South Carolina *Crowell v. Herring*, 301 S.C. 424, 392 S.E.2d 464 (1990) is instructive because the defamatory comments actually led to the investigation into Crowell's conduct that he had acted unlawfully. The court in

Crowell held that " utterance arising out of the judicial proceeding and having any reasonable relation to it, *including preliminary steps leading to judicial action of any official nature* provided those steps bear reasonable relation to it." adding that the statements must "initiate legitimate investigations or inquiries into others' supposed wrongdoings". The defamatory publications have no relation to this standard. and fits the glove of conduct excluded per the explanation given by the West Virginia court in Collins (op.cit.).

g. The defense is frivolous.

15. Regarding the Thirteenth Defense – "Indispensable and Necessary Parties".

a. In paragraph 13 of their answer, Defendants wrote: "*The Amended Complaint should be dismissed for the Plaintiff has failed to add indispensable and necessary parties*".

b. This is the sort of pleading which is insufficient to state a defense. Defendants have failed to state who the "indispensable and necessary parties" are and why they are indispensable TO PLAINTIFF obtaining complete relief. It may well be that they need to be joined BY DEFENDANT in third party practice – so that the defendants may recover in turn. That does not make them "indispensable and necessary parties" to Plaintiff's obtaining complete relief.

c. This defense may not be raised unless defense counsel has actual knowledge which she evidently has not shared – if such facts exist at all. The failure to state the necessary elements at the time the defense is raised waives this defense, as Plaintiff is entitled to "cure" the disability.

16. Regarding the Fourteenth Defense – "Ambiguity".

a. In paragraph 39 of their answer defendants write "Certain governing documents relating to the International Club community may be ambiguous and therefore, the answering Defendants assert ambiguity as a defense."

b. The governing documents are irrelevant to the additional torts raised in the amended complaint. The CC&R's are a contract for the use of land. The principal of "Good Faith and with Fair Dealing" is a concept which is independent of any provision of the CC&R's. Defamation, intimidation, invasion of privacy, and harassment are not subjects of sections of the CC&R's. The records access

provisions of the Non-Profit Corporation Act are unambiguous and well established.

c. "Ambiguity" may be applicable to what the covenants actually consist of, given the multiple amendments and a letter of 2003 possibly vacating the covenants as a whole – thus Plaintiff's request that the Court assist in clarifying this entire matter (of the CC&R's). But that is inapplicable to the tortuous conduct of Defendants.

d. In the matter of the defamatory words cited in the Frinzi court papers, the observations of the federal court that writing the objected to phrases is defamatory per se is completely unambiguous.

e. Defendants have not stated with particularity what is "ambiguous", which tort it relates to, and how it affected their conduct. "Ambiguity" is a frivolous defense in instant case.

17. Regarding the Fifteen Defense – None. Paragraphs 40 and 41 state an inapplicable "counter-claim" for attorney fees, without explanation of what theory of law entitles them to this. See Plaintiff's separate Answer to Counter-Claim raised in Answer to Amended Complaint.

[A] **END NOTE RELATIVE TO "GOOD FAITH" Defense**

***Gatley on Libel and Slander* adopts the following words to describe fair comment -- "... a defense to an action of libel or slander that the words complained of are fair comment on a matter of public interest. ... There are matters on which the public has a legitimate interest or with which it is legitimately concerned and on such matters, it is desirable that all should be able to comment freely and even harshly, so long as they do so honestly and without malice."**

In the *Law of Defamation in Canada*, author R. Brown comprehensively sets the defense out as follows:

"Everyone is entitled to comment fairly on matters of public interest. "Such comments are protected by a qualified privilege if they are found to be comments and not statements of fact, and are made honestly, and in good faith, about facts which are true on a matter of public interest.

"In order to be fair, it must be shown that the facts upon which the comment is based are truly stated and that the comment is an honest expression of the publisher's opinion relating to those facts. Where a comment imputes evil, base or

corrupt motives to a person, it must be shown that such imputations are warranted by, and could reasonably be drawn from those facts."

"The comment must be made on a matter of public interest. It could be of public interest because of the importance of the person about whom the comment is made, or because of the event, occasion or circumstances that give rise to the opinion."

"The protection may be lost if it is shown that the comment was made maliciously, in the sense that it originated from some improper or indirect motive, or if there was no reasonable relationship between the comment that was made and the public interest that it was designed to serve."

In *Creative Salmon Co. v Staniford*, Justice Gerow adopted these words:

"To be fair, a comment must be based on facts truly stated and must not contain imputations of corrupt or dishonorable motives on the person whose conduct is criticized, save insofar as such imputations are warranted by the facts."

"The onus is on Mr. Staniford (the Defendant) to prove that the statements were made honestly and fairly. In order to do so, he must satisfy both a subjective and objective test: subjective honesty of belief in the defamatory statement, that is, the comment is one which a fair minded person would honestly make on the facts proved; and objective fairness, in the sense that the comment is one which a person could honestly make on the basis of all the facts known to the defendant."

Lord Denning, in *London Artists Ltd. v. Littler*, added:

"In order to be fair, the commentator must get his basic facts right. The basic facts are those which go to the pith and substance of the matter."

The defense of "fair comment" in the U.S. since 1964 has largely been replaced by the ruling in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), (U.S. Supreme Court). This case relied on the issue of actual malice, which involves the defendant making a statement known at the time to be false, or which was made with a "reckless disregard" of whether the statement was true or false.

Each state writes its own laws of defamation, and the laws and previously decided precedents in each state vary. In many states, (including Alabama where the case of Times v. Sullivan originated), the "fair comment" defense requires that the "privilege of 'fair comment' for expressions of opinion depends on the truth of the facts upon which the comment is based" according to U.S. Supreme Court Justice Brennan who wrote the ruling in Times v. Sullivan.

If the facts are not absolutely true then the defendant could be sued by the plaintiff for damages, although the plaintiff would need to establish to the satisfaction of a jury that the statements were defamatory, and that the defendant published or made them.

"Actual malice" removes the requirement of being faultless in the reporting of the facts by the defendant.

The "actual malice" standard only applies when the statement is about a "public official", or a "public figure", or in some cases about a "matter of public interest".

---------- **End of End-Note** ----------

WHEREFORE, Plaintiff having considered each and every Defense asserted by Defense Counsel on behalf of Defendants, and having shown that for various reasons they are either without merit or are legally insufficient, the Plaintiff prays that the same be disregarded and that this case proceed.

By: _____

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

June 30, 2009

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2009-CP-26-3596
	)	
Ronald Jarmuth	)	
	)	
Plaintiff	)	PLAINTIFF'S ANSWER
	)	TO COUNTER-CLAIM
vs.	)	OF AMENDED COMPLAINT
	)	
The International Club	)	
Homeowners Association, Inc.,	)	
and	)	
Rosemary Toth	)	
	)	
Defendants	)	
	)	

1. Ronald Jarmuth ("Jarmuth") Plaintiff Pro Se, and COUNTER-DEFENDANT, ANSWERS Defendant's Counter-Claim stating the following Defenses and Objections:

2. In paragraph 41 of Defendants' "Answer and Counter-Claim" they demanded

> "an Order of the Court declaring that the Plaintiff is totally and solely liable for all attorney's fees, costs and expenses associated with the defense of this action"

and they sought

> "a judgment against the Plaintiff for all attorney's fees, costs and expenses incurred in this action to defend the claims of the Plaintiff."

which is exactly the same counter-claim they stated in their Answer and Counterclaim to the original complaint, only it was stated as their paragraph 19. Plaintiff begs the indulgence of the Court for repeating here the defense to the Counter-Claim of the original answer, but the counter-claim is as ridiculous now as it was earlier and the defense to said counter-claim is still the same.

3. Plaintiff denies committing any actionable tort against Defendants or failing to take any action (causing harm to Defendants) which Plaintiff was obligated to take. Defendants have not even alleged that Plaintiff committed any actionable tort

nor failed to take any action Plaintiff was required to take relating to Defendants nor have they alleged that they have been harmed by such "not plead" "non-event".

4. Plaintiff states as a Defense the SC Rule of Civil Procedure mandatory Defense 12(b)(6), that Defendants' Counter-Claim Rule 12(b) failed "*to state facts sufficient to constitute a cause of action*".

5. There is no contractual basis providing for Plaintiff to pay attorney fees, even if Plaintiff were to lose all aspects of this case. The only contracts which exist between the Parties is the putative Homeowners' Association (HOA) Covenants[1] and the HOA Bylaws.

a. The Covenants provides that the HOA is entitled to attorneys fees and court costs ONLY in conjunction with a successful lawsuit to collect unpaid assessments. The Defendants have not asserted such a counter-complaint and Plaintiff denies owing any unpaid HOA assessments. The operational part of the Covenant is quoted below:

> "ARTICLE VI - COVENANT FOR MAINTENANCE ASSESSMENTS
>
> Section 6.1. Creation of the Lien and Personal Obligation of Assessments. ... The annual and special Assessments, together with interest, costs of collection, and reasonable attorney's fees for the collection thereof, shall be a charge on the Unit and shall be a continuing lien upon the Unit and improvements thereon against which each such Assessment is made. Each such Assessment, together with interest, costs of collection, and reasonable attorney's fees for the collection thereof".

b. In exactly the same manner the HOA Bylaws likewise provide a basis for a homeowner to bear the attorney and court costs ONLY for lawsuits to collect unpaid assessments. The operational part of the Bylaws is quoted below:

> "12.2 Creation of Lien and Personal Obligation of Assessments.
>
> ...any such Assessments, together with late charges in an amount to

---

[1] Which Plaintiff's complaint argues ceased to exist as of November 3, 2003 per a signed agreement between the Declarants Plantation AD and the successor developers DR Horton and Sunbelt (Charles Flynn). Plaintiff's Complaint asks the Court to so rule in a Delcaratory Judgment.

be determined by the Board, from time to time, together with interest, court costs and reasonable attorneys' fees incurred to enforce or collect such Assessments"

"12.7 Liens.

... all sums assessed against any Unit pursuant to the Declaration, together with court costs, reasonable attorneys' fees, ... The continuing lien and equitable charge of such Assessment shall include ... all costs of collection (including reasonable attorneys' fees and court costs) and any other amounts provided or permitted here under or by law."

"13.4 Enforcement.

... Each Owner shall comply strictly with the By-Laws and the published rules and regulations of the Association adopted pursuant to the Declaration ... Should the Developer or the Association employ legal counsel to enforce any of the foregoing, all costs incurred in such enforcement, including court costs and reasonable attorneys' fees, shall be paid by the violating Owner"

6. There is no statutory or common law basis to obligate Plaintiff to pay Defense attorneys fees and costs. SC Rule of Civil Procedure Rule 8(a) requires Defendants, in their Counter-Claim, to provide "(2) a short and plain statement of the facts showing that the pleader is entitled to relief". Defendants instead have asserted a demand bare of any grounds, facts, or legal basis. Lacking any "meat", this demand fails even to state a new and untested legal theory for relief.

a. Defendants have not alleged that Plaintiff's complaint constitutes a frivolous lawsuit, and thus they have no entitlement to costs per SC Statute 15-36. They have not denied that a contract exists to which the parties to this lawsuit are parties to the contract (Covenants), and the very existence of the Declaratory Judgment Statute is proof per se that the Legislature has deemed a request that the Court interpret a contract to be "non-frivolous". Unlike Defendants' answer, the Complaint in detail states facts with exactitude, including time and place.

b. Attorneys fees are not allowable costs to the prevailing party per South Carolina Statute 17-37. Since Plaintiff initiated this case, he has already paid the initial court costs. Even if Plaintiff were to lose through summary judgment, there are no costs taxable to him under 17-37. The taxable costs are exclusively amounts paid into court or to non-parties.

c. The Common Law (which adopts the "American System" of litigation costs) lacks a basis to tax such costs on Plaintiff. The exceptions are where there is a contractual provision – lacking here – or a statutory provision – also lacking.

WHEREFORE, having answered the Counter-Claim, the Plaintiff / Counter-Defendant prays that the same be dismissed, and for such further relief as this Court may deem just and proper.

By: _____

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

June 30, 2009

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CIVIL ACTION NO.: 2009-CP-26-3596
Ronald Jarmuth,)	
)	
Plaintiff,)	**DEFENDANTS' THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC.'S AND ROSEMARY TOTH'S AMENDED ANSWER TO COMPLAINT AND FIRST AMENDMENT TO COMPLAINT AND COUNTERCLAIM**
)	
vs.)	
)	
The International Club Homeowners)	
Association, Inc.,)	
Rosemary Toth,)	
and K.A. Diehl & Associates,)	
)	
Defendants.)	
)	

HORRY COUNTY
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The Defendants, The International Club Homeowners Association, Inc. and Rosemary Toth, answering the Complaint and the First Amendment to the Complaint would respectfully show and allege unto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation contained in the Complaint and the First Amendment to the Complaint not hereinafter admitted, modified or qualified is denied and strict proof demanded thereof.

2. The allegations contained in Paragraph 1 of the Complaint are admitted except that Plaintiff's International Club property is subject, without qualification, to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (later amended to the Declaration of Covenants and Restrictions for International Club) (hereinafter "Declaration") filed in the Horry County Register of Deeds Office, Deed Book 2117, Page 1353 on February 8, 1999 and the Defendant HOA's Bylaws, as amended (collectively hereinafter referred to as "Governing Documents").

3. The allegations contained in Paragraphs 2, 3 and 4 of the Complaint are denied as stated, but it is admitted that the Defendant, The International Club Homeowners Association, Inc. (hereinafter referred to as "Defendant HOA") is non-profit corporation, organized under the laws of the State of South Carolina, the Defendant, Rosemary Toth was the elected President of the Defendant HOA and she is a co-owner of International Club property subject to the Declarations, and that said property is located in Horry County.

4. The allegations contained in Paragraphs 5, 6, 7, 8 and 9 of the Complaint are denied and strict proof demanded thereof.

5. The allegations contained in Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of the Complaint are denied in that the documents referred to therein speak for themselves.

6. The allegations contained in Paragraphs 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, and 87 of the Complaint are denied and strict proof demanded thereof.

7. The allegations contained in Paragraphs 88 and 89(a) of the First Amendment to the Complaint are admitted.

8. In answering Paragraph 89(b) of the First Amendment to the Complaint, the answering Defendants admit the address of the Defendant K.A. Diehl & Associates, Inc., that it is a corporation in good standing and that it has contracted with the Defendant The International Club Homeowners Association, Inc., but the remaining allegations are denied and strict proof demanded thereof.

9. With respect to the allegations in Paragraph 90 of the First Amendment to the Complaint, the Answering Defendants admit only that venue in Horry County is proper.

10. The allegations contained in Paragraphs 93, 95 and 98 of the First Amendment to the Complaint are admitted.

11. The allegations contained in Paragraphs 91, 92, 94, 97, and 99 of the First Amendment to the Complaint are denied and strict proof demanded thereof.

12. In answering Paragraph 96 of the First Amendment to the Complaint, it is only admitted that the Answering Defendants' Attorney did email a letter to the Plaintiff and the letter speaks for itself.

13. In answering Paragraph 100 of the First Amendment to the Complaint, the Answering Defendants do not have sufficient information as to the date the web-page became operational and therefore deny the same.

14. The allegations contained in Paragraphs 101, 102 and each of the 103 paragraphs, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 133, 134, 135, 136, 137, 138, 139, 140, 141, 143, 144, 145, 146, 147, 149, 151, 152, and 154 of the First Amendment to the Complaint are denied and strict proof demanded thereof.

15. With respect to the allegations contained in Paragraphs 130, 131, and 132 of the First Amendment to the Complaint, it is admitted that a letter was sent to homeowners in the International Club Community by K.A. Diehl and Associates.

16. In answering Paragraph 142 of the First Amendment to the Complaint, the said allegations therein constitute a legal conclusion but it is admitted that the Declaration of

Covenants and Restrictions, as amended, constitutes a contract with the homeowners in the International Club community.

17. In answering Paragraphs 148 and 153 of the First Amendment to the Complaint, the statutory provisions referenced therein speak for themselves.

18. In answering Paragraph 150 of the First Amendment to the Complaint, the Answering Defendants admit that a letter dated April 28, 2008 was emailed to Plaintiff and the letter speaks for itself.

SECOND DEFENSE

19. The allegations of the First Defense are incorporated herein and made a part and parcel hereof.

20. The Answering Defendants assert the applicable statutes of limitation as a complete defense to Plaintiff's claims.

THIRD DEFENSE

21. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof.

22. The Answering Defendants assert waiver, estoppel and laches as complete defenses to Plaintiff's claims.

FOURTH DEFENSE

23. The allegations of the First, Second and Third Defenses are incorporated herein and made a part and parcel hereof.

24. Any and all actions undertaken by the Answering Defendants were undertaken in good faith and therefore, subject to the business judgment rule.

FIFTH DEFENSE

25. The allegations of the First, Second, Third and Fourth Defenses are incorporated herein and made a part and parcel hereof.

26. The Answering Defendants assert unclean hands on the part of the Plaintiff as a complete defense to Plaintiff's claims.

SIXTH DEFENSE

27. The allegations of the First, Second, Third, Fourth and Fifth Defenses are incorporated herein and made a part and parcel hereof.

28. The Answering Defendants assert consent and/or novation as a complete defense to Plaintiff's claims.

SEVENTH DEFENSE

29. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Defenses are incorporated herein and made a part and parcel hereof.

30. The Defendant, Rosemary Toth, at all times, has acted and continues to act within the powers and authorities given to her by the Governing Documents for the Defendant HOA and therefore, is immune from any claims asserted by the Plaintiff.

EIGHTH DEFENSE

31. The allegations of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses are incorporated herein and made a part and parcel hereof.

32. Any and all matters asserted as to the Plaintiff are absolutely privileged in that all matters published are contained in Court decisions and opinions.

NINTH DEFENSE

33. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eight Defenses are incorporated herein and made a part and parcel hereof.

34. Any and all communications regarding the Plaintiff were made in good faith and thereby are privileged.

TENTH DEFENSE

35. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight and Ninth Defenses are incorporated herein and made a part and parcel hereof.

36. Any and all statements with respect to the Plaintiff were fair comment and thereby protected.

ELEVENTH DEFENSE

37. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth and Tenth Defenses are incorporated herein and made a part and parcel hereof.

38. Any and all statements with respect to the Plaintiff is neutral reportage and thereby protected.

TWELFTH DEFENSE

39. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth and Eleventh Defenses are incorporated herein and made a part and parcel hereof.

40. Any and all facts relating to litigation involving the Plaintiff is privileged.

THIRTEENTH DEFENSE

41. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eight, Ninth, Tenth, Eleventh and Twelfth Defenses are incorporated herein and made a part and parcel hereof.

42. The First Amendment to the Complaint should be dismissed for the Plaintiff has failed to add indispensable and necessary parties.

FOURTEENTH DEFENSE

43. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Defenses are incorporated herein and made a part and parcel hereof.

44. Certain governing documents relating to the International Club community may be ambiguous and therefore, the answering Defendants assert ambiguity as a defense.

FIFTEENTH DEFENSE

45. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth Defenses are incorporated herein and made a part and parcel hereof.

46. The Plaintiff's claims are barred, in whole or in part, by the Plaintiff's payment of assessments and fines to Defendant HOA.

SIXTEENTH DEFENSE
AND COUNTERCLAIM

47. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, and Fifteenth Defenses are incorporated herein and made a part and parcel hereof.

48. Upon the dismissal of Plaintiff's claims, the Defendants seek an Order of the Court declaring that the Plaintiff is totally and solely liable for all attorney's fees, costs and expenses associated with the defense of this action and therefore seek a judgment against the Plaintiff for all attorney's fees, costs and expenses incurred in this action to defend the claims of the Plaintiff.

SEVENTEENTH DEFENSE
AND SECOND COUNTERCLAIM

49. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, and Sixteenth Defenses are incorporated herein and made a part and parcel hereof.

50. The Defendant HOA is a non-profit corporation organized under and existing by virtue of the laws of the State of South Carolina.

51. Upon information and belief, the Plaintiff, Ronald Jarmuth, is a citizen and resident of the State of South Carolina.

52. Upon information and belief, the Plaintiff, Ronald Jarmuth, owns Lot 12 of the Pebble Creek at the International Club ("Property").

53. The Property is located in Horry County, South Carolina, and this Court has jurisdiction over both the Property and the parties to this action.

54. As the owner of the Property, the Plaintiff is subject to the Governing Documents.

55. The provisions of the Governing Documents provide that the Defendant HOA governs the International Club subdivision.

56. Section 7.2 of the Declaration provides:

> "Prior Review of All Plans. No building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement...shall be commenced, erected, or maintained upon any portion of the Subdivision, nor shall any exterior addition or change be made until the plans and specifications...showing the grading, filling nature, kind, size, shape, height, materials, color and location of the same shall have been submitted to and approved in writing as to the harmony of the exterior design and location in relation to the surrounding structures and topography by the Developer...Provided however, that upon Developer's selling of not less than 3,650 of the Units in the Subdivision, this right of approval shall be transferred to an Architectural Review Board of the Association."

57. The Architectural Review Board for the Defendant HOA holds the architectural review rights pursuant to the Governing Documents. All Owners within the International Club apply to the Architectural Review Board for approval of plans and specifications for improvements constructed within the International Club.

58. The Defendant HOA enacted Architectural Guidelines in 2005 and has amended them from time to time.

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

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

61. The Defendant HOA, through its Architectural Review Board, sent notice to the Plaintiff that he violated the Governing Documents and the Architectural Guidelines by constructing improvements on the Property without approval from the Architectural Review Board and that the violation subjected him to fines.

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

63. Pursuant to Section 7.4 of the Declaration:

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

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

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

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

67. Although the Plaintiff's application for the fence and the brick wall were denied and the Defendant HOA directed the Plaintiff to remove the brick wall, the Plaintiff failed and refused to remove the brick wall constructed.

68. The brick wall is a continuing violation of the Governing Documents and the Defendant HOA's Architectural Guidelines, and the Plaintiff has been fined accordingly.

69. Moreover, the Plaintiff has failed and refused to acknowledge the validity of the Governing Documents, the Architectural Guidelines, and the authority of the Defendant HOA and the Architectural Review Board to enforce the same.

70. Pursuant to the provisions of the Governing Documents, Plaintiff is responsible for paying assessments, fines, late fees, interest and other related charges to the Defendant HOA.

71. Provisions of the Governing Documents further provide that if the Plaintiff does not pay the assessments, fines or other related charges, Plaintiff is responsible for all costs of collection, including reasonable attorney's fees, that are incurred by the Defendant HOA.

72. The Plaintiff, as owner of the Property, was and is assessed regular assessments, fines, late fees, interest and other related charges. As of August 26, 2011, the Plaintiff owes One Thousand One Hundred Thirty Two and 00/100 ($1,132.00) Dollars plus the costs of collections for his continuing violation of the brick wall, which the Plaintiff has not paid despite due demand being made upon him to pay said assessments and fines.

73. The Plaintiff, as current owner of the Property, continues to incur fines, fees and additional related charges throughout the pendency of this case during his continued ownership of the Property.

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

75. Plaintiff breached the terms of the Governing Documents and the Architectural Guidelines, and therefore, the Defendant HOA is entitled to a judgment in an amount to be determined by this Court, together with costs and attorney's fees incurred in bringing this action as well as an order requiring the Plaintiff to comply with the Governing Documents and the Architectural Guidelines and to remove the brick wall from the Property.

WHEREFORE, having answered the Plaintiff's Complaint and the First Amendment to the Complaint, the Defendants hereby pray as follows:

a. the Plaintiffs' Complaint and First Amendment to the Complaint be dismissed with prejudice;

b. judgment against the Plaintiff in an amount to be determined by the Court;

c. an order requiring Plaintiff to comply with the Defendant HOA's Governing Documents and Architectural Guidelines and to remove the brick wall from the Property in violation of the Governing Documents and Architectural Guidelines;

d. this Court award reasonable attorney's fees and costs to the Defendant HOA; and

e. for such other and further relief as this Court deems just and proper.

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Attorneys for the Defendants

Myrtle Beach, South Carolina
October 24, 2011

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	CIVIL ACTION NO.: 2009-CP-26-3596
Ronald Jarmuth,)	
)	
Plaintiff,)	**DEFENDANT K.A. DIEHL & ASSOCIATES, INC.'S ANSWER TO COMPLAINT AND FIRST AMENDMENT TO COMPLAINT**
)	
vs.)	
)	
The International Club Homeowners)	
Association, Inc.,)	
Rosemary Toth,)	
and K.A. Diehl & Associates, Inc.)	**RECEIVED**
)	**DECEMBER 17, 2011**
Defendants.)	

2011 OCT 12 PM 1:
CLAIRE HUGGINS-WOOD
CLERK OF COURT
COUNTY

The Defendant, K.A. Diehl & Associates, Inc. (hereinafter "Answering Defendant") answering the Complaint and the First Amendment to the Complaint would respectfully show and allege unto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation contained in the Complaint and the First Amendment to the Complaint not hereinafter admitted, modified or qualified is denied and strict proof demanded thereof.

2. The allegations contained in Paragraph 1 of the Complaint are admitted except that Plaintiff's International Club property is subject, without qualification, to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (later amended to the Declaration of Covenants and Restrictions for International Club) (hereinafter "Declaration") filed in the Horry County Register of Deeds Office, Deed Book 2117, Page 1353 on February 8, 1999 and the Defendant HOA's Bylaws, as amended (collectively hereinafter referred to as "Governing Documents").

3. The allegations contained in Paragraphs 2, 3 and 4 of the Complaint are denied as stated, but it is admitted that the Defendant, The International Club Homeowners Association, Inc. (hereinafter referred to as "Defendant HOA") is non-profit corporation, organized under the laws of the State of South Carolina, the Defendant, Rosemary Toth was the elected President of the Defendant HOA and she is a co-owner of International Club property subject to the Declaration, and that said property is located in Horry County.

4. The allegations contained in Paragraphs 5, 6, 7, 8 and 9 of the Complaint are denied and strict proof demanded thereof.

5. The allegations contained in Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, and 24 of the Complaint are denied in that the documents referred to therein speak for themselves.

6. The allegations contained in Paragraphs 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, and 87 of the Complaint are denied and strict proof demanded thereof.

7. The allegations contained in Paragraphs 88 and 89(a) of the First Amendment to the Complaint are admitted.

8. In answering Paragraph 89(b) of the First Amendment to the Complaint, the Answering Defendant admits its address, that it is a corporation in good standing, and that it has contracted with the Defendant HOA, but the remaining allegations are denied and strict proof demanded thereof.

9. With respect to the allegations in Paragraph 90 of the First Amendment to the Complaint, the Answering Defendant admits only that venue in Horry County is proper.

10. The allegations contained in Paragraphs 93, 95 and 98 of the First Amendment to the Complaint are admitted.

11. The allegations contained in Paragraphs 91, 92, 94, 97, and 99 of the First Amendment to the Complaint are denied and strict proof demanded thereof.

12. In answering Paragraph 96 of the First Amendment to the Complaint, it is only admitted that the Defendant HOA's attorney did email a letter to the Plaintiff and the letter speaks for itself.

13. In answering Paragraph 100 of the First Amendment to the Complaint, the Answering Defendant does not have sufficient information as to the date the web-page became operational and therefore denies the same.

14. The allegations contained in Paragraphs 101, 102 and each of the 103 paragraphs, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 133, 134, 135, 136, 137, 138, 139, 140, 141, 143, 144, 145, 146, 147, 149, 151, 152, and 154 of the First Amendment to the Complaint are denied and strict proof demanded thereof.

15. With respect to the allegations contained in Paragraphs 130, 131, and 132 of the First Amendment to the Complaint, it is admitted that a letter was sent to homeowners in the International Club Community by the Answering Defendant on behalf of the Defendant HOA.

16. In answering Paragraph 142 of the First Amendment to the Complaint, the said allegations therein constitute a legal conclusion but it is admitted that the Declaration of Covenants and Restrictions, as amended, constitutes a contract with the homeowners in the International Club community.

17. In answering Paragraphs 148 and 153 of the First Amendment to the Complaint, the statutory provisions referenced therein speak for themselves.

18. In answering Paragraph 150 of the First Amendment to the Complaint, the Answering Defendant admits that a letter dated April 28, 2008 was emailed to Plaintiff and the letter speaks for itself.

SECOND DEFENSE

19. The allegations of the First Defense are incorporated herein and made a part and parcel hereof.

20. The Answering Defendant asserts the applicable statutes of limitation as a complete defense to Plaintiff's claims.

THIRD DEFENSE

21. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof.

22. The Answering Defendant asserts waiver, estoppel and laches as complete defenses to Plaintiff's claims.

FOURTH DEFENSE

23. The allegations of the First, Second and Third Defenses are incorporated herein and made a part and parcel hereof.

24. Any and all actions undertaken by the Answering Defendant were undertaken in good faith and therefore, subject to the business judgment rule.

FIFTH DEFENSE

25. The allegations of the First, Second, Third and Fourth Defenses are incorporated herein and made a part and parcel hereof.

26. The Answering Defendant asserts unclean hands on the part of the Plaintiff as a complete defense to Plaintiff's claims.

SIXTH DEFENSE

27. The allegations of the First, Second, Third, Fourth and Fifth Defenses are incorporated herein and made a part and parcel hereof.

28. The Answering Defendant asserts consent and/or novation as a complete defense to Plaintiff's claims.

SEVENTH DEFENSE

29. The allegations of the First, Second, Third, Fourth, Fifth and Sixth Defenses are incorporated herein and made a part and parcel hereof.

30. The Defendant, Rosemary Toth, at all times, has acted and continues to act within the powers and authorities given to her by the Governing Documents for the Defendant HOA and therefore, is immune from any claims asserted by the Plaintiff.

EIGHTH DEFENSE

31. The allegations of the First, Second, Third, Fourth, Fifth, Sixth and Seventh Defenses are incorporated herein and made a part and parcel hereof.

32. Any and all matters asserted as to the Plaintiff are absolutely privileged in that all matters published are contained in Court decisions and opinions.

NINTH DEFENSE

33. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh and Eighth Defenses are incorporated herein and made a part and parcel hereof.

34. Any and all communications regarding the Plaintiff were made in good faith and therefore are privileged.

TENTH DEFENSE

35. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Defenses are incorporated herein and made a part and parcel hereof.

36. Any and all statements with respect to the Plaintiff were fair comment and thereby protected.

ELEVENTH DEFENSE

37. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and Tenth Defenses are incorporated herein and made a part and parcel hereof.

38. Any and all statements with respect to the Plaintiff is neutral reportage and thereby protected.

TWELFTH DEFENSE

39. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Defenses are incorporated herein and made a part and parcel hereof.

40. Any and all facts relating to litigation involving the Plaintiff are privileged.

THIRTEENTH DEFENSE

41. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Defenses are incorporated herein and made a part and parcel hereof.

42. The First Amendment to the Complaint should be dismissed for the Plaintiff has failed to add indispensable and necessary parties.

FOURTEENTH DEFENSE

43. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth and Thirteenth Defenses are incorporated herein and made a part and parcel hereof.

44. Certain governing documents relating to the International Club community may be ambiguous and therefore, the Answering Defendant asserts ambiguity as a defense.

FIFTEENTH DEFENSE

45. The allegations of the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, and Fourteenth Defenses are incorporated herein and made a part and parcel hereof.

46. The Plaintiff's claims are barred, in whole or in part, by the Plaintiff's payment of assessments and fines to Defendant HOA.

WHEREFORE, having answered the Plaintiff's Complaint and the First Amendment to the Complaint, the Answering Defendant hereby pray as follows:

a. the Plaintiffs' Complaint and First Amendment to the Complaint be dismissed with prejudice;

b. this Court award reasonable attorney's fees and costs to the Answering Defendant; and

c. for such other and further relief as this Court deems just and proper.

McNair Law Firm, P.A.

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athompson@mcnair.net
Attorneys for the Defendants K.A. Diehl & Associates, Inc., International Club Homeowners' Association, Inc., and Rosemary Toth

Myrtle Beach, South Carolina
October 12, 2011

CERTIFICATE OF SERVICE

I, Donna M. Brady, an employee for the McNair Law Firm, P.A., attorneys for the Defendant The International Club HOA in the above-captioned action, certify that I have this the 12th day of October, 2011, served the below listed document(s) to the addressee listed at his address of record, via first class U.S. Mail, with sufficient postage attached as follows:

Document(s):

- Defendant K.A. Diehl & Associates, Inc.'s Answer to Complaint and First Amendment to Complaint; and
- Certificate of Service.

Addressee:

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
Email: ronaldjarmuth@msn.com

Donna M. Brady

FILED
HORRY COUNTY
2011 OCT 12 PM 1:12
MELANIE HUGGINS-WARD
CLERK OF COURT

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	Civil Action No. 2009-CP-26-3596
	)	
Ronald Jarmuth	)	
Plaintiff	)	PLAINTIFF'S ANSWER
	)	TO COUNTER-CLAIM
vs.	)	OF DEFENDANT'S AMENDED
	)	COMPLAINT
The International Club	)	
Homeowners Association, Inc.,	)	AND ASSERTION OF
et al	)	COUNTER – CLAIM BY
Defendants	)	PLAINTIFF
	)	

Plaintiff / Counter-Defendant Ronald Jarmuth (hereafter referred to as "C-Def") answers the Counter – Complaint stated in Defendants' / Counter – Plaintiff's (hereafter referred to as "C-Pl") Amended Answer with Counter-Complaint filed with the Court on or about October 24, 2011, which Counter – Complaint was addressed at a hearing held December 7, 2011 on C-Def's SCRCivP Rule 12(b)(6) Motion – and for which, as of the date of the filing of this pleading, no Order of Court has yet issued. [1]

The Counter – Complaint is set out in paragraphs 50 through 74 of the Amended Answer, thus no response is required to the allegations of the earlier paragraphs which are not part of the Counter – Complaint as stated. To the extent that any earlier paragraphs can be read as being part of the Counter – Complaint, the allegations of the earlier numbered paragraphs are denied.

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified, or qualified is denied and strict proof demanded thereof.

2. Plaintiff admits that "the Defendant HOA is a non-profit corporation organized under and existing by virtue of the laws of the State of South Carolina" as stated in paragraph 50 of the Counter – Complaint. Plaintiff admits the allegation of paragraph 51 that "the Plaintiff, Ronald Jarmuth, is a citizen and resident of the State of South

Carolina". Plaintiff admits the allegation of paragraph 52 that "the Plaintiff, Ronald Jarmuth, owns Lot 12 of the Pebble Creek at the International Club ("Property")" but clarifies that said lot is within the "International Club Planned Unit Development, formerly known as Lantana Planned Unit Development, and formerly known and initially approved as the Murrells Inlet Golf Plantation. Plaintiff admits the jurisdictional allegations of paragraph 53.

3. Plaintiff admits the allegations of paragraph 54 that "as the owner of the Property, the Plaintiff is subject to the Governing Documents" but clarifies that the use of the property, not the person, is subject to the Covenants running with the land, as amended, specifically including those amendments to the Covenants which were properly enacted. C-Def explicitly rejects any allegation that the putative Bylaws of the International Club Homeowners Association have any legal effect, asserting that no Bylaws of C-Pl HOA exist with any legal effect, and further asserting that any acts of C-Pl HOA purporting to rely on any such Bylaws or rules are ultra-vires. C-Def asserts that Amendments two (2) through five (5) were enacted in violation of the South Carolina Non-Profit Corporation Act and of the Covenants, and are thus ultra-vires and ineffective.

4. C-Def denies and rejects the allegation of paragraph 55 that "the provisions of the Governing Documents provide that the Defendant HOA governs the International Club subdivision" asserting instead that the Murrells Inlet Golf Plantation Association, Inc (MIGPA) is the HOA which properly governs the PUD per the legally effective covenants. C-Def demands strict proof.

5. C-Def denies the allegation of paragraph 56 that "Section 7.2 of the Declaration provides" for anything, since said Section was "waived" by the First Amendment to the Covenants (the only legally effective Amendment to the Covenants). Plaintiff states further that, per Black's Legal Dictionary, first and any later editions, "waived" equates to "deleted" and alternatively means that any rights or obligations anyone might suffer per Section 7.2 became ineffective and legally incapable of being raised as of the date of the First Amendment. C-Def demands strict proof.

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[1] The Court, from the bench, stated it's intention to deny C-Def's Rule 12(b)(6) motion – and directed that counsel for C-Pl prepare and submit to the Court an Order following the December 7, 2011 hearing. No such order has been served on C-Def to-date (December 20, 2011).

6. C-Def denies and rejects the allegations of paragraph 57, since those allegations depend on the legally non-existent Section 7.2 of the Covenants.

7. C-Def denies and reject the allegations of Paragraph 58 that Defendant HOA legally enacted any "Architectural Guidelines" prior to the dates of the events complained of in the Counter – Complaint: September through October, 2010 and demands strict proof.

8. C-Def admits the allegations of paragraph 59 to the extent that C-Def filed "Courtesy" applications to the C-Pl putative Architectural Review Board (ARB), said courtesy applications explicitly clarifying that there was no provision under the Covenants requiring such application. C-Def further states that the application in question began with the statement that

> "This document set is provided the ARB of the International Club HOA without waiving any objections as to the authority of said ARB or said HOA in this matter. This qualification is made so as not to implicate potential HOA assertions of "waiver" or "estoppel". ... I note that Amendment #1 of the Covenants removed all "Architectural Controls" as well as the requirement to seek prior approval from and ARB for any modifications. I also note that the same Amendment explicitly deleted all controls over fences".

9. C-Def denies the allegation of paragraph 60 that C-Def

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

C-Def asserts that there is no "brick wall" upon the property and that the lawn edging was explicitly applied for and approved as "red brick edger's for both (the area upon which a fence would ultimately be erected, which did not happen, and in the flower bed, which was built. C-Def asserts that the landscape drawing overlaying a survey of the property, which was submitted as required, depicted a line of "Brick Edging" running from the curb to C-Def's rear property line. Said Brick-Edging was approved by C-Pl's ARB thus C-Pl is complaining about the erection of a line of Brick Edging which C-Pl approved and calling it a "Fence" because the "Fence" was not approved – disregarding that neither a wall nor a fence was ever built.

10. C-Def asserts that the allegations of paragraph 61 violate the requirements of SCRCivP Rule 9(f) in that no specific date of the alleged correspondence is stated in the counter – complaint. Answering further, C-Def denies that he received any letter relating to any "wall or fence" prior to the courtesy meetings of the ARB. C-Def asserts that the

situation on the ground remains the same as before that courtesy application and act of the ARB which on October 8, 2010 approved what is actually on the ground. C-Def denies that the ARB

> "sent notice to the Plaintiff that he violated the Governing Documents and the Architectural Guidelines by constructing improvements on the Property without approval from the Architectural Review Board and that the violation subjected him to fines.".

11. C-Def denies the allegations of paragraph 62 that he applied to the ARB for approval of anything, stating further that, as explained supra, a "courtesy" set of documents was submitted.

12. C-Def denies the allegations of paragraph 63, since that paragraph asserts the legal viability of Section 7.4 of the Covenants, which section was "waived" in paragraph #11 of Amendment #1 to the Covenants, dated May 10, 2000, at Deed Book 2258 Page 1454. C-Def demands strict proof.

13. C-Def admits the allegations of paragraph 64 to the extent that it states that "The Architectural Review Board approved the Plaintiffs request for the flower bed and edging". Again, paragraph 64 is defective in that if fails to allege the date of the alleged event as required by SCRCivP Rule 12(f). C-Def denies that the ARB denied any request to construct a "wall" as no such request was ever lodged. C-Def denies that he received, at any time, any correspondence which asserted that any disapproval was founded on the basis that any C-Def request of action "did not comply with the general scheme of development for the International Club." C-Def demands strict proof.

14. C-Def denies the allegation of paragraph 65 than C-Pl "demanded that the brick wall be removed from the Property". C-Def demands strict proof.

15. C-Def admits the allegations of paragraph 66 to the extent that he paid, "under protest", a fine so as to give C-Def "liquidated direct damages" under which he could sue C-Pl. C-Def further states that said "fine" was never demanded for constructing any "brick wall" or "fence". C-Def denies that he "attempted to sue the Defendant HOA", stating the he "did" sue the C-Pl.

16. C-Def denies the allegations of paragraph 67, in as much as they are directed at the existence of a disapproved "brick wall". C-Def further states that he never "refused" to do anything; he merely ignored C-Pl and sued to enforce his rights and to enjoin C-Pl from

asserting non-existent rights. Likewise C-Def denies the allegations of paragraph 68 because it too construes the approved "brick edging" as a "brick wall" which was never applied for nor disapproved.

17. C-Def admits the allegations of paragraph 69 that he has "failed and refused to acknowledge the validity of the Governing Documents, the Architectural Guidelines, and the authority of the Defendant HOA and the Architectural Review Board to enforce the same" which is not an actionable position but rather protected speech under the First Amendment to the United States Constitution and protects C-Def from allegations of "waiver and estoppel".

18. C-Def denies the allegations of paragraph 70 and demands strict proof.

19. C-Def denies any allegation of paragraph 71 that the Covenants provide for "attorneys fees" and "costs of collection" for anything other than the enforcement of an explicit provision of the covenants, and further explains that the rules which the Covenants provide for are limited to "regulations governing bodies of water, water courses and other Common Areas".

20. As to the allegations of paragraph 72, C-Def denies the capacity of C-Pl HOA to exercise any right granted by the Covenants to the Murrells Inlet Golf Plantation Association, the HOA for the PUD. Answering further, C-Def admits that the legitimate HOA has the authority under the Covenants to determine and collect assessments for the operation of the common property. As to any other matter, C-Def denies it and demands strict proof. C-Def denies any allegation that he owes C-Pl anything. C-Def likewise denies the allegations of paragraph 73. As to the allegations of paragraph 74, the prior and current Board of the C-Pl HOA is the direct cause of any expense to the HOA because it is frivolously attempting to enforce non-existent ("waived") covenants putatively prohibiting an action ("brick wall") which never took place and relating to "brick edging" which said C-Pl's ARB approved. C-Def asserts further that said former and current Board Members of the HOA should be held personally liable for said expenses.

21. C-Def denies the allegations of paragraph 75 that he "breached the terms of the Governing Documents" which are the legally effective covenants. C-Def further asserts that at the time of the alleged events there were no legally effective ARB Guidelines. C-Def demands strict proof to the contrary. That being the case, C-Def denies that "the

Defendant HOA is entitled to" anything.

SECOND DEFENSE

22. Res Judicata. C-Def demands that the Court dismiss the Counter – Complaint in it's entirety because the events complained of are part and parcel of Plaintiff's under-lying Complaint and the Rules provide that any damage which Defendant might have suffered from the same events must be plead as a Counter – Complaint at the time the original answer is filed, or shall be lost forever through res-judicata.

THIRD DEFENSE

23. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof. The C-Pl lacks standing to bring the claims asserted in the Counter- Complaint, in that the Defendant is not the HOA for the PUD per the covenants.

FOURTH DEFENSE

24. The allegations of the First through Third Defenses are incorporated herein and made a part and parcel hereof. The C-Pl's claims should be dismissed because they are barred by the doctrines of Collateral Estoppel and further that the C-Pl has failed to follow it's own putative rules.

FIFTH DEFENSE

25. The allegations of the First through Fourth Defenses are incorporated herein and made a part and parcel hereof. The answering C-Def asserts the Doctrines of Estoppel, Waiver, Consent, and Laches as complete affirmative defenses to the allegations contained in the Counter - Complaint.

SIXTH DEFENSE

26. The allegations of the First through Fifth Defenses are incorporated herein and made a part and parcel hereof. There is no underlying contractual basis which grants the C-Pl any rights under the Covenants since what would have been the applicable covenants were "waived" through the First Amendment to the Covenants filed with the Recorder of Deeds on May 10, 2000 at Deed Book 2258 Pages 1453 et seq. Further, there is no relief which the Court can grant to the C-Pl because the alleged "brick wall" does not exist and thus the Court can nor require it's removal. The C-Pl has not plead for a restraining order either.

SEVENTH DEFENSE

27. The allegations of the First through Sixth Defenses are incorporated herein and made a part and parcel hereof. All actions of the C-Def were undertaken in good faith and in accordance with the Covenants. C-Def strictly complied with the existing and legally effective covenants and rules.

EIGHTH DEFENSE

28. The allegations of the First through Seventh Defenses are incorporated herein and made a part and parcel hereof. The C-Pl's claims are barred by the doctrine of equitable estoppel.

NINTH DEFENSE

29. The allegations of the First through Eighth Defenses are incorporated herein and made a part and parcel hereof. The counter – claim is barred by the doctrine of Novation through the action of the First Amendment to the Covenants.

TENTH DEFENSE

30. The allegations of the First through Ninth Defenses are incorporated herein and made a part and parcel hereof. The C-Pl's claims are barred by the doctrine of unclean hands.

ELEVENTH DEFENSE

31. The allegation of the First through Tenth Defenses are incorporated herein and made a part and parcel hereof. The Counter – Complaint is barred by the doctrine of laches.

TWELFTH DEFENSE

32. The allegation of the First through Eleventh Defenses are incorporated herein and made a part and parcel hereof. The Counter – Complaint was filed to harass the Plaintiff and for other improper purpose, in further violation of the South Carolina Rules of Ethical Practice applicable to Defense Counsel.

COUNTER – CLAIM BY PLAINTIFF

33. Plaintiff asserts a compulsorily counter – claim as required by SCRCivP Rule 13(a) and as allowed by Rule 15(a). Plaintiff was effectively served an Answer / Counter – Claim ("pleading") following the denial of Plaintiff's Rule 12(b)(6) Motion. Rule 15(a) provides that

"A party may amend his pleading ... within 30 days after a responsive pleading is served"

34. Through the service on April 13, 2009 of Plaintiff's Complaint styled Jarmuth v HOA et al in this Court, 2009-CP-26-3596, Defendants have been on actual notice of the deletion of those provisions of the Covenants upon which Defendants depend for the filing of their Counter – Complaint. Since at least 2006 the Defendants have posted that First Amendment to the Covenants on it's web-site and have referred to it on numerous occasions. The knowing assertion of rights through a Counter - Complaint which rights were obviously deleted years prior to the assertion of those rights constitutes a Frivolous Proceeding as defined by the South Carolina Frivolous Civil Proceedings Sanctions Act, Sections 15-36 et seq of the Code.

35. The Counter – Complaint was filed to harass the Plaintiff and for other improper purpose, in further violation of the South Carolina Rules of Ethical Practice applicable to Defense Counsel.

36. In accordance with SC Code 15-36-10(G) Plaintiff requests the following sanctions:

(1) an order for the Defendant to pay the reasonable costs and attorney's fees of the Plaintiff

(2) an order for the attorney to pay a reasonable fine to the court; and

(3) a directive of a no monetary nature, including injunctive relief, designed to deter a future frivolous action or an action in bad faith.

WHEREFORE, having answered the Counter - Claims of the Counter - Plaintiffs, the Counter - Defendant hereby prays as follows:

a. that the Counter - Complaint be dismissed;

b. sanctions as requested per paragraph 36 above.

c. for such other and further relief as this Court deems just and proper.

Respectfully submitted,

Ronald Jarmuth
Plaintiff / Counter – Defendant Pro Se
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

Ronald Jarmuth,)
)
Plaintiff,)
)
vs.)
)
The International Club Homeowners)
Association, Inc.)
Rosemary Toth,)
And K.A. Diehl & Associates,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2009-CP-26-3596

DEFENDANTS THE INTERNATIONAL CLUB HOMEOWNERS ASSOCIATION, INC.'S AND ROSEMARY TOTH'S ANSWER TO SECOND AMENDMENT TO COMPLAINT

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

Ronald Jarmuth,)
)
Plaintiff,)
)
vs.)
)
The International Club Homeowners)
Association, Inc.)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2010-CP-26-11320

FILED
HORRY COUNTY
2012 MAY 30 PM 1:17
MELANIE HUGGINS-WARD
CLERK OF COURT

The Defendants, The International Club Homeowners Association, Inc. and Rosemary Toth ("Defendants"), hereby answering the Second Amendment to Complaint styled as "Plaintiff's Answer to Counter-Claim of Defendant's Amended Complaint and Assertion of Counter-Claim by Plaintiff" dated December 20, 2011 would respectfully show and allege unto this Honorable Court as follows:

FIRST DEFENSE

1. Each and every allegation not hereinafter admitted, modified or qualified is denied and strict proof demanded thereof.

2. The allegations contained in paragraphs 1 through 32 do not necessitate a response, however to the extent that a response is required, the Defendants deny the allegations contained therein and demand strict proof thereof.

3. The Defendants deny the allegations contained in paragraphs 33, 34, 35, and 36.

SECOND DEFENSE

4. The allegations of the First Defense are incorporated herein and made a part and parcel hereof.

5. The governing documents of the International Club community may be ambiguous and therefore, the Defendants assert ambiguity as a defense.

THIRD DEFENSE

6. The allegations of the First and Second Defenses are incorporated herein and made a part and parcel hereof.

7. The Defendant HOA acted reasonably, in good faith, and in accordance with the governing documents of the International Club community in asserting a claim against the Plaintiff for Breach of the Covenants and Injunctive Relief, and therefore, the Plaintiff's action is barred by the business judgment rule.

FOURTH DEFENSE

8. The allegations of the First, Second, and Third Defenses are incorporated herein and made a part and parcel hereof.

9. The Defendant HOA's claim was clearly warranted under the facts alleged, and therefore, the Plaintiff's action is barred.

FIFTH DEFENSE

10. The allegations of the First, Second, Third, and Fourth Defenses are incorporated herein and made a part and parcel hereof.

11. The Plaintiff's breach of the governing documents of the International Club community bars the Plaintiff's action.

WHEREFORE, having answered the Second Amendment to Complaint, the Defendants pray that the same be dismissed and that the Court issue an Order directing that the Plaintiff be solely and totally responsible and liable for all attorney's fees, costs and expenses in the defense of this action, and for such other and further relief as this Court may deem just and proper.

McNair Law Firm, P.A.

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Attorneys for the Defendants
The International Club Homeowners
Association, Inc. and Rosemary Toth

Myrtle Beach, South Carolina
May 30, 2012

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

HORRY COUNTY
12 AUG 20 PM 3:14
MELANIE HUGGINS-WARD
CLERK OF COURT

HISTORY AND SUMMARY

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

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

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

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

Evidence Issues

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

regarding Plaintiff's prior knowledge of Defendants' exhibits.

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

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

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

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

had never been given to Plaintiff prior to the trial.

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

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

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

PLAINTIFF'S ORDER OF PRESENTATION OF THE CASE

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

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

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

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

UNDERLYING FRAMEWORK / SCHEME OF GOVERNANCE

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

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

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

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

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

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

Use of Property

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

County Development Regulations

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

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

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

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

State Regulation

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

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

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

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

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

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

a. The developer names a homeowner association and imposes an obligation on homeowners to join it by placing such an obligation in the covenants that run with homeowner lots.

b. The developer writes the bylaws for the association and attaches them to the covenants, often many years before the association is actually incorporated – by others – and does not separately record, attest to them, or index them to the association name.

c. Sometime thereafter the named association is incorporated by the developer as the Declarant.

d. For many years thereafter the developer runs the association without giving a voice or a vote to the homeowners who he requires to be paying members of the

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

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

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

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

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

Plaintiff read the following text from the statute:

> SECTION 33-31-205. Organization of corporation.
> (a) After incorporation: (2) if initial directors are not named in the articles, the incorporator or incorporators shall hold an organizational meeting at a call of a majority of the incorporators:
> (i) to elect directors and complete the organization of the corporation; or
> (ii) to elect a board of directors who shall complete the organization of the corporation.

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

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

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

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

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

> SC 33-31-202 (c) The articles of incorporation may set forth:
> (1) the purpose for which the corporation is organized which may be, either alone or in combination with other purposes, the transaction of any lawful activity;
> (2) the names, addresses, and zip codes of the individuals who are to serve as the initial directors;
> (3) provisions not inconsistent with law regarding:
> (i) managing and regulating the affairs of the corporation;
> (ii) defining, limiting, and regulating the powers of the corporation, its board of directors, and members, or any class of members; and
> (iii) the characteristics, qualifications, rights, limitations, and obligations attaching to each or any class of members;
> (4) any provision that under this chapter is required or permitted to be set forth in the bylaws.

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

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

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

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

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

> SECTION 33-31-205. Organization of corporation.
> (a) After incorporation: (2) if initial directors are not named in the articles,

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

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

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

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

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

Defense counsel did not controvert the applicabiliity of this statute.

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

The applicable statute is:

SECTION 33-31-206. Bylaws.
(a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.
(b) The bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.

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

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

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

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

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

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

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

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

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

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

DISTINCTIVE NAMES

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

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

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

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

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

MEMBERSHIP

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

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

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

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

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

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

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

Subparagraph 601 (Admission) reads that

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

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

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

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

- Resignation -

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

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

"(a) A member may resign at any time."

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

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

None of this was controverted by Defense Counsel.

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

- Contractual Obligations And Debts -

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

The Act reads:

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

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

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

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

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

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

Defense Counsel did not controvert any of this.

-- IHOA HAS NO DEFINED OBLIGATIONS OR MEMBERS --

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

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

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

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

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

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

-- TERMS OF OFFICE --

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

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

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

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

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

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

> (a) The articles or bylaws may specify the terms of directors. Except for designated or appointed directors, the terms of directors may not exceed five years. In the absence of a term specified in the articles or bylaws, the term of each director is one year. Directors may be elected for successive terms. ...
>
> (c) Except as provided in the articles or bylaws: (1) the term of a director filling a vacancy in the office of a director elected by members expires at the next election of directors by members; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Bylaws. Subsection 701 of the Act provides that

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

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

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

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

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

-- ELECTIONS --

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

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

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

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

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

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

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

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

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

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

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

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

-- LIST OF VOTERS --

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

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

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

The Act reads:

SC 33-31-720 Members' list for voting.
(a) a corporation shall prepare an alphabetical list of the names of all its members who are entitled to notice of the meeting and shall list the members show the address and number of votes each member entitled to vote at the meeting ... [and] a list of members entitled to vote at the meeting but not entitled to notice of the meeting.
(b) The list of members must be available for inspection by any member for the purpose of communication with other members concerning the meeting
(d) If the corporation refuses to allow a member [to] copy the list , the court may summarily order the inspection or copying at the corporation's expense and may postpone the meeting and may order the corporation to pay the member's costs, including reasonable counsel fees, incurred to obtain the order.
...
(g) A member may inspect and copy the membership list only if (i) his demand is made in good faith and for a proper purpose; (ii) he describes with reasonable particularity his purpose; and (iii) the list is directly connected with his purpose.

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

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

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

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

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

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

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

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

-- BOARD ACTIONS WITHOUT MEETING --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

-- COMMITTEES --

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

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

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

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

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

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

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

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

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

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

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

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

> "The Common Expenses to be funded by the annual Assessments may include, but shall not necessarily be limited to, the following: ... 12.3.6 The expenses of the Architectural Review Board which are not defrayed by plan review charges;"
>
> In Section 3.1 of the Covenants it provides that
>
> "The Association shall be authorized but not required to provide the following services: ... (d) To set up and operate the Architectural Review Board as provided for herein."

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

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

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

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

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

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

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

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

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

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

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

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

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

Committee Records and Open Meeting Requirement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

owner subject to the covenants.

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

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

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

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

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

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

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

This was all plead and not controverted at trial.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

At trial Maureen Sullivan testified that maintaining the property of others at the expense of homeowners with money collected through assessments is in the interest of property owners because, as she put it, it enhances property values. This is a very subjective statement. It also evaded the issue that at no time did the Defendant IHOA ever own the golf course, the roads, the Horton property, or the homeowner property that the IHOA collect money to maintain via easements. At trial it was agreed that the only property [3] the IHOA owns is the Amenity Center area and several retention ponds.

Section 1.6 of the Covenants defines "Common Areas" as

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The issue before the Court is

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

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

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

Sale of Assets

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

SECTION 33-31-1202. Sale of assets other than in regular course of activities.
(a) A corporation may sell, lease, exchange, or otherwise dispose of all, or substantially all, of its property, <u>other than in the usual and regular course of</u>

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

(b) Unless this chapter, the articles, or bylaws, require a greater vote the proposed transaction to be authorized must be approved:
(1) by the board; AND
(2) by the members by two-thirds of the votes cast or a majority of the voting power, whichever is less;

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

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

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

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

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

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

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

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

Disposition of the Proceeds

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

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

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

> **(a) A mutual benefit corporation may purchase its memberships**

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

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

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

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

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

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

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

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

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

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

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

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

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

BOARD MEMBER LIABILITY FOR UNLAWFUL DISTRIBUTION (CENTRAL ELECTRIC PROCEEDS)

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

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

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

The Act States:

> **SC 33-31-833. Liability for unlawful distributions.**
> **(a) Unless a director complies with the applicable standards for conduct described in Section 33-31-830, a director who votes for or assents to a distribution made in violation of this chapter or the articles of incorporation is personally liable to the corporation for the amount of the distribution that exceeds what could have been distributed without violating this chapter.**

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

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

-- MEMBERS OF THE ASSOCIATION --

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

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

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

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

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

> **SC 33-31-140. Definitions. (23)(a) "Member" means a person entitled, pursuant to a ... corporation's articles or bylaws ... to vote on more than one occasion for the election of a director or directors or any other matter which under the terms of this chapter requires approval by the members.**
> **(b) A person is not a member by virtue of any of the following:**
> **(A) any rights the person has as a delegate;**
> **(B) any rights the person has to designate or appoint a director or directors; or**
> **(C) any rights the person has as a director.**

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

Section 1.27. Unit

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

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

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

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

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

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

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

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

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

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

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

-- End of Division 1 –

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

- DIVISION 2 -

PEBBLE CREEK IS NOT SUBJECT TO THE COVENANTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Plaintiff then invoked the following case law:

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

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

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

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

In Player v. Chandler, 299 S.C. at 105, 382 S.E.2d at 894, the South Carolina Supreme Court asserted: that in interpreting the sale the terms are limited to what is written on the deed itself. The court wrote that the terms do not include any

> "secret purpose or intention on the part of one of the parties, stored away in his mind ... "

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

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

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

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

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

But which is "The Association"?

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

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

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

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

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

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

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

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

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

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

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

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

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

REQUIRED NAME CHANGE INDEXING WAS NOT DONE

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

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

indexes."

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

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

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

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

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

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

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

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

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

The Amendment Reads: Pl # 551

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

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

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

All subsequent amendments recite the following: (Pl 563)

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

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

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

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

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

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

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

January 19, 1999 – Golf Course property sold. Deed – Pl #544.
February 3, 1999 – Pebble Creek property sold, which is where Plaintiff's property is located. Deed- Pl #545.

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

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

> **(a) Amendments by Developer. For a period of fifteen (15) years ... Developer may amend this Declaration in any particular ... without the approval of any Owner ...**
> **(i) in the event that such amendment materially ... alters or changes any Owner's right to the use and enjoyment of such Owner's Unit ... such amendment shall be valid only upon the written consent thereto by a majority in number of the then existing Owners affected thereby; ...**

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

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

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

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

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

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

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

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

The SECOND QUESTIONS IS:
Could the Developer legally do so, since
(1) Amendment #1 came after the sale of the golf course and the Pebble Creek properties which subjected them to an association with MIGPA, and
(2) MIGPA had equitable riparian rights in the ponds and the right to operate and get income from amenity facilities.

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

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

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

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

The Formula, from Amendment #1, is:

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

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

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

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

To get to IHOA, the rule would have to have been, which it was not:
Wherever the name "Murrells Inlet Golf Plantation" appears in the Declaration, it should now be read as "International Club Home Owners".

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

OR

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

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

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

EFFECT OF MERGER OF ICA INTO MIGPA

IMPORTANT DATES:

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

THUS:

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

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

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

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

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

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

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

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

The Court is further asked to Order:

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

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

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

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

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

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

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

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

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

* **That MIGPA is not bound by any agreements or contracts entered into by IHOA.**

* **That MIGPA owns riparian rights to ponds in the PUD per Covenants 4.17**

* **That MIGPA not the IHOA owns the rights or interests in any easements within the PUD created by the Covenants.**

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

- DIVISION 3 -

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

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

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

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

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

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

development.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit B contains all the rest of the property in Plat Book160 at 79, and the property at Plat Book 158 at Page 155. The former Plat contains The Enclaves, The Fairways, what is now The Highlands, The Villas (condo), The Glens (multi-family), The Cambridge (condo), and The Links. All of those, except The Enclaves and The Fairways, are assessment paying members of the IHOA and within the PUD. The former Plat also contains The Meadows which is outside the PUD. The latter Plat contains The Grand Vistas (condo) which is outside the PUD and does not pay assessments. The latter Plat also contains the Front Entrance which is outside the PUD.

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

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

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

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

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

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

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

Extent of PUD

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

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

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

Extent of Covenants Applicability to Land

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

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

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

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

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

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

Elements to Be Considered in Forming a Conclusion

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

To declare covenants:

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

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

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

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

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

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

- DIVISION 4 -

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

-- Supporting Law --

CASE LAW

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

Epting v. Lexington Water Power Co., 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.

Hardy v. Aiken 631 SE 2d 539, 369 SC 160 - SC: Supreme Court, 2006

Arcadian Shores Homeowners v Cromer, 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007 –

Dryden v. Calk, 771 F. Supp. 181 (S.D. Tex. 1991).

Frey v. De Cordova Ben Estate Owners' Ass'n., 632 S.W.2d 877, 880 (Tex.App.--Fort Worth, aff'd 647 S.W.2d 246) (Tex. 1982) ;

Holleman v. Mission Trace Homeowners' Ass'n., 556 S.W.2d 632, 635 (Tex.Civ.App.--San Antonio 1977,

Concept

A promise to do or not do something on my property is a covenant which runs with the land. A right to do something on someone else's land is an easement, as it the obligation to allow someone else to do something on my land. These are the dominant and servient sides of an easement.

If I promise to do something on someone else's property that is a personal services contract. If written into a deed it is still a personal services contract and does not survive the sale of my property. For example, to get a deal when I buy a lot I might promise to buy my groceries from the seller, or to join his chapter of the VFW, attend his church, buy my

shoes from him, or to mow his lawn. If I sell my house that obligation does not transfer. It does not survive the transfer. These do not touch and run with the land because it does not control something I do on my land.

The People and Property Subject to the Covenants

The Highway 17 Covenant on it's page 3, Deed Book page 609, says that "an owner shall mean and refer to the record owner (including the Declarants) as shown by the real estate records ... situated within the "Property" .

That Covenant on it's page 4, Deed Book page 610, says that "Property" shall mean and refer to all the Property which is subject to this Declaration. It says that the Plantation Tract is at Exhibit F.

The actual property subject to the Covenants, called "The Connector" is where the PUD homeowners have a putative duty to do something, is described on Book page 608 page 2 as stated at the Highway 17 Exhibit C.

The Highway 17 Covenants do not impose an obligation on anyone to perform anything except on the Connector where they supposedly have an obligation to perform maintenance on someone else's property.

On Page 7 Article 5 Section 1 of their covenants it is asserted that non-owners of The Connector property have an obligation to pay for the purposes described in Section 2.

The purposes are stated in Section 2, Page 8, Book Page 614, that being "the improvement, maintenance, enhancement, enlargement, and operation of ... the Connector.

The Connector Property, Exhibit C, Deed Book page 651, page 45 of the Covenant, excludes the actual road from the property, but it includes the rest of the right of way for what is now known at some of Tournament Drive.

On June 5, 2001 the entire Connector, including roadway and shoulders, was conveyed to Horry County and accepted by Horry County Council Resolution R076-01, PI # 409. As such the entire area which to be benefited by the Covenants do not belong to any of the original parties to the Covenants. The dedication was made without any reference to the Highway 17 Covenants and thus they are not preserved.

The Dedication documents describes the dedication as being Tournament Boulevard, and the owners of The Connector as being "Kaminski, owner and developer of Prince Creek", ETS, and Bill Hatoway. Plantation AD is not listed as an owner. All owners have to be listed to assure that everyone with an interest in the property has surrendered it to the County.

Because there is at least a clear Change of Circumstances, the Court is empowered

to void the entire Highway 17 Covenants. At the present day So at this point in time there is at the least a Change in Circumstances. None of the Declarants or parties to the Highway 17 Covenant and no successor save the County has an equitable interest in the property. There is no horizontal privity to enforce the Highway 17 Covenants.

Exhibit F to the Highway 17 Covenants is the property belonging to Plantation AD which is related to the Covenants and it is described as the "Murrells Inlet Golf Plantation" property. This property is not contiguous with The Connector and shares no common point. It is separated from The Connector by the southern end of Tournament Drive which was not and is not a part of the PUD. There is no horizontal privity between the Plantation property and the Connector.

The southern end of International Club Drive is on Plat Book 160 at 79, Pl #454, which plat also describes 9.79 acres which is Cypress Keyes. Cypress Keys is not contiguous with the Murrells Inlet Golf Plantation Cypress Keyes is contiguous with The Connector.

The Plantation property did not have horizontal privity to The Connector. The owners in the PUD do not have vertical privity to an original owner with horizontal privity to The Connector.

The obligation to do something on someone else's property or for someone else is a personal services contract, not a covenant, and does not survive the transfer of property on either side. After the Highway 17 Declaration of Covenants, there have been at least two transfers of Plaintiff's property: From Plantation AD to Sunbelt, from Sunbelt to Cheryl Essex, and from Essex to Plaintiff.

On page 11 of the Highway 17 Covenants, Deed Book page 617, it exempts from any obligation under the Highway 17 Covenants any property, Section 11 (c) any property owned by a non-profit organization – which includes the HOA. Thus the HOA being exempt has no vertical or horizontal privity with Highway 17 through property it owns. The IHOA is however being assessed for the acreage the IHOA owns.

It also exempts wetlands. The retention ponds are areas which periodically become wet and which although not directly connected with the rivers or oceans are still defined as wetlands on the PUD plats and by SC DHEC and it's county counterparts. The IHOA is however being assessed for wetlands acreage.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	)	consolidated with
Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	
	)	

- DIVISION 5 -

WHO OWNS THE ROADS IN THE PUD AND ARE THEY SUBJECT TO THE COVENANTS ?

What was set before the Court in Plaintiff's Complaint and was argued in Court was the question of the IHOA enforcement of Covenants on the Roads in the PUD.

Plaintiff argued at trial that

(1) The roads in the PUD are all owned by Horry County [1] ;

(2) Horry County took title to those roads;

(3) Title or Dedication was not encumbered by the Covenants;

(4) Continuous use by the Public endows PUD homeowners with at least the same rights enjoyed by the public at large;

(5) IHOA "rules" if otherwise valid are pre-empted by state law.

(6) The IHOA has no vertical privity to the roads and thus has no right to enforce covenants on the use of roads, even if valid.

UNDISPUTED FACTS

At trial Plaintiff introduced as evidence all the Plats in his evidence book. None of these were controverted by Defense Counsel. Plaintiff also presented for the Court's inspection the original 25" x 30" (approximately) plats which were provided him by the Horry County Planning Commission or by the Horry County Recorder of Deeds.

Working from the plats, Plaintiff pointed out that the Declarant was aware of

[1] Except for Madrid Drive in The Glens, which the builder of The Glens deeded to the IHOA.

distinctions between Easement, Dedication, and Private, because those labels appeared at various places on various plats. For example, golf cart crossings were marked "easements", roads were marked "dedicated to Horry County" and the front entrance was marked "private".

A CD was submitted to the Court as evidence which was authenticated by Mr. Louis Astorino at his deposition. At 6 minutes and 10 seconds it perpetuates an admission against interest by Defendant Rosemary Toth, who was present in the courtroom, that the PUD roads are "owned" by Horry County. No evidence or testimony was offered to refute her admission. However, the contention of Defense witnesses was that Horry County enjoyed an easement which was absolutely limited by all of the provisions relating to roads in the covenants.

At trial it was conceded by Defense and uncontroverted when asserted by Plaintiff that the IHOA took no action against anyone who it suspected was not a PUD homeowner – to include not even placing a note on a window – who did any of several things which resulted in a violation letter and fine if done by a homeowner.

It was not disputed that Horry County maintains the roads, to include abating flooding, striping the road lanes, erecting traffic control signs, enforcing speed limits, and even controlling conduct on the road shoulders by requiring encroachment permits for anything done on the shoulders. It was not disputed that the IHOA has several times applied for encroachment permits to do various things within the roadway; and copies of IHOA applications signed by Toth herself as IHOA President were placed into evidence. Pictures of Horry County doing flood abatement and posting traffic control signs were placed into evidence.

Plaintiff submitted into evidence pictures and documents which showed that homeowner property ended as much as over twenty feet from the curb, and that the typical roadway extended an average of over twelve (12) feet towards homes from the curb. Plaintiff placed into evidence copies of encroachment permits he received from Horry County for various plantings within the right of way. Plaintiff also placed into evidence pictures of various trees (Fletcher, across the street from him) which were in the right of way and which had not received either an encroachment permit from the County nor had the IHOA done anything to address this apparent violation of Covenant restrictions on use of roads.

The Glens Planning Commission approval Plat was entered into evidence, Plat Book 197 at 171 Pl # 466 and the original oversize plat was offered to the Court and the parties for inspection (hard to read the reduced size copies). Madrid Drive was marked "private". Pickering Drive was NOT marked "dedicated" but was marked "existing public". This was approved on May 25, 2004. That portion of International Club Drive (from the intersection with Pickering Drive in front of the Golf Course Clubhouse to the point next to The Grand Vistas where International Club Drive became owned by DR Horton) which was dedicated to Horry County was now marked "Existing Public". Of all the plats relating to the PUD filed with the Planning Commission this one was unique because,

referring to Madrid Drive, the only road in The Glens, "The Roads and Drainage within the Subdivision [The Glens] are intended to be Private and maintained by the [Glens] HOA."

The representation of DR Horton to the Planning Commission was that Madrid Drive would be deeded to The Glens (sub) HOA and maintained by that sub-HOA. Instead he deeded Madrid Drive to the IHOA, a "gift" for which there is no evidence that the IHOA ever accepted same by signing any document (including the deed) or by Act of the Board of Directors prior to the tail end of this lawsuit in 2012.

At trial it was pointed out that The Murrells Inlet Golf Plantation and Lantana Plats specified the exact road right of way and pavement widths (approved by Planning Commission) The first of those two places, Pl # 450, had the notation "All roads and rights of way shall be designed and built by the developer and inspected by Horry County Engineering for the purposes of dedication to Horry County Government. The only exception shall be driveways to multi family projects or service / maintenance facilities." The Lantana PUD, which was qualified as the "Revised Master Plan",

The most illustrative one is at Plat Book 181 Page 89 Pl #460. This contains a dedication signed by Plantation Golf, Plantation AD, and Sunbelt, the three landowners. The Dedications were actually signed December 29, 2001. It reads:

> "The undersigned hereby acknowledges that I am (we are) the owner() of the property shown and described hereon and that I (we) adopt this (plan of development / plat) with my our) free consent and that I (we) hereby dedicate all items as specifically shown or indicated on said plat."

The notes of the Plat refer to the properties owned by Sunbelt, The Golf Course, and Plantation AD. This is the Plat with roads marked "public" or "private and the golf cart crossings marked "easements". As of this date no roads were marked "dedicated". Specific pavement widths and right of way widths are shown. This is the definitive plat for roads in the PUD, subject to the Dedication documents of the County Council which are consistent with this Plat.

At Plaintiff's Exhibit # 60 is the US Postal Service approval for Plaintiff to install a locking mailbox, the particular locking mailbox that Plaintiff requested Postal approval for – September 8, 2010. Plaintiff asserted that the Postal Service has pre-empted IHOA authority to approve mail boxes – especially when located on a public street which the HOA NEVER owned and which Plaintiff NEVER owned (a person without horizontal privity on some plot of land can neither enforce nor be subjected to an obligation or restriction relating to that land).

ARGUMENT

Who owns those roads?

What are the rights and obligations of

* **Horry County**
* **Homeowners**
* **The HOA**

regarding the roads in the PUD which have been "dedicated" to the public, accepted and maintained by the County and which the owners have sworn are "public" on plats of record?

What authority and limitations exist regarding the HOA's authority to –

* **Regulate speed limits on roads inside the PUD?**
* **Tow vehicles parked legally on these non-HOA owned roads first marked as "public" and later explicitly dedicated to the Horry County?**

Plaintiff reiterates that at no time has a filed document relating to Plats and Approvals used the word "easement" when referring to the roads in the PUD.

Doctrine of Eminent Domain

Blacks Legal Dictionary. 1st Edition, Page 426 Pl #87 and 88 describes "Eminent Domain" as "The Right of the people or government to take private property for public use."

Article 14 Sections 2 of the South Carolina Constitution (Eminent Domain) states that "title to all lands and other property" may "vest in the State" by "grant [or]m gift" as well as by "purchase ... or otherwise". The manner in which the state acquires property is irrelevant as to the title.

Section 3 – Ultimate Property in Lands -- of the South Carolina Constitution makes it clear that because "the people of the State ... possess the ultimate property in and to all lands" no individual can diminish the state's title to land by conditioning the state's title without the state's explicit consent.

Case Law

Case law is conclusive that unless the state explicitly agrees in writing, the taking of property for public use is without any conditions or restrictions.

> **"The default rule in eminent domain is that a taking in fee simple establishes a new title and extinguishes all existing possessory and ownership interests not specifically exempted"**

"where the government takes fee simple title, it takes all interests, specified

as well as unspecified and if the government intends to take less than fee simple title, the excluded interests shall be specifically mentioned." United States v. 194.08 Acres of Land, 135 F.3d 1025, 1029 (5th Cir. La. 1998)

"When the government acquires fee simple interests in land ... the government simultaneously extinguishes the servitudes burdening the property because continuance of the burdens of a servitude would interfere with the purposes for which the property is acquired. ... courts are of the view that ... land that is subject to an enforceable covenant, such acquisition extinguishes all existing possessory and ownership interests not specifically exempted and the ...authority acquires the land free from the burden of the covenant --- Newberry v. Andalusia, 257 Ala. 49 (Ala. 1952), Dothan Area Chamber of Commerce, Inc. v. Shealy, 561 So. 2d 515 (Ala. 1990).

"The government's rights as the condemnor are distinct from those of an ordinary purchaser of property ... securing better title against the entire world than may be obtained by voluntary conveyance" United States v. Carmack, 329 U.S. 230 (U.S. 1946).

SC Department of Transportation, Respondent, v Horry County, Burroughs & Chapin, et al Appeal from Horry County; Opinion No. 26911; January 18, 2011, SC Supreme Court
The grant of an easement for a highway conveys title to the roadway. Horry County's conveyance to title back to Burroughs & Chapin was defective because it remained with SC DOT.

Implying that unless otherwise stated in the document, the granting of a road easement to the state brings title with it.

Van Blarcum v. City of North Myrtle Beach, 523 S.E.2d 486 (S.C. Ct. App. 1999) found that when Myrtle Beach accepted a dedication it gained "title to two five-foot rights-of-way that extend to the Atlantic Ocean along the "east" and "west" boundaries of the two lots on which the motel sits,"

The payment of taxes on disputed property is evidence contrary to the intent to dedicate property to the public. Anderson v. Hemingway, 269 S.C. 351, 237 S.E.2d 489 (1977).

It is noted that neither the Developer, any Builder, nor the IHOA have ever paid taxes on any road within the PUD. Indigo Creek, the PUD "next door" has a gate on one entrance and the short road behind it is taxed. If taxes are not assessed on a road, this is supportive that the county has more than a mere easement -- that it owns the road

" The assessment of taxes is a factor to consider along with other evidence. " Van Blarcum, 337 S.C. at 452, 523 S.E.2d at 489

DEDICATION

Blacks Legal Dictionary, 1st Edition, Page 343 defines "Dedication" as "an appropriation of land to some public use, made by the owner, and accepted for such use by or on behalf of the public. 23 Wis. 416; 33 N.J. Law, 13. A deliberate appropriation of land by it's owner for any general and public uses, reserving to himself no other rights than such as are perfectly compatible with the full exercise and enjoyment of the public uses to which he has devoted his property. 22 Wend. 472."

In February 24, 1997 the Horry County Planning Commission approved the plan of development for the Murrells Inlet Golf Plantation with certain conditions. One of those conditions was set out in a note on Page G-2: Pl # 450

> "RIGHTS OF WAY MAINTENANCE. All roads and rights of way shall be designed and built by the Developer and inspected by Horry CO Engineering for the Purpose of DEDICATION to HORRY COUNTY GOVERNMENT. The ONLY EXECEPTION shall be driveways to Multi-Family projects or service / maintenance facilities."

On October 15, 2002, well before Horton came on the scene, the Pebble Creek developer Sunbelt began the process of dedicating roads in the PUD to Horry County. The documents for every dedication have had no reservation or exclusion relating to any covenants. The County Council Resolutions, such as this one, R-155-02, Pl #413, are for complete dedication and have no exception for any covenants. The HOA is not a grantor on any of the dedications.

These Road dedication documents were never made available to Plaintiff by the HOA, either before filing suit or in discovery after. They were obtained by FOIA, Pl #400.

Tournament Drive is effectively part of the main entrance to Prince Creek.

During the relevant period Tournament Drive when Highway 17 and PUD covenants were being declared and filed, Tournament Drive (the Highway 17 Connector) did not touch or come close to land within the PUD. At the time the Developers / Builders Plantation and Sunbelt did not own any land on which Tournament Drive was built – they never did – nor adjanent to that property. Neither Sunbelt for Plantation AD were grantors in the Tournament Drive dedication documents Pl # 409, June 5, 2001.

When Pebble Creek was developed and Plaintiff's lot was sold on September 27, 2001 (Pl #566) there was no egress to Tournament Drive. The reference to the front entrance in deeds was that Sunbelt and successor homeowners would have an "easement" over the front entrance, which became owned as private property by DR Horton and which was marked "private" on Planning Commission plats.

The dedications of all the roads in the PUD, plus Tournament Drive, are at Pl #401

through 414. The dedications relate to the owners as the grantors and never any HOA as grantor.

The dedications were accompanied by Certificates of Non –Litigation which refer to the "fee simple" dedication to Horry County. Fee simple is a term of art referring to transfer of ownership.

One of the road dedication documents that Horry County requires is a "Certificate of Non-Litigation". It includes the statement "that (nothing) will affect the fee simple dedication of the below named project."

No later than Februry 15, 2011, Pl # 404, R-14-11, Horry County took title to the PUD Roads. Sample: Pl # 405, February 21, 2006

> "FEBRUARY 21, 2006 Horry County Council Resolution R-16-06 A resolution to accept DEDICATION of the Roads and Drainage ... into the County Road System. ... The developers ... request the roads and drainage be DEDICATED to Horry County. ... fully executed DEDICATION documents ... it is the intent of Horry County Council to accept the roads and drainage ... into the County system. ... Now therefore: Horry County Council resolves To accept the roads and drainage ...

Section 28-2-90 of the SC Code, The South Carolina Eminent Domain Procedures Act specifies that the state can take eminent domain title to property without a formal proceeding "(1) at any time upon receipt of written consent of the record owner or owners"

The title that vests in the state is "fee simple".

Per Section 8-2-450 of the Act, this authority extends all the way down to the municipality level.

In Ford et al v Dickerson et al; 222 W. Va. 61; 662 S.E.2d 503; No. 33349, Filed: February 27, 2008 the West Virginia Supreme Court held stated that

> "The words or terms "road," "public road," or "highway" shall be deemed to include, but shall not be limited to, the right-of- way, roadbed ... necessary for the maintenance of travel, ... and such public road or highway shall be taken to include any road to which the public has access and which it is not denied the right to use, ...

Courts have held that title to roads can vest in a government without the formal exercise of eminent domain, specifically –

> (2) by continuous and adverse user by the public ... accompanied by some official recognition thereof as a public road by the county...

(3) by the owner's dedication of the land to the public use, ... - *Ryan v. Monongalia County Court*, 86 W.Va. 40, 102 S.E. 731 (1920).; *State ex rel. Riddle v. Department of Highways*, 154 W.Va. 722, 725, 179 S.E.2d 10, 13 (1971) and Ford et al v Dickerson et al; op cit..

The HOA was never the owner of the roads. Sunbelt or DR Horton, the owner prior to dedication, dedicated the roads to the County "fee simple", without a single written word attempting to limit the extent of the title. No taxes were ever paid on the roads. The HOA does not hold the capacity as a Servient or Dominant easement holder and has no association with any easement rights and no authority through title to exercise any control over the roads.

Horry County has performed maintenance on these roads, for example when there was flooding on the streets September 22, 2011 – see photos Pl #20, #29, #30, and # 35. #37 Horry County has also painted the road lines on International Club Drive.

PRIVITY

The HOA never owned any roads in the PUD, The HOA never owned any home lots in the PUD.

No homeowner ever owned any of the roads or the right of way of any of the PUD streets.

The Developers no longer own any of the roads in the PUD and does not own any home lots "subject to the covenants".

The parties to the Covenants are the Developer, the homeowners, and the HOA, possibly exercising rights derived from the homeowners.

None of these has "Privity" ownership in the Roads such as to give them the right to enforce Covenants applying to the land between the homeowner property lines – the roads.

Black's First Edition, Page 942, Pl # 89 & 90, states that "the term "privity" means mutual or successive relationship to the same rights of property. ... Privity of contract is that connection or relationship which exists between two or more contracting parties. It is essential to the maintenance of an action on any contract that there should subsist a privity between the plaintiff and defendant in respect of the matter sued on." – in this case, the use of property neither owns.

The County owns the roads – additional argument below. If the covenants were effective against the County, they could only control what the owner of the road does with the land – they are not effective against one who has never had an ownership interest in the roads and neither homeowners nor the HOA have standing to try to enforce covenants on the use of the road where neither own or ever owned the roads.

Deed restrictions are private contracts affecting land.

In Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,*;368 S.C. 342; 628 S.E.2d 902 the Court noted that "Restrictive covenants differ from contracts in that they 'run with the land,' and that the only provisions which are enforceable are those "which 'touch and concern' land, and therefore, run with the land" citing Epting v. Lexington Water Power Co., 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.

The fact that no party to the Covenants owns the roads must invalidate – because of lack of privity -- those covenant provisions and purported rules controlling the use the roads:

INVALID COVENANT SECTIONS BECAUSE OF NO PRIVITY

Section 6.2 Purpose of Assessments – Obligation to Maintain Roads and right to collect Assessments for that purpose;
Section 7.16 Tree Removal – in the road right of way;
Section 7.21 Sign Control – in the road right of way;
Section 7.25 Parking – on the roads (a police issue);
Section 7.26 Junk Vehicles – on the roads (a police issue);
Section 7.27 Motor-ccyles on the streets (a police issue);
Section 7.28 Mailboxes, because they stand on county property and are governed by county encroachment ordinance and US Postal Service rules;
Section 7.33 Landscaping, to the extent that it is in outside of homeowner property and in the road right of way;

INVALID HOA ARCHITECTURAL REVIEW BOARD RULES BECAUSE OF NO PRIVITY

K. Landscaping – to the extent that it purports to apply to lawns between homeowner property lines and curbs.

R. Mailboxes – are in the area owned by the County.

Section V Application Review Fees and Deposits – none.

> "These deposits cover any damages to International Club common areas from contractors, vendors, etc during construction. ... e.g., trucks with more than two axles, track – driven equipment, front end loaders ..."

The potential damage is to county owned roads for which the county has repair responsibility. There is no liability by any person using or abusing the roads to the HOA. There is no privity here.

IHOA's Asserted Authority

The HOA's February 27, 2008 Landscape Contract Pl # 345 with Sunbelt Landscape Services provided that the HOA would spend over $ 6,000 to maintain the Tournament Drive / International Club Drive area of International Club Drive then owned at the time by DR Horton and owned since April 2010 by the HOA – which area is outside the PUD.

That contract spent almost $ 9,000 in 2008 to maintain International Club Drive in areas owned by DR Horton or dedicated to Horry County.

The contract provided approximately $ 27,000 more to maintain shoulders and areas beyond of non – HOA owned roads elsewhere in the PUD – including Golf Course owned property.

Of the contract's $ 56,000, only $ 12,000 was used to maintain HOA owned property – the Amenity Center complex grounds. Pl #345.

On or about June 25, 2008 the HOA's Building and Grounds Committee (Pete Pizzi and Mike Butryn) made an official presentation to the HOA at a Board of Directors' meeting . Pl # 330.

The Board was informed by the Building and Grounds Committee, Pl #331, that the HOA was spending 22 % ($ 14,000) of it's grounds maintenance budget to maintain property owned by DR Horton, 38 % ($ 25,000) to maintain Golf Course property, 31 % ($ 20,000)to maintain roads dedicated to the county or otherwise not owned by the HOA, and 2 % ($ 1,300) to maintain land owned by homeowners. Only 7 % ($4,600) was being spent to maintain HOA owned "common" property.

On May 12, 2009 the HOA Board held a meeting at which the Board admitted that it is maintaining the "County Right of Way". Pl # 355.

It is noted that no where in the PUD is there a single sign alerting the public to any restrictions on parking on roads. This HOA owned Amenity Center parking lots now contains such a warning sign erected this year, over three years after the issue was raised by Plaintiff. There is nothing to tell the public that the streets are in the PUD.

On <u>July 15, 2011</u> the HOA Board of Directors alerted SOME of the homeowners via a "Friday Facts" e-mail – to those it chooses to send this to, which does not include the Plaintiff – that the HOA intends to tow cars (whether owned by homeowners or the public) without notice or warning and to hold said cars for ransom at some un-stated non-PUD location.

The HOA claimed authority under Covenant sections 7.25 (Parking, which was deleted by Covenant Amendment #1 May 10 2000) and section 7.26. The Board stated that "When the roads ere dedicated for public use and county maintenance, the full property

title did not transfer to the county, just some property rights and we can not have a gated community. ... Road right of way remain subject to covenants .. The county does not "own the roads"".

The HOA declared that it may tow a car – without knowing who owns a car – if the car is "parked on the street for more than 4 hours ... This is consistent with state law ... no warning may be placed on the vehicle or delivered ... "

Section 7.26 of the Covenants reads:

> "Section 7.26. Junk or Disabled Vehicles. No stripped, partially wrecked, unlicensed or invalidly licensed, disabled or junk motor vehicle, or part thereof, shall be permitted to be parked or kept in the Subdivision. The Association shall have the right to have towed or otherwise removed any vehicle in violation of this Section 7.26,

There is no obligation to report one's license plate numbers to the HOA and the HOA has no way of distinguishing owner vehicles from those of the public who choose to park on the roads dedicated to the PUBLIC at large. If the HOA has no right to tow a public vehicle from a spot it likewise has no authority to tow a homeowner vehicle – as Privity would grant such right upon all vehicles on the property. As a matter of law homeowners have the same rights as those of the general public to park on the streets dedicated to ALL of the PUBLIC. Homeowners are part of the public.

The actual state law does not give a private person any right of action as to a suspected violation PI #250:

> SC Code 56-5-2510. Stopping, standing or parking outside of business or residential district. (A) No person shall stop, park, or leave standing a vehicle, whether attended or unattended, upon the roadway outside a business or residential district when it is practicable to stop, park, or leave the vehicle off the roadway. An unobstructed width of the highway opposite a standing vehicle must be left for the free passage of other vehicles

The PUD is a "residential district – PUD". See the road dedication documents. The PUD is zoned residential by the County and is thus a "residential district" – which definition was affirmed in South Carolina Court of Appeals case on writ of Certiorari, Restaurant Row et al v Horry County, No. 24944 May 17, 1999. Thus the statute – which is the ONLY parking limitation statute – does not apply. Horry County has no parking ordinance applicable to unincorporated areas.

Horry County does, however, have a Towing Ordinance, Sec 12.5-123, which governs "Non-Consensual Towing from PRIVATE property". Among other things there have to be signage, which is lacking in the HOA (section a(2)a), and the HOA has to be able to control who may enter the street, which it does not (section a(1)). Further, per part a, the decision to involuntarily tow without notice is limited to a police officer – thus the

HOA's declaration is an intent to commit a crime (grand theft – auto).

Horry County's Land Development Ordinance controls. From the "get go" it is clear that the PUD's streets were to be "dedicated to Horry County" unless designated as a platted private road with a fee – simple deed to a tax – paying HOA. The HOA never owned the streets and no one has ever paid taxes on the streets – including from the moment they were built. Chapter 18, Article 4, Section 2-1.. See Pl # 53 and 254.

The same section states that the area dedicated to the county is NOT the pavement, but the area "measured from lot line to lot line" including shoulders, graded areas, and the utility easement areas. Clearly the County acquired at the least SERVIENT ownership of and easements – the HOA does not own easements either. Per paragraph "B" "the roadway shall be no less than 60 feet in width". The paved area in the HOA is often approximately 25 feet wide. There is a peculiarity here because someone in the Horry County Planning Office allowed many of the streets in Pebble Creek to be 50 feet wide. Plat Book 181 @ 89, Pl # 460.

The county area beyond the curbs is unevenly distributed left and right of the paved road. An example is Bill Fletcher's house – across from Plaintiff's on Pickering Drive, Pl # 38 and #39 – 21 feet which means 4 feet of Plaintiff's grass belongs to Horry County.

21 feet of Plaintiff's neighbor Fletcher's grass belongs to Horry County.
If Fletcher doesn't own it, who does?
No one pays taxes on the shoulders.
Upon pain of "fines" levied by Beckie Abel, an employee of the HOA's management company KA Diehl – a defendant here – homeowners maintain the area from their property line to the curb. Except if you are the Golf Course, or a present or former Board Member living across from the Amenity Center, or are Developer, in which case the HOA maintains the area from the property line to the curb. See Buildings & Grounds presentation earlier.. Pl #330 331

Pl 47 49 Homeowner Curb sides maintained. At right is typical street-side edging and landscaping found in the PUD – several houses away from Plaintiff's on Pickering Drive. The HOA demands prior ARB approval and control over everything between the property line and the curb. At the offices of Defendants's counsel, Plaintiff recently examined hundreds of ARB applications and found dozens of these cases. Pl # 40, 42

Horry County has asserted it's authority per Ordinance Appendix B Zoning Section 1301 Encroachment: "WITHIN PUBLIC RIGHTS OF WAY". The phrase "rights of way" includes "dedicated" streets however one might choose to argue it. The HOA's asserted authority is PRE-EMPTED by Horry County's encroachment law. Clearly the HOA has no authority to permit encroachment where the county might prohibit it,

PL 252 "1301.2. - Encroachments within public rights-of-way. ...
encroachments within any public right-of-way shall be limited.
Encroachments, including but not limited to, untagged vehicles, untagged or

> tagged vehicles for sale, landscaping, and structures ...shall not be permitted within the public right-of-way unless an encroachment permit has been issued by the applicable regulatory agency (Horry County or South Carolina Department of Transportation). Unlawful encroachments may be removed from the right-of-way by the county without further notice to the owner. The owner of the encroachment shall be liable for all costs of removal. "

Plaintiff applied for and was issued Encroachment Permit #4691 Pl #629 by the County on July 9, 2008, which covers all landscaping and objects between Plaintiff's property line and the curb so long as the following conditions are met:

> "All plants in the Right of Way must be maintained below 3' in height and all items in the Right of Way must be break away. Any item(s) not meeting these criteria will be removed at the owner's expense".

Other homeowners, such as Fletcher across the street from Plaintiff, #38 39, and down the street #40 #42, did not and were selectively "left alone" by the HOA. Fletcher was on the Transition Committee and an ARB Board member – he denied Plaintiff the swing set request, and #40 is John Bianchi, a former board member.

On September 26, 2008 Pl #62 63 "The Villas", a condo development within the PUD, received approval from Horry County Planning to install temporary speed limit and curve signs on International Club Drive in the portion dedicated to the County. Per the HC Planning Commission (and the permit, as in the case of Plaintiff's encroachment permit) it was not necessary to obtain prior agreement of Defendant HOA – clearly showing who exercises dominion over these "dedicated roads". Pl #63

On October 2, 2008 Defendant Rosemary Toth, as President of the HOA, applied for an encroachment permit from the Horry County Planning Commission so as to plant landscaping on International Club Drive. By this act she and the IHOA recognized that the county had more than an easement on the road. A servient easement holder – the road owner – does not need permission from the dominant easement owner – the non-owner user – to do something to the road.

It was signed by Defendant Rosemary Toth in her capacity as IHOA President:

Defendants Toth and IHOA sought to plant trees in the area between the curb and the property line

September 18, 2011 and for a few days more, the PUD was hit by storms. The streets flooded into yards. The HOA recognized that it was Horry County not the HOA with responsibility to deal with the flooding – who were called by the IHOA to clear the storm sewers which had been installed under Pickering Drive by the Developer. If the County merely possessed an easement allowing the public to pass, the county would be the benefiting easement holder and the HOA would be responsible to fix the road (Servient –

Dominant Easement doctrine). The HOA recognized that the County is more than an easement holder – it holds the responsibilities of the owner of the streets in the PUD to maintain the streets.

On September 20, 2011 Diehl, for the IHOA, let homeowners know that the "Horry County Storm Water Department" was taking care of the road flooding problem.

ORDER REQUESTED

Plaintiff has shown with the preponderance of the evidence that it is more likely than not that for many reasons as a matter of fact and law, the PUD Covenants do not control what may be done with the streets and that the IHOA has no dominion over them.

Plaintiff asks the Court to Order that it has made findings of fact and conclusions of law that:

(1) The PUD Covenants do not control what may not or must be done within the roadways in the PUD, with the exception of Madrid Drive; the Covenants do not apply to the "front entrance because that road has never been subjected to the covenants and is outside the PUD.

(2) The IHOA has no authority to regulate or control the road ways in the PUD.

(3) There are no restrictions other than those imposed by County or State regulation on what may or may not be done in the streets in the PUD.

(4) The roadways in the PUD extend from private property line to private property line and valid obligations and restrictions on the use of property begin and end within private lots.

(5) The obligation to maintain the roadways lies with Horry County which owns the road ways with the exception of Madrid Drive and that portion of International Club Drive not yet dedicated to the County.

(6) Any and all provisions of the Covenants, including those of subordinate HOA regimes, which contradict these findings are null and void.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	
	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	consolidated with
Plaintiff	Civil Action No. 2010-CP-26-11320
vs.	PLAINTIFF'S POST-TRIAL BRIEF
	SUPPORTING
The International Club	PROPOSED ORDER
Homeowners Association, Inc.,	
et al	
Defendants	

- DIVISION 6 -

WERE THE ACTS OF THE IHOA BOARD BEFORE SEPTEMBER 2007 ULTRA VIRES AND ARE THERE OTHER ULTRA VIRES ACTS OF THE BOARD SINCE THEN ?

What was set before the Court in Plaintiff's Complaint and was argued at Trial was that because the IHOA Board was illegally constituted until September 2007 when at least some semblance of an election by homeowners was held, no board member has authority to act and thus all of the acts of the board were "ultra vires"

It was also argued that many of the subsequent acts of the IHOA board members singly or collectively clearly required either (1) a vote of the members; (2) approval by the board as documented in the minutes; or (3) were not within the scope of authority of the board stated in the Bylaws or (4) were directly contrary to mandates in Covenants, Bylaws, or The Act.

Although the Defendant IHOA was incorporated on March L 2001 as a Non Profit Corporation with Members entitled to vote, no election for members of the Board was held until September 29, 2007 and the term of office of that Board did not properly commence until March of 2008.

APPLICABLE LAW AND RELATED COVENANT AND BYLAWS PROVISIONS **

[** Plaintiff asserts that there are no legally effective Bylaws for the IHOA - thus making moot exceptions in law which consider alternatives under Bylaws.]

The Defendant IHOA was incorporated on March 1, 2001. Pl # 552 per Secretary of State documents.

SC Code 33-31-701. Annual and regular meetings. Pl #223:

(a) A corporation with members shall hold a membership meeting annually at a time stated in or fixed in accordance with the bylaws.

Bylaws 3. ANNUAL AND SPECIAL MEETINGS OF MEMBERSHIP Pl #548

3(a) The annual members' meeting shall be held ... on the second Saturday in March of each year (or such other date as may be designated by the Board of Directors) ...

The First Annual Meeting of The Association AND the Members Was Required to be Held on March 10, 2001- the Second Saturday of March, 2001. Pl #116

Here's what was supposed to happen BEFORE March 10, 2001:

Two directors were to be appointed by the Developer, Plantation AD. until THE MARCH 10 2001 Annual Meeting.

SC Code 33-31-804. Election, designation, and appointment of directors. Pl #230

(a) If the corporation has members entitled to vote for directors, all the directors, except the initial directors, must be elected .. at each annual meeting thereafter, unless the articles or bylaws provide some other ... method of election, or provide that some of the directors are appointed by some other person or designated.

Bylaws Part 4 Board of Directors Section 1 Number. Pl # 248

Until the first annual meeting of the members, the affairs of the Association shall be managed by a Board of two (2) directors selected by the Developer.

AT THE MARCH 10, 2001 ANNUAL MEETING: (which never took place) three directors were to be appointed, for terms of 1, 2 and 3 years. Thereafter, all directors were required to be elected, beginning with one director in 2002, one director in 2003, and one director in 2004. Bylaws Part 4 Board of Directors Section 1 Number Pl #248

"Until the first annual meeting of the members, the affairs of the Association shall be managed by a Board of two (2) directors selected by the Developer. Thereafter, the affairs of the Association shall be managed by a Board of not less than three (3) directors, ..."

Bylaws Part 4 Section 2 Term of Office. Pl #248
"At the first annual meeting the Developer shall select approximately one-third (1/3) of the directors for terms of one year each, approximately one third (1/3) of the directors for terms of two years each and approximately one-third (1/3) of the directors for terms of three (3) years each; "

This scheme results in one Board Member whose office ended March 2002 (one year); one Board Member whose office ended March 2003 (two years); and one Board Member whose office ended March 2004 (three years).

Clearly after the second Saturday in March, 2003, two of the Board Members, a majority, were to be elected by the homeowners.

This didn't happen.

Plaintiff asserts that with regard to a non-profit corporation with members SOME of the directors may be "appointed by some other person or designated" - but not all. SC Code 33-31-804 - invalidating the "designate all" provision of the bylaws. " some of the directors are appointed by some other person"

No election was held until September 19, 2007

The so called "First Annual Members Meetings" was held on July 30, 2004 - which was neither in March, nor the anniversary of the Board's appointment on September 3, 2003. Pl# 305.

No election was held.

BEGINNING IN 2001 THERE WERE HOMEOWNERS ELIGIBLE TO VOTE

On September 27, 2001 Sunbelt, the builder of the Pebble Creek area of the PUD, sold the house -- that Plaintiff now owns - to Cheryl Tucker Essex in Deed Book 2412 at Page 46. This was only one of many such sales to homeowners of completed houses made at that time. Pl #566. Plaintiff's predecessor purchased home September 27, 2001. From Plaintiff's Deed:
"This being the identical property conveyed to the Grantor by Deed of Sunbelt Homes of Myrtle Beach, Inc, recorded September 27, 2001 in Deed Book 2412 at page 0046, Office of the Register of Deeds for Horry County."

On April 29, 2003 Plantation AD, the Developer, sold the remaining PUD property to DR Horton who sold hundreds of houses – most of which years before the 2007 election. Pl #556

Approximately 222 houses were sold in Pebble Creek, where Plaintiff lives, years before the 2007 election.

The 2nd ANNUAL MEETING OF MEMBERS WAS TO BE HELD ON MARCH 9, 2002.

It wasn't.

Bylaws 3. ANNUAL AND SPECIAL MEETINGS OF MEMBERSHIP Pl #548
3(a) The annual members' meeting shall be held ... on the second Saturday in March of each year (or such other date as may be designated by the Board of Directors) ...

Per the calendar for 2002 this was to be March 9, 2002. Calendar Pl # 117

THE DEVELOPER ILLEGALLY RAN THE BOARD THROUGH AT LEAST SEPTEMBER 19, 2007

Examples:

From the Minutes of Board September 10, 2002. Pl #300. all board members were appointed by the Developer.

From the Minutes of Board September 3, 2003. Pl #301. On that day the Board minutes tells us that Charles Flynn, the owner of Sunbelt had been magically appointed to the Board without an election or meeting, as was Developer employees Rick Ryan and Ron Peoples and Russ Carson. Also on the board without election was DR Horton's employee Doug Brown.

Per the minutes no existing board member resigned thus no vacancy had been created. DR Horton simply appointed the new board. Upon information and belief Doug Brown, Horton's employee, simply announced the new Board composition.

No Notice of the Meeting to Replace the Directors was given to Owner Members of the HOA: By statute, notice to homeowners of this meeting and it's purpose was required.

SC Code 33-31-705. Notice of meeting. Pl #225
(a) A corporation shall give notice consistent with its bylaws of meetings of members in a fair and reasonable manner. ..

From the minutes of the "First Annual Members Meetings" held July 30, 2004 Pl # 305: Members were not permitted to vote. The minutes for July 30, 2004 reflect that the Developer lectured homeowners to be meek and not question the Developer Board. He also lied to the homeowners, such as when a homeowner asked about spending money on International Club Drive - which was owned by DR Horton but for which the HOA was spending money maintaining. The HOA so called president, Doug Brown, Horton's employee, lied and said the road was owned by the HOA:

> "Several Members questioned the main entrance road condition. Chairman Brown stated that at this time, this roadway areas is owned and maintained by the Association"

He was truthful that the Horton owned road was "maintained by the Association" but not about it's ownership.

At trial Plaintiff made the unchallenged assertion that in 2011 the federal government fined DR Horton over $75 million dollars for homeowner fraud in North Carolina, and that other actions are underway in other states against Horton for fraud.

No election was held at the "Second Annual Meeting" on August 19, 2005, still disregarding the provision for the Annual Meeting of Members to be held on the Second Saturday in March.

The "Third Annual Members Meeting" was held on August 16, 2006. No election was held. Pl # 315

On August 8 2007 a Notice of Election to be held September 19, 2007 was mailed. This is un-numbered in Plaintiff's list of exhibits but was submitted into evidence. It's authenticity and admissibility was not challenged by Defense Counsel.

The Court is asked to look closely at the second paragraph of that Notice, which reads that the new, 2007 Board will be "appointed by the Developer to act as a Board of Directors". This explains the statement made to Plaintiff, a statement against interest of a member of the board, of outgoing Developer Board Member – Horton Employee Pat Walsh that Walsh had appointed the new board. This was when Plaintiff asked to see the tally of votes on September 19, 2007 and was refused – with Walsh making that statement.. Pl # 320

The first election was held on September 19, 2007. This was neither the anniversary of the appointment of the September 3, 2003 Board Reorganization nor was it the second Saturday of March. The Court is asked to note that the date of an election is not the date a term of office begins, and the Bylaws provide for one year terms. No director resigned to make way for the 2007 directors.

Plaintiff asks the Court to hold that IHOA Board terms of office begin on the second Saturday of March, per the Bylaws

On November 12, 2007 the board sent a letter to the homeowners. In the second paragraph, it told the homeowners that tne new board had been "appointed", although this was "based on the number of votes". This is consistent with the August 8 announcement.

This letter was also not within Plaintiff's list of exhibits and was submitted in impeachment of the assertions by Toth in her deposition that she had been elected by the homeowners. It was submitted in evidence.

Plaintiff's original suit in 2009 asked that all Board Members then in office who had been "elected / appointed" in 2007 be removed, as well as any who had been "appointed" by the board to fill the rest of the term of a board member "elected / appointed" in 2007 who had resigned. Prior to trial Plaintiff waived as "moot" this demand because there was no relief that the Court could grant, all such terms of office having expired in September, 2010. Likewise the demand that the Court look into election irregularities, moot for the same reason.

What is not moot is the legal effectiveness of the decisions, contracts, and other acts of the 2007 Board through the period September 2009, when two out of three of the 2007 board members or their appointed replacements would no longer be in office.

Plaintiff asserts that it is more likely than not, given the documents of the IHOA itself both before and after the 2007 election, that the 2007 Board had been appointed by Pat Walsh, the Horton employee, who stated in an admission against interest that he saw the 2007 election as nothing more than a suggested beauty contest (not his words).

Plaintiff waives asking the Court to enter an order on the question of whether the 2007 Board was appointed or not and the ultra – vires effect of such appointment in lieu of election. The Court thus does not have to deal with what Plaintiff has earlier "waived" relating to the 2007 election.

IMPORTANT CONSEQUENCE:

If the Board was illegally constituted until at least September 17, 2007 all acts and particularly contracts of prior boards were ultra vires. The practical effect of this is only felt on long term contracts, specifically the October 20, 2003 cable tv contract Pl # 302, and the November 20, 2003 "Golf Course Agreement" Pl # 558.

The damage was done by the respective developers, Sunbelt and primarily DR Horton, who Plaintiff believes are beyond the statute of limitations and in any event are not parties to this suit; likewise the individual Builder appointed members of the Board.

At trial Plaintiff did not argue the amount of damages that the putative boards effected by virtue of their illegal assumption of office. Plaintiff is also of the belief that the ultra – vires acts of the illegal boards are not recoverable from the IHOA's insurer since they are not "errors or omissions" of officers.

Plaintiff has shown by a preponderance of the evidence and the law that it is more likely than not that no member of the Board of Directors was properly in office prior to September, 2007.

Plaintiff Asks the Court to Enter an Order holding that each and every act of such prior boards was "ultra – vires" and of no legal effect.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	
	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	consolidated with
Plaintiff	Civil Action No. 2010-CP-26-11320
vs.	PLAINTIFF'S POST-TRIAL BRIEF
	SUPPORTING
The International Club	PROPOSED ORDER
Homeowners Association, Inc.,	
et al	
Defendants	

- DIVISION 7 -

THAT THE SECTIONS OF THE COVENANTS MARKED "WAIVED" WERE ACTUALLY DELETED AND ARE LEGALLY INEFFECTIVE

What was set before the Court in Plaintiff's Complaint and was argued at Trial was that Amendment # 1 to the Covenants effectively deleted many homeowner restrictions on use and obligations stated in the original covenants. The issue came about because the Board of Directors elected in September, 2007 led by Defendant Rosemary Toth refused to accept that any covenant provision had ever been altered, and insisted on enforcing the unaltered original covenants, except for their assertino that provisions of later amendments which subjected additional areas of the PUD covenants – and added dues paying members – were valid.

Plaintiff has suffered direct damages through the efforts of boards since 2009 to enforce those "waived" covenants. Certain of the changes also impose new burdens on the free use of property – by imposing what amounts to a property transfer tax on sale and resale of lots paid by the home owner at original purchase and by the homeowner seller at resale, when the original provision was to impose that as a one time charge at the original sale – paid by the builder as seller. This also had the effect of transferring a burden from the builder to the buyer at original purchase.

That original payment was called a Capital Contribution in the covenants. Based upon a Builder's Agreement obtained prior to when Plaintiff filed his complaint, it appeared that each Builder was required to pay, into the IHOA accounts, a capital contribution of $ 1,000. There being over 700 units, the expected reserve was in the range of $ 700,000.

Pebble Creek Equitable Ownership in the Amenity Center

- A Note –

The same Builder's Agreement indicated that Sunbelt had a binding commitment with his home buyers to provide amenities which would be exclusive to Pebble Creek homeowners. This was verified through information compounded and assembled in discovery over three years. The same Builders Agreement indicated that Plantation AD had a contract with all builders to build for all single family homeowneres a very large common complex at G-2 where the golf course club house now stands, but that this was among the many contracts that Plantation defaulted on through 2003 (Plantation and it's President R Scott Pyle were the defendants in numerous civil suits over contract breaches). Based on the agreement it appeared that Pebble Creek home owners owned a $ 220,000 stake in the Amenity Center since the agreement stated that Sunbelt would provide Horton that much money to satisfy Sunbelt's obligations to it's own home buyers. Papers provided Plaintiff by DR Horton in 2012, by order of this Court, indicate that Sunbelt did indeed give Horton approximately $ 220,000. In 2009 Plaintiff subpoenaed the related documents from Sunbelt who admitted their existence but claimed they were "proprietary" or "so numerous" that producing them would be a burden. In 2012 when this Court finally got around to a hearing to enforce the 2009 subpoena, Sunbelt asserted that it had destroyed the documents during the interval. Plaintiff notes that this constitutes Spoilation of Evidence and may rise to the level of Contempt of Court. However, since no document survives which states the "conditions" under which the Sunbelt funds were provided to Horton to build the Amenity Center, no equitable claim can be made to support this contention in the Complaint. However, the Horton documents did relate that approximately $ 220,000 was given by Sunbelt to Horton to provide amenities for 220 Pebble Creek homeowners, towards the construction of what is now the IHOA Amenity Center, and that Horton, with approximatly 500 additional home buyers, contributed approximately $ 110,000 towards the construction.

This statement is made to explain why Plaintiff at trial did not seek to prove equitable ownership by Pebble Creek homeowners in the Amenity Center and is not asking the Court for related relief.

-- Waived Covenants --

ISSUE: DID THE AMENDMENTS WHICH "WAIVED" PROVISIONS OF THE COVENANTS EQUATE TO DELETING THOSE RESTRICTIONS?

To answer this question the covenants and amendments were presented and the Court was asked to declare the effect of those amendments and what the resulting rights and obligations of the homeowners and association are – as well as the legal validity of certain changes.

On February 8, 1999 Plantation AD, the owner of all the property in the future PUD, filed Covenants concerning the property. Pl # 547.

On January 29, 1999, ten days earlier, Plantation sold to Sunbelt (a builder) the lots

which were resold as "Pebble Creek" where Plaintiff lives. Pl # 545.

On May 9, 2000, Plantation AD filed Amendment 1 to the Covenants. Pl #551.

The document "waived" many of the pre-existing covenant restrictions. The HOA has taken the position that these "waivers" applied solely and exclusively

to the Developer, Plantation AD,
to Sunbelt, a developer and
to International Club Villas, another developer (that day see Amendment #1).

At trial William Freiboth, current IHOA President, made the surprising assertion that none of the restrictions and obligations in the Covenants (other than the mandate to pay assessments) apply to "The Villas". Plaintiff proferrs that his search of IHOA documents has not revealed a single covenant violation levied against The Villas nor a single instance where The Villas applied for permission to do something. Until the resolution in favor of The Villas of a lawssuite filed in 2010 (prior to this lawsuit) against the IHOA,The isolation of The Villas was so complete that they received no notices from the IHOA at all, not even invitations to elections.

To this day Defendants have attempted to enforce every single "waived" covenant restriction, to include levying fines and other sanctions for violating "waived" sections of the Covenants.

Amendment #1 changed the name of the PUD and "waived" numerous Covenant sections.

On April 25, 2003 Plantation AD sold it's remaining lots in the PUD to DR Horton. Pl # 556. Filed April 29, 2003.

On April 25 2003, Plantation AD and Horton executed Amendment 2 to the Covenants, Filed April 29, 2003. This designated Horton as the successor Developer and assigned Plantation's rights to Horton. Pl #555. No prior or subsequent notice was given to existing homeowners of this amendment.

On March 26, 2004 Horton executed Amendment 3 to the Covenants and filed it March 29, 2004. This Amendment deleted, modified, or added numerous covenant provisions. Pl #559. No prior or subsequent notice was given to existing homeowners of this amendment.

On December 23, 2004 Horton and Seacoast Associates, another developer, executed Amendment 4 to the Covenants, Pl #561, filed December 28, 2004. No prior or subsequent notice was given to existing homeowners of this amendment.

This fourth Amendment made major changes to the assessment provisions (changes 3, 4 and 5) and explicitly banned all multi-family occupants from the Amenity Center

(change 3).. At the time Plaintiff raised this issue, Maureen Sullivan, a homeowner from The Glens who was on the HOA Board, asserted that her unit was a "townhome", thus a "single family unit", and eligible for use of the Amenity Center. In sympathy, Plaintiff notes in the exhibits that Defense Counsel brought to trial that there were many self-serving documents generated by the seller, DR Horton, which asserted that Horton's customers in The Glens could use the Amenity Center. Sullivan testifed at trial that it was a salesman who told her this, that she relied on same, and that this was critical to her decision to buy a unit in The Glens. However, the use of the Amenity Center, per the Covenants, turns on whether The Glens was designated "multi-family" to the Planning Commission, which it was, and not on what DR Horton called the units. Horton could have called these units palaces but they were still attached townhouses with it's own common property owned by a sub-association with it's own covenants.

During various elections Rosemary Toth and other board members campaigned to keep homeowners from The Villas off the HOA Board [1] under the theory of "how can they decide how to use Amenity Center Money If They Can't Use the Amenity Center". Maureen Sullivan, a Board Member, owned a house in The Glens which is an area which is defined by the Horry County Planning Commission as a "Multi-Family" townhouse development which per the covenants is in the same category as The Villas.

On or about May 17, 2011 this Court signed a consent judgment in case 2009-CP-26-3211 in which the Villas sued the HOA for, among other things, depriving homeowners in The Villas of a vote in IHOA elections and depriving them of representation on the IHOA Board. In the consent decision the IHOA agreed to appoint a Villas homeowner as a non-elective member of the Defendant's HOA Board. As of today there is no Villas IHOA Board Member.

On June 4, 2008, Horton and yet another developer, ADA Ocean Boulevard, signed Amendment 5 to the Covenants, filed June 20, 2008. This granted ADA "Developer Rights" exempting ADA, like all other developers from the beginning, from any building restrictions. Pl #563. Amendment #5 repeated word for word many of the changes of Amendment #4. No prior or subsequent notice was given to existing homeowners of this amendment.

Through the beginning of this lawsuit in 2009 the IHOA website represented that the Covenants consisted only of the basic covenants and Amendment #1. Upon inquiry at the office of co-defendant KA Diehl, requesting covenant documents, these were the only covenant documents known to exist. Amendments # 2 through 5 were found by Plaintiff's search at the recorder of deeds prior to filing this lawsuit.

No Declarant had asked nor been granted consent by any homeowner to impose a covenant change which increased the burden on existing homeowners – particularly the change in capital contributions which shifted payment of this from the builder to the

[1] Various Villas homeonwers independently found out about the 2007 and later elections and filed the requisite papers to appear on the ballot.

homeowner and made it a recurring expense.

In paragraphs 5 and 7 page 1 of Amendment #3 Pl #559 the Declarant acknowledged that any such change required the consent of existing homeowners. He didn't have it.

Amendment #1 was declared prior to the sale of any house to any individual homeowner. When Amendment #2 was declared in April, 2003, there already were many homeowners – for example Plaintiff's house was conveyed on September 27, 2001, almost two years before Amendment #2. Plantation sold Pebble Creek to Sunbelt prior to the Covenants itself being declared.

MEANING OF THE PHRASE "WAIVER"

On Page 1231 of Black's Legal Dictionary, 1st Edition, the legal meaning of the phrase "Waiver" is stated as follows: Pl #97 and 98--

> "WAIVE, v. To abandon or throw away; as when a thief, in his flight, throws aside the stolen goods, in order to facilitate his escape, *he is technically said to waive them.*
> In modern law, to renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity to take advantage of some defect, irregularity, or wrong.
> A person is said *to* waive a benefit when lie renounces or disclaims it, and lie is said to waive a tort or injury when he abandons the remedy which the law gives him for it. Sweet"

HOA ARGUMENT THAT WAIVERS APPLY ONLY TO DEVELOPERS

Case law is completely against Defendant's argument.

"[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Restrictive covenants are contractual in nature. Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. Taylor, 32 S.C. at 4, 498 S.E.2d at 864. -- Hardy e at v Aiken et al, SC

Supreme Court. Opinion No. 26130 Filed June 12, 2006 .

Defendants argue that the use of the word "waive" instead of "delete" has some special implication --- but don't explain how this translates to applying the "waivers" only to Developers. HOWEVER, a not too careful reading of the original covenants immediately puts the lie to that "limited application" argument.

COVENANT RESTRICTIONS DID NOT APPLY TO DEVELOPER OR BUILDERS – NO DEVELOPER OR BUILDER WAIVER NEEDED

In coming to this conclusion we need only look to the original language of Sections 2.2 and 7.2 of the Covenants – Pl 547:

Section 2.2 reads:

> "Section 2.2 Plan of Development of Additional Property. ... Developer reserves the right to plan, design, develop, construct, maintain and manage ..., the Multi-Family Areas and any unsold Unit as Developer deems necessary or convenient for its purposes, ... including without limitation the right to change the number, shape, size and density of the unsold Units, ... the Multi-Family Areas, ... and the Additional Property.

The last paragraph of Section 7.2 read:

> "Section 7.2 Prior Review of All Plans. Section 7.2 of this Declaration shall not apply to the Developer or to any Designated Builder "

Amendment #5 Pl #563 Para 7 named Kinsale a Designated Builder – for Ballycastle.
Amendment #1 Pl #551 Para 7 named The Villas developer a designated builder.
Amendment #2 Pl #555 Page 2, named Horton as the developer.
Amendment #3 Pl #559 Pages 2 and 3, paragraph 5 named Sunbelt as a designated builder.

These named builders were the only builders in the PUD. As such, per the last paragraph of Section 7.2 of the covenants, the covenant restrictions did not apply to said developers at all and no waiver was needed for any of these builders.

Importance of "Waived" Covenant Provisions to the Case:

Plaintiff argues that he has been illegally harmed by the HOA's insistence on applying an obviously deleted requirement to seek prior Architectural Review Board approval for changes – waived Section 7.2 – and by prohibiting Plaintiff from erecting a Fence despite that the Section, 7.25, has been "waived". The bogus counter – complaint for enforcement and damages is grounded exclusively in the assumption that 7.2 and 7.25 are still effective and, if that is not so, the counter – complaints amount to a frivolous proceeding and an unethical advancement – by Defense Counsel – of that counter – complaint. It is also a violation of the Civil Rule relating to signing a pleading unless the

argument is grounded in substantial law – which is not the situation here.

"WAIVED" PROVISIONS

Amendment #1 to the Covenants, Pl #551. May 11, 2000

At the time there were no individual homes sold in the HOA so notice is not an issue.

Page 1. paragraph 4 of the Amendment reads:
Section 3.7 of the Declaration is hereby deleted in its entirety. There shall be no restrictions on property management firms utilized to operate any Multifamily Association created on the Multifamily Parcel.

The Court is asked to declare that this deletion does not create an additional burden on property and is thus deleted, and to further Order That the HOA shall not attempt to enforce Section 3.7.

Amendment #1 contained the following "waivers":

9. The Declarant hereby waives all easement rights reserved in Article IV, Sections 4.10, Section 4.11, Section 4.12, Section 4.16 and Section 4.17 of the Declaration.

11. The Declarant hereby waives the Architectural Controls set forth in the two numbered Sections 7.2 in Article VII and of Section 7.4, Section 7.25 and Section 7.31 of the Declaration.

12. The Developer hereby waives its rights to enter into and for maintain the Golf Course Easement Area as set forth in Article VII, Section 7.37 (c) of the Declaration.

The Court is asked to consider Black's interpretation of the word "Waived" and equate that to "deleted". From the previous argument, it can be seen that developers and builders had absolute exclusion from the provisions of the covenants in creating their homes for sale.

No "waivers" / deletion created an additional burden on property. Since there were no homeowners there was no need to obtain 100% assent – the Declarant was the homeowner – at least for the non-pebble creek area.

Examining them one by 1:

Sections 4.10, Easements for Utilities. Waiver terminated the right of the "Developer, the Association and their respective successors and assigns .. <u>the power to grant and accept easements</u> to and from any private or public authority, agency, public service district, public or private utility or other

person upon, over, under and across ... To the extent possible, all utility lines and facilities serving the Subdivision and located therein shall be located underground. " The PUD was to stay like it was.

It is noted that this waiver explicitly removes from the developer or the association the power to grant easements. Plaintiff interprets this to mean that the IHOA Board has no authority to grant easements, which is germane to the IHOA Board granting Central Electric an Easement in 2010 for overhead utilities. [2]

The Court is asked to declare that the granting by the Board of an easement is an ultra-vires act.

The waived Section 4.11 of the covenants had read:

Section 4.11. Easements for Walks. Trails and Signs.
There is hereby reserved for the benefit of Developer, the Association and their respective successors and assigns the alienable, transferable and perpetual right and easement upon, over and across:
(i) all portions of the Multi-Family Areas in which Units are not constructed or erected; and
(ii) all other lands which may remain unimproved for the installation, maintenance and use of sidewalks, jogging trails, bicycle paths, signs of all kinds, lakes, lagoons, swales, ditches, other water courses, drainage ways, and related improvements.

-- May 10 2000 Amendment 1

The Court is asked to declare that waiving this section equated to deleting it.

The next section waived in Amendment #1:

Section 4.12. Easements for Association deleted in Amendment 1.
There is hereby reserved a general right and easement for the benefit of the Association, ..., to enter upon any Unit, or Multi-Family Area or any portion thereof in the performance of their respective duties. ... this easement is to be exercised only during normal business hours and ... only upon advance notice to and with permission of the Owner... Any such entry and performance shall not be deemed a trespass.

In effect this waived section had granted the Association permission to enter property to determine whether there was an ARB violation – or whether work had been done without ARB approval. It was akin to a search without a search warrant or a search authorized without probable cause. Deletion of this section was wise.

[2] A pre-existing restriction in the original covenants absolutely forbids overhead utilities.

It is noted that Amendment #1 also deleted the requirement to seek ARB approval for anything, thus there was no need to "inspect", reinforcing the interpretation that it was the intent of the developer in Amendment #1 to delete the requirement to seek ARB pre-approval.

This deletion does not impair a homeowner's enjoyment or use of his lot because it eliminates adverse trespassers.

THE COURT is asked to declare that this waiver deleted Section 4.12.

The COURT is asked to declare that any entry into private property by the Association or its KA Diehl representatives to inspect for ARB violations without the consent of the homeowner is a trespass.

The next section waived in Amendment #1:

Section 4.16. Environmental Easement was also "waived".

> There is hereby reserved for the benefit of the Developer, the Association an alienable, transferable and perpetual right and easement on ... unimproved portions of the Common Areas, Units and Multi-Family Areas for the purposes of taking any action necessary to effect compliance with environmental rules, regulations and procedures ..... instituted by the Board of Directors or by any governmental entity, such easement to include without limitation the right to implement erosion control procedures and practices, the right to drain standing water and the right to dispense pesticides.

This deletion enhanced the free use of property.

It is clear that this provision was a "helper" section to the enforcement of the requirement to seek pre-approval from the ARB – and the deletion of the helper section buttresses the argument that it was intended to delete a requirement to seek pre-approval from the ARB.

The Court is asked to declare this "waiver" is a deletion.

The next section waived in Amendment #1:

Section 4.17 Pond Water.

This section granted the Association a perpetual equitable interest in the riparian rights in the PUD – ownership of the water in the ponds. It read:

> There is hereby reserved for the benefit of Developer, the Association [a] perpetual right and easement: (i) to pump water from lagoons, ponds ... (ii) to drill, install, locate, maintain and use wells, pumping stations, ... (iii) to

spray or locate any treated sewage effluent

The Court has already been asked to deal with this amendment.

The next section waived in Amendment #1:

Sections 7.2 Architectural Review Board, ARB.

The deletion of this section is the most important provision of Amendment #1.

Plaintiff has already explained that "waiver" equates to "delete" AND
That no developer or builder was ever required to nor ever actually sought approval of any plans from any ARB.

Not to be overlooked is that deleted section 7.2 was the source of authority for the development, promulgation, and enforcement of architectural rules. The deleted section read in part:

> The Architectural Review Board shall have the right and authority to establish, amend and enforce architectural guidelines, rules and regulations, to aid the Architectural Review Board and Owners in establishing an orderly and efficient procedure for accomplishing its duties and powers here-under.

So deleting this section not only deletes the requirement to seek approval, it deletes the authority of the ARB to make and enforce rules.

This does not gut the enforcement of the surviving covenant provisions.

Under the Covenants any homeowner as well as the Association itself can demand that a homeowner, or the golf course, that violates the covenants remedy that – and can enforce a failure to remediate with suit in court. Ultimately, this is the same enforcement mechanism that the Covenants prescribes without deleting 7.2.

So deleting the ARB does not deprive any homeowner of any protection, rights, or obligations that the amended covenant sets out. The amendment merely eliminates a dysfunctional requirement susceptible of corrupt use because of a lack of checks and balances.

Whether or not the Covenants applied to Pebble Creek – and hence subsequent Amendments, the Covenants certainly apply to the Horton sections of the PUD.

In analyzing the deletion it is irrelevant whether the deletion was wise or unwise, functional or dysfunctional. The analysis need look only to several things:

1) Did an existing homeowner have notice before or after -
There were no existing homeowners on May 10, 2000 who were entitled to notice.

2) Did the elimination of the ARB add burdens to the free use of property?
No --- It actually facilitated the freer use of property.

3) Did this deprive some homeowner of any right or did it impose any new obligation?
No.

4) Did Plantation AD have the authority to make this deletion and did he properly do so?

Yes – and it should be noted that the only entity whose rights were diminished was the Developer himself, since the Developer ran the ARB for years, the developer was restricting his own powers of control over homes after sale. Without an ARB, no homeowner needed to ask the developer for permission to perform modifications after purchasing a home, which approval could be arbitrarily with-held. It should be noted that there are no known instances where any developer refused to allow any homeowner to make any modification requested directly from the developer prior to the 2007 transition to homeowner control of the PUD.

In making this decision the court should be guided by Arcadian Shores HOA v Cromer, 644 SE 2d 778, 373 SC 292, where the Court held that any "regulation" stating a restriction not explicitly stated in the covenants was in fact an attempt to enlarge the covenants and required the procedurally correct amendment of the covenants. The Court further held that any so called "rules" required proper signing, acknowledging, and indexing with the recorder of deeds to place everyone on effective notice of these rules – which procedure is never followed for so called ARB rules.

The Court is asked to declare that

1. Section 7.2 has been deleted and is unenforceable;
2. Any attempt to enforce 7.2 is frivolous and without authority.
3. There is no source of authority to establish, amend and enforce architectural guidelines, rules and regulations,
4. AND TO ENJOIN THE ENFORCEMENT OF SECTION 7.2.

The next section <u>waived</u> in Amendment #1:
Amendment #1 also "waived" <u>Section 7.4. Fences</u>.

This deleted section is found beginning on Page 17 of the Covenants, PL #547.

In examining this section it should be noted that this has absolutely nothing to do with gardens, flower beds, landscaping edging, trees, or palm tree beds, which the Defendant has attempted to use it to control,

Plaintiff introduced into evidence photographs showing that there are literally dozens of fences of wide architectural variation, height, location, and materials throughout the PUD – far more than the 28 that the Defendant admitted through answers to

interrogatories.

In Arcadian Shores v Cromer the Court of Appeals held relating to fences in an HOA which Arcadian Shores sought to control --

> "However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts."
>
> "Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures." Upheld that the Association thus waived its right to review / approve.

Besides the failure to have a consistent scheme, there is a fatal defect in the wording which the Developer may have recognized when he decided to delete this section. That flaw is that forever more, even when the Developer lacks horizontal privity in the development, the ARB is not allowed to act without the Developer agreeing in every instance. The text reads:

> No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board and set back from Unit lines at such distance as the Developer and the Architectural Review Board in their *sole discretion* may require, or except those erected by the Developer in Common Areas. Said fences and patio fences shall be allowed only after obtaining prior written approval of the Developer and Architectural Review Board. Said fences shall be made of materials approved in advance by the Developer and Architectural Review Board ...

Additionally, the section purported to allow the ARB to act selectively and capriciously, without having to relate a decision to a covenant provision or to give an explanation. Further, there was no procedure stated to appeal such a decision, thus making it susceptible to manipulation by hostile neighbors for personal purposes.

Deleting this section enhanced the free use of property. It did not impose a single additional burden on homeowners.

The next section waived in Amendment #1:

> Section 7.25. Relating to parking was deleted.
>
> Parking; Certain Vehicles Prohibited From Units.

This section was problematic to start with because the Horry County Planning Commission approval of the Development, and all subsequent approvals, uniformly stated that all roads would be built to Horry County standards, would be public, and would be dedicated to Horry County.

The Requirement for Dedication was in addition to the requirement that all roads be Public.

In unincorporated areas all parking restrictions are pre-empted by state law which in effect says that if you don't block traffic and passing sight lines, all duly registered vehicles can park where they want to, in the South Carolina spirit of hands off government – a message lost to the incumbent HOA Board and it's predecessors.

Horry County has promulgated ordinances for the towing of vehicles from private property, making it illegal for private individuals to arbitrarily tow or harass private cars. There are strict provisions as to towing from public streets – it may be done only by police or fire officials.

The streets were never owned by any home owner association and clearly there was no horizontal privity from the start. Individual homeowners always have had at least an easement of necessity to park any number of their vehicles on the public streets in the PUD so long as those cars are legally registered and don't obstruct traffic.

There is yet another impediment to any attempt by an HOA to regulate parking on public streets in the PUD: individuals who don't live in the PUD have an absolute right to park on streets within the PUD, and the HOA would have no legal mechanism to restrict such vehicles. An attempt to restrict identical cars identically parked, one owned by a homeowner and another by an outsider, clearly would reflect a capricious and arbitrary and selective enforcement mechanism.

The deletion of the section was a wise choice. It does not impose an additional burden on the free use of property.

It is also supported by Hardy v Aiken, 631 SE 2d 539. 369 SC 160 Supreme Court 2006 where it was held that ARB rules which purported to impose parking controls not explicitly contained in covenants – or to supplement same – were illegal and void, supporting the lower court's decision upholding the free use of property.

The "waived" section read in part:

> **... Owner agrees not to park any automobile or other vehicles (including golf carts) or those of such Owner's guests on the streets ... Parking shall only be allowed on designated paved parking areas, ... No travel trailers or mobile homes, campers or other habitable motor vehicles ... shall be used, kept, stored or parked overnight, ... The Association shall have the right to have towed or otherwise removed any vehicle in violation of this Section 7.25, and shall charge the cost thereof to the Owner of the Unit involved, and shall have a lien for such cost against such Unit, enforceable in the same manner as an Assessment as provided herein.**

It is noted that it is common in the PUD for travel trailers , boats, and other such

vehicles to be parked for days in driveways or on the streets of the PUD. This was the testimony at trial of Plaintiff's witnesses and in Mr. Astorino's original deposition. It was also Plaintiff's testimony. This was not controverted when Freiboth, Abel, and Sullivan took the stand.

The Court is asked to declare Section 7.4 deleted and unenforceable, and to enjoin any attempt to enforce same.

The next section waived in Amendment #1:

> Section 7.31. Prohibition of Open Outdoor Storage was likewise waived. It read
>
> No materials of any kind shall be stored on a Unit other than in an approved enclosed structure, which shall be attached to the principal dwelling. Firewood and bicycles may be stored outside in side or rear yards only, provided they are not visible from any Common Area, easement, street or Recreational Amenity area.

The deletion of this section enhances the free use of property and does not impose any additional burden on any homeowner.

In evaluating this deletion it is not the Court's role to decide the effect this may have on property. This Amendment was properly noticed, witnessed, recorded and indexed. Every homeowner was on notice that this provision was deleted – as was the deletion of all other sections accomplished in Amendment 1. Thus when homeowners bought their units they could not rely on Section 7.31, nor the section on fences, nor the section on ARB.

It also did not add an additional burden on the free use of property.

The Court is asked to declare this section voided and enjoin any attempt at enforcement.

The next section waived in Amendment #1:

Section 7.37 (c) within Section 7.37 Special Restrictions Affecting Golf Fairway Residential Areas. This subsection (c) deleted by Amendment #1 pertained to the "Golf Course Maintenance Easement" which was deleted by this amendment.

It should be noted that at the time of Amendment #1 the same individual who controlled the developer, Plantation AD, also controlled the golf course, Plantation Golf. AD.

The deleted subparagraph read:

> There is reserved to the Developer a "Golf Course Maintenance Easement Area" on each Lot ... adjacent to any golf course ... This reserved easement shall permit the Developer ... to go onto any Golf Course ... Area for the

purpose of landscaping or maintaining said area. ... The Developer reserves the right to waive the easement herein reserved in whole or in part in its sole discretion.

The Court is asked to note that in the context of this section, the clear meaning of waive is delete, where he said he might waive the easement in whole or in part.

Deleting this enhanced the free use of homeowner property because it eliminated the possibility that someone might arbitrary tear out a homeowner's landscaping – a possibility that would obstruct sales of golf course side lots.

The Court is asked to note that even with this deletion there remains a prohibition on obstructing the view of golf course side lots onto the golf course. This is enforceable at law by homeowners themselves, the actual injured parties anyway.

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PROVISIONS IN AND CHANGES TO THE COVENANTS
THE COURT IS ASKED TO INTERPRET BY DECLARATION

ORIGINAL COVENANTS PL #547

Who owns the rights to the water in the Ponds within the PUD, irrespective of who owns the underlying land, and what use may the owner of the riparian rights make of the water?

Plaintiff argues that the covenants as originally stated gives the riparian rights to all water in all ponds within the PUD to the Association named in the original covenants – The Murrells Inlet Golf Plantation Association.

The relevant section reads:

Section 4.17. Wells and Effluent. There is hereby reserved for the benefit of Developer, the Association and their respective agents, employees, successors and assigns an alienable, transferable and perpetual right and easement: (i) to pump water from lagoons, ponds and other bodies of water located within the Subdivision for the purpose of irrigating any portions of the Subdivision, for fire control and for other purposes;

(ii) to drill, install, locate, maintain and use wells, pumping stations, water towers, siltation basins and tanks and related water and sewer treatment facilities and systems within the Common Areas, including within any portion of the Recreational Amenities; or

(iii) to spray or locate any treated sewage effluent within the Common Areas, including within any portion of the Recreational Amenities or upon any

unimproved portions of any Unit, or Multi-Family Area.

Plaintiff asserted at trial that when the Covenants were written, it endowed the named association, MIGPA, with the equitable riparian rights to the water in all the ponds in the PUD.

The Court is asked to Declare that Riparian Rights in the water in the ponds and in the streams in the PUD belonged to MIGPA from the moment the Covenants were declared.

Plaintiff asserted at trial that the developer could not, without the consent of MIGPA, deprive MIGPA of those equitable riparian rights without it's consent.

The Court is asked to declare that no Amendment to Covenants could affect a property right, particularly the riparian rights, without the written consent of the property holder, in this instance it being MIGPA.

Plaintiff asserted at trial that the Developer had no capacity as a matter of law relating to covenants to delete a provision endowing MIGPA with equitable riparian rights.

The Court is asked to declare that Section 4.17. Wells and Effluent survived any attempt by the Developer to delete it by amendment and remains in force.

Plaintiff asserted in court, citing Hardy v Aiken, 631 SE 2d 539,369 SC 160 – 2006 that general provisions for amending covenants can not be used to alter, create, or eliminate specific provisions of covenants related to specific rights or obligations. Or more exactly, that a vote of the members in the majority stated in The Act was required.

Plaintiff asks the Court to Declare that the only way The Association may eliminate, alter or impose provisions of covenants relating to specific equitable rights or uses of property is through the vote of the members as provided in The Act.

How has the notion of Common Areas been affected by Amendment?

The Developer never designated any actual property as Common Areas.

Paragraph #3 of Amendment #1 stated that
3. There is no "Common Area" as such term is defined in the Declaration located in or on the Multifamily Parcel.

Plaintiff interprets this as an attempt by the Developer to prevent a future IHOA Board from transferring the burden of maintaining property belonging to a multi-family sub association to the IHOA in general by accepting ownership of sub-association property and declaring it to be IHOA common areas since it would not be owned by the IHOA.

This has actually happened and Plaintiff believes that this is "illegal" under the

covenants, Amendment #1. DR Horton deeded the parking lot for the Glens to the IHOA, without the IHOA's consent in the minutes, and the IHOA now is maintaining this limited use parking lot aka Madrid Drive at the expense of all homeoweners.

At trial William Freiboth testified that in 2012 the current IHOA board discovered what Horton had done. Clearly the IHOA board had no knowledge about this – it wasn't in their minutes. The Horry County Planning Commission plat for the Glens, Pl # 466 specifically required the HOA of The Glens to maintain that "private road" / common area. Freiboth also testifed that the current board just recently gave The Glens sub-HOA $ 10,000 to "reimburse The Glens for maintaining " it's own parking lot, and committed to having all homeowneres maintain Madrid Drive / aka The Glens parking lot into the future.

The Court is asked to declare that this action directly violates the provision of the amended covenants, per Amendment #1, which prohibits IHOA common areas "in the multi-family parcel". Madrid Drive, as a common area, is "in the multi-family parcel"

The Court is also asked to Order that if the current IHOA board is unsuccessful in retrieving the $ 10,000, that the current board be held personally, individually, and collectively resonsible to repay the IHOA for the $ 10,000.

When all was said and done Freiboth and the current board tried to capitalize on the original covenant's definition of common areas. Common Areas were defined in Section 1.6 of the Original Covenants, pg 2 as

> Section 1.6. Common Areas shall mean and refer to all *real and personal property owned by the Association* for the common use and enjoyment of the Owners *or designated by the Developer as Common Areas*,

Plantiff asks that the Court explicitly declare that roads and shoulders are not Common Areas to settle the issue that the roadways are not among the property for which The Association can collect money, through assessments, to maintain.

If one looks at Plat Book 181 Page 89, Pl #460 one sees that all roads in the PUD are marked "public" and are specified to be dedicated for public use on every Planning Commission plat relating to the PUD.

CAPITAL CONTRIBUTIONS IN THE AMENDED COVENANTS:

In accounting terms, Capital expenses is money spent on equipment with a life of more than one year. This is easily seen through IRS rules regarding deductions for business expenses.

The original Covenants refer to Capital Contributions as follows::

Section 3.5 Capital Contribution. The association shall collect a capital

contribution equal to 1/6th of the aggregate annual assessment for each Unit as set forth in Article VI. Each Unit's share of said capital contribution shall be collected and transferred to the Association at the time of the closing of the initial sale of each Unit *by the Developer.* All sums paid as a capital contribution are in addition to and not in lieu of regular assessments for common expenses.

The Court is asked to declare void this section because of it's ambiguity.

An additional reason for the Court to void this section is because it is not uniform in it's computation and application:

If this is tied to the monthly assessments imposed on homeowners, it becomes speculative and very arbitrary because of the following:

(a) Some homeowners pay less than others in a monthly assessment, for example at one time $ 70 for single family homeowners and $ 20 for condo homeowners, and of the $ 70, much of that is for cable TV and garbage which is not a charge paid to the HOA by condo owners. Thus single family homeowners will have their capital contributions controlled not by the need for capital replacement but by the unrelated charges imposed by the cable and garbage companies.

(b) The assessment increases from year to year, thus a homeowner selling in year one will pay less than a homeowner paying in a following year – supposedly for the same capital replacement cost thus the later homeowners pay a larger share of replacement capital money.

The Court is asked to declare that any scheme which collects uneven rates from the same category of homeowner is void.

CAPITAL CONTRIBUTION AMENDMENT PROVISIONS OBJECTED TO:

Amendment #3, March 29 2004 Pl #559:

3. Section 3.5 shall be deleted in its entirety and the following shall be substituted in *its place and* stead:
Section 3.5 Capital Contribution. The Association shall also collect a Capital Contribution equal to two (2) month's assessments for such Unit from each new Owner of a Unit upon the transfer of such Unit either from the Developer or from another Owner. All sums paid as Capital Contributions are in addition to and not in lieu of regular assessments for common expenses.

4. Section 6.7 shall be deleted in its entirety and the following shall be substituted in its place:
Section 6.7 Capital Contribution. The Association shall collect a Capital

Contribution from each Owner of a Unit as provided in Section 3.5 hereof.

The Court is asked to declare that this amendment is void for the following reasons:

(1) Unequal burden on a particular house unit for the reasons stated. Note that there is a difference between a burden on property and a burden on a particular owner.

(2) Requiring a subsequent purchaser to pay a sum of money to the HOA imposes an additional burden on the sale because it increases the cost of the housing unit.

(3) The HOA does not own and has never owned a particular housing unit. It has been held that a covenant may not require a buyer or seller to pay sums to a third party upon the sale of property; All federal mortgage institutions such as FHMA, Fannie Mae, VA, have bans on paying such sums in connection with mortgages issued by or for those agencies, which means that this payment scheme makes it impossible for a buyer to finance a house in the PUD if the requirement is honestly disclosed to the federal agency. In addition, this is not a proper covenant touching and running with the land..

(4) These changes were made without the approval of or prior or subsequent notice to existing homeowners.

(5) It violates the Hardy v Aiken [3] decision in that this change required 100% approval and could not be made in any other fashion. Further, there is a specific amendment provision in section 6.4 which specifically applies to added capital contributions other than the one at original sale.

Additional Ambiguous Burden

Horton imposed an additional burden, on condo buyers but not single family home buyers, in paragraph 5, covenant burden added, Amendment #4 to the Covenants, Pl 561, December 2004 which should be voided because of it's ambiguity and internal wording conflicts:

> **5. Owners of Units in the Multi-Family Parcel shall pay the amount of One Hundred and Fifty ($150.00) and no/100 Dollars to the Association at the time a Unit is conveyed from the Developer to a third-party purchaser as a contribution toward the maintenance of the entrance and roads of the International Club PUD.**

This is clearly NOT the capital contribution charge because it is for "Maintenance".

Related Problems:

In 2004 DR Horton owned the International Club Drive front entrance off

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[3] Hardy e at v Aiken et al, SC Supreme Court. Opinion No. 26130 Filed June 12, 2006

Tournament Drive AND all the roads in the PUD. The International Club Drive front entrance isn't even in the PUD. No roads or entrances were or are "common areas". The County always owned and owns the Pebble Creek entrance – off of McDowell Shortcut Road.

The Court is asked to declare the change numbered "5" in Amendment #4, paragraph 5, void.

In addition --

(1) This is internally ambiguous and doesn't make sense: At the initial sale the developer sells to a second party. The developer never will "convey from the developer to a third party purchaser". This event will literally never occur.

(2) Doesn't apply to single family homeowners – so not uniform in its application.

(3) No prior or subsequent notice to existing condo homeowners.

(4) Violates the Hardy v Aiken decision in that there are specific assessment provisions and the general amendment by developer scheme was used to make Amendment #4..

(5) Condo homeowners now have a fixed, very large additional burden charge. This is in addition to the first month's two months of assessments charge so this makes it more expensive to resell the house.

(6) This is a personal services contract not a proper covenant that runs with the land, and lacks horizontal privity on the part of either party or anyone with an interest in the sale of the real estate.

(7) It is imposed on existing homeowners without their consent or notice.

INTERPRETATION OF UNAMENDED COVENANT PROVISIONS

INTERPRETATION OF COMMON AREA DEFINITION.

Definition:

> Section 1.18. Multi-Family Area shall mean and refer to any portion of the Subdivision designated as such by the Developer in which common elements are owned by either the Owners of Units in such Multi-Family Area as tenants-in-common or by the Multi-Family Association composed of such Owners, pursuant to a Horizontal Property Regime or other multi-family legal structure within the Subdivision upon which there shall have been or will be constructed either attached or detached townhouses,

condominium units, apartment units, cooperative units, cluster homes, patio homes or similar multi-family structures.

When Developers applied to the Horry County Planning Commission for subdivision approval, the plats were required to designate whether an area was for single family or multi-family use, the densities, the number of units, and other restrictions such as set backs and percent lot coverage.

We see this in the Planning Commission documents Pl #449, in the Murrells Inlet Golf Plantation approval in 1997, Pl # 450, in the Lantana 1999 approval, Pl # 451, in the 2000 approval of The Villas, Pl #459, and in the 2004 approval of The Glens, Pl #466.

Both the Villas, the Cambridge townhouses, and The Glens own common area through their sub-homeowner associations, the Multi-family associations, which certainly are at worst an "or other multi-family legal structure". The Cambridge recorded the deed to it's common area from Horton on June 12, 2007. Likewise The Glens common area from Horton on December 4, 2007.

The Planning Commission specifically approved The Glens as "Town Houses" not "Town Homes". See Glens approval plat Pl # 466.

The covenants do not refer to nor depend on any sales literature put out by any builder calling an area a "townhome". They simply state an area is either single family home or multi family, with consequential rights and obligations, which determination was perpetuated in Planning Commission documents and related Plats.

The Court is asked to declare that any area of the PUD designated as a multi-family area in a planning commission Plat and which owns common areas through an association other than the one designated in the PUD overall Covenants is a "multi-family" area within the meaning of the Covenants.

Per Arcadian Shores v Cromer, an alternative interpretation is not permitted. The Covenants could have been written to exclude "town homes" from the "mutli-family" definition but did not. When Horton bought out Plantation in 2003, and subsequently made numerous amendments, it had the opportunity to try to alter the covenants in this regard but did not.

Horton's usage when it sold The Glens units, for example, to sometime Board Member Maureen Sullivan on October 4, 2005, does not control.

-- CONFLICT BETWEEN NON-PROFIT CORPORATION ACT AND COVENANTS OVER CAPACITY OF COVENANTS TO CONTROL AN ASSOCIATION --

At trial the Defense witness King asserted that it was the "habit" or "practice" of developers in Horry County to write controls over hypothetical, then non-existent non-profit corporations (future home owner asociations) into their covenants. Reading the deposition testimony of Toth, Freiboth, and Pyle (the developer / President of Plantation AD) and listenting to the trial testimony of King, Sullivan, and Abel it is clear that it is common to assume that documents associated with deeds to land can have anything to do with corporations.

Within South Carolina there is no HOA statute. The legislature has deliberately chosen to leave control over HOA's remain under the Non-Profit Corporation Act, 33-31 of the Code.

The Code expressly states in many places that the governance of a non-profit corporation is explicitly to be derived from The Act, from the Articles of Incorporation, and from the Association's Bylaws. Any other document which attempts to control the operation of a non-profit corporation is pre-empted by law, common law and practice to the contrary.

On February 8, 1999 R Scott Pyle, President of Plantation AD, signed the covenants with purported Bylaws for "The Association" as an Exhibit. Pl # 547

On July 26, 1999 the HOA was incorporated with the Secretary of State. Pl #552.. The Declarant / incorporator was Ken Grover.

SC Section 33-31-206. Bylaws. (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.

Nothing in the Covenants, including the Exhibit purporting to be the HOA's Bylaws, can be considered the Bylaws because they were adopted by someone who was not the incorporator nor, since the HOA did not exist, was Pyle a member of the HOA's board of directors.

Section 3.4 of the Covenants purports to control the Voting rights in the Association.

Covenants provisions must touch and run with the land and control the use of the property. Voting in a non-profit corporation does not touch and run with the land nor does it affect the use of the private property. Since this covenant topic is not part of the Association's Bylaws, but part of a document never adopted by the Association nor it's incorporator, this area of the covenants should be declared null and void since it has nothing to do with land. The default provisions of The Act will apply to The Association, thus this does not leave the IHOA in limbo.

The Covenants reads as follow in this regard:

Section 3.4. Voting Rights. The Association shall have two classes of voting membership:

Class A. Class A members shall be all Owners excepting the Developer. Class A members shall be entitled to one vote for each Unit in which they hold the interest required for membership by Section 3.3 above. When more than one person holds such interest or interests in any Unit, the vote attributable to such Unit shall be exercised as such persons mutually determine, but in no event shall more than one vote be cast with respect to any such Unit. The owner of the Golf Course shall have the voting rights of fifty (50) Class A members.
Class B. The sole Class B member shall be the Developer. The Class B member shall be entitled to ten (10) votes for each Unit in which it holds either the interest required for membership under Section 3.3 above or (as to the Additional Property) the right to submit Units to this Declaration. The Class B membership shall cease and become converted to Class A membership upon the occurrence of the first of either of the following two events:

The statute goes further:

SUBARTICLE B. . TYPES OF MEMBERSHIPS - MEMBERS' RIGHTS AND OBLIGATIONS SECTION 33-31-610. Differences in rights and obligations of members.

All members have the same rights and obligations with respect to voting, dissolution, redemption, and transfer, unless the articles or bylaws establish classes of membership with different rights or obligations. All members have the same rights and obligations with respect to any other matters, except as set forth in or authorized by the articles or bylaws.

Clearly the covenants (which are neither the articles nor bylaws) can NOT establish classes of membership.

The Court is asked to declare that nothing in the Covenants shall control the operation of any homeowners association, specifically to include voting rights and privileges in such a homeowner association..

MEMBERSHIP ISSUE.

The Covenants requires that every homeowner be a member of the named association. This would be a legally valid requirement if the PUD was in a state with a homeowners association act – but the subdivision is in South Carolina. All HOA's in South Carolina are expressly incorporated subject to a specific membership statute -- See Pl # 552 == that being 33-31-202 of the South Carolina Non-Profit Corporation Act. This is pre-emptive of private agreements to the contrary, in areas where it does not provide for provisions to the contrary, such as the section of when the annual meeting shall take place.

The Covenants:

Section 3.3. Membership. Every person or entity who is an Owner of any

Unit shall be a member of the Association. Membership shall be appurtenant to and may not be separated from ownership of the Unit.

There is no provision in the covenants for resignation. This is not stated as "may be a member" as a scope of eligibility, such as a neighborhood association.

This is pre-empted by law:

ARTICLE 6. MEMBERS AND MEMBERSHIPS
SUBARTICLE A. . ADMISSION OF MEMBERS
SECTION 33-31-601. Admission. (a) The articles or bylaws may establish criteria or procedures for the admission of members.
(b) No person may be admitted as a member without his consent.

SUBARTICLE C. . RESIGNATION AND TERMINATION
SECTION 33-31-620. Resignation. (a) A member may resign at any time.

33-31-601 of the Code states that the articles or bylaws, not some external covenant, controls criteria for membership.

The Court is asked to declare that Section 3.5 of the Covenants is void as a matter of law.

BYLAWS OF THE ASSOCIATION DECLARED IN THE COVENANTS

Turning to Exhibit C of the Covenants, "Bylaws of the Association", Pl #548 --

This purports to be the Bylaws of the Murrells Inlet Golf Plantation Association.

It was recorded at Deed Book 2117 at 1400.

It is NOT indexed to the Murrells Inlet Golf Plantation Association.

It is part of a document indexed to the Murrells Inlet Golf Plantation – the PUD, exactly as early amendments to the covenants were indexed.

It is NOT indexed to the Defendant International Club Homeowners Association or to ANY homeowners association.

It is not separately signed or verified by anyone.

It is part of a document which violates the statute in that it is not declared by the incorporator or board of directors.

Section 33-31-206. Bylaws. (a) The incorporators or board of directors of a corporation shall adopt bylaws for the corporation.

These Bylaws were never adopted by the membership or board of any HOA.

The Court is asked to Declare that the Bylaws which are at Exhibit C to the Covenants, as found in Deed Book 2117 Pages 1384 through 1400, are null and void as to their effectiveness as the Bylaws of any Association.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	
	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	consolidated with
Plaintiff	Civil Action No. 2010-CP-26-11320
vs.	PLAINTIFF'S POST-TRIAL BRIEF
	SUPPORTING
The International Club	PROPOSED ORDER
Homeowners Association, Inc.,	
et al	
Defendants	

- DIVISION 8 -

THAT THE GLENS IS A MULTI-FAMILY AREA

What was set before the Court in Plaintiff's Complaint and was argued at Trial was that the Glens is a multi-family sub-development and as such is bound by the limitations of the two other multi-family areas, those being The Villas and The Cambridge, and eventually The Ballycastle if and when it is built.

The particular practical question is whether homeowners in The Glens are allowed to use the Amenity Center. The homeowners in The Cambridge are not allowed to use the Amenity Center. The builder of The Cambridge and The Glens was DR Horton. A different builder constructed and sold The Villas condominiums. That builder came through with his promise to build a cabana and pool for the Villas purchasers. Horton promised the same for The Cambridge homeowners but never delivered, which is still a source of contention between Cambridge homeowenrs and DR Horton but which is outside of this litigation.

DR Horton was not the author of The Covenants. Horton, however, inherited the authority of Plantation AD – the title of Developer -- as part of the purchase of the remaining lots from Plantation AD in 2003. Horton could have, but did not, amend the Covenants to alter the requirements for use of the Amenity Center. As recently as 2010 Horton attempted to get the homeowenrs to allow Cambridge multi-family owners into the Amenity Center so as to resolve the dispute between Horton and the Cambridge. The over - whelming opposition of single family homeowners stifled that attemptl.

As Maureen Sullivan, a defense witness who is a member of the boarrd of The Glens' sub-association and former board member of IHOA testified at trial, the lure of the Amenity Center meant for single family homeowners was the critical inducement in getting her and others to buy at The Glens – from Horton.

For purposes of reference the Court is asked to note Pl # 557, the May 16, 2003 agreement between Sunbelt and Horton. That agreement perpetuates that the original concept for homes was that single family homes would all be 1900 square feet or larger (page 4). The Murrells Inlet Golf Plantation Plat approved by the Plannng Commission and modified and reapproved as the Lantana Plat reflect homes with lots of one-third of an acre or larger. The 2003 submission by Horton on June 19, 2003 Pl #461 reflected small houses on one – quarter acre lots, or smaller. Pebble Creek homes are as large as 3000 square feet, typical Horton homes are as small as 1200 square feet, or even smaller. Horton changed the look of the PUD.

MULTI FAMILY PER COVENANTS

The Covenants talk about "Areas" as the key to distinctions between ownership rights, not the construction of units within those areas. Thus an argument that The Glens is a "townhome" not a "townhouse" is bogus and inapplicable.

The Covenants defines what it means by a "multi – family area". PL # 547 Covenants

> Section 1.18. Multi-Family Area shall mean and refer to any portion of the Subdivision designated as such by the Developer in which common elements are owned by either the Owners of Units in such Multi-Family Area as tenants-in-common or by the Multi-Family Association composed of such Owners, pursuant to a Horizontal Property Regime or other multi-family legal structure within the Subdivision upon which there shall have been or will be constructed either attached or detached townhouses, condominium units, apartment units, cooperative units, cluster homes, patio homes or similar multi-family structures.

At Plaintiff's # 007 is a photo placed into evidence at trial of what one of The Glens units looks like. It is a typical tounhouse. "A picture is worth a thousand words". Upon information and belief, it is Maureen Sullivan's unit. At Pl # 011 is another picture of a row of The Glens townhouse units and at Pl # 016 is another set of such units. More such units are at Pl # 109 and # 110..

The Horry County GIS images of the two common areas held in common by all owners of units in The Glens are at Pl # 107 and 108 with their TNS numbers. It can be seen that these common areas are to the rear of either row of The Glens townhouses. Plaintiff's witnesses Mike Butryn and Pete Pizzi testified that IHOA maintains at least one of these areas at the expense of all homeowners.

The full Planning Commission approval Plat for The Glens is Pl # 466 approved May 26, 2003, Plat Book 197 at 171. "Blow ups" of notes from this Plat are at Pl # 128 through 130.

Both the Murrells Inlet Golf Planatation and Lantana PUD's refer to the area on which The Glens was built as "mutli-family", "MF", and has substantially different restrictions for construction there than for the areas designated as "Single Family", "SF".

Section 1.18 refers to Multi – Family associations or subordinate regimes. These are defined in the Covenants as follows:

> Section 1.19. Mufti-Family Association or Subordinate Regime shall mean and refer to a corporation or an unincorporated association the shareholders or members of which are all Owners of Units within a Multi-Family Area or within any subordinate property development within the Subdivision, whether submitted to a horizontal property regime or made subject to further or additional restrictions and/or covenants of ownership, use and control.

It was undisputed that The Glens has it's own additional set of covenatnts with restrictions which provide for joint ownership of the two common areas and for membereship in a subordinate regime, The Glens Homeowners Association.

Another phrase used in distinguishing single from multi-family areas

> Section 1.20. Multi-Family Declaration shall mean and refer to any instrument or document, and any amendments thereto, which is recorded in the office of the Register of Deeds for Horry County with respect to any Multi-Family Area and which creates a townhouse, patio home, cluster home, cooperative regime, or condominium or horizontal property regime for such Multi-Family Area or imposes covenants, conditions, easements and restrictions with respect to such Multi-Family Area.

In the Murrells Inlet Golf Plantation PUD approval The Glens is the area at Phase II. It was is approved as "MF" Use with 14 Units per Acre.

In the Lantana modification The Glens is in area hase G-1 with 9.6 Acres. Phase G-1 is makred as a Multi-Family Phase approved for 192 units.

The May, 2004 DR Horton approval from Horry County Planning is for a "Glens Townhouse" development. In submitting and receiving approval for that the Developer, DR Horton, and The Planning Commission, were both in agreement with what is in The Glens. In the approval document, Plat Book 197 at 171, the notes read"

> 10. The project name and phase is: The Glens Phase I at International Club. The Type of Development is TOWNHOUSES RESIDENTIAL.
>
> 12. The Glens Ph I has 47 TOWNHOUSE Units and an area of 9.74 acres. This Phase has a density of 5.76 Units / Acre.

The original Covenants did not leave homeowners in multi-family areas without amenities. It contemplated that the developer would provide separate facilities – exactly what happened in The Villas and what was promised The Cambridge.

That "separate facilities" concept is found in the Covenants at Section 6.5:

> **"Section 6.5. Rate of Assessment. Both annual and special Assessments must be fixed at a uniform rate for all Units (whether improved or unimproved) and may be collected on a monthly, quarterly or annual basis, except that the Developer shall have the right, at its sole discretion, to create multi-family associations within the subdivision *which will contain separate recreational amenities*. In such case the Units within such multi-family associations will not have the right to use recreational amenities located on any Common Area owned by the Association. The assessments paid by all Units located in such multi-family associations will not include the costs of maintenance of the recreational amenities**

This concept of separation was stated in a later amendment made by DR Horton: Amendment #4 of the Covenants, enacted on December 28, 2004 by the Developer DR Horton

> **" Pursuant to Section 6.5 of the Declaration, the rate of Assessments for the Units in the Multi-Family Parcel shall not include the cost for maintenance, upkeep and repair of certain recreational amenities located on Common Areas within the International Club Subdivision *and the Owners of Units within the Multi-Family Parcel shall not have the right to use said recreational amenities.*"**

All of these documents were submitted uncontested into evidence at trial.

Plaintiff has shown, by the preponderance of the evidence, that The Glens is in a multi-family area and is not entitled to use the Amenities set aside for homes in the Single Family area.

The Court is asked to state findings of fact and conclusions of law that The Glens is located in a multi-family area and is not permitted, under the covenants, to use the Amenity Center set aside for homeowneres in the single family areas.

Plaintiff has not plead nor requested any retrospective adjustment and the impact is all prospective.

This issue was amply stated in Plaintiff's complaint. An officer of The Glens HOA was present at trial and had an opportunity to state her case in rebuttal. That case in rebutal came down to buyers in The Glens depending on what DR Horton sales persons stated.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth)	consolidated with
Plaintiff)	Civil Action No. 2010-CP-26-11320
)	
vs.)	PLAINTIFF'S POST-TRIAL BRIEF
)	SUPPORTING
The International Club)	PROPOSED ORDER
Homeowners Association, Inc.,)	
et al)	
Defendants)	
)	

- DIVISION 9 -

THAT THE HTC / "MASTER HOA" CABLE CONTRACT DOES NOT BIND HOMEOWNERS

What was set before the Court in Plaintiff's Complaint and was argued at Trial was that the contract between the "International Club Master HOA" and the Horry Telephone Cooperative" ("HTC") is not binding on homeowners and the Court was asked to declare that no homeowner had any obligation under the HTC / Master Association contract. The Court was NOT asked to void the contract.

At trial Defense Counsel took the testimony of Denise Ambuhl who represented that she is the HTC official knowledgable about and responsible for the "Business" sector of HTC's operations, including contracts for various services between HTC and homeowner associations in Horry County.

At trial Ambuhl testified that the mission of HTC is was originally to provide telephone services in areas of Horry County where commercial sources did not offer it because it was not profitable to do so, and that later HTC's mission was expanded to include other services which could be offered to HTC's customers using HTC's telephone infrastructure – such as cable tv and internet services.

For purposes of this Brief and in testimony at court, the phrase "Master Association" was used / will be used to refer to the "other" party to the HTC contract which on it's face is the "International Club Master Association". The Defendant will / was continue to be referred to as "IHOA".

The testimony which was adduced by Defense Counsel was that the HTC contract as it exists is typical of many which HTC has in place and that because this practice (in general) has never been challenged this instance of it is acceptable. To put it in the same

"vein" as the King testimony, "habit" trumps common law, case law, ordinance and statute. This is clearly not so.

Under cross examination Ambuhl testified that –

(1) HTC's overall business is very profitable;
(2) HTC issues "excess capital contribution refunds" each year in the order of magnitude of millions of dollars;
(3) Each HTC customer with telephone service receives such an "excess capital contribution refund" each year;
(4) HTC separaely bills IHOA for cable service in the "neighborhoods" within the PUD;
(5) HTC's bills for the separate neighborhoods commonly reflect different "per house" monthly charges for different neighborhoods;
(6) Ambuhl has no actual knowledge of the circumstances of the signing of the Master Association / HTC contract;
(7) No competitor cable tv source is permitted to use the infrastructure within the PUD used to deliver cable services;
(8) HTC did not install the original cable tv infrastructure in Pebble Creek;
(9) HTC did not install nor does it own the "premises" equipment in single family houses in Pebble Creek;
(10) The IHOA is a subscriber of telephone service from HTC and thus the IHOA would have received excess capital contribution refunds each year;
(11) In the HTC / Master Association contract, the Master Association is free to charge whatever it wants to homeowners, up to the amount that homeowners would pay if they subscribed to cable services from HTC outside of the HTC / Master Association Contract;
(12) Homeowners who receive cable services under the HTC / Master Association contract (originated by HTC) are not HTC customeres;
(13) The HTC customer under the HTC / Master Association contract is HTC's counterpart on the HTC / Master Association contract;
(14) HTC does not mandate the Master Association to impose any rate increase at all each year;
(15) HTC increases its rates in some, but not all years, under the HTC / Master Association contract at the begining of the first billing period beginning in April;
(16) The rate increaase that the IHOA imposes each year on January 1st is not mandated by any HTC rate increase and can be any amount that the Master Association chooses and is part of the Master Association's receipts – it is not a pass through to HTC;
(17) For IHOA homeowners to receive digital tv through the HTC / Master Association contract, homeowners must rent a "set top box" at a cost of $ 10.00 per room per month, or for the six tv's possible in each Pebble Creek home, an additional cost of $ 60.00 per month;
(18) For IHOA cable to have the functionality of a "digital video recorder" through the HTC / Master Association contract they must pay an additional monthly charge of $ 5.00 per month;
(19) That HTC is aware that the "Dish TV" company is offering high definition

(all channel) television programming for six room with the equivalent of six set top boxes and Digital Video Recorder service for $ 19.99, which would cost approximately $ 95.00 through the HTC / Master Association contract;

(20) That HTC as a provider of cable tv services to end consumers was required to, and did, obtain a cable tv franchise from Horry County;

(21) Homeowners who receive only the cable tv service provided through the HTC / Master Association contract are not HTC customers;

(22) The "Customer" under the HTC / Master Association contract is the other subscribing party to that contract (Ambuhl testified that she considers it to be the IHOA).

At trial Plaintiff argued that the arrangment was akin to a "franchise", not too different from a reseller of cell phone services (called capacity in the business) because the reseller, the "Master Association", bought product in bulk and was free (within limits) to resell it in a specified territory at rates and under such terms as The Master Association chose.

At trial it was not controverted that the Master Association sells cable tv services to consumers (homeowenrs) and does not hold a cable tv franchise from Horry County;

At trial, through additional testimony, it was not controverted that homeonwers in "The Villas" condominium area (which area pays assessments to the IHOA) are not asked to nor do they buy their cable tv service through the IHOA. It was likewise conceded that the same situation exists for homeowenrs in "The Cambridge" condominium area and for the golf course, all of which have separate arrangements to receive their cable tv services.

At trial the testimony of Plaintiff was not controverted that to install cable tv service to homeonwer units the installer would have to disconnect and disable any existing alternative source of tv service (e.g., satellite dish, over – the – air antenna) and that HTC does not in fact install parallel "premises" equipment.

At trial the testimony of Plaintiff was not controverted that the covenants and federal law entitle homeowners to install satellite dishes and over – the – air antennas on any area of their housing unit that they control (by ownership or rental) without any interference by an ARB or otherwise.

It was not controverted that the assessments for the Condo homeowners reflects just a "front door" charge for the contact with KA Diehl, a charge to maintain the roads owned by Horry County which roads were never owned by the HOA, a charge for reserves to repair Horry County roads, and money for IHOA corporate insurance and miscellaneous operating expenses.

At trial the testimony of Plaintiff (supported by the ledgers of IHOA) was not controverted that each month KA Diehl charges the IHOA accounts that are at times more than the amounts paid to HTC. No explanation was given by IHOA witnesses (Freiboth / Toth / Case at deposition; Freiboth at trial) for Plaintiff's unrefuted observation that the destinations of these excesses could not be found in the IHOA's books and these excesses

were not shown as "profit" on the IHOA annual statement.

The HTC / Master Association contract was introduced into evidence. It is dated October 30, 2003 Pl # 302 and is between the non-existent "Master HOA" and HTC. More on that later.

Plaintiff's uncontroverted testimony that no "Master HOA" exists in the records of the South Carolina Secretary of State in the records of the Horry County Recorder of Deeds in any capacity.

At trial Plaintiff argued that the Enforcement by IHOA of the contract requires homeowners to pay money to IHOA for a personal service or personal product, not something which directly "touches or runs with the land". Plaintiff testified that this arrangement is little different from a provision in a covenant, perhaps inserted as an inducement for a property seller to reduce the price of land, that says that homeowners must buy their groceries from a particular supermarket owned by the property seller. These cable tv groceries happen to be sold by the Defendant IHOA.

Such a contractual commitment could be part of a contract for sale of land as an inducement for a seller to sell at a particular price, but it is a personal service contract, not a valid covenant. There is considerable case law that such a provision in a covenant is unenforceable.

It has been blithely assumed in Horry County by developers and HTC that they can force homeowners to buy cable tv services from HTC. There is no case law enforcing this strategy.

The HTC / Master HOA contract has no severability clause. Thus if the Court finds that any provision is invalid for any reason, the entire contract is void.

Plaintiff asserted that the contract or contractual relationship which Plaintiff is not seeking to disturb is the attempt by the IHOA to use the covenants as a contract between homeowners and the association.

The testimony of Toth and Freiboth at depositions and of Freiboth at trial is that they consider the HTC / Master Association contract as binding on homeowners. They point to the exhibits in the HTC / Master Association contract when asked to explain what the IHOA does with regards to cable services.

At trial Plaintiff introduced as impeachment evidence the following uncontroverted documents which were authenticated by defense witness Ambuhl:

(1) The IHOA "welcome" letter dated May 1, 2007 stating that the IHOA is HTC Member # 0254899 further identifying it to IHOA's TID.[1]

(2) The HTC document titled "Connect on October 21, 2008" which Ambuhl admitted was HTC's Annual Member Meeting Announcement which contained the "President's Letter" from HTC's CEO / CFO O'Neil Miller.

(3) A letter from O'Neal Miller to Plaintiff dated February 27, 2009.

(4) The Dish TV $ 19.99 offer.

Ambuhl agreed that the statement in O'Neal Miller's letter that Plaintiff is not HTC's cable customer through the Contract applies to all IHOA homeowners.

The "welcome" letter states that regarding excess capital contribution "refunds"

> "These funds are assigned as capital credit allocations and are disbursed based upon each member's proportional share of member-related revenue".

Plaintiff asserted that "revenues" are what a member pays in a bill, and profit is the difference between revenue and expenses. Plaintiff asserted that there is no provision in the HTC bylaws to divide revenues into "line of business" categories. Although at the start of her cross examination Ambuhl stated she was familiar with HTC's bylaws, upon questioning on this matter she changed her testimoney to say that she was unfamiliar with what the HTC Bylaws said regarding computation and refund of excess capital contributions.

The letter also goes on to say that "When these credits are paid, they are issued to the member name on the capital credit account".

The last page of O'Neal Miller's "President's Letter" stated that later in 2008 HTC would distribute "Over $ 5 million ... [to] 105,000 member [s]".

Plaintiff was not challenged when he testified at trial that he had copied every document relating to HTC in early 2009 (from the inception of the HTC contract in 2003) prior to filing this complaint and had not found entries reflecting the receipt, by the IHOA, of anything from HTC which could be related to such a distribution.

[1] Per Privacy Order of the South Carolina Supreme Court, the IHOA TID which is on the document is not repeated here.

Case Law Relating to Collection of Money Fees.:

There is no case law to support the notion that homeowners can be forced to pay money to their HOA's for cable tv service because of a provision in their covenants.

Plaintiff noted at trial that rental contract may include a provision, as part of the arms – length contract signed between lessor and lessee, for the tenant to accept and pay for particular specified cable tv services. Such an arrangement has always been seen as a "personal services contract".

There is, however, case law that covenants MAY NOT force homeowners to pay sums of money under such circumstances, albeit not in South Carolina where this has never been challenged before.

South Carolina has adopted the doctrine that where a case presents a "novel" situation, South Carolina trial courts should look to the decisions of appellate courts in other states for guidance.

South Carolina courts have freely drawn upon other states' decisions, treatises and the Restatement of Property in fashioning the law of restrictive covenants -- Lynch, 159 SE at 30, Marathon Finance Co v HHC Liquidation Corp, 483 SE 2d 757, 764 (SC Ct App 1997)

At trial Plaintiff focused on the requirement to pay money for something:

MidSouth Golf v. Fairfield Harbourside Condominium Assn., 187 N.C. App 22, 31, 652 S.E.2d 378, 384 (2007), <

In MidSouth,

the declaration of restrictive covenants provided that the homeowners be assessed a license fee for maintenance of recreational amenities owned by the Declarant, regardless of whether or not they used the amenities. MidSouth, 33,. The homeowners had no equitable rights in the amenities. *Id.* at 35.

A Trial Plaintiff followed this line of judicial reasoning where it talks about money.

The court in MidSouth cited the precedent set by the court in Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978). Relying on Raintree, the court in MidSouth voided the homeowner obligation, fnding in MidSouth that the supposed homeowner obligation to pay money for goods or services did not run with the land.

In Raintree, a developer created a covenant requiring all lot owners to be members of a country club and pay dues. The court found that a covenant requiring membership in a country club and payment of dues did not run with the land.

> "This covenant creates an affirmative duty, a charge or obligation to pay money, i.e., country club dues, for the services and use of the country club facilities which are not upon, connected with, or attached to the defendants' land in any way. The [lot owners] are required to pay, whether they use the facilities or not. The payment of a collateral sum of money does not concern the land citing Nesbit v. Nesbit, 1 N.C. 490,495, 1 Cam. & Nor. 318, Cam. & Nor. 318 (1801)

"Courts have generally held that covenants to pay money do not touch and concern the land". Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (N.Y. 1938)) cited in Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978).

This should be the law of the case for cable tv payments to the IHOA for cable tv services that homeowners may not choose to use, and by extension to single family home owner involuntary membership in the "PAEC" (Amenity Center).

Plaintiff does not contest the right of the resident IHOA, which ever one that might be, to offer bulk services with a discount which homeowners might voluntarily choose . Plaintiff contests the IHOA's posture and practice that home owners have an enforceable (by the IHOA) obligation under the covenants to accept and pay for same

Provisions Relating to Cable Service In The Covenants

The precedent and practice relating to parallel utilities such as water, sewer and power is that the acceptance and use of utilities mentioned in the Covenants is optional

The covenants do not have any provision actually mandating homeowners to accept cable tv services from the IHOA. The covenants merely permit the IHOA to offer it. Covenants, Pl # 547.

> Section 2.1. Plan of Development of the Subdivision. Developer shall have the right, but not the obligation, ... including but not necessarily limited to the following: ... (iii) installation and maintenance of any water, sewer, storm and surface water drainage systems and other utility systems and facilities, to include, but not limited to, T.V. cable and its various attendant services and telephone service to include teletype or computer, telex, news service, or computer, or any such like instrument used in the transmittal, reception, or retrieval of messages, facts, or information;

This clearly provides the option to the developer to install infrastructure as may be required by the Horry County planning commission. It does not impose a burden on

homeowners to use any of this. In Pebble Creek the developer either installed or arranged for the installation of sewer and water services from GSWSA and electric services from Horry Electric. The precedent is that home owners are not forced to accept either, and make their own arrangements with GSWSA and Horry Electric for these utility services.

> Section 2.4. Utilities and Related Facilities. Developer, ... may retain ownership of the telephone, master television antennas and/or cable system facilities serving the Subdivision. ... Telephone, master television antennas and/or cable system services shall be provided to the Subdivision pursuant to the terms of agreements between the Association and Developer, its affiliates, successors or assigns.

These phrases in the Covenants states a right for the developer to optionally retain an equitable ownership of certain infrastructure. It is speculative to conclude that the developer intended to offer it to cable tv providers, who have the option of running their own lines by eminent domain.

Plaintiff has presented case law that "all doubts must be resolved in favor of the free use of property".

The phrase "shall be provided" imposes an obligation on the Developer to install the requisite infrastructure which works to the advantage of the developer because it made his property more sale-able. To interpret this any other way would require an interpretation that "The Association" can lawfully, through the Covenants, contract for goods and services for homeowners in perpetuity, which is not a proper covenant running with the land and would violate the Statute of Frauds.

The only covenant provision which actually relates cable or television services to homeowners is --

> Section 7.24. Communication System. There shall not be permitted or maintained any type of radio or communications system antenna (other than normal receive-only radio antennae) or satellite dish larger than 24" in diameter

Clearly homeowners are permitted to select how they want to obtain their television service. This does not further state that homeowners shall purchase cable services from the Association. This is the logical text that should be used if it was the intention. Intents are not good enough when interpreting covenants.

The covenant provisions must be read in light of Arcadian Shores HOA v Cromer, 644 SE 2d 778, 371 SC 292 which provided that

> "nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed

been foreseen by them at the time when the restriction was written."

In 1999 commercial cable television providers and satellite television providers existed. Cable television franchises all use the phrase, "cable television service shall be provided" in a particular specified area. The provision of franchised cable television does not require the homeowners in the area of the franchise to accept or pay for it. The language of the covenants is exactly the same.

While the covenants provide that the IHOA can offer cable services there is no unambiguous requirement for homeowners to accept it.

Defense witnesses have never been able to cite a single provision entitling the IHOA to include cable tv services, or, for that matter, garbage services, in assessments – which is what the Defendant has done.

The area which controls what the HOA can include in assessments is Article 6 page 14 through 16 which says nothing about homeowners being charged for cable television or garbage collection. The only things that the IHOA can collect for, per the covenants, is maintenance of the common area. To be enforceable, if involuntary charges were contemplated, per Arcadian Shores, they would have to be explicitly mentioned.

They are not.

Returning to the October 30, 2003 HTC / Master Association contract, Pl # 302, the second paragraph of the first page of that contract clearly implies that it applies to the entire property described in that paragraph, that it applies to both single family and multi-family units, and that it will be applied in a "roll out basis" to housing units as they are sold. It was admitted at trial that no multi-family unit is subjected to the contract by the IHOA, which is selective and capricious enforcement of a purported covenant provision, which constitutes "waiver and estoppel".

There is a provision on page 2 of the contract, top paragraph, which can only be read that the receipt of services by home owners is optional. The text reads:

"HOA is responsible for fees based on 100% of the total units activated".

At trial Plaintiff asserted his technical knowledge regarding infrastructure and premises equipment, however, that expertise is not required to interpret the above quote.

Activation necessarily entails not only an electronic "turn on" somewhere "up stream" from a home ("premises") but also the physical connection of the cable service to the distribution box on the side of a single family house, well within the real property. As Plaintiff explained, without challenge, a 6-way distribution plate is situated on the side of every single family house (and a counterpart somewhere for condominium units) and a physical connection must be made to each of the 6 jacks from a "splitter" and a physical connection made, with the permission of the homeowner, between the cable feed coaxial

cable (at trial Plaintiff called this "8g) and the splitter. Since entry onto the "courtelage" [2] of a homeowner lot without the consent of the home owner is a trespass, this physical change is clearly at the option of the home owner.

There are other problems related to the cable tv contract, Pl # 302.

As Plaintiff observed at trial, the contract has no severance clause.

Despite the important and dependent assertion by Doug Brown, who signed for "The International Club Master HOA" ("ICMA") the ICMA is not "the sole owner or sole representative" of any homeowner, which is the dependent representation which ICMA makes to HTC in the contract.

The contract says that the property to which this applies is the "International Club Master HOA". There is no PROPERTY with that name. The defendant is the International Club Homeowners Association and the PUD is the International Club Planned Unit Development or Lantana PUD or Murrells Inlet Golf Plantation PUD.

On Page 4, Section 6, there is the phrase "Promotional Material". There is no need for promotional material for acceptance of a service which is mandatory.

> "Owner shall submit for company's review and approval prior to use all proposed advertising and promotional materials for the premises or its dwelling units which refer to the Company's service."

There is a privacy issue here, because the contract provides the ICMA shall provide, at HTC's request, the names, service addresses, telephone numbers, and other account information about homeowners. This information was never provided to the association with any IHOA request to sign nor disclosure of privacy rights allowing the association to release this information to anyone.

Access. The bottom of page 2 provides HTC an easement to enter into private property, for certain purposes which easement the association does not itself hold.

At trial Plaintiff asserted and Denise Ambuhl admitted that any entity which provides cable services to an end user requires a cable franchise from the County. Since the IHOA is the provider to homeowners of cable services, billing and collecting for same, irrespective of how the IHOA obtained it, the IHOA must obtain a franchise to provide cable services over property it does not own. The only franchise providers in Horry County are Time-Warner and HTC. The association, by demanding money for the resale

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[2] "Courtelage" has been used in case law to describe the area private area belonging to a property owner in which he has an expectation of privacy and over which he desires to assert control. It need not be enclosed by a fence or wall. It has been held that to enter a courtelage for a search requires a search warrant and any search in a "courtelage" without a properly obtained search warrant is an illegal entry.

of cable tv services, is an illegal cable service provider.

As is the case for the provision of goods or services by unlicensed vendors, customers may not compel a charge (by a vendor) for services provided without a license where a license (or franchise) is required.

It has likewise generally been held that an individual or company can not be charged for goods or services they have not requested, even if they use the goods or services.

For example, Christmas return address labels you receive from a charity. Or the following scam: paper delivered by company which was not ordered, used by the company, and a bill following soon after – often at inflated prices. Many businesses check the receiving dock logs against the bill but forget to check their orders.

In this instance, cable tv services are unrequested goods or services.

In Horry County the county council has determined that waste management, in unincorporated areas of Horry County shall be obtained from the county through it's tax imposed for the operation of recycling / waste collection points. Plaintiff testified at trial that he uses the Horry County facility "just around the corner" on McDowell Shortcut Road, which he pays to use through taxes on Plaintiff's property -- and that Plaintiff DOES NOT USE the Waste Management services provided by the IHOA. This none-use was unrefuted. While plaintiff has possession of the garbage receptacle provided by Waste Management, he does not "fill it or put it out".

There is no legitimate economic reason or special benefit to homeowners accruing from participating in the cable tv program. Higher quality (HiDef) programming over a wider range of program sources with more utility (Digital Video Recording) can be obtained at lower cost from Dish-TV.

The representation by the IHOA witnesses that the charges are a pass thru is a fraud and swindle as defined in 18 USC 1341, frauds and swindles. Pl # 266.

The requirement by the IHOA that homeowners purchase cable tv services from them, including charging for the services whether desired or not, whether requested or not, is an act in restraint of trade per SC 39-3-10 Pl # 263, Agreements affecting Competition.

An assertion by the IHOA that homeowners must buy cable services and waste management services from IHOA also violates SC 39-03-140 Pl # 265, agreements to limit competition.

Additional supportive cases:

Engler v. Tenhaaf (1979), 74 Ill. App.3d 799, 803, 393 N.E.2d 1266, 1269; Kessler, at 905), Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,*;368 S.C. 342; 628 S.E.2d 902 Epting v. Lexington Water Power Co., 177 S.C. 308, 314-317, 181 S.E. 66, 69-70 (1935); 17 S.C. Jur. Covenants §§ 18 and 19.
Arcadian Shores Single Family Homeowners Association, Inc v. Miriam R. Cromer; Opinion 4223, re-filed May 17, 2007; 2007 S.C. App. LEXIS 98
Clear Lake City Water Authority
Dryden v. Calk, 771 F. Supp. 181 (S.D. Tex. 1991).
Frey v. De Cordova Ben Estate Owners' Ass'n., 632 S.W.2d 877, 880 (Tex. App.--Fort Worth, aff'd 647 S.W.2d 246) (Tex. 1982) ; Holleman v. Mission Trace Homeowners' Ass'n., 556 S.W.2d 632, 635 (Tex.Civ.App.--San Antonio 1977,

At trial the Plaintiff entered into evidence and asked the Court to refer to and consider -- various Federal Communications Commission rules and regulations, and a related court decision by the United States Court of Appeals for the District of Columbia Circuit, Plaintiffs # 258 and # 259, which held that "Exclusivity Arrangements" are null and void and that any contract with such a provision is void in it's entirety. At trial Ambuhl testified that any homeowner is free to choose his source of tv programming, and that the bulk services contract offered by HTC is only one of the choices that a homeowner could make.

RELIEF REQUESTED

Plaintiff asserts that through the preponderance of evidence Plaintiff has presented sufficient fact and invoked appropriate legal authority to support the following ORDER:

THAT

1. No home owner has any obligations under the contract for provision of cable tv services entered into between HTC and the ICMA.

2. The IHOA has no standing or rights to enforce the contract in it's own name.

3. The IHOA lacks a required cable tv franchise from Horry County and is enjoined from offering cable tv services to end users until and unless it obtains a proper cable tv franchise from Horry County permitting it to do so.

4. Home owners in the International Club PUD are free to choose without any interference from the IHOA the source and method of delivery of television programming.

5. Plaintiff is individually entitled to a refund from the IHOA of any money the IHOA had collected from Plaintiff related to the provision of television services reaching back to April 7, 2006, three years prior to the date this complaint was filed.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
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- DIVISION 10 -

THAT THE COVENANTS CAN NOT FORCE HOME OWNERS TO JOIN AND PAY ASSESSMENTS FOR "THE AMENITY CENTER" AND THAT THE IHOA CAN NOT COLLECT MONEY TO SUPPORT THE AMENITY CENTER AS INVOLUNTARY ASSESSMENTS

Plaintiff at trial argued that there is no enforceable provision under the Covenants to compel single family home owners to pay assessments for the Amenity Center.

This proposion in it's fullest form is that:

(1) There is no enforceable covenant obligation for single family home owners to join the Amenity Center;

(2) There is no enforceable covenant obligation for single family home owners to pay assessments for the support of the Amenity Center;

(3) There is no enforceable covenant right for the Defendant IHOA to demand and collect such assessments from single family home owners;

(4) An agreement to join and / or pay for the Amenity Center is a personal service contract and not a proper covenant under the Restatement of Servitudes.

In Plaintiff's Complaint it was argued that the Pebble Creek builder had a binding obligation to provide certain amenities for the exclusive use of Pebble Creek home owners

and that Amenities as delivered did not satisfy that obligation. The Complaint also argued that Pebble Creek home owners have an equitable interest in The Amenity Center, which would supercede the provision in the Covenants that home owens have no equitable rights in the Common Area. In discovery, as was mentioned at trial, evidentiary problems arose because of the destruction of evidence by the builders after they had been subpoenaed. Another confusing issue in the area of advocacy is that the documents related to the "Builders Agreement" which led to DR Horton building the Amenity Center were likewise destroyed after being subpoenaed. Not among the records of the IHOA prior to trial when said records were examined by Plaintiff in the office of KA Diehl, prior to suit, was the deed for the Amenity Center land which Plaintiff later independently found at the Horry County Recorder of Deeds and provided defendants (in discovery) early in 2009. Because the IHOA can be asserted to be a "third party purchaser" of the Amenity Center lot and because the documents to support an equitable claim by Pebble Creek home owners were kept from Plaintiff, those areas are not being put to the Court for decision.

Becaise of evidentiary issues, Plaintiff is not challenging the equitable title of the IHOA to the Amenity Center complex, to include the two parking lots. The IHOA is free no matter what to continue to operate that Complex, to (non-compulsively) solicit membership and collect use or (user's choice) membership fees, and to enter into contracts binding the IHOA for the maintenance of that property.

The simle question which is before the court relates to the inclusion of Amenity Center "dues" in the involuntary assessments levied on single family home owners, and the presumption (of the IHOA) that such home owners MUST join the Amenity Center facility.

For Pebble Creek home owners, this question is further simplified if the Covenants do not apply to Pebble Creek by virtue of having been declared ten days after Pebble Creek was sold to Sunbelt by Plantation AD, the declarant of the covenants. Plaintiff asserts that this is true.

The Requirement to Join the Amenity Center Should Be Set Aside Because it is a Personal Services Contract and does not sufficiently Touch and Concern the Land

It has blithely been assumed by developers in Horry County that they can force homeowners to enroll in Amenity Centers run by their HOA's. In Georgetown County, and to our north in North Carolina, the practice has generally been that the offering was a country – club type scenario and that enrollment was voluntary; enrollment offered a lesser price to participate then offered to non-resident members of the clubs.

There is no case law to support the notion that homeowners can be forced to join amenity centers in their developments but there is case law to the contrary, albeit not in South Carolina where this has never been challenged before. South Carolina has adopted the doctrine that where a case presents a "novel" situation, South Carolina trial courts should look to the decisions of appellate courts in other states for guidance.

South Carolina courts have freely drawn upon upon other states' decisions, treatises and the Restatement of Property in fashioning the law of restrictive covenants -- Lynch, 159 SE at 30, Marathon Finance Co v HHC Liquidation Corp, 483 SE 2d 757, 764 (SC Ct App 1997)

The case most directly on point is MidSouth Golf v. Fairfield Harbourside Condominium Assn., 187 N.C. App 22, 31, 652 S.E.2d 378, 384 (2007),

In MidSouth,

"the declaration of restrictive covenants provided that the homeowners be assessed a license fee for maintenance of recreational amenities owned by the declarant, regardless of whether or not they used the amenities." MidSouth, 33,. "The homeowners had no equitable rights in the amenities." *Id.* at 35.

The court in MidSouth relied heavily upon the precedent set by the same court in Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978). In MidSouth the Court voided the homeowner obligation, ffnding in MidSouth that it did not run with the land.

In Raintree, a developer created a covenant requiring all lot owners to be members of a country club and pay dues. The court found that the covenant did not run with the land.

"This covenant creates an affirmative duty, a charge or obligation to pay money, i.e., country club dues, for the services and use of the country club facilities which are not upon, connected with, or attached to the defendants' land in any way. The [lot owners] are required to pay, whether they use the facilities or not. The payment of a collateral sum of money does not concern the land. Nesbit v. Nesbit, 1 N.C. 490,495, 1 Cam. & Nor. 318, Cam. & Nor. 318 (1801) Courts have generally held that covenants to pay money do not touch and concern the land. Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (N.Y. 1938)). . . We find that the performance by the defendants of this covenant is not connected with the use of their land and does not touch or concern their land to a substantial degree.

-- Raintree Corp. v. Rowe, 38 N.C. App, 664, 248 S.E.2d 904 (1978) at 908-09.

In MidSouth the Court concluded that "the *recreational amenities are not appurtenant to [the land] and therefore the covenant to pay amenity fees does not touch and concern [the land].*" MidSouth at 36, 652 S.E.2d at 388.

This should be the law of the case for both the Amenity Center and Highway 17 dues.

o -Damages- o

IF the Court finds for any reason that Plaintiff was not contractually obliged to join the Amenity Center but money was involuntarily collected from him, the questions of damages arises: how much does the IHOA owe Plaintiff.

Plaintiff has computed this for the period 2007 through 2012, ignoring the prior sums.

At trial Plaintiff cited to the specific documents (ledgers, announcements, budgets, etc) of the IHOA itself as the source of the amounts. Those sources were stated for the record, one by one, at trial. This enumeration was not challenged by Defense Counsel.

Through August of 2012, from January of 2007, the amounts are computed as follows:

	Total Assessment	Amentity Center	Per Year
2006	$70	$18	$216
2007	$70	$18	$216
2008	$70	$18	$216
2009	$88	*$18*	$216
2010	$88	*$18*	$216
2011	$88	*$18*	$216
2012	$91	*$18*	$144
	$6,507		$1,440

Note: $ 5,940 is the total assessment paid by Plaintiff from 2007 through

The Amenity Center assessments are taken from the following IHOA documents:

2006 From the November 2006 Year End document, $ 18 per month for 2006. Pl # 317.

2007 From the November 2006 Year End document, $ 18 per month for 2007. Pl # 317.

2008 From the December 2, 2007 IHOA letter, no change in assessments for 2008 Pl # 342.

2009 There was no change in the amount for the amenity center.

2010 From the November 6, 2009 Budget Pl # 364 and the November 20, 2009 Newsletter, Pl # 366.

2011 From the November 16, 2010 Budget Letter, Pl # 387 the amenity center charge is unchanged, although overall assessments rose.

2012 From the October 28, 2011 Budget for 2012, Pl # 388, overall assessments rise but the amenity center charge remains at $ 18.00. Assessments and other charges are carried for nine months through September, 2012.

At trial Plaintiff asked the Court to take judicial notice that Plaintiff has previously moved the court to deposit assessments with the Clerk of Court but the Court at a hearing ruled that because the expense to the court was significantly more then the amounts in question, Plaintiff should – and did – continue paying the assessments under protest.

Defense Counsel did not controvert that every Plaintiff assessment check since early 2009 has been marked "paid under protest" as were any checks for payment of putative fines. Pl # 373..

Since 2006 per the schedule above, Plaintiff has paid $ 1,440 in Amenity Center charges and $ 6,780 in overall assessments.

RELIEF

The Court is asked to declare and Order that on the basis of findings of fact and conclusions of law --

(1) The Amenity Center located in the International Club PUD at the general vicinity of the intersection of Pickering and International Club drives is owned by the IHOA.

(2) No home owner in the International Club PUD is subject to any obligation under the covenants to join the Amenity Center owned by the IHOA, nor any obligation under the covenants to pay money for the support or maintenance of any Amenities. Such a requirement is a personal services contract which must be freely entered in by a homeowner and is not a proper covenant which touches and runs with the land. As a finding of Fact and Conclusion of Law the Court finds that there is no enforceable personal services contract for such a duty or obligation exists.

(3) The IHOA is free to operate the aforementioned Amenity Center under a "voluntary membership" basis, or under a "fee for use" basis.

(4) This decision does not set aside any restrictions on eligibility for use of the Amenity Center contained in the Covenants for the International Club PUD.

(5) The Defendant IHOA has no rights under the Covenants to force any homeowner to pay assessments or dues for membership in, support or maintenance of the Amenity Center, or to involuntarily become a member of the Amenity Center. The Defendant IHOA is enjoined from any act which is contrary to this decision.

(6) The Plaintiff is awarded direct damages in the amount of One Thousand Four Hundred and Fifty Eight Dollars ($ 1,458.00) which is levied against the IHOA by virtue of involuntary membership in the Amenity Center which will be considered part of an award of Six Thousand Five Hundred and Seven Dollars ($ 6,507.00) total award for assessments wrongfully collected by the IHOA from Plaintiff or his predecessor for the years 2006 through September of 2012.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	)	consolidated with
Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	
	)	

- DIVISION 11 -

INJUNCTIVE RELIEF TO ASSURE THAT HOME OWNERS HAVE CONTINUED AND UNCHALLENGED ACCESS TO THE AMENITY CENTER PARKING

Plaintiff at trial and in his Complaint, asserted that Defendant Rosemary Toth, in her capacity as President of the IHOA and Board Member, had ordered the removal of signage for Parking Lots associated with the Amenity Center, [1] had asserted that these two lots both belonged to the Golf Course, and asserted that the use of those lots by home owners was at the discretion and fore bearance of the Golf Course. The Complaint asserted that Toth was alienating IHOA property and that was contrary to the law and the covenants.

Plaintiff at trial and in his Complaint asserted that Toth had made these lots availabe in particular for the Joe Bernat Golf Acadmeny, whose playing area was across the street from the parking lot which is off Pickering Drive (the other one opening onto the Golf Course entrance road, a private road over which the IHOA holds an easement). The Bernat Academy had no parking lot and as Plaintiff assserted, also lacked business and sales tax permits in South Carolina and Horry County. A photo of the Bernat sign on Pickering Drive across from the parking lot was introduced as Pl # 86.

A photo of the Pool Parking Lot sign that existed on March 22, 2009 that Toth ordered removed is at Pl #68. It was accidentally introduced a second time at Pl # 134. Plaintiff stipulated at trial that the current IHOA Board has in 2012 erected a new set of signs which meets the Horry County towing ordinance – as Plaintiff had demanded be done in his Complaint and in other documents.

[1] The signs had been erected by a former board of directors. This is perpetuated in the Minutes of that decision.

At trial both Plaintiff and Defense Counsel agreed that the two parking lots are the equitable and unalienable property of the IHOA. A deed to the Amenity Center land and the (first) parking lot on Pickering Drive was entered into evidence, Pl # 554, Deed Book 2511 at 967, August 22, 2002. A deed to the second parking lot opening off of the Golf Course private entrance road was entered into evidence, PL #560, Deed Book 2771 at 1490, August 4, 2004.

An extract of the March 24, 2009 Minutes of the Board (in evidence at Pl # 355 was read into the record at trial. At #6 was the

> "Issue Statement: Golf course employees are occasionally parking in the pool parking lot and homeowners are occasionally parking in golf course parking lots"

which Plaintiff observed was the Pickering Drive lot. The analysis and action the board took – Plaintiff suggests it was Defendant Toth's statement and decision -- is also in the mintues and there lies the problem. The minutes relate:

> "Amenity Center parking actually resides on golf course property. .. The Board will direct K.A. Diehl to remove all "no parking" signs within the pool parking lot. The Board encourages home owners to use discretion (in time and numbers) when parking in Golf Course lots.".

Plaintiff also submitted as evidence Horry County GIS photos of the overall complex and the individual lots, together with Plats. Because of the consensus between the two sides, those need not be explored. The photos as Pl # 121, 122, and 123 are informative, because the Bernat academy area to the left of the complex, a field, can be seen to have no parking.

Clearly the Defendant IHOA mitigated the issue of doubts of ownership over the lots and as to the control which the Golf Course could exercise over the lots. There remains, however, the real possibility that a future IHOA officer could repeat the scenario.

Plaintiff thus requests that the Court Order the following relief as a finding of fact and conclusion of law::

(1) That the two parking lots adjacent to the Amenity Center facility be and are the equitable property of the IHOA;

(2) That the IHOA is enjoined from removing the existing "no parking / subject to towing" signs completely but is free to alter the locations and text so long as they provide notice to the public that the two lots are private property for use by Amenity Center patrons and that use by others is subject to towing with the text meeting the notice requirements of Horry County towing ordinances.

(3) That the IHOA is enjoined from any act which will restrict the use of the Amenity Center parking by any home owner paying for the use or support of the Amenity Center who is also permitted to use said facility under the covenants.

(4) That the IHOA institute and enforce policies and procedures to insure that neither the golf course nor any so called academy acting with it's permission or accord nor the employees nor customers thereof make use of the parking lots.

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)	SUPPORTING
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Homeowners Association, Inc.,)	
et al)	
Defendants)	
)	

- DIVISION 12 -

INJUNCTIVE RELIEF PROHIBITING KA DIEHL FROM ENGAGING IN UNLAWFUL BUSINESS PRACTICES AND ACTS IN RESTRAINT OF TRADE

Plaintiff at trial, and explicitly in his Complaint, alleged that Defendant KA Diehl was engaging in unlawful business practices in restraint of trade; that the Defendant IHOA Board was not acting in good faith in permitting this; that this breached the fiduciary duties both Diehl and the Board had towards the IHOA; that the IHOA had been or would be harmed by this; and that the privacy rights of Plaintiff and the homeowners had been or could be breached by these practices.

The nexus of this revolves around

(1) The KA Diehl Contractor Program, including

(a) Charges payable to Diehl imposed by Diehl on prospective Contractors before they will be allowed to compete for contracts for goods or services offered by IHOA;

(b) Requirement for prospective contractors to join Community Association Institures, a homeowenr management trade association;

(c) Provisions enabling prospective contractors to know who they will be bidding against;

(d) Provisions providing businesses that enroll in this program to have access to the names, addresses and other information relating to homeowners without the informed consent of said homeowenrs;

(e) Using communications avenues (such as web sites, newsletters, and emails) paid for by the IHOA to channel advertising from such business participants towards

homeowners, without giving such homeowenrs an "opt out" method;
(2) IHOA / KA Diehl contract provisions and Diehl practices regarding discounts and rebates from vendors;
(3) IHOA / KA Diehl contract provisions relating to non-competition by homeowners who are or were members of the IHOA Board or Committees;
(4) KA Diehl representations that they were "property managers"
(5) KA Diehl and the IHOA violating the SC Non Profit Corporation Act by outright refusal to permit inspection and copying of records or refusing to provide the voter list.

At trial Plaintiff besides entering all his exhibits into evidence, he specifically cited to the following docuents:

1. Diehl "storefront" signs, Pl #101 and #102 which stated that Diehl is a "Property Manager";
2. Plaitniff July 24, 2008 Request for Voter List; #333;
3. IHOA / Diehl 2008 Contract; # 343;
4. Diehl Contractor Program documents; #348;
5. Plaintiff April 28, 2009 Request to Diehl for voter list; #358;
6. Plaintiff September 3, 2009 Request to Diehl for Voter List; #361;
7. IHOA / Diehl 2009 Contract; # 367;
8. IHOA / Diehl 2010 Contract; # 383;
9. Diehl Vendor Agreement; #397;
10. Diehl Vendor Program "Summary" page; # 398;
11. Diehl's Vendor Certification web page; #399;
12. Community Association Institutes (CAI) "Get A New Member Incentive Program" providing for kickbacks or rewards for signing up new members; #702;

Plaintiff also cited to the following statutes, laws or regulations, whose contents were offered either as evidence or in the alternative, the Court was asked to take judicial notice of said regulatory provisions:

1. SC 16-13-230, Breach of Trust with fraudulent intent # 206;
2. SC 16-13-240, Obtaining signature or property by false pretenses; # 207;
3. SC 33-31-830 General Standards of Conduct; # 235;
4. SC 33-31-842 Standards of Conduct for Officers; # 239;
5. SC 33-31-720 Member List for Voting; # 226;
6. SC 33-31-1602 Inspection of HOA Records; # 245.
7. SC 39-03-10 Agreements Affecting Comopetition; # 263;
8. SC 39-03-30 Injured Person May Recover Damages; # 264;
9. SC 39-3-140 Agreements to Limit Competition; # 265;
10. SC 40-57-20 License Requirement for Property Management; # 246;
11. SC 40-57-30 Definitions; # 247;
12. SC 40-57-220 Penalties for action without license; # 248;
13. SC 40-57-230 Civil actions; # 249;
14. 18 USC 1341 Frauds and Swindles; # 266;
15. IRS Announcement 2002-18 (34) Cash Rebates; # 267.

DETAILS

1. Under IHOA contracts with KA Diehl, Board members are not permitted to sell goods or services to the HOA until at least three years after leaving office – and this includes competing with Diehl for the HOA management contract!

> From the 2009 Contract Page 1 Pl # 367
> 1.3 The Association acknowledges that during their relationship with the MANAGER each Board Member will acquire knowledge of organizational methods and other information concerning the unique and distinctive elements comprising the MANAGER's business and agrees to maintain this knowledge in a confidential manner. The Board agrees to refrain from hiring, directly or indirectly, any board member(s) who is or was on the board of the ASSOCIATION during the term of this agreement and for two years following the termination of this agreement without first obtaining written consent of MANAGER.

At trial Plaintiff noted the following objectionable aspects, none of which were controverted by Defense Counsel:

* Board Members in their individual capacities are not parties to any Diehl Contract.
Plaintiff's witness Butryn testified he never signed such an agreement.

* Board Members never signed any "non-compete" agreement.
Plaintiff's witness Butryn stated that he was never even informed about this provision.

* "Proprietary Information" about the HOA is the property of the HOA – not Diehl.
Plaintiff's witness Butryn testified extensively that KA Diehl operations have nothing unique about them, and that the flow of knowledge and expertise was from the Buildings and Grounds Committee to KA Diehl, not the other way around. In particular Diehl adopted the contract check lists and specifications that Butryn and another witness, former Buildings and Grounds Committee member Pete Pizzi developed and that Diehl later incorporated into contracts they provided to the IHOA for said services.

* There is nothing "proprietary" or "special" about how Diehl is organized and operates.
Defense witness Abel testified that she and other Diehl employees hold no licenses at all from any state recognized licensing authorities and that the training they speak of comes almost exclusively from the CAI trade group and not from any educational institution licensed or certified by any state or other licensing institution.
Butryn testified that KA Diehl was unable to provide any suggestions at all regarding PUD maintenance or repair issues.

* This also prevents a Board member from being employed by a contractor. Since the IHOA / Diehl contracts have provisions for automatic renewal, the non-compete term could

be for many years.

Plaintiff at trial asserted that this is illegal. This conclusion is, of course, for the Court ultimately to make but Defense Counsel asserted absolutely nothing to refute it, not even raising an objection to Plaintiff's assertions.

One directly applicable statute is:

> SC Code 39-3-140 Pl # 265. Agreement to limit competition by not dealing with or boycotting those not in agreement shall be conspiracy to defraud.
>
> "If any two or more persons ... shall enter into any ... agreement, ... or understanding to control or limit the trade ... or to limit competition in such trade by refusing to buy from ... any other person ... for the reason that such other person is not a member of or a party to such ... agreement, ... or understanding ... such persons shall be guilty of a conspiracy to defraud and shall be subject to the penalties prescribed in this article.

Also --

> SC Code 39-3-10 Pl # 263. Arrangements, contracts, agreements, trusts and combinations adversely affecting competition or price declared against public policy.
>
> "All arrangements, contracts, agreements, trusts or combinations (a) between two or more persons as individuals, firms or corporations, made with a view to lessen, or which tend to lessen, full and free competition ... are declared to be against public policy, unlawful and void. "

Issue

Diehl keeps or kept credit card cash rebates for purchases of goods or services made on behalf of the IHOA.

> The Diehl 2009 Contract Page 2 Pl # 367 provided:
>
> 2.3 Manager discloses to Association that by virtue of Manager's services to other similar associations, Manager is occasionally able to obtain discounts by dealing on a volume basis with suppliers, subcontractors, and laborers. ... Manager agrees not to charge any undisclosed fees.

This only requires that the end price to the IHOA be no more then the IHOA would have paid had no such arrangement existed between KA Diehl and vendors. This does not commit Diehl to reduce the end price to the IHOA or to remit such discounts to the IHOA.

Although discovery was sought on Defendant Diehl, throughout the course of this litigation Defense Counsel never produced a single "DIEHL" document in discovery, only

IHOA records (and only on one day, October 3, 2011 for inspection, Plaintiff being prohibited from bringing others to help scan the eight (8) coffin size tubs of documents).

From Page 5 of that contract.

> 5.3. In addition to the fees outlined in this section for services rendered, Manager may also receive compensation for their role in providing, investment, and financial products, insurance products, or services and other general services to Association pursuant to a direct or indirect affiliation with an organization. These fees are NOT in addition to those presented by the organization, in no way affect the pricing of the product or services, and are included in the overall contracted service by Association. The partnerships created by Manager create a direct benefit to the Association and in no way distort or interfere with the competitive bidding process. All final decisions on products presented rest with the Board of Association.

What Diehl is saying is that it will receive kickbacks or other value consideration from vendors of goods or services that Diehl provides to the IHOA, and that this will not affect the end price of the goods or services. However, it also says that these "kickbacks" are ultimately paid for from the money that the IHOA pays the vendor.

It is also a federal crime.

* Plaintiff at trial testified that Plaintiff inspected IHOA ledgers (many years worth in evidence) explicitly search for Diehl pass throughs of post-purchase rebates from credit card companies or suppliers, Plaintiff never found a single one. The Court is free to look for same.

A credit card refund (quarterly, annually) or supplier rebate or even a manufacturer coupon rebate will show up after the purchase, billing to IHOA, and payment by the IHOA to Diehl. As such it would be a later and separate accounting entry showing a price adjustment and a parallel cash receipt. Plaintiff did not find a single one. In accounting parlance these are reductions in the cost of goods or services to the IHOA, and unearned taxable income to KA Diehl. These and the overpayment for goods and services by businesses with follow on refunds of the excess are notorious tax evasion techniques for small businesses.

Since Plaintiff was unable to get to Diehl's financial records, despite the fact that Diehl is a co-defendant and this was explicitly plead in the complaint, Plaintiff is unable to plead to the Court the extent of the damage to the IHOA.

It was unrefuted and conceded (by Julie Case at her deposition) that Diehl pays some HOA expenses via Diehl credit card and receives cash or other rebates from bank card issuer.

* Per IRS rules, rebates kept by an intermediary are unearned income to the intermediary. See IRS Announcement 2002-18 Pl # 267.

*** It is criminally fraudulent for an agent to receive compensation for any business he conducts on behalf of "his master:"**

At trial Plaintiff laid out the details of US v Tesvich, USDC-Georgia (Northern; Criminal) 1:08-CR-201; Home Depot buying agent. 18 USC 1349.

In that criminal action Tesvich was a purchasing agent for Home Depot. His activities did not increase the cost of any goods or services to Home Depot. However, Tesvich received thousands of dollars from vendor, and a new SUV. The US District Court held that this conduct is illegal under federal law, 18 USC 1349. All consideration received by an agent is the property of the master and the agent has an affirmative duty to disclose and either refuse to receive said consideration or to pass it to the master.

The 2008 Contract (Page 5 Pl # 343) and earlier such contracts agreed to remit such rebates to HOA; under Defendant Rosemary Toth, the contracts were revised to remove this provision from later contracts. Again, Plaintiff's Inspection of IHOA Ledgers shows no such "rebates" paid to any IHOA account.

The IHOA / Diehl contracts up to and including 2008 contained the following text:

> **2. Manger discloses to Association that by virtue of Manager's services to other similar associations, Manager is occasionally able to obtain discounts by dealing on a volume basis with suppliers, subcontractors and laborers. Manager agrees not to collect or charge any undisclosed fees, rebates or discounts; and in the event that any such items are paid to Manager, such fees shall be immediately remitted to Association.**

This is what was supposed to happen. The 2009 Board (and later) under Toth was not acting in good faith and with obedience to it's duties as a fiduciary to permit the change which removed this prohibition on kickbacks. It can not be said that Toth and her board were unaware of this because Plaintiff made this known prior to filing suit and in the complaint itself.

The 2008 Contract and prior contracts Page 3 Pl # 343 required purchases to be made in "name of HOA" not in Diehl's name. This would have channeled rebates and discounts to the IHOA and would have resulted in invoices naming the IHOA – which would have prevented Diehl from obtaining manufacturer rebates in Diehl's name. This was dropped in the 2009 and later contracts.

Here's the deleted provision from the 2008 contract:

"9. Manger shall purchase out of the funds of Association equipment, tools, goods and supplies, materials and services as shall be reasonably necessary to perform its duties, including the maintenance, upkeep, repair, replacement, refurbishing, preservation and administration of Development. Whenever possible, purchases shall be made in the name of Association. When making purchases, Manager shall make a diligent effort to obtain the best price available."

ISSUE

Diehl requires potential vendors to pay Diehl to be an "Eligible" Vendor.

The 2009 Contract Page 11-12 Pl # 367 requires "open biding"; it does not restrict bidding to a "closed" list; and does not authorize Diehl to "surcharge" potential bidders: See Paragraph 2, "Outside Vendors". Paragraphs a b and c.

Subparagraph a of the 2009 contract requires a competitive bidding process.

Subparagraph b of the 2009 contract provides for the distribution of requests for proposals to "potential pre-approved" bidders.

Subparagraph c of the 2009 contract provides for Diehl to evaluate bids, check references and recommend action by the Board.

Plaintiff's witness Butryn, at his deposition, testified extensively about his background in contract management for various government entities, mainly school districts, whose requirements for goods and services included all the requirements of the IHOA. He was read the information, from the Diehl vendor package, that Diehl collects about potential vendor, which does not include any references or information about prior work. The information Diehl collected, it was noted, included insurance information and tax number. Butryn declared any recommendations based on such limited information is useless.

The prior contracts had a prohibition on what became the Diehl Vendor Program. Under Defendant Toth, Diehl was permitted to use the Diehl Vendor program in conjunction with IHOA requirements for goods and services.

From the 2008 Contract Pl # 343, Page 5, which prohibited collecting or charging any fees, rebates or discounts:

"2. Manager discloses to Association that by virtue of Manager's services to other similar associations, Manager is occasionally able to obtain discounts ... Manager agrees not to collect or charge any undisclosed fees ... and in the event that any such items are paid to manager, such fees shall be immediately remitted to Association"

Which Plaintiff believes requires remitting the $200 application fee and the annual

"renewal" fee to the IHOA.

The 2009 contract hedged but still did not provide allow any such "undisclosed fees".

"2.3 ... Manager agrees not to charge any undisclosed fees".

At trial Plaintiff asserted, and it was not controverted by Defendants Diehl nor Defendant IHOA, that no such disclosure was ever made (about the up front and annual fees).

This practices also violates South Carolina and federal Statutes relating to fraud and Restraint of Trade. See statutes invoked.

The Diehl contractor program requires contractors to pay Diehl before they are allowed to bid on an IHOA contract for goods or services: From the Diehl Contractor Program document labeled "To Contractor, Supplier and Vendors; From Property Management Services Coordinator [1]

> "Contractors, Suppliers & Vendors who have filled out the attached forms ... and paid the $ 200 processing fee will be approved and are eligible for payments for goods or services"

Explicitly not within the criteria is a requirement to provide any references or to meet any standard of experience or training. The forms do not even require stating an applicable license. From the Diehl Vendor Package, page 1 Pl # 397

And they are also required to pay an annual fee of $ 125 – from the Diehl Vendor Certification Program web page, "Step 5: Annual Renewal of $ 125.00. Don't be left out. Register Today!" Pl # 399

Issue

Diehl also reveals the names of competing vendors.

Per the Vendor Certification Program web page: (page 1) Pl # 399

"See the other Approved Vendors in your category".

There is no functional reason vendors should know who else is bidding or doing business with the IHOA.

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[1] The phrase "Property Management" or "Property Manager" is a restricteed phrase and in South Carolina it is illegal for anyone except a licensed realtor or a licensed realtor firm to use such a phrase in any context. See SC 40-57-20, -30, and -220. At the time Diehl's "Store Front" sign read "Property Management". Pl #101 and 102.

Issue - Restraint of Trade.

Diehl provides potential vendors who "sign up" the names and contact information of homeowners for the vendors to use for advertising or to solicit services.

Neither KA Diehl nor the IHOA has provided any homeowner a statement of privacy policies, nor asked for permission to release this information to vendors, nor provided an "opt out" method. This disclosure includes the names and information about homeowners, such as Plaintiff, who choose not to sign up to the Diehl / IHOA web site for the explicit reason of not agreeing to such invasions of privacy.

Further, the relationship of Plaintiff and homeowners is with the IHOA – they have no "business relationship" with KA Diehl such as to permit Diehl to use homeowner information for commercial purposes. It violates FTC rules in this regard.

From the KA Diehl Vendor Agreement: Pl #397

"The names of any and all owners are available to you upon request at the office of KA Diehl"

* **This violates homeowners common law expectation of privacy.**

* **Homeowners have not signed any Diehl or HOA privacy agreement.**

* **The Diehl / HOA contract does not allow such disclosure.**

* **This violates FTC Regulations (credit) and federal law imposing privacy controls.. Diehl engages in "on-line" assessment collection via credit card or bank electronic transactions or checks in the mail.**

* **There is no functional reason for such disclosure.**

* **Neither the HOA nor Diehl will give homeowners such a list.**

From the list of exhibits, it is a matter of fact that Plaintiff Jarmuth demanded the voter / homeowner list at least 3 times and was never given same. But vendors are given an equivalent list.

There is no discretion here:

SC Code 33-31-720. Members' list for voting. Pl # 227
(a) .... a corporation shall prepare an alphabetical list of the names of all its members who are entitled to notice of the meeting ... The list must show the address ... of ... each member ... This list must be prepared on the same basis and be part of the list of members.
(b) The list of members must be available for inspection by any member for the purpose of communication with other member ... A member ... is entitled on written demand to inspect and ... to copy the list ...

The IHOA / KA Diehl refusal has been used to suppress the effectiveness of dissenting protests. It violates the implied covenant of good faith and fair dealing – which was plead in Plaintiff's Complaint. All of the above was stated in testimony at trial

Issue

Diehl requires the IHOA to Join the "Community Association Institute" (CAI) a trade group which lobbies on behalf of management companies.

(2009 Contract Pl # 367 Page 6 para 8.4)

8.4 Manager, through it's involvement with continuing education and commitment to the Community Association Industry is requiring that during the term of this Agreement, Association or Association Board Members shall maintain a membership in the local chapter of CAI (Community Association Institute). Membership will be paid by the Association."

The Court has the minutes of the Board of Directors. There isn't a single reference to any benefit or participation in CAI activities. There is no good faith reason for Toth, when accepting, not dictating, a management contract (which was never competed) would let the management company dictate such a provision.

The management contract provides for the functions that the management company will perform, their authority, and what their compensation is. It is implied that the management company will have the expertise to substitute for board lack of expertise. Given that the IHOA is buying that expertise, a Board / HOA membership in CAI contributes nothing to the Diehl / HOA relationship. The fact that Diehl gets away with this, apparently with the 61 communities it manages, doesn't make it right. Plaintiff asserts that this "requirement" "affects competition" and "limits competition" from those associations that compete with CAI. The IHOA is told that the IHOA must obtain supplemental expertise from Diehl's choice of sources. Plaintiff points out that the Horry – Georgetown Technical Institute and Coastal Carolina University provide courses and other training in the area of community management, which courses qualify towards realtor licensing. Such a decision is properly a discretionary decision by the HOA, not by it's contractor.

It is also a fraudulent requirement because it fails to disclose that HOA membership in CAI gives Diehl "valuable consideration". See CAI Referral Program. Pl # 702

It was uncontroverted that the KA Diehl Contractor Program also requires prospective contractors to join CAI. At trial, Diehl's employee Beckie Abel was unable to provide a single credible benefit for such membership to real life vendors of goods or services to home owner associations.

The document states:

- Make ONE phone call
- Send ONE e-mail
- Have ONE conversation

That's all it takes to recruit a member and participate in CAI's Every ONE Counts campaign—and win one or more of these rewards:

- A vacation package including air fare, hotel, rental car and spending money
- A 32-inch flat screen TV
- A gift card for $500 in gas
- A Sirius or XM satellite radio installation and subscription for one year
- Global Positioning System (GPS)

This conduct is within the scope of fraudulent conduct enumerated in USA v Tesvich (a Home Depot buyer in Georgia).

RELIEF: Declare the mandatory HOA / Board member membership void
Permit "voluntary" direct HOA membership, from year to year, if a Board so chooses.

Plaintiff Requests the Following Relief

1. That the IHOA be enjoined from signing any contract which even purports to allow a management company to keep any rebates, discounts, or other consideration related to the purchase of goods or services to the IHOA.

2. That KA Diehl be enjoined from such practices with any home owner association it manages.

3. That KA Diehl be Ordered to refund to any vendor the "fees" it collected from such vendors.

4. That KA Diehl and the IHOA be required to publish or announce requirements for goods and services, (as to KA Diehl, for any association it provides services to) and to accept bids from any responding prospective vendor; that it not engage in any "prequalification" scheme or program.

5. That KA Diehl and the IHOA be required to liberally distribute homeowner / voter lists to home owners on demand.

6. That KA Diehl and the IHOA be required to issue annual statements of privacy rights to home owners.

7. That KA Diehl be required to pay to the IHOA any discounts, rebates, or other consideration it has received for the period reaching back to 2006 related to the provision of goods or services to the IHOA.

8. That KA Diehl be enjoined from releasing any information about home owners to any other entity.

9. That KA Diehl be enjoined form using any information about home owners to solicit business from home owners.

10. That any provision in any contract between KA Diehl and any home owner association restricting in any way the provision of goods or services to a home owner association by said association's board or committee members be and is null and void.

11. That KA Diehl be enjoined from requiring any prospective vendor or any home owner association to join CAI, and that Diehl be required to refund to the IHOA any membership or other fees which the IHOA has paid to CAI.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	
	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	consolidated with
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vs.	PLAINTIFF'S POST-TRIAL BRIEF
	SUPPORTING
The International Club	PROPOSED ORDER
Homeowners Association, Inc.,	
et al	
Defendants	

- DIVISION 13 -

ILLEGAL DISTRIBUTION OF PROCEEDS OF ILLEGALLY APPROVED ILLEGAL SALE OF ASSETS

Plaintiff's Complaint alleged the IHOA Board in general and Defendant Rosemary Toth in particular acted in violation of their authority and made decisions in their board capacities that were explicitly in violation of The Act and of the Covenants.

At trial a focus was on a particular act, the unanimous decision in 2010 of the Board of the IHOA to sell to Central Electric an easement to run overhead power over IHOA owned property. The agreement also allowed Central Electric to destroy all landscaping in along most of the length of the front entrance, much of which had recently been recently planted at IHOA expense and all of which had been nurtured for many years at IHOA expense. As Toth, Freiboth, and Sullivan testified at depositions and at trial much of the justification of landscaping was that the impact of this landscaping, all of it including particularly the front entrance, was crucial to maintaining property values. [1]

The nature of the front entrance and the destruction which Central Electric did was undisputed at trial.

At Toth's deposition and in trial testimony by Sullivan and through a Notice of Special Meeting and Minutes of the Special Meeting introduced into evidence whose admissibility was not disputed the fact was likewise undisputed that the Board unanimously agreed not to put the decision to the homeowners for a vote of approval.

[1] This was the jusitification given for maintaining the front entrance at IHOA expense when owned by Horton.

In like testimony and through the testimony of Astorino, Butryn, and Pete Pizzi Deposition testimony was taken that at the special meeting, several homeowners demanded that a vote of approval or disapproval be taken. The deposition testimony is that at least one homeowner begged for the vote. Sullivan testified that the Board refused to even allow this line of discussion, saying that the announcement for the special meeting did not include a vote so the Board would refuse to even hear these homeowner vote demands.

At trial and through the testimony of Butryn and Sullivan it was undisputed that an official Virginia (state) study had been given to the board and other homeowners by Butryn which stated that the quantification of damages far exceeded the amount that the Board accepted from Central Electric. Sullivan's testimony was that the Board did not even consider having an independent appraisal done by an expert knowledgeable about this topic – or by anyone. Sullivan testified that the Board just accepted the Central Electric offer.

At trial and in deposition testimony of Toth and Sullivan it was put into the record that homeowners demanded that Central Electric be compelled to place the power mains underground. The response in the record was that the Board agreed with Central Electric's contention that this would be too costly – to Central Electric – and sided with Central Electric on "bury the power lines" issue rather than with the homeowners whose interests the Board was supposed to protect.

The Court is asked to note from the numerous pictures put into evidence by Plaintiff and the GIS photos put into evidence by Defense Counsel that before the Central Electric installation at the front entrance, no overhead utilities are present throughout the PUD.

At trial it was conceded by Sullivan that homeowners have no equity interest in the area concerned – or in any Common Area – and that with the installation of the Central Electric power line and the total destruction of the landscaping no individual homeowner gave up anything nor had a provable individual loss.

The related documents, the April 6, 2010 Notice of the Special Meeting (Defense #70), three related "Friday Facts" March 12, 2010, March 19, 2010, and March 26, 2012, the Minutes of the April 19, 2010 Special Meeting Pl # 369 Def # 72 all confirmed that no vote was taken, that all related decisions were made by uanimous vote of the Board, including Toth (and Sullivan), and that the Board also decided to and did distribute much of the cash proceeds to homeowners in the amount of $ 75 per homeowner. These documents and the testimony was that an additional $ 10,000 was set aside for "contingencies". Plaintiff asserted that "Contingencies" in the context of the Central Electric destruction of landscaping and the explanation that Central Electic's offer was to provide for restoration was that "contingencies" has to be to restore unforseen damage which Central Electric was not separately restoring (such as irrigation / sprinkler system damage which would be discovered later).

Plaintiff personally attended and observed all preceding meetings of the IHOA

Board of Directors and the Special Meeting at which the IHOA Board "announced" their decision. Plaintiff did not participate.

An Act of Directors or Officers which directly violates explicit prohibitions or restrictions of the Covenants, the Bylaws, the Articles, or The Act is an ultra – vires act.

An Act of Directors or Officers which is taken when the evidence available indicates that the decision is reckless or contrary to the Association and in particular when the members bring the folly of this to the attention of the Board is an act in violation of the Standards of Conduct.

Plaintiff points out the decision of the Collective Board to distribute proceeds to homeowners gave each director money in their private capacities that they would not have received except for that decision. There was no vote to exclude themselves nor to put into the record anything supportive of their decision except for reference to the offer from Central Electric.

The decision without a vote is prohibited by The Act.
The appoval of above ground utilities is prohibited by The Covenants.
The distribution of cash proceeds is prohibited by The Act.

Per 32-31-1202(b) the sale required approval of the home owners. The statute requires approval:

(1) By the Board AND

(2) By the Home Owners at a Special Meeting approved by a vote of at least two – thirds of the homeowners attending and voting at the meeting

OR

(1) By the Board AND

(2) By a vote of one half plus 1 of the total number of homeowners entitled to vote.

whichever is less.

Rosemary Toth personally announced, at the meeting, that no vote would be taken.

However, in this instance a stricter vote standard is required.

SC 32-31-1202(b) has an exception for a stricter vote standard:

"Unless this chapter, the articles, or bylaws, require a greater vote"

From the IHOA Bylaws, Pl # 548, Section 11.1 "Condemnation":

"11.1 Whenever all or any part of the Common Areas or Recreational Amenities of the Subdivision shall be taken by condemnation or eminent domain, or is conveyed in lieu thereof by the Board acting on the agreement of at least seventy-five (75%) percent of the total vote of the Association"

The Bylaws provided strict and explicit restrictions on what might be done with the cash proceeds received from Central Electric:

Alternative #1: Restore the area and put the remaining funds into the reserves for like requirements:

11.1.1 If the taking or sale in lieu thereof involves a portion of the Common Areas on which improvements have been constructed, then unless within sixty (60) days after such taking ... at least seventy-five (75%) percent of the total membership of the Association, shall otherwise agree, the Association shall restore or replace such improvements so taken, to the extent practicable, on the remaining lands ... If such improvements are not to be repaired or restored, the award or proceeds shall be retained by and for the benefit of the Association.

Alternative #2:

Put all the funds into the reserves as a contingency for like requirements:

From Plaintiff's # 369, Minutes of Special Meeting April 19, 2010. Bottom of second page. "Breakdown of remaining funds $ 80,000.00"

" $ 50,250 Funds to be distributed to 670 homeowners at the rate of $ 75.00 per unit owner.[2]
$ 15,000 Funds for potential Master Assocation landscaping projects (TBD)
$ 10,000 Funds to be deposited in money market account for contingent expenses [3]
$ 4,750 Funds for tax liability ($2,186 quoted by CPA – balance as cushion)"

The Court was asked to take judicial notice that this is exactly what was stated in the Meeting Announcement.

Plaintiff, Butryn, Pizzi, and Astorino testified that they did not request this

[2] Plaintiff asserted that the explanation he heard was that these were new projects outside of the impact area.

[3] Plaintiff asserted that the explanation he heard was that this was for contingencies in the impacted area discovered later or somehow not mitigated by Central Electric.

distribution.

At trial Plaintiff introduced into evidence Pl # 395 from the 2011 IHOA General Ledger that the IHOA Board had used the $ 10,000 contingency fund to pay a judgment against it won by The Villas HOA sub-association which was unrelated to the Central Electric landscaping destruction and restoration.

At trial Plaintiff argued that the $ 10,000 was a restricted account. It was undisputed by Sullivan that the $ 10,000 was the same $ 10,000 received from Central Electric. Sullivan testified that the Board could use the $ 10,000 in any manner it deemed.

The Court approved settlement in The Villas v IHOA was entered into evidence to relate the $ 10,000 to the judgment against the IHOA; the ledger statement itself says this was the purpose of the payment. This document was added at trial as an impeachment document related to the testimony of Sullivan. It's authenticity was not disputed.

Plaintiff has earlier in this Brief addressed the individual and joint liability of Directors and Officers for the illegal distribution of assets SC 33-31-833, and the nature of prohibited distributions SC 33-31-1301 and in particular the Sale of Assets not used in the normal course of business, SC 33-31-1202. Plaintiff had asked the Court to make general rulings which would later be applicable to specific instances.

This is the primary instance with exemplary and provable direct damages to the IHOA.

Plaintiff asks the Court to enter an Order which states that Plaintiff through the preponderance of the evidence enables the Court to make findings of fact and conclusions of law that:

(1) The IHOA Board was prohibited by the Covenants from approving above ground utilities.
(2) The landscaping at the front entrance were assets not used in the normal course of business by the IHOA.
(3) The IHOA owned the front entrance at the time of the events in question.
(4) The IHOA Board was prohibited by law and the Bylaws from making the transaction with Central Electric without the appropriate consensual vote of the homeowners.
(5) The Board unanimously decided not to have a vote of home owners.
(6) A demand for a vote was made by home owners.
(7) The Board acted recklessly in failing to obtain an independent estimate of the value of the effects of the Central Electric / IHOA decision.
(8) The Board unanimously decided to distribute $ 50, 250 to homeowners out of the proceeds from Central Electric.
(9) The home owners who received that distribution had no equitable or legal right to any portion of that distribution and the Board was aware of this.
(10) The $ 10,000 in contingency funds received from Central Electric was a

restricted fund to be used for landscaping purposes.

(11) The Board unanimously decided to distribute the $ 10,000 in partial settlement of an unrelated money judgment against the IHOA.

(12) The use of the $ 10,000 to pay the judgment to The Villas HOA was a prohibited use of the proceeds from Central Electric.

(13) The members of the board are individually and collectively responsible for the damages to the IHOA.

(14) The direct damage to the IHOA is $ 60,250.

(15) As a judgment is entered against the board members at the time, in 2010, specifically including Rosemary Toth and Maureen Sullivan, to repay $ 60,250 to the IHOA.

(16) As provided by SC 33-31-851, the insurance company for the HOA is enjoined from reimbursing or otherwise providing the funds to satisfy this judgment against the Board members themselves.

(17) Any excess money remaining from the proceeds received from Central Electric shall be treated as restricted funds to be used for the restoration of landscaping damage.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	
	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	consolidated with
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vs.	PLAINTIFF'S POST-TRIAL BRIEF SUPPORTING
The International Club Homeowners Association, Inc., et al	PROPOSED ORDER
Defendants	

- DIVISION 14 -

GOLF COURSE ASSESSMENTS MUST BE AT THE RATE SET IN THE COVENANTS

-

"AGREEMENT SHOULD BE VOIDED BECAUSE OF CONFLICTS OF INTEREST AND LACK OF AUTHORITY

Plaintiff's Complaint and Plaintiff's trial testimony alleged that the basis for the rate of assessments for the Golf Course, whichever one that might be, was inflexibly set by the Covenants on a basis inflexibly binding it to the rate of assessments for single family homeowenrs. The Court was requested to interpret the Covenants and to declate that such is the obligation of the Golf Course.

The Court was also asked to declare that it was an ultra – vires act to alter that in any way without amending the covenants, and that such was never legally consumated.

Some of the details were addressed when the Court was asked to declare whether certain types of acts of the Board were Ultra Vires. To recount:

1. The IHOA Board never authorized the Golf Course Agreement as it was signed by Doug Brown.

2. The IHOA Board itself was illegally in office and had no power to act.

3. There was clearly self dealing and a conflict of interest.

4. The Golf Course never performed as required under the Agreement.

5. The stated reason for the agreement, to obtain a one-half acre parking lot for the Amenity Center, was fraudulent because the developer had the obligation (not the IHOA) to provide so much parking as was required to obtain a Certificate of Occupany or other permits to use the facilities.

6. The Golf Course never deeded the 1/3 acre contemplated by the Board as the explicitly required additional parking area; it received 1/4 acre instead.

a 2003 Golf Course Agreement between the IHOA (as signed by Doug Brown, putative board president), DR Horton, the Developer, and the Golf Course, should be set aside and voided

The rate of assessment for the Golf Course is stated in Covenants Section 6.5.

The requirement to amend bylaws to alter the basis of assessment is stated in statute, SC 33-31-1021 and the requirement to put it to a vote is stated in SC 33-31-1003..

The entitlement to amend the bylaws by action of the developer excludes any amendment which alters or changes any owner's rights or obligations. Covenants Section 8.5(a) and such amendment is valid only upon the written consent of a majority of the existing homeowners (does not state voting weight).

The board's decision to exchange only the unpaid golf course assessments remaining in 2003 (and no more) for one – third acre was stated in the Mintues of the Board, November 20, 2003.

The documents related to the deed for the one-quarter acre filed with Horry County stated that the land was valued at $ 5,000, thus it is not an act in good faith to trade this for what the Golf Course agreement itself on page 1 said was a $ 51,000 debt through August 31, 2003, increasing at $ 1,750 per month in the remainder of 2003.

The Bylaws at Part I (f) and Part IV Section 4 prohibit any compensation of any kind to directors.

Brown personally received a free golf course membership through at least 2007.

DR Horton received reduced price golf course memberships for his home buyer customers, free rounds of golf, free use of golf course clubhouse area for a sales office, and a very reduced rental rate for the clubhouse for sales events.

The golf course received the value of the IHOA maintaining, in perpetuity, areas of golf course private property.

The IHOA lost $ 370,366 in actual assessments not paid which the covenants required to be paid, plus $ 213,404 in non-compunded interest (per the covenants) for a total loss to date of $ 583,770.

The numbers are from Plaintiff's computation worksheet Pl # 389 supported by IHOA General Ledgers at Pl #390 through #394 plus #705 through #707.

At trial Plaintiff provided uncontroverted testimony that the non-payment or under-payment by the golf course in every year since the inception of the PUD and the conflict of interest when the agreement was made was hidden from home owners by the Boards – all boards – through the present one until after Plaintiff filed his Rule 16 statement January 17, 2012 that he intended to prove this at trial before expected home owner observers.

Plaintiff asserts that because this was hidden from the home owners, statutes of limitations are not tolled.

Plaintiff asks the court to determine that Plaintiff through the preponderance of the evidence has placed sufficient facts and grounds in law before the court for the Court to Order as follows:

1. That the rate of assessment of the golf course be and always has been that specified in Section 6.5 of the Covenants, it being fifty times the rate of assessments charged to a single family home owner entitled to use the Amenities of the Association.

2. That the agreement between the golf course, the IHOA, and DR Horton signed on or about November 3, 2003 ("The Agreement") be and is void and was never of force or effect.

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)	
)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth)	consolidated with
Plaintiff)	Civil Action No. 2010-CP-26-11320
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vs.)	PLAINTIFF'S POST-TRIAL BRIEF
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Defendants)	
)	

- DIVISION 15 -

SPENDING ASSESSMENT MONEY TO MAINTAIN LAND NOT OWNED BY IHOA

INCLUDING PRIVATE PROPERTY AND PUBLIC STREETS

Plaintiff's Complaint and Plaintiff's trial testimony alleged that the IHOA was collecting assessments and using them for purposes not permitted by the Covenants.

Specifically, Plaintiff complained that the IHOA was and still is spending large amounts of money coereced from homeowners through assessments which were and are still used to

(1) Maintain private streets and private rights of way not owned by the IHOA;

(2) Maintain and improve golf course property;

(3) Maintain some private home owner property adjacent to the streets;

(4) Maintain the shoulders of streets owned by Horry County; and

(5) Purchase water from the golf course which the Association owns for purposes of irrigating the aboves stated areas, and for the irrigation of a limited area owned by the IHOA around the Amenity Center.

In the Comlaint, in deposition testimony and at trial it was not controverted that the experts to the IHOA on this issue was the (then) Buildings and Grounds Committee and

that the members of that group, perticularly Mike Butryn, who testifed at trial, was professionally expert in this regard and known to be so by The Board.

It was likewise uncontroverted that in 2008 the Buildings and Grounds committee made a formal presentation to the IHOA Board, chaired by Defendant Toth, apprising the board that most of the landscaping budget was used to maintain areas not owned by the IHOA – and requested that these areas no longer be maintained at IHOA expense or that the owners be billed for such maintenance as provided for by the covenants if the owners were derelict in maintaining these areas.

It was likewise uncontroverted that the 2008 and there after of the Board was to continue to maintain the same areas at IHOA expense and not to seek reimbursement.

At trial Defense Counsel presented as an expert witness Christopher Sullivan. His only claim to expertise was that he had been in the irrigation business for many years. He stated he was familiar with the infrastructure used by the IHOA to irrigate the areas it is irrigating.

His testimony focused on an assertion which is not controverted that it is cheaper to buy water from the golf course than to install a separate IHOA owned well.

He stated that he knows it to be a fact that the Golf Course is drawing water from the various retention ponds around the PUD, which Plaintiff does not dispute.

He stated that he was unaware that the Association owns riparian rights in the retention ponds and had done no calculations in preparation for his testimony to address any alternative other than "buy golf course water Or drill your own well". He had no actual data on the capacities of the two large ponds which are adjacent to the main areas maintained – the large lake along side The Villas and adjacent to International Club Drive (the "front entrance") and the large lake to the right of Pickering Drive as one enters Pebble Creek from the Amenity Center.

Photos and Plats were cited to the Court to see that these are lakes, not small retention ponds. Sullivan stated that he could not even estimate the depth of the lakes so as to determine their capability to provide water but admitted that it more likely than not would be sufficient to irrigate the principal IHOA owned common area – the Amenity Center.

At trial Sullivan admitted that he does not read any technical or learned journal related to golf course or home owner assoication maintenance and was unfamiliar with a publication from Clemson University's Extension Service titled "Irrigation Systems". While this was not among Plaintiff's Rule 16 exhibits distributed to the Defendant pre –

trial, [1] it was introduced into evidence as impeachment evidence. The authenticity of this was not controverted.

From page 1 of the Clemson document it was noted that the kind of grass which the IHOA maintains requires one (1") to one and a quarter inch (1 – 1/4 ") of water per week, preferably all at once, once a week. Sullivan's testimony is that the IHOA was watering with this amount several times a week.

The August 22, 2002 deed from Plantation Golf AD to the IHOA for the Amenity Center, Pl # 554 Deed Book 2511 at 967, stated that the Amenity Center land totalled 1.56 acres. From the GIS photos of the area at Pl #123 it can be seen that the retention pond immediately adjacent to the Amenity Center is one – third the size of the entire uncovered Amenity Center area (uncovered meaning areas of grass) and that by the Clemson computation even a three foot deep pond, which this is at least per Sullivan's testiomny, would carry the Amenity Center area for between thirty six and twenty four weeks. The small lake on the other side of the golf course drive is at least as deep and as large as the entire Amenity Center area, without even discounting the "covered" area of the lot.

Looking at Defense Map 2 a GIS photo of the area and comparing it to Plaintiff's #460 Plat Book 181 at 89, one can see that proceeding just "up" Pickering Drive from the Amenity Center area there is a very large LAKE to the right of Pickering which even goes further and to the rear of the first four houses on Pickering drive in Pebble Creek.

Sullivan admitted that by his observation, which was not controverted, this other lake is at least several feet deep and from the documents it may be concluded that this lake is approximately three times the size of the Amenity Center complex, not discounting for "covered" land.

Plaintiff has already demonstrated that by the Covenants the Association holds the Riparian rights to the water in these lakes and ponds.

Clearly there is no need to drill for the water to irrigate IHOA property – water that the Association owns can be readily pumped in sufficient quantities from lakes and ponds nearby that the IHOA with little more cost than a one time pump cost, tied into existing irrigation piping, and that the IHOA should be receiving payment from the Golf Course for water the golf course draws from the lakes and ponds, not the other way around.

At trial Sullivan testified that he was completely unaware of the progrtam that the Grand Strand Water and Sewer Authority ("GSWSA") has to provide free, treated water to golf courses and associated areas for irrigation purposes. Plaintiff proferred that GSWSA bears the total cost of bringing the treated water to the point where it can be accessed by the golf course or homeowenr association.

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[1] Every one of Defense Counsel's exhibits were given to Plaintiff in the courtroom moments before the trial began. The day prior to the trial an ambiguous list of these documents, but not the documents themselves, were provided Plaintiff by Defense Counsel.

Sullivan stated that he was unaware that the Indian Wells PUD (which is nearby) found that retention ponds and lakes in the community were sufficient to provide satisfactory irrigation using the Clemson standards, and that this resulted in satisfactory greens and lawns.

In trial, Butryn testified that the Buildings and Grounds committee informed the IHOA Board (in 2008 under Toth) that almost all the irrigation and grounds maintenance was done on land that is not owned by the IHOA – not the Common Area – and recommended that this cease and desist to the extent that it was not reimbursed by the property owner, including the shoulders of the roads. Butryn testified that at the time Toth, on behalf of the Board stated that the IHOA would continue it's current (at the time) practices which Plaintiff testified and Sullivan and Butryn agreed continue to this day.

Assessments May Only Be Imposed to Maintain the Common Area
Anything Not Owned by the Association is NOT the Common Area

Covenants Article I Definitions

> Section 1.2. Assessment shall mean and refer to an Owner's share of the Association's charges for Common Expenses and funding of reserves

From the covenants it is clear that roads and areas open to the public are not common areas:

> Section 1.6. Common Areas shall mean and refer to all real and personal property now or hereafter owned by the Association for the common use and enjoyment of the Owners or designated by the Developer as Common Areas, together with any improvements thereon. Such areas are intended to be devoted to the common use and enjoyment of the members of the Association as herein defined, and are not dedicated for use by the general public; and the general public shall thereby have no easement of use or enjoyment therein.

PAST BOARD KNOWLEDGE OF THE ISSUE

In Toth's deposition testimony she admitted that she had been a member of the "Transition Committee" prior to being elected to the Board in September, 2007. At the deposition she admitted that the appointed authority was the director controlled board then in place. She admitted that the transition committee was in place from November 16, 2006 until the September 2007 election.

At the Toth deposition she was presented with what is Plaintiff's Exhibit 3 to that deposition, a letter from another member of the Transition Committee, Reggie Corfield, to her by name.

It read is part:

> "Dear Rosemary
> I know you are having a meeting today and as promised, I am giving below my comments on Tracy Fisher's [2] response. There were many questions addressed to her but I do not believe she answered all of them. .. I wonder if she is saying something on their [Horton's] behalf? If this is indeed the position DRH is taking then I believe the HOA is under no obligation to maintain them and I wouild respond as follows: ...
>
> I take the position that if DRH does not convey the common areas and the Amenity Center at or prior to transition, we should not use Association funds to maintain them. I do not believe we are obligate to do so either and here is why?
>
> The defnition of common areas is found in Article 1 sec 1.6 which says "Common areas shall mean and refer to all real and personal property now or hereafter owned by th Assocation for the common use ... Key word is OWNED. What we do not "own" is not common area all though DRH "allows" us to use it. ...

[underlining and Capitalization by Reggie Corfield in the original]

> Then go to Art. III sec 3.1 ... "Association shall maintain and keep inn good repair all portions of the common areas. Landscaping, maintenance, ponds, water courses, Insurance and on and on which is our entire POA budget of approximately 400 thousand dollars a year.
>
> Common area is defined as what HOA owns and so we are clearly under no obligation to maintain what we do not own. Yes, we may not have access to the Amenity Center but why should be [sic] pay for the upkeep of DRH's property? ...
> Thanks. Reggie

DAMAGE TO THE ASSOCIATION

Butryn and Pete Pizzi testified at trial that they were the IHOA's undisputed experts on buildings and grounds issues. They testified as to how on the behalf of the IHOA with the pre-knowledge and consent of the IHOA Board in 2008 visited the Horry County Engineering Department and Planning Commission to obtain detailed plats and other official documents mapping the drainage system, at least of Pebble Creek, and the official record of ownership of lands in the PUD then maintained, or which might be maintained, by the IHOA. They testified as to having bought at Butryn's personal expense a "survey wheel" to relate what is on the ground to what is on the plats and descriptions.

[2] Tracy Fisher is an attorney in the law firm of Wilcox Buyck. She is also Plaintiff's attorney of record on real estate matters relating to the PUD. In the conversation referred to, Fisher represented the builder, DR Horton, and not the IHOA.

This was all uncontroverted at trial as was Butryn's knowledge and expertise in this area.

At trial it was not disputed that in 2008 Butryn and Pete Pizzi wrote the specifications that since that time have been used for all Landscaping / Buildings and Maintenance contracts, and that KA Diehl at the time had nothing comparable and was given this for Diehl's later use.

At trial Sullivan (a member of The Glens board and a former member of the IHOA board) testified that the IHOA is maintaining one of the two tracts which are The Glens' common areas.

In the Deposition of Butryn and of Pete Pizzi both identified the Buildings and Grounds Presentation they wrote, along with Mike Templeton, another member of their Committee, which was presented to the Board at an official meeting on June 25, 2008, Pl #330. At # 331 is the "Cost Breakout" numbers that Plaintiff took from the presentation, which Butryn identified as the numbers in his presentation.

Butryn at trial stated that the area labelled "Common HOA Area" actually included nothing more than the shoulders of the County owned roads and that the IHOA owned and maintained area consisted only of the Amenity Center complex. This was undisputed.

From that chart at Pl # 331 the Court was asked to note that if only the IHOA owned Amenity center was considered, only 7.55 percent of the landscaping budget was spent on what was actually Common Areas – owned by the IHOA. Thus only $ 4,908 out of $ 65,000 was being spent to maintain the Common Areas – and thus home owners are being improperly assessed for purposes that the covenants do not give The Asssociaiton the authority to levy assessments for.

Put another way, the IHOA Board under Toth was mis-appropriating $ 60,000 out of $ 65,000 in that area of the budget.

At trial Butryn testified that although his numbers calculated on the basis of acreage indicated that the IHOA was spending $ 24,390 a year to maintain golf course property, because that area was more labor intensive it was certain that the per hour cost was actually far more.

Butryn testified that the advice of the Committee was to either cease and desist from doing any maintenance on anything but the IHOA owned Common Area or to maintain only such additional area as the IHOA will be reimbursed to maintain.

At trial the Court was asked to refer to the 2008 General Ledger for the Golf Course Pl #707, which documents that in 2008 the Golf Course only paid $ 13,872 but was receiving landscaping services on it's property in the amount of at least $ 24,390.

The Court is asked to note that a property owner is supposed to receive no direct services to his property by reason of payment of assessments and this represented a mis-

application of money which should have been used for other IHOA purposes.

From Pl # 389 the Court is asked to note that in 2008, the Golf Course was required to pay $ 42,000, not the $ 13,872 actually paid and was not entitled to receive the $ 24,390 (or more) of services.

At trial the Court was asked to take judicial notice that per IRS regulations, a non-profit home owner assoication is not permitted to provide goods or services to property owners.

As was admitted at trial by current Board President Freiboth, these practices and consequent damages continue to this day. The damages thus far exceed the $50,000 (or more) from 2008.

Plaintiff asserts that the facts are sufficient to show that the 2008 Board, presided over by Defendant Rosemary Toth, did not act in good faith or otherwise as required by The Act.

RELIEF REQUESTED

Plaintiff asserts that he has by the preponderance of the evidence provided facts and applicable citations of law entitling him to the following relief:

1. That Defendant Rosemary Toth be and is required to pay to the IHOA the sum of One Dollar ($ 1.00) as a token of the consequential damages her misconduct caused the IHOA in 2008. The Court further finds that her conduct with regard to use of IHOA landscaping money was intentional and that she acted against the beset advice available to her in her capacity as Board Member and IHOA President.

2. That because of SC 33-31-851, the indemnificatin of board members or officers, Toth may not be indemnified for this award and that she is personally liable for the cost of her defense in this litigation.

3. That it is unlawful for the IHOA to spend assessment funds on areas not owned by the IHOA which are not also declared to be Common Areas within the PUD.

4. That the IHOA is enjoined from collecting in the form of assessments any funds for, and is likewise enjoined from expending any IHOA funds for any purpose at all upon lands which are not (a) in the PUD; (b) owned by the IHOA; and (c) declared to be Common Areas.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	)	consolidated with
Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S POST-TRIAL BRIEF
	)	SUPPORTING
The International Club	)	PROPOSED ORDER
Homeowners Association, Inc.,	)	
et al	)	
Defendants	)	
	)	

- DIVISION 16 -

DEFENDANT IHOA AND DEFENDANT ROSEMARY TOTH ILLEGALLY DENIED PLAINTIFF PERMISSION TO ERECT SWING SET

Plaintiff's "3596" Complaint alleged that various provisions of the Covenants had been deleted; that such were being enforced by the Defendant none the less; and that additional restrictions on the free use of property were being imposed by the Defendants which were not to be found in the Covenants. It also complained about the violation of the implied covenant of good faith and fair dealing.

Plaintiff's "11320" Complaint added the specific issues that the IHOA was interfering with Plaintiff's use of property and harassing Plaintiff by demanding that Plaintiff conform to the then non-existent Covenant Section 7.2, the ARB requirement. This Complaint further complained about IHOA disregard for the procedural rules in the IHOA's purported Bylaws.

In paragraph 19 of the 11320 Complaint Plaintiff raised the issue of Prior Review of plans by the ARB.

In paragraph 20 of the 11320 Complaint Plaintiff raised the issue of the IHOA ignoring procedural mandates of it's purported Bylaws, and attempting to use those Bylaws as ostensible authority for restrictions on the free use of property not to be found in the Covenants.

In paragraph 21 of the 11320 Complaint Plaintiff raised the issue that ARB rules were being used to extend the limitations on property in ways not explictly stated in the covenants.

In paragraph 22 of the 11320 Complaint plaintiff plead that

"The actions of Defendant constitute harassment and tortuous interference with" Plaintiff's lawful use of his property.

With regard to the swing set, Plaintiff's trial testimony alleged that the Defendants violated the implied covenant of good faith and fair dealing (which was asserted in the 3596 complaint).

What Happened

On July 21, 2009, months after Plaintiff filed the 3596 complaint, Plaintiff filed an ARB Request to install a swing set Plaintiff # 601.

In that application it recounted that Cartman, Plaintiff's neighbor on that side who was a member of the ARB, objected to anything near his house which might bring with it the noise of children playing. Plaintiff's application stated alternatives which Plaintiff offered to install at Plaintiff's expense, such as a fence or hedge to buffer the noise (which was hypothetical) and to hide the view. Maureen Sullivan, at trial, testified that she saw Plaintiff at the pool with three very well behaved little foster girls. At the time Sullivan was a member of the Board so the Board clearly knew Plaintiff had foster children for whom this was to be used. The application perpetuates that Cartman had stated that he bought his house with the understanding that Pebble Creek is a retirement community devoid of children. While there are restricted communities limiting residence to persons over a certain age, the PUD is not one of them.

The application pointed out that "The Architectural Guidelines have no restriction on where a swing set may be placed". It went on to quote the only provision -- securely anchoring them.

The application contained a photo of a swing set at 109 Pickering, down the street, of another at 105 Keswick, in Pebble Creek, of another next door (on the side away from Cartman) at the Paar residence, A manufacturer's photo of the one proposed was included showing it smaller than any of the others. An architectural drawing from the manufacturer was included showing the safe footprint requirement to be 10 feet by 32 feet, stating that this could only be found where Plaintiff intended to set it up. A survey plat was included which showed the swing set would be far back from the front of Plaintiff's house, in fact midway along the side of Plaintiff's house. Another photo showed there was insufficient room at the rear for a swing set. A last photo showed the very large expanse available where Plaintiff proposed to put it – AND that this was no wheres near the front of Plaintiff's house.

On August 5, 2009 Pl #602 the IHOA, through KA Diehl, denied the request. Cartman had participated in the ARB decision making – had not been required to leave the room at that time. The ARB would not allow Plaintiff to hear or observe the decision making. This was violative of the The Act's requirement for open meetings and, if any hypothetical privacy was involved, it related to Plaintffff and thus it was Plaintiff's to assert, which he did not.

The letter was actually sent by Defendant KA Diehl's employee Julie Case. The reason she gave was as follows:

> "The installation of a swing set on the side of a home which is visible on the street ... is prohibited". "This application must be denied based on the location of the swing set".

There is no such restriction in the covenants Pl #547 nor were there in the ARB Guidelines at the time, Pl #600.

The ARB guidelines at the time are at Pl #600. Per it's own title, these are just "guidelines" and not "rules". If the IHOA wanted to call them "rules" they should have written so. Per case law, this doesn't matter because covenant restrictions will not be extended by rules or by construction or implication.

Swing sets in the Guidelines are address at "L Recreational Equipment #2 Swing sets" on page 4 of the guidelines.
It Reads: " Swing sets must be approved by the ARB and if approved must be securely anchored per hurricane specifications".

Plaintiff's neighbor, Jay Cartman, was at the time on the ARB. When Plaintiff, as a good neighbor, informed Cartman that Plaintiff intended to place a swing set on the side yard Cartman responded by stating that he hates kids and hates their noise and as an ARB member he will make sure that Plaintiff's swing set never gets built. Cartman was allowed to participate at the ARB meeting considering Plaintiff's swing set. The ARB always has stated that it will not allow anyone in the room while it deliberates who does not participate in the deliberation at hand.

The Court is asked to note that Plaintiff offered to erect a palm tree bed or a fence to screen the swing set from Cartman. This was ignored by the ARB.

Interrogatories in Discovery

Turning to Defendant's answers to interrogatories, Pl # 605 and 604, one finds that the IHOA authorized the construction of seventeen swing sets. One of them Sobczyk, is in a side yard at the identical location where Plaintiff desired to place his swing set.

At trial Pete Pizzi testified that Mr. Sobczyk is his son – in – law, that Pizzi has visited both the Sobczyk house and that of Plaintiff, that the Sobczyk is identical to that of

Plaintiff; that Pizzi is aware of where Plaintiff would have erected Plaintiff's swing set, that Sobczyk's is in the side yard in the exact location where Plaintiff's would have been set up.

Plaintiff testified that the photos of Sobczyk's house were shot by Plaintiff standing in the road way, thus the Sobczyk swing set is visible from the road. Plaintiff also testified that at the time a neighbor on the other side, Paar, had a swing set which had no landscaping nor fence to obstruct the view from Plaintiff's yard or kitchen window or from the street. Pizzi testified that the Sobczyk lot also had limited space in the rear making it impossible or unsafe to install a swing set there.

Cartman's wife is a diabetic. Prior to this incident she had told Plaintiff that she is a diabetic and had shown him the disposable injector she uses. Right after this many of these needles started showing up in Plaintiff's yard. At the time Plaintiff had several foster children and the swing set was for their use. Plaintiff saw Cartman walk by the areas where these needles were found – said strolls occurring immediately before the needles were thrown into the yard, where they had not been prior to the strolls. This was a hazard to the foster children. Police reports were made. Horry County police responded. They took the injectors into custody, hopefully to be fingerprinted. These are reflected in a number of police reports. A picture of one such injectable is at Pl #620.

Plaintiff's SC Human Rights Complaint

Another neighbor, Fletcher, a friend of Cartman's, who lives across Pickering from Plaintiff, also was on the ARB at the time. Since this denial with the participation of Cartman followed Cartman's statement that he will have the swing set denied because he hates kids and their noise, and because there is nothing in the covenants nor the ARB guidelines to support the denial, Plaintiff filed a Human Rights Complaint.

The Human Rights Complaint is at Pl # 614.

In response to this on November 16, 2009 Defendant Toth wrote the Human Affairs office, Pl # 603, She wrote,

> "The ARB has never approved a swing set in any location other than the back yard".

Her response to the Human Rights Commission had another statement in it that implied that Plaintiff had re-applied for the Swing Set to another ARB panel which did not include Cartman or Fletcher – and that the denial could not have been influenced by Cartman's anti – children bias.

It was a lie.

Plaintiff never submitted a second Swing Set Application.

Toth also wrote that the disapproval came from the ARB and not from the IHOA,

skirting the issue as to who has the authority to enforce the covenants and whether the ARB is in fact a servant of the IHOA Board.

Plaintiff asks the Court to conclude that it is more likely than not that the Human Rights Commission did not enforce the civil rights complaint because of Toth's lie, not because the discrimination was unfounded.

PHOTOS

At trial Plaintiff introduced photos to put a face on what was going on.

At Pl # 610 is the Swing Set Plaintiff wanted to install. Plaintiff had already bought it and the pieces are sitting inside Plaintiff's garage. Plaintiff bought it because similar swing sets are to be found around the PUD and there was no reason to be found in the covenants why Plaintiff should not install it where he planned to.

This is not nearly as large as the one sold in Sam's Club or the one's commonly found along the Grand Strand.

From the manufacturer's photo it can be seen that it requires a safe area around the swing set of 15' x 26' so that a child coming off a swing will not bang into a house, tree or fence. At Plaintiff's house such an area is only found on the left or right side of Plaintiff's house. Plaintiff's rear yard does not have that much space – the developer sited the house placing the uncovered areas on the left or right.

The Court can see that safe area at Plaintiff's # 613, the safe area sketch provided by the manufacturer.

The Court was asked then to look at another swing set found around the PUD. This one is foud at 1212 Hargate Street. It is the Sobczyk house. Plaintiff asserted and it was not controverted that it is the same model as Plaintiff's and 1212 Hargate has the same lot size / placement issues as Plaintiffff – the large safe areas is on the right side of that house – exactly where Plaintiff proposed to place his swing set. Plaintiff # 611 / 612. The swingset Sobczyk installed, however, is much larger than that of Plaintiff. Instead of the straight slide it has a curved slide and is three levels, one level higher than Plaintiff's swing set.

The Court was next asked to look at several more swing sets around the neighborhood – as shown to the ARB in the swing set application Pl # 601. On the third physical page numbered "2" are pictures of swing sets at 109 Pickering Drive which is bigger than Plaintiff's proposed swing set. There also is another one shown which is at 105 Keswick. It also is bigger. Turning the page one sees an all-metal one at 249 Pickering – across the Cul De Sac from Plaintiff's house and with no landscaping to block it from being seen, in all it's glory, from Plaintiff's dining room window – and from two other houses on the Cul De Sac. If the Cul De Sac is Pickering Drive, this playset can be seen from the road. At 239 Pickering is another one similar to Plaintiff's.

The Court was asked to note, specifically, that the ARB / IHOA approved a swing set larger than that proposed by Plaintiff on the same side yard for the same type of house that Plaintiff lives in.

The Court was next reminded that through Amendment #1 (May 10, 2000, Pl ## 551) to the Covenants, the Developer deleted the requirement to seek ARB approval at all, Section 7.2. The existence of this was known to the IHOA because it was the sole Amendment to the Covenants on it's web site, In addition, Plaintiff mentioned this deletion in the Application.

Section 7.2 of Covenants as it had existed is at Pl 547.

The play set was fully within the setback and building line requirement of Section 7.11, which are set out in Pl #609, the accessory structure restrictions imposed by Horry County when it approved the PUD. The Open Storage restriction, Section 7.31, was "waived". There are no further Covenant provisions which, by speculative enlargement, could possibly apply.

The court is asked to recall the Harrogate approval in the side yard. .

CASE LAW

At Trial Defense Counsel failed to cite any cases contrary to those cited by Plaintiff, nor did Defense Counsel contest the asserted meaning of the cited cases.

Arcadian Shores Homeowners v. Cromer 644 SE 2d 778, 373 SC 292 - SC: Court of Appeals, 2007. The Court ruled that enforceable controls over use of property have nothing to do with rules – the must be explicitly and unambiguously stated in the Covenants.

The lower court wrote:
(1) the 1985 Regulations were not valid because they were not properly signed, acknowledged, or indexed;
(2) the 1965 Declaration does not prohibit Cromer's motor home;
(3) the Association abandoned its right to approve of fencing;

The SC Court of Appeals wrote:

:

We concur ...that any "regulation" mentioning "motor homes (RV's), campers, or travel trailers" necessarily constitutes a change to the original 1965 restrictions and that such a change would require a document signed and acknowledged by the majority of lot owners. Further, we recognize the master ruled the 1985 Regulations were invalid because they were improperly signed, acknowledged, and indexed

... nor will a restriction be enlarged or extended by construction or

> implication beyond the clear meaning of its terms, even to accomplish what it may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.

Relating to this, in 1999 swing sets were common.

> The Arcadian covenants challenged stated
>
> 7. ... Lot owners will comply with such reasonable regulations as the Developer may make

The Appellate Court wrote:

> This provision gives the Developer the power to enact regulations with respect to the [specified prohibitions] parking or storage of commercial vehicles, boats, or machinery.

The Appellate Court that stated –

> if the grantor had wanted to restrict mobile homes, he could have done so." *Id.* at 5, 498 S.E.2d at 86
>
> "However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts."
>
> "Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."

Upheld that the Association thus waived its right to review / approve. The Court is reminded of the extensive variation in swing sets throughout the PUD and the large number of them. The Defendant admitted to at least 17 it had approved in Defendants' Response to Interrogatories Pl 604 Pl 605.

By this reasoning, Plaintiff is likewise permitted to have other items in his yard which were in wide spread use in 1999 when the Covenants were drawn and which are not mentioned in the restrictions – such as model garden trains.

> "Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants." Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998).

Cited in 4575 - Santoro v. Schulthess, SCCA # 4575 Filed July 1, 2009

"A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property.". Hamilton v. C.M., Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980):

"The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution." Taylor, 32 S.C. at 4, 498 S.E.2d at 864.

In another case, Hardy e at v Aiken et al, SC Supreme Court. Opinion No. 26130 Filed June 12, 2006 the South Carolina Supreme Court held that the applicable

"rule of construction [is\ that any ambiguity must be strictly construed against the party seeking enforcement." Citing Queen's Grant II Horizontal Property Regime v Greenwood Development Corporation, d/b/a Palmetto Dunes Resort, Inc; 2006 S.C. App. LEXIS 79,*;368 S.C. 342; 628 S.E.2d 902

"Deed restrictions are encumbrances on realty and therefore, under common law, are to be strictly construed in favor of the free use of land." -- Levine v. Turner, 264 S.W.2d 478 (Tex.Civ.App.--El Paso 1954, writ dism'd); *Davis v. Huey,* 620 S.W.2d 561, 565 (Tex. 1981).

"Any ambiguity is resolved in favor of the least restrictive reasonable interpretation." -- Silver Spur Addition Homeowners v. Clarksville Seniors Apartments, 848 S.W.2d 772 (Tex.App.--Texarkana, 1993).

And from Arcadian Shores –

"However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts."

"Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."

Upheld that the Association thus waived its right to review / approve.

The Court is reminded of the Sobczyk swing set on Harrogate, and the swing set across the street from Plaintiff "which is visible on the street". Plaintiff took the Harrogate pictures from the street so obviously Harrogate is visible too. As a matter of fact, every picture Plaintiff took of swing sets was taken from the street.

From Arcadian Shores ---

... nor will a restriction be enlarged or extended by construction or implication beyond the clear meaning of its terms, even to accomplish what it

> may be thought the parties would have desired had a situation which later developed been foreseen by them at the time when the restriction was written.

The Court is reminded that the over-arching rule of construction for covenants is that ambiguity must be resolved in favor of the free use of property and this section is clearly very ambiguous and lends itself to selective and capricious application – and misuse by vindictive neighbors.

Given the Harrogate approval, the lack of a specific covenant or ARB guideline restriction, the large number of prior approvals, the wide variation in the individual swing sets, the Court is asked to direct the IHOA to cease and desist from interfering with Plaintiff's swing set and to declare that it is a lawful installation and to rule that the denial was selective, capricious, and a denial of Plaintiff's lawful use of his property..

RELIEF REQUESTED

Plaintiff has presented applicable statutes and case law and the preponderance of the evidence to demonstrate he is entitled to the following Order of Court:

(1) That the Defendants IHOA, Rosemary Toth, and KA Diehl, acting in concert together, willfully acted to deprive Plaintiff of the free use of property by using standard and regulations that they knew or should have known either did not exist or were inapplicable.

(2) That Defendant Rosemary Toth, in her answer to the South Carolina Human Affairs Commission, acted willfully and unlawfully to obstruct the Plaintiff's lawful resort to relief from that Commission.

(3) That there are no restrictions on the placement of swing sets within the PUD other than the Horry County set back requirements.

(4) That the Defendants are enjoined from any action directly or through others acting on their behalf or in concert with them from enforcing any restriction on swing sets and from imposing any restriction on the free use of property not explicitly stated as a restriction on use in a section of the Covenants not "waived" or "deleted".

(5) That Defendant Toth is ordered to provide Plaintiff a written apology for the action of the IHOA.

(6) That Defendant Toth is ordered to write to the South Carolina Human Affairs Commission relating that in conjunction with Jarmuth's prior Human Affairs complaint

(a) Jarmuth did not submit a second swing set application and as such no such re-application was denied by another ARB panel which did not include Cartman or Fletcher;

(b) The IHOA has approved another swing set for another house in the PUD of

the same model as Jarmuth's in the same side yard location as that requested.

(7) Payment by the Defendants of Punitive damages in an amount that the Court deems appropriate.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	
	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	consolidated with
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vs.	PLAINTIFF'S POST-TRIAL BRIEF SUPPORTING
The International Club Homeowners Association, Inc., et al	PROPOSED ORDER
Defendants	

- DIVISION 17 -

DEFENDANT IHOA's DENIAL OF PLAINTIFF's FENCE WAS ARBITRARY, CAPRICIOUS, NOT BASED ON A COVENANT RESTRICTION AND INTENTIONALLY MEANT TO INJURE PLAINTIFF

Plaintiff's "11320" Complaint alleged the IHOA unlawfully and knowingly imposed fines for supposed violation of non-existent covenant provisions and non-existent architectural review board rules. It also asserted a claim of interference with allowed uses of Plaintiff's property. There is no provision in the Covenants, Bylaws, or ARB Guidelines related to landscape edging and never has been.

At trial Defense Counsel called current IHOA board president Freiboth to the stand as their witness. She also called a Diehl employee, Beckie Abel. Plaintiff called Michael Butryn, Pete Pizzi and Louis Astorino to give related testimony as to the facts they know. Under questioning witnesses testified as follows:

1. Freiboth --That he was knowledgable about the Covenants (Pl # 547) and all their amendments, as well as the putative Bylaws (Exhibit C to the Covenants, Pl # 548) for the IHOA and in particular Section 13 relating to Procedures; and that he likewise was knowledgeable about the July 1, 2010 ARB Guidelines in force in 2010 (Pl #371).. Also, that he was the President of the IHOA Board when events surrounding Plaintiff's "Fence or Wall" occurred.

2. Freiboth testified that the ARB is parallel to the IHOA Board and not a committee of the IHOA which Plaintiff controverted. This issue is addressed separately (supra) in this Brief.

3. Freiboth testified that it was his belief that if Plaintiff was dis-satisfied with the ARB decision at issue here it was Plaintiff's burden to appeal that to the IHOA Board – and he further testified that Plaintiff did not do so.

4. Freiboth testified that if Plaintiff had filed an "appeal", then the IHOA Board would have investigated the situation and drawn some conclusions about how the situation should be handled. Freiboth testified that since Plaintiff did not file an "appeal" of the ARB decision, the IHOA board took the ARB's decision as final and considered the "fine" upheld.

5. Freiboth testified that the contractor, Defendant KA Diehl, was allowed by covenants and bylaws and ARB Guidelines to impose fines when Diehl on it's own decided that a violation of covenants had occurred, and that Diehl, on it's own, was empowered to issue "cease and desist" letters as well.

6. Freiboth testified that the Diehl violation letter was considered dispositive of an alleged violation and the burden was on the home owner to prove a violation had not occurred.

7. Beckie Abel, another Defense witness, was also called to testify and she testified that her employer, KA Diehl, gets paid a certain sum of money to issue violation letters, and that payment is made whether or not the alleged violation is a violation; Abel also testified that Diehl gets paid for a Diehl employee periodically to scour the neighborhood looking for violations and as such, many violations do not begin with a complaint from another homeowner.

8. Plaintiff's witness Louis Astorino testified that he believes KA Diehl employees trespass in his yard because they have accused him of violations which are only visible from his back yard, the area beyond that being occupied by a lake.

9. Both Astorino and Pete Pizzi testified about violation letters from Diehl regarding either non-existent violations or situations approved by Diehl or by Toth or by the Developer, often with readily available correspondence to prove it. Witnesses testified as to problems with Diehl continuing to demand payment for fines after they had been paid.

10. Witnesses testified about fines being imposed by the ARB or by Diehl at the onset of a violation incident. Astorino testified that his voting rights had been suspended prior to a hearing before the IHOA Board.

11. After convoluted examination, Freiboth conceded that the items that the IHOA was calling a "wall" were actually flower bed edgers, but that somehow Plaintiff could hypothetically have used them as part of a wall.

12. In testimony, Freiboth conceded that the edgers about which the IHOA was complaining could not contribute to the support of a fence in any way.

13. In testimony Freiboth conceded that Plaintiff had applied for the erection of a vinyl fence supported by fence posts – not a wall – and that the implication of this was that there would be "air space" between the fence and the landscape edgers.

14. Freiboth testified that he had personally seen what was actually installed and Freiboth testified that despite this and the language of the application, the IHOA was asserting that Plaintiff had intended to build a wall and that the edgers were a wall.

15. Butryn testified that in the course of his business he had drawn specifications for and supervised the erection of fences and walls for school districts, and that no wall was installed and what was installed was useless in the context of either a fence or a wall.

16. Freiboth was unable to explain and did not controvert that the minutes of the meetings of the board of directors of the IHOA include not a single instance of the Board hearing an appeal of a covenant violation and that the do not include a single instance of the imposition by the Board of a fine or a suspension of rights.

17. Abel testified that numerous fines had been imposed by Diehl and collected from homeowenrs by Diehl over the years and numerous letters had been written for which Diehl had been paid.

18. Freiboth admitted at trial that Plaintiff had not erected the fence that had been applied for – not a post nor a panel, and that Plaintiff had not put in the requisite paver base material that Butryn testified must be laid in the earth – at least twice the width of the wall and at some depth – underneath where a wall is to be erected.

19. Freiboth conceded that he was aware that the IHOA had approved the identical landscape edgerse for use elsewhere in Plaintiff's lot and elsewhere in the neighborhood and that in fact such landscape edgers were common throughtout the neighborhood.

At trial Plaintiff testified that

(1) The fence and edgers were related to the invasion of Plaintiff's property by Cartman following the swing set issue, in particular following Plaintiff's use of Cartman's statement about children in Plaintiff's Human Affairs Commission complaint. After the Complaint Cartman proceeded to pound stakes into that portion of Plaintiff's irrigation and sprinkler system located near their common property line. Plaintiff testified that Cartman futher put up "no trespassing" signs facing Plaintiff's house – well into Plaintiff's property. Plaintiff

testified that this destroyed the functionality of that section of the system.

(2) That Cartman repeatedly sprinkled used hypodermic needles previously used by Cartman's wife for her diabetic condition and that this endangered the foster children who lived with Plaintiff. Plaintiff testified that there are numerous police reports filed by the Horry County Police where they collected the evidence and filed reports of these incidents.

(3) Plaintiff's complaint asserts that Cartman was behaving erratically and making threats to Plaintiff's wife.

(4) That the Horry County Police suggested to Plaintiff that the resolution of this problem required that Plaintiff hire a licensed surveyer to resurvey the line, to install property stakes and that the surveyor install additional iron pipes on the boundary. Plaintiff testied that he was told that to resolve the issue and avoid a physical confrontation Plaintiff should then immediately pull a string line between the surveyor stakes and install a garden bed with edgers along side but barely into Plaintiff's property, which should resolve the issue of intent related to Cartman pounding stakes into Plaintiff's irrigation system. The Horry County police had been shown the photos of Cartman actually pounding such stakes into Plaintiff's irrigation system and other signs Cartman had installed on Plaintiff's property. A picture showed Cartman with a saw in hand emerging from a hedge largely on Plaintiff's property. These pictures are in evidence.

(5) Plaintiff testified that the ARB submission which was made with the notation that it preserved Plaintiff's objections and reservations about the IHOA's authority and the existence of any requirement for application or the existence of fence restrictions, included a request to erect a fence and another request to install the landscape edgers which were installed, and that the illustration had two lines – one for the fence which was disapproved and one for the edgers which was approved.

(6) Plaintiff testified that the IHOA has also approved those same edgers on the portion of the property line leading from the curb (actually, across the county right of way over which Plaintiff has an encroachment permit) in conjunction with a flower bed in plain view of the road, and that the edgers in the rear which are called a "wall" can not even be seen from the road.

THE COVENANT PROVISIONS REQUIRING PRIOR ARB APPROVAL AND REGULATING FENCES DO NOT EXIST AND ARE NOT LEGALLY ENFORCEABLE

The HOA asserts Plaintiff violated the provisions in the Covenant Pl # 547 which require prior HOA Architectural Review Board approval of all changes, and the covenant provision regulating fences. It attempts to enforce a non-existent covenant restriction on Fences.

Plaintiff asked the Court to declare that these provisions are unenforceable because:

* **They have been deleted.**
* **They have been "waived" by inconsistent enforcement**

Plaintiff also preserved his objection that the Defendant IHOA is not the homeowners' association for the Planned Unit Development and thus lacks standing in the matter.

In Arcadian Shores Single Family Homeowners Association, Inc v. Miriam R. Cromer; Opinion 4223, refiled May 17, 2007; 2007 S.C. App. LEXIS 98; the SC Court of Appeals upheld the lower court decision that homeowner association regulations are unenforceable and invalid unless they are "properly signed, acknowledged, (and) or indexed". In that same case the Court of Appeals noted that

> **"Waiver has been defined as the intentional relinquishment of a known right. Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993). ... However, extensive omissions or variations tend to show that no scheme exists, and that the restrictions are only personal contracts. citing Gibbs v. Kimbrell, 311 S.C. 261, 267, 428 S.E.2d 725, 729 (Ct. App. 1993).**

In upholding the Arcadian judgment finding that the homeowners association waived it's control over fences and other issues, the Court noted that

> **"the Association inconsistently enforced this requirement. Moreover, pictures of property throughout the neighborhood show the absence of any scheme with respect to fencing or other structures."**

This Court is invited to examine the numerous pictures of fences throughout the neighborhood which have been expressly permitted by the HOA which fences:

- **are over four feet high;**
- **are adjacent to a street;**
- **are between adjacent properties;**

- are sometimes not within the approved list but never – the – less the IHOA has chosen to waive enforcement of the putative fence provision in the covenants;

- are approved projects similar to the so called "wall" which definition of plaintiff's lawn edging Plaintiff objects to.

At trial Plaintiff asked the Court to look at the evidentiary pictures of fences and walls within the PUD which have been either approved or permitted to remain. As all photos were taken by Plaintiff from the street it is seen that all fences are visible from the street.

Pl # 2 8 foot high plastic fence on Pickering Drive.
Pl # 3 8 foot high plastic fence on Pickering Drive.
Pl # 4 112 Worchester Court. Completely surrounds the sides and rear of the back yard and one side is against the street.
Pl # 5 Right side of 120 Seville - GSWSA 8 foot high wood fence.
Pl # 6 Same fence visible from GIA – fence is clearly a nuisance to Harrigan at 120 Seville Drive.
Pl # 8, # 9, # 10 Fences adjoining street at 165, 170, and 174 Seville These stand astride the lot property line.
Pl # 12 Similar fences at 184 Seville.
Pl # 13 Similar fences at 164 Seville. The court is asked to note that these are neighbors or close to Defendant Toth.
Pl # 14 Fence at 186 Seville viewed from GIS. Note fence is facing Dunham Court.
Pl # 15 Fence at 166 Seville.

At trial Plaintiff testified about the background: how Cartman campaigned to deny Plaintiff the installation of a swing set in the area where the IHOA later said Plaintiff built a wall without prior ARB approval. While the matter with the Human Affairs Commission was pending, as has been related, Cartman is alleged to have been dropping used hypodermic needles on Plaintiff's yard. Pl # 620. This was perpetuated in Horry County Police reports, who came numerous times to investigate and took possession of each needle.

Carman proceeded to install stakes and no trespassing signs on Plaintiff's side of their common lot line --- destroying Plaintiff's sprinkler system in that area. On September 3, 2010 Plaintiff took a picture of Cartman pounding a stake into Plaintiff's sprinkler system on Plaintiff's side of the common lot line. Pl #621. At this time Cartman was still a member of IHOA's ARB.

Cartman also cut his own hedges, Pl #622 on September 3, 2010, and falsely accused Plaintiff's wife of doing so. Cartman later sued Plaintiff's wife in magistrate court over this but was thrown out of court for having no plausible case on a motion for summary judgment made on Jarmuth's behalf by Jarmuth's

counsel of record in the case.[1]

At Pl #623 are several of Cartman's stakes driven into Plaintiff's sprinkler line. Cartman topped these with "No Trespassing" signs. Plaintiff ultimately complained about this violation of the "no sign" covenant and Cartman was ordered to remove said signs and stakes.

Plaintiff discussed this trespass with the Horry County Police and rather than have Cartman arrested for vandalism, malicious destruction of property, and trespass Plaintiff took the suggestion of the Police and had his common property line professionally surveyed – an unnecessary expense.

Thereafter Cartman proceeded to try to move the survey stakes. However, at the foot of each Plaintiff had paid the surveyor to drive 2 foot steel pins at the survey points where the stakes were also placed. At Pl # 624 is a survey stake that Carman was seen, by Plaintiff, moving numerous times. Plaintiff reset this each time it was moved – to the location of the steel pin. At Pl # 625 are several pictures to show the Court the problem that the IHOA ARB official, Cartman was causing as he drove even more, larger stakes into Plaintiff's sprinkler system across the line now marked by the survey. At this point the Police suggested installing landscaping edging along the property line, exactly as the HOA had previously approved elsewhere as edging on Plaintiff's property, and as was in widespread use around the PUD.

The September 7, 2010 Complaint that Plaintiff sent the IHOA about Cartman is at Pl #626.

There is no provision in the ARB Guidelines or Covenants relating to landscaping edging. As will be reiterated, the Covenant provision relating to Prior ARB approval was "waived" as was the provision relating to "fences and walls".

On September 27, 2010 the ARB / IHOA / Defendant KA Diehl sent Plaintiff a "Violation Notice". Pl # 627. Per the letter, without a hearing or Board action, Defendant KA Diehl, acting ultra-vires, imposed a $ 50 fine on Plaintiff. There is no covenant provision permitting a contractor to impose a fine – ever. There is no covenant provision permitting any fine of any sort by the IHOA except with the record of the board by vote recorded in the minutes of a board of directors meeting. There is no such record. This was simply Defendant KA Diehl making money for itself, because KA Diehl gets $ 10 or more dollars per violation letter, whether they are valid or not. Again, this occurred after Plaintiff "turned Cartman in".

The letter stated that the ARB Guidelines was the source of authority.

[1] Cartman actually filed two such Magistrate Court Comlaints, both of which were defended by Counsel and both of which never got beyond Carman's presentaiton of his putative grounds.

The ARB guidelines are not the source of authority for anything. They are not even rules, although ARB rules are not able to extend the covenants.

The letter cited Section 7.2 asserting that Prior Approval of the ARB is required prior to ANY modification to the property can be done. It ignored the issue that there is no Section 7.2 any longer.

On May 5, 2010, which was several months before, at a Board Meeting, Pl # 370, page 3 Section VI New Business para C New Violation Policy the Board announced that as of May 1, 2010 it was announced that no fine will be imposed prior to a final hearing. This is in accord with a provision, long ignored, in the purported IHOA Bylaws . Pl # 548, Bylaws page 45 Deed Book 2117 Page 1399. "The Board shall not impose a fine, suspend voting rights or infringe upon or suspend any rights of an owner unless and until the following procedures are followed" which procedures are notice and a hearing. The IHOA did not follow it's own procedure. The enforcement procedure has no provision for KA Diehl to do anything but send the notice. For Defendants it's all about the money, not covenants or rules.

The ARB Guidelines which supposedly were in effect are Pl #371.

On page numbered 2 of the document, actually the third page, Section II, Paragraph E, it lists "Items which need no approval". So KA Diehl's letter that everything needs approval is contradicted by their ARB Guidelines. More items which do not need approval were separately announced at other board meetings and homeowner correspondence from Diehl.

The Guidelines regarding landscaping are in Section L, physical page 4 numbered 3.

That section talks about not destroying large trees or bushes and doing all sorts of lawn and garden maintenance, all without ARB application or approval. There is no guidance on flower bed maintenance.

On page numbered 5 Section S is the section on Fences. Through bylaws the IHOA can not resurrect restrictions which had been clearly deleted such deletion being a clear statement that the deleted behavior is now permitted. There is nothing in this section to even suggest that this applies to lawn edging, for which there are no guidelines.

The letter cites the bylaws section on authority for enforcement, Section 13.2, proving that the author, KA Diehl employee Julie Case read the bylaws, but it ignores the section following, 13.2, Procedure, of which Diehl and the IHOA is in violation.

The Court is asked to examine section 13.2 of the Bylaws.

The Court is asked to note that in the IHOA's counter-claim it calls what Plaintiff installed a "wall". Not a fence, not landscaping. A wall.

At this point it will help if the Court Takes notice of exactly what the IHOA is calling a wall installed without obedience to the deleted 7.2 ARB Prior Approval and the deleted covenant section on fences.

The photo at Pl #21 has the view of Plaintiff's yard from Pickering Drive. The Court is asked to note the landscape edging around the tree bed to the left, the palm tree bed to the right, and around the planting bed in the front of the house. Looking along the right side of the house the IHOA claims that Plaintiff built a wall. An invisible wall.

The photo at Pl #22 is a direct on view of the supposed right end of the wall. Note the existing edging around the hedges surrounding the power box. Note the edging around the flower beds to the left and right of the power box, which have also been approved by the IHOA as edging. Then look to the left of the left hand flower bed at the same edging blocks. These are now, according to the IHOA, a wall. The photo at Pl #23 is the flower bed with edging approved by the IHOA. At #24 is a larger picture. At #25 is the same edgers approved for one of Plaintiff's Palm beds. Note that although Plaintiff has an encroachment permit from Horry County, the Palm bed is set back to the property line. This illustrates the issue of lawns which do not belong to homeowners but which extend onto the county streets.

At Photo # 26 the "wall" can be seen to the left, dividing Plaintiff's lot from Cartman's. The edgers are entirely on Plaintiff's lot. Per the suggestion of the Horry County Police this placed a line down which could not be moved without difficulty and which now protects Plaintiff's sprinkler system which has not yet been repaired. The supposed wall is from the left edge of the picture to the center. As the Court can see, it is landscaping edgers and not a wall.

If the IHOA had not interfered, a second line of edgers would have been laid and the middle area filled in as a flower bed. There has never been covenant controls over flower beds. From Pl # 27 the same edgers can be seen dividing Plaintiff's lot from his other neighbor. Somehow for eight or more years this has not been a wall.

Photo Pl #28 shows the existing flower bed which Plaintiff wants to extend. These flower beds were approved. Pl #40 and #42 show longstanding edging in other nearby homeowner's yards – across the cul de sac, which the IHOA is not calling a wall. The one at #42 belongs to John Bianchi, a former board member. Plaintiff's palm beds were modeled on his., including the edgers.

On September 29, 2010 Plaintiff paid the $50 putative ARB "fine" which the

letter said had been added to Plaintiff's "Association account in accordance with the ARB Guidelines".

The July 2010 ARB Guidelines are at Pl #371.

The July 2010 ARB Guidelines contradict the IHOA purported Bylaws, Pl 548, because the bylaws state in Section 13.3 the following:

13.3.1 A Written Demand to cease and correct the issue within ten days. No fine is provided for.

13.3.2 The Board, not the ARB, serves the homeowner with notice of a hearing the Board schedules. The homeowner does not request same. A potential fine is to be mentioned as a potential sanction if the board does not rule in the homeowner's favor at the hearing.

13.3.3 A hearing and a decision.

On September 30, 2010, the next day, Plaintiff submitted a complete ARB Application package to KA Diehl, the IHOA's contractor. Pl #629. On page 1 it contained the stipulation that it did not waive any objections to the IHOA being the association or to the validity of some or all of the covenants or rules.

On page 4 of the submission Plaintiff checked the box "lawn edging" as well as "fence".

Page 5 was a plat of Plaintiff's lot overlaid with what was desired: It showed three things:

1. Flower beds around the power box. This was seen in the pictures on either side of the power box. Pl # 24.

2. Brick edging along the property line, as suggested by the Horry County Police, all the way from the curb to Plaintiff's rear property line. This to quickly take care of Cartman's destruction of Plaintiff's sprinkler system.

3. A vinyl fence running from behind the power box all the way back to Plaintiff's rear property line.

Page 6 and Page 7 were pictures of the Vinyl Fence, typical of the fences shown in pictures of fence around the neighborhood. Both sides were "good" sides.

Page 8 thru 11 was Plaintiff's encroachment permit from Horry County to place landscaping in the area between the curb and the property line.

Page 1 related that the Horry County Police advised installing first a string

line and then edging all the way along the common property line between Cartman and Plaintiff, from front pin to rear survey pin. The ARB application called for a line of edgers AND a fence, not one or the other, not the edgers up front and the fence in the back.

It is noted that vinyl fence posts embedded in concrete, Pg 6 of the application, and these support the panels, pg 7 of the application. Brick edgers are not a part of a vinyl fence. Their function was to place a mark on the ground where Cartman would thus not be able to destroy irrigation systems any further. They are not part of a fence system. They are several inches below such a fence. Vinyl fences are suspended several inches above the ground.

On October 8, 2010 Pl # 631 KA Diehl's Julie Case wrote Plaintiff on behalf of the IHOA, not of the ARB, stating that Plaintiff's request to install a flower bed and edging had been approved. The edging requested was all the way from the curb to the rear property line. This edging, which they approved, they now call a wall.

The same day Julie Case of Diehl for the IHOA wrote Plaintiff another letter, for which they earned another $10 or more, stating that they had disapproved Plaintiff's request for a vinyl fence with a brick foundation. Actually, this is the same "edgers" that they had separately approved. As was shown by the pictures previously placed into evidence these are the same edgers which separate Plaintiff's property from the other neighbor's lot, and which surround all of Plaintiff's planting beds – and which are in common use through out the neighborhood.

<u>On October 11, 2010, Pl # 633, Plaintiff demanded the putative appeal</u> mentioned in the ARB Guidelines which is the same review that the Board is supposed to automatically schedule without being asked. This pointed out that Section 7.4, fences, of the covenants had been deleted as had the ARB application Section 7.2. The letter noted other infirmities, such as Bob Berman being both an ARB member and a board member, while the Covenants state a person can hold only one office at a time.

THE ABOVE DOCUMENT IS THE APPEAL THAT FREIBOTH TESTIFIED AT COURT THAT PLAINTIFF NEVER MADE.

At trial Plaintiff pointed out, and it was not controverted, that this procedure does NOT require a home owner to make an appeal but rather puts the burden on the IHOA board to schedule such an appeal, independently, to serve the notice of the hearing, to conduct the hearing "on the record of the minutes of the board" and to enter a decision "on the record" – and that no fine or suspension of rights may be made until this has all been completed AND there has been a finding on the record that a violation has occurred.

At trial Freiboth, when confronted with the document which was titled "Appeal", still claimed this was not an "appeal" because on an inner page Freiboth claimed that Plaintiff had explicitly "waived" his right to an appeal. Freiboth was insructed to read the text which did not say a waiver of an appeal but instead the text put the IHOA on notice of Plaintiff's intent to litigate this – in parallel – in court. For approximately twenty minutes Freiboth had been testifying under oath that Plaintiff had not filed anything that could be taken as an appeal and that the IHOA board had expected Plaintiff to appeal.

On October 20, 2010, based on the postmark on the envelope attached to the IHOA letter dated October 14, 2010, Pl # 634 (envelope pg 2), the IHOA answered with the 6 day back dated letter through Beckie Abel of Diehl. She acknowledged receiving the letter of October 11, 2010 which was titled "Putative Appeal of October 8 2010 Disapproval of Fence". Her letter stated that

> **"Unless you successfully appeal the ARB decision, you must remove the brick fence foundation...".**

She disregarded that the letter she referred to was an appeal. Plaintiff can not physically drag the requisite people into an appeal room. So the IHOA has refused to hold the appeal hearing – but they continue to impose an illegal fine for disregard of two non-existent covenant sections by erecting a fence that does not exist.

But that is not the end of it. On October 24, 2010, Pl # 635, Plaintiff wrote the IHOA and reminded them of their refusal to follow section 13.3 of the Bylaws and their refusal to hold an appeal. There was never a response from the IHOA to this.

Plaintiff asks the Court to consider this a willful and malicious evasion of the IHOA Board's obligations and obstruction of Plaintiff's rights.

The Court is invited to draw the conclusion that Defendant has imposed a frivolous fine and frivolously and maliciously violated the implied covenant of good faith and fair dealing. Defendant is attempting Prior Restraint for which they have no legal basis to request.

On February 8, 1999 Plantation filed Covenants. # 547.
On May 9, 2000, Plantation AD filed Amendment 1 to the Covenants. The document "waived" the ARB Requirement and all fence restrictions. # 551.

Plaintiff invited the Court to take judicial notice of Black's Legal Dictionary, First Edition, Page 1231 from whch it is clear that a "waiver" equates to deletion: Pl #97 & 98.

On Page 1231 of Black's Legal Dictionary, 1st Edition, the legal meaning of

the phrase "Waiver" is stated as follows:

> "WAIVE, v. To abandon or throw away; as when a thief, in his flight, throws aside the stolen goods, in order to facilitate his escape, *he is technically said to waive them.*
> In modern law, to renounce, repudiate, or surrender a claim, a privilege, a right, or the opportunity to take advantage of some defect, irregularity, or wrong.
> A person is said *to* waive a benefit when lie renounces or disclaims it, and lie is said to waive a tort or injury when he abandons the remedy which the law gives him for it. Sweet"

The waiver of fence restrictions is more defining than if there had been no fence restrictions in the first place. It is an explicit act by the developer showing that it was his desire that there not be any fence restrictions. If that was not his desire, he could have modified the fence provision. He waived the complete restriction.

Likewise the requirement to seek prior approval from an Architectural Review Board. By "Waiving" this requirement instead of modifying it the developer conclusively showed his intention that homeowners should be free to use their property.

The absence of a fence restriction coupled with numerous instances where fences have been installed implicates the Arcadian Court Decision. By allowing fences in side yards and elsewhere the Defendant HOA has "waived" it's right to regulate these – if that right existed at all.

In Anderson v. Buonforte, Opinion No. 3998 , SC Court of Appeals filed June 13, 2005 the Court wrote

> "A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." citing See Hamilton v. C.M., Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980) ().

In Penny Creek v Fenwich Tarragon; 375 S.C. 267; 651 S.E.2d 617 the SC Court of Appeals held that

> "restrictions on the use of property are historically disfavored. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 270, 363 S.E.2d 891, 893 (1987). "Thus, to enforce a restrictive covenant, a party must show that the restriction applies to the property either by the covenant's express language or by a plain unmistakable implication." Rhodes v.

Palmetto Pathway Homes, Inc., 303 S.C. 308, 311, 400 S.E.2d 484, 485 (1991). "Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property" Hardy, 369 S.C. at 166, 631 S.E.2d at 542".

In Cimino v Dill (1982) 108 Ill. APp. 3d 782, 785, 439 N.E.2d 980 the Illinois Court of Appeals held noted that

> doubts and ambiguities in the covenants should be resolved in favor of natural rights and against restrictions (Engler v. Tenhaaf (1979), 74 Ill. App.3d 799, 803, 393 N.E.2d 1266, 1269; Kessler, at 905),
>
> "A waiver is a voluntary and intentional abandonment or relinquishment of a known right." Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992).

On March 18. 2011 Defendant responded to certain Interrogatories posed by Plaintiff (on February 16, 2011). Quoted below is Interrogatory #16 and Defendant's Answer:

> 16. Identify by name, lot address and date any instance where a homeowner has been permitted to erect a fence situated between his lot and an adjacent lot.
>
> ANSWER: Listed below are the dates, names and addresses where fences have been permitted:
>
> 1. February 4, 2004 - Diskin - 505 Crawley Place
> 2. September 1, 2004 – Bernardo - 182 Pickering Drive
> 3. September 22, 2004 - Cipriani - 186 Seville Drive
> 4. September 28, 2004 - Tempelton - 826 Castlebridge Court
> 5. October 15, 2004 - Buller - 513 Dunham Court
> 6. February 2, 2005 - Lattig - 208 Whitchurch Street
> 7. March 8, 2005 - Small - 166 Seville
> 8. June 13, 2005 - Wronka - 170 Seville
> 9. August 5, 2005 - Anthony - 831 Castlebridge Court
> 10. August 16, 2005 - Bergman - 405 Moat Court
> 11. September 8, 2005 - Sweeney - 704 Hawick Street
> 12. January 17, 2006 - Sciarretta - 1020 Knightsbridge Court
> 13. March 3, 2006 - Dougherty - 280 Pickering Drive
> 14. March 6, 2006 - McCray - 805 Castlebridge Court
> 15. March 6, 2006 - Sconyers - 253 Whitchurch Street
> 16. March 13, 2006 - Hamden - 230 Pickering Court
> 17. May 3, 2006 - Walker - 849 Castlebridge
> 18. May 3, 2006- Zielenski - 1019 Knightsbridge Court
> 19. July 11, 2006 - Boudreau - 105 Keswick Court

20. October 13, 2006 - Russell - 139 Wicklow
21. October 13, 2007 - Weibel- 252 Marbella
22. April 9, 2007 - Proctor - 174 Seville –
23. June 27, 2007 - Pappas - 501 Turret Court
24. July 3, 2007 - Benjamin - 627 Locke Court
25. August 28, 2007 - Antioho - 1108 Preston Place
26. December 21, 2007 - Rearick - 1112 Worchester Court
27. January 18, 2008 - Crawford - 521 Tamarindo Court
28. September 22, 2010 - Kinsey - 236 Whitchurch

The waiver did not eliminate the enforcement of the remaining restrictions. Individual homeowners or the HOA could come forward and "counsel" homeowners – after the fact – about actual violations. If a homeowner or the HOA sincerely believed a violation of the covenants existed after the fact, it could sue to enforce the covenants.

IHOA ARGUMENT THAT WAIVERS APPLY ONLY TO DEVELOPERS

Case law is completely against Defendant's argument.

"[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." Hamilton v. CCM, Inc., 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. Restrictions on the use of property will be strictly construed with all doubts resolved in favor of free use of the property, although the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants. Taylor v. Lindsey, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). Restrictive covenants are contractual in nature. Hoffman v. Cohen, 262 S.C. 71, 75, 202 S.E.2d 363, 365 (1974). The language of a restrictive covenant is to be construed according to the plain and ordinary meaning attributed to it at the time of execution. Taylor, 32 S.C. at 4, 498 S.E.2d at 864. -- Hardy e at v Aiken et al, SC Supreme Court. Opinion No. 26130 Filed June 12, 2006 .

Defendants argue that the use of the word "waive" instead of "delete" has some special implication --- but don't explain how this translates to applying the "waivers" only to Developers. HOWEVER, a not too careful reading of the original covenants immediately puts the lie to that "limited application" argument:

COVENANT RESTRICTIONS DID NOT APPLY TO DEVELOPER

In coming to this conclusion we need only look to the original language of Sections 2.2 and 7.2:

Section 2.2 reads:

> **"Section 2.2 Plan of Development of Additional Property. ... Developer reserves the right to plan, design, develop, construct, maintain and manage ..., the Multi-Family Areas and any unsold Unit as Developer deems necessary or convenient for its purposes, ... including without limitation the right to change the number, shape, size and density of the unsold Units, ... the Multi-Family Areas, ... and the Additional Property.**

Unsold units incorporate single family lots on which houses have not yet been constructed.

> **The last paragraph of Section 7.2 read: "Section 7.2 Prior Review of All Plans. Section 7.2 of this Declaration shall not apply to the Developer or to any Designated Builder "**

Importance of "Waived" Covenant Provisions to the Case:

Plaintiff argues that he has been illegally harmed by the HOA's insistence on applying an obviously deleted requirement to seek prior Architectural Review Board approval for changes – waived Section 7.2 – and by prohibiting Plaintiff from erecting a Fence despite that the Section, 7.4, has been "waived". The bogus counter – complaint for enforcement and damages is grounded exclusively in the assumption that 7.2 and 7.4 are still effective and, if that is not so, the counter – complaints amount to a frivolous proceeding and an unethical advancement – by Defense Counsel – of that counter – complaint. It is also a violation of the Civil Rule relating to signing a pleading unless the argument is grounded in substantial law – which is not the situation here.

RELIEF REQUESTED

1. Return of Plaintiff's $ 50 plus interest.

2. An order enjoining the Defendants, all of them, from attempting to enforce Sections 7.2 and 7.4 against anyone.

3. Court Costs plus all other cots because Plaintiff's suit against the IHOA and other Defendants is in fact a suit to enforce provisions of the covenants and such suits are entitled to complete costs, not just court costs.

4. A written apology published to every homeowner for the actions against Plaintiff, stating that the ARB application process and the fence restriction do not exist.

5. Punitive damages in an amount to be set by the court.

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	
	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	consolidated with
Plaintiff	Civil Action No. 2010-CP-26-11320
vs.	PLAINTIFF'S POST-TRIAL BRIEF
	SUPPORTING
The International Club	PROPOSED ORDER
Homeowners Association, Inc.,	
et al	
Defendants	

- DIVISION 18 -

DEFENDANT IHOA's REFUSAL TO PERMIT PALM TREE BED EXTENSION FEBRUARY – MARCH 2012

A VIOLATION OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

EXACTION AND EXTORTION

INVASION OF PRIVACY

On March 20, 2012, in the 3596 Case, Plaintiff filed a Motion to Amend to add events which had just transpired relating to Plaintiff's application for a Palm Tree Bed Extension. This was heard by the Court on June 15, 2012 at which point Defense Counsel stated that she objected based on the form of how Plaintiff was seeking to add an additional cause of action.

At the hearing Plaintiff asserted that the event in question occurred between the same parties and was related to the existing causes of action and that unless the injury was plead, Plaintiff was concerned that he would not be able to seek relief because of res Judicata and waiver.

The Court ruled that the cause of action relating to the Palm Tree Bed Extension was in fact implied in the existing causes of action but from the bench granted Plaintiff's amendment anyway.

The text of the Motion included:

2. Plaintiff would add an additional cause of action with several elements arising from events which occurred between February 26, 2012 and March 16, 2012, and which is on-going in it's damage and effect.

EVENTS

(1) February 27, 2012 Plaintiff delivered a "Putative" ARB Application to KA Diehl. IT: Disputes authority of the HOA and of the ARB.

(a) Requests to add several palm trees identical to palm trees in place to the ends of Plaintiff's existing palm tree beds. PLAINTIFF # 642. See also Plaintiff Photo # 025.

(b) Similar palm trees directly across street on Bill Fletcher's lot and on Corbet's lot (Plaintiff # 642 last page) – except his 2 palm trees at curb encroaches on streets, and has no county encroachment permit. Mine do not encroach and I have an encroachment Permit.

(c) Time is of the essence since good sized / healthy Pindo Palm trees at reasonable price – or any price at all – is only during the early weeks of March each year, at a cost of approximately $159.00 – Plaintiff bought one. After that the price for a good specimen goes up to$ 300 or more.

(2) March 6, 2012 ARB Meeting. PLAINTIFF # 643. Two ARB Members present. One is husband of co-defendant Rosemary Toth and has a conflict of interest. Other refuses to identify himself. Also present – VANESSA FATTOROSS an employee of the HOA contract management company, not an employee of HOA. They refuse to let me record the meeting and go into "executive session" to decide my application. Contractor employee remains during decision. Diehl contract does not provide for Diehl contractor to attend ARB meetings. Plaintiff # 383.

(3) March 16, 2012. The Architectural Review Board wrote Plaintiff. Plaintiff # 644.

(a) It was signed "For the Architectural Review Board".

(b) The ARB refused to either approve or disapprove application.

"Your ARB request has been deferred for consideration by the ARB".

(c) The ARB demanded that Plaintiff pay the HOA $ 1,735 and abandon Plaintiff's lawsuit about the fence issue before it would do it's duty to consider and make a decision on the Application: that Plaintiff abandon lawsuit 2010-CP-26-11320 against the HOA before the ARB will do it's duty.

"Your HOA account also needs to be brought current""

This raised a privacy issue. The status of Plaintiff's HOA account is not a criterion for ARB approval and there is no way the ARB could learn of any defiiciency except if Diehl – whose employee was present at the ARB meeting – had breached Plaintiff's privacy and disclosed the disputed "deficiency".

They wrote:

"As of today, your account balance is $ 1,735.00"

It was clear that either Defendant Diehl or Defendant IHOA had provided this information to several home owners who had no right to know this, no need to know this and that this breached Plaintiff's reasonable expectation of privacy.

It also wrote that the demand was

"removing the brickwork along the property line and restoring the sod"

There are two problems with this:

(1) This is an element of an existing lawsuit in which the IHOA is the defendant.

(2) The existing "brickwork" is not in the application put before the ARB by Plaintiff and thus either Defendant IHOA or Defendant Diehl or both had conspired to provide this additional information to the ARB and to use it against Plaintiff so as to force Plaintiff to abandon his cause of action against the IHOA and against Diehl. Defendants could reasonably be expected to claim this was an admission by Plaintiff of Defense's contentions.

To address this it is not even necessary to determine which is The Association and whether the IHOA has no authority, and it is not necessary to determine whether the covenant provisions relating to ARB approval or fences have BOTH been deleted.

The action of the IHOA through it's ARB committee fails on it's own criteria and stated procedures.

ITEM: CRITERIA

The Criteria that the ARB is supposed to use in considering landscaping is set out in the Covenant provision relating to landscaping: Section 7.33. Landscaping. Plaintiff # 547 page 21. From the covenants:

Landscaping, fences and items are restricted when they are "impediments to

the enjoyment of views, (of views) of natural areas, or (views) of street intersections"

The existing Palm tree bed controls the view behind it. The additional tree at one end and at the other end has a negligible view impact. The only thing behind Plaintiff's Palm Trees is the view of the architecturally blank side of Plaintiff's house – there is no view there of the golf course of any natural area. Further, Palm Trees have already been approved by the HOA which relate to the same views – the existing ones in the middle (approximately nine of them).

ITEM: HOA POLICY FOR ARB DECISION MAKING ONLY PROVIDES FOR "YEA OR NEA" BASED ON PROJECT INFO ACTUALLY SUBMITTED IN THE APPLICATION

-ARB Guidelines Plaintiff # 600 & 606

(1) – The ARB has no enforcement authority for assessment status and members have no need or right to have access to home owner accounts.

See Covenant Section 7.3 Objectives of ARB Page 17 Plaintiff # 547.

(2) - ARB Guidelines do not include the Status of Prior Projects. – see Pl # 600 & # 606

(3) - ARB Decision making Alternatives do not include deferring a decision. See Plaintiff # 646

"I understand that the ARB will act upon this request at the next regular ARB meeting. I also understand that if enough information is not included in this Application that it may be returned to me for more.

- For ARB Use Only -
____ APPROVED ____ DISAPPROVED ____CONDITIONAL APPROVAL ____ WITHDRAWN

ITEM: INVASION OF PRIVACY

* The only documents the ARB should have in front of them are:
  1. Covenants
  2. ARB Guidelines
  3. Homeowner Application

* The ARB was given access to Plaintiff's HOA info including:
  1. account balance
  2. putative status of earlier violations

* ARB Members have no need to know about these things.

* The HOA has refused over the years to produce a statement of privacy rights for homeowners

* ARB Members do not sign a statement of non-disclosure of anything they are given.

* The only possible source of this information is co-defendant Diehl's employee Vanessa Fattoross giving it to them.

* Plaintiff has a reasonable expectation that other homeowners will not have access to his financial / account information and violation status.

On October 5, 2010 the ARB refused to let Plaintiff listen in on deliberations over his application or over any of the other homeowner applications because they alleged it all was "private" and they owed a duty of confidentiality. All ARB decisions are closed to the person who applied and all ARB discussions with a homeowner applicant are closed to other homeowner applicants. The IHOA can't have it both ways.

ISSUE: THE DEVELOPER AND NOT THE HOA HAS ARB REVIEW AUTHORITY – IF ANYONE DOES

Covenants Plaintiff # 547 Section 7.2 Page 16

> Section 7.2. Prior Review of All Plans. Deleted by Amendment #1 No ... landscaping ..., and no change in ... landscaping, [shall be made] ... until the plans and specifications ... shall have been submitted to and approved in writing as to the harmony of the external design and location in relation to the surrounding structures and topography by the Developer.
>
> Provided, however, that upon the Developer's selling of not less than 3,650 of the Units in the Subdivision, this right of approval shall be transferred to an Architectural Review Board of the Association. ... provided, further, that the Developer may transfer its rights of approval under this Declaration prior to its selling 3,650 of the Units in the Subdivision if it so chooses.

The Developer has not sold close to 3,650 units. There are slightly more than 700 units sold in the PUD at this time.

As of June 20, 2008, a year after the so-called "transition", the Developer was still asserting that he has Developer Rights since on that date he imposed Covenant Amendment #5, Plaintiff # 563.

The Developer has not "transferred it's rights of approval" to the IHOA.

Ergo – The HOA's ARB is acting ultra vires usurping Developer rights, if any.

See Amendment #1, deleting 7.2, May 10 2000 Plaintiff # 552

ISSUE: EXACTION AND EXTORTION BY HOA / ARB

(1) The Legitimate acts of the ARB were to approve or disapprove based on landscape criteria of the submitted project.

(2) There is no charge for an ARB submission or approval of landscaping(

(3) The ARB / HOA demanded that Plaintiff pay $ 1735 to the HOA / ARB before the ARB / HOA would do it's duty which was to consider all ARB applications using only the published ARB Guidelines and the applicable Covenants.

See Plaintiff # 448 Blacks 1st at Page 448 – EXACTION

> **EXACTION.** The wrongful act of an officer or other person in compelling payment of a fee or reward for his services, under color of his official authority, where no payment is due.

See Plaintiff # 449 Blacks 1st at Page 465 – EXTORTION

> **EXTORTION.** Any oppression by color or pretense of right, and particularly the exaction by an officer of money, by color of his office, either when none at all is due, or not so much is due, or when it is not yet due. 4 Conn. 480.

ISSUE: BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

The HOA owed Plaintiff a duty to comply with the implied covenant to deal in good faith and with fair dealing – which is at least to conform to the HOA's own rules and not to attempt to circumvent the processes of the court.

Because of the threat of potential fines, a HOA stands in an unbalanced bargaining posture relative to homeowners. In such a unbalanced contractual situation the HOA owes a duty to be especially careful to conform to it's rules:

Blacks 1st at 543, Plaintiff's 649:

> GOOD FAITH. Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. Civil Code Dak. § 2105; 1 Dak. 399, 46 N. W. Rep. 1132.

This is especially egregious since the Defendant HOA has not conformed to it's own putative Bylaws, Plaintiff's # 548.

HOA Bylaws Section 13.3 13. RULE MAKING page 45.

> " Board shall not impose a fine, suspend voting rights or infringe upon or suspend any other rights of an Owner ... for violations of the Declaration, By-Laws or any rules and regulations for the Association, unless and until the following procedure is followed:
>
> 13.3.1 Written demand to cease and desist [done]
>
> 13.3.2 Within two (2) months of such demand ... written notice of a hearing to be held by the Board in executive session.

The Bylaws go on to state that the notice must contain

> "13.3.2.4 The proposed sanction to be imposed."

The phrase "proposed sanction" implies that no sanction can be imposed prior to the meeting.

The HOA has violated it's own rules by not scheduling a hearing conforming

to it's own rules and by imposing a sanction prior to such a hearing.

In point of fact, on October 10, 2010, Plaintiff's # 633 regarding the matter of the "wall" which isn't a wall or "fence" which isn't a fence, Plaintiff demanded that appeal hearing – but on October 21, 2010 Plaintiff's # 634 the HOA Board refused to hold such a hearing. On October 23, 2010 Plaintiff's # 635 Plaintiff reminded the HOA Board that it must hold such a hearing prior to imposing a sanction. Nothing more was heard from the HOA Board on that – until on March 16, 2012 the HOA demanded the sanction of $ 1,735 before it would do it's duty of considering the putative ARB application for additional palm trees.

RELIEF REQUESTED

AN ORDER

1. Stating that the restriction on landscaping found in the covenants is inapplicable to Plaintiff's lot because –

a. nothing that is planted or that could be planted on any area of Plaintiff's lot within it's property lines can impede the view of traffic; and

b. nothing that is planted or that could be planted on any area of Plaintiff's lot can impede any view of natural areas because Plaintiff's lot is not adjacent to any natural areas nor to the golf course.

2. Enjoin the IHOA or anyone acting in concert with them, to include any ARB entity acting under any asserted authority of the IHOA's bylaws, rules, or other resolutions, from enforcing any landscaping controls on Plaintiff's lot.

3. Ordering that the IHOA may not impose a fine on anyone until it has completely and exactly fulfilled the procedures stated in it's bylaws relating to notice and hearing, and directing it to examine it's books and to return every fine that was imposed prior to the completion of a Board hearing with an outcome adverse to a homeowner.

4. Enjoin KA Diehl and it's employees and agents from issuing any letters which purport to impose any fines.

5. Require KA Diehl to return to the IHOA any fees or other proceeds it received related to the writing of such "fine" letters.

6. Requiring the IHOA, the ARB, and all elements thereof to conduct all it's meetings and business in public, except for those matters which have traditionally been deemed by the court as within court accepted privilege, such as "attorney –

client". Additionally, a finding that the determination of the approval of any matter relating to the restrictions, obligations, rights and duties of the covenants is a matter of interest to every property owner in the PUD and is not subject to any such claim of privilege.

7. Hold that no ARB as mentioned in the covenants can require pre-work application and enjoin the IHOA from asserting such a requirement.

8. Hold that the association related to the PUD through the covenants may not condition any right stated in the covenants on anything except the terms explicitly stated in the covenants related to that right.

9. Hold that the IHOA has violated the implied covenant of good faith and fair dealing and impose a sanction of the court's determination.

10. Hold that no guidelines or rules issued by the association related to the PUD through the covenants may not expand upon the restrictions explicitly imposed in the covenants.

11. Hold that any provision of the covenant which through amendment has been stated as "waived" is in fact to be taken as "deleted".

12. Hold that any prior or future act of the IHOA or it agents or the association related to the PUD through the covenants which attempts to enforce a "waived obligation" or to extend the restrictions is an act in violation of the covenant of good faith and fair dealing.

13. Hold that the attempt to pre-condition Plaintiff's right to the free use of his property by planting trees and landscaping on the payment of money to the IHOA is extortion and or exaction, and for the court to impose sanctions on all defendants payable to Plaintiff.