

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. Supreme Court

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Maité Murphy, Circuit Court Judge

S.C. Ct. App. Order filed Feb. 5, 2015

Jasper County,

Respondent,

v.

The Settings of Mackay Point,
LLC and Bond Safeguard
Insurance Company,

Defendants,

Of which Bond Safeguard
Insurance Company is

Petitioner.

APPENDIX

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INDEX

TABLE OF CONTENTS.....	1
 <u>COURT OF APPEALS ORDERS</u>	
Order dismissing appeal dated February 5, 2015	4
Order denying rehearing dated May 6, 2015.....	6
 <u>MATERIALS PRESENTED TO THE COURT OF APPEALS¹</u>	
Notice of Appeal dated December 4, 2014	7
Motion to Dismiss dated December 11, 2014	8
Return to Motion dated December 22, 2014.....	14
Exhibit A: Affidavit of Bruce Maas.....	23
Exhibit B: Development Agreement.....	32
Exhibit C: Phase II West Bond	79
Exhibit D: Permit Extension Joint Resolution of 2013	80
Exhibit E: Permit Extension Joint Resolution of 2010.....	88
Exhibit F: Jasper County Lawsuit Summons and Complaint	94

¹ There is no record on appeal. The Court of Appeals dismissed the appeal before any materials were designated for inclusion in the record. Pursuant to Rule 242(e)(2), SCACR, this Appendix contains the materials presented to the Court of Appeals relating to the dismissal. Irrelevant portions of those materials—such as cover letters and certificates of service—have been omitted. Further, the materials presented below included multiple identical copies of several documents. Instead of putting the same documents in the Appendix several times, Petitioner has included only one copy of each document and has used cross-references in the Index to indicate other places where those documents appeared in the materials.

(Return Exhibits, Continued)

Exhibit G: Bond Safeguard Insurance Company's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment	101
Memo Exhibit 1: Development Agreement.....	<i>Please see pp. 32-78</i>
Memo Exhibit 2: Excerpt from <i>Bruner & O'Connor on Construction Law</i> (2009).....	107
Memo Exhibit 3: Permit Extension Joint Resolution of 2010	<i>Please see pp. 88-93</i>
Exhibit H: Bond Safeguard Insurance Company's Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment .	111
Memo Exhibit A: Permit Extension Joint Resolution of 2013	<i>Please see pp. 80-87</i>
Memo Exhibit B: Lot 267 Deed.....	115
Memo Exhibit C: Lot 207 Deed.....	118
Memo Exhibit D: 2007 Deed to Lot 228	121
Memo Exhibit E: 2008 Deed to Lot 228.....	124
Exhibit I: Bond Safeguard Insurance Company's Motion to Alter or Amend Order Granting Plaintiff's Motion for Summary Judgment.....	127
Motion Exhibit A: Cover Letter dated December 10, 2013.....	144
Motion Exhibit B: Email dated November 27, 2013	145
Motion Exhibit C: Order Granting Summary Judgment.....	146
Motion Exhibit D: Excerpts from Deposition of Chris Parish.....	158
Motion Exhibit E: Permit Extension Joint Resolution of 2010	<i>Please see pp. 88-93</i>
Motion Exhibit F: Permit Extension Joint Resolution of 2013	<i>Please see pp. 80-87</i>

(Return Exhibits, Concluded)

Motion Exhibit G: Development Agreement.....	<i>Please see pp. 32-78</i>
Motion Exhibit H: Bond Safeguard Insurance Company's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment.....	<i>Please see pp. 101-110</i>
Motion Exhibit I: Bond Safeguard Insurance Company's Supplemental Memorandum in Opposition to Plaintiff's Motion for Summary Judgment	<i>Please see pp. 111-126</i>
Exhibit J: 2013 Purported Deed to Lot 228	179
Exhibit K: Affidavit of James Cate.....	182
Exhibit L: Lot 228 Lawsuit Summons and Complaint	185
Exhibit M: Affidavit of Cordes Ford	205
Exhibit N: Email from Judge Murphy's law clerk dated Dec. 1, 2014.....	208
Petition for Rehearing dated February 19, 2015	209

The South Carolina Court of Appeals

Jasper County, Respondent,

v.

The Settings of Mackay Point, LLC and Bond Safeguard
Insurance Company, Defendants,

Of Which Bond Safeguard Insurance Company is the
Appellant.

Appellate Case No. 2014-002609

ORDER

Respondent has filed a motion to dismiss, arguing the underlying order denying Appellant's motion to stay is not immediately appealable. Appellant has filed a return, asserting (1) the underlying order is appealable under section 14-3-330(1) of the South Carolina Code (1976) because it "finally determined a substantial matter forming a key part of [its] defenses" and thus involves the merits, and (2) it is appealable under section 14-3-330(2)(c) because it "removes a material issue—ownership of Lot 228—from the case," thereby preventing Appellants from proving the deed is void. Contrary to Appellant's arguments, the order does not fall under subsection (1) because it does not involve the merits, and it does not fall under subsection (2)(c) because it does not "strike[] out an answer or any part thereof or any pleading in any action." Because the underlying order is not appealable, Respondent's motion to dismiss is granted. See S.C. Code Ann. § 14-3-330 (1976) (providing an interlocutory order is not immediately appealable unless it affects the merits or affects a substantial right).


FOR THE COURT

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2/5/15 

Columbia, South Carolina

cc: F. Cordes Ford, IV, Esquire
David Starr Cobb, Esquire

The South Carolina Court of Appeals

Jasper County, Respondent,

v.

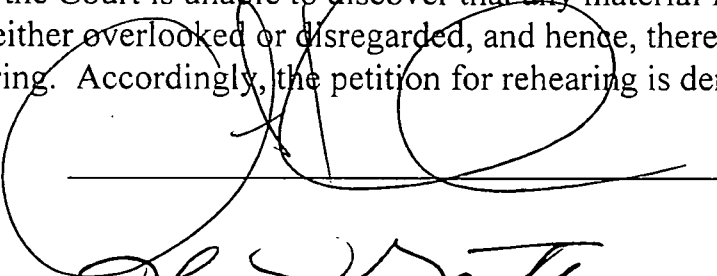
The Settings of Mackay Point, LLC and Bond Safeguard
Insurance Company, Defendants,

Of Which Bond Safeguard Insurance Company is the
Appellant.

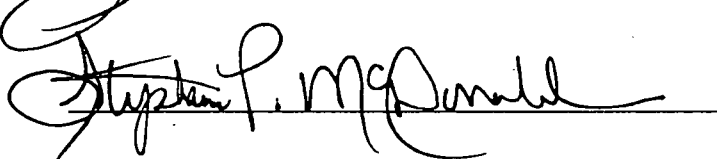
Appellate Case No. 2014-002609

ORDER

Appellant has filed a petition to rehear the dismissal of this appeal. After careful consideration of the petition, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ J.


_____ J.


_____ J.

Columbia, South Carolina

cc: F. Cordes Ford, IV, Esquire
David Starr Cobb, Esquire

FILED

5/6/15

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Maité Murphy, Circuit Court Judge

Case No. 2010-CP-27-252

Jasper County,

Respondent,

v.

The Settings of Mackey Point,
LLC and Bond Safeguard
Insurance Company,

Defendants,

Of which Bond Safeguard
Insurance Company is

Appellant.

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NOTICE OF APPEAL

Bond Safeguard Insurance Company appeals the order of the Honorable Maité Murphy dated December 1, 2014, denying Appellant's motion to stay. Appellant received written notice of entry of the order on December 1, 2014.

December 4, 2014



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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

Maite Murphy, Circuit Court Judge

Docket No.: 2010-CP-27-252

Jasper County.....Respondent

v.

The Settings of Mackey Point, LLC and
Bond Safeguard Insurance Company,.....Defendants,

Of which Bond Safeguard Insurance Company is Appellant.

Motion to Dismiss Appeal

December 11, 2014

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SC Court of Appeals

MOTION

Respondent moves for an order dismissing this appeal for lack of jurisdiction. Respondent respectfully asserts that the order denying Bond Safeguard Insurance Company's motion to stay the December 10, 2014 trial is interlocutory and not appealable under the requirements of S.C. Code Ann. § 14-3-330. Therefore, no "final judgment, appealable order or decision" giving rise to a right to appeal exists, and this Court should dismiss Appellant's appeal pursuant to Rule 201, SCACR.

Pursuant to Rule 240(c)(2), SCACR, Respondent sets forth its supporting arguments and authorities.

STATEMENT OF THE CASE

This lawsuit involves an unpaid bond concerning infrastructure at a project in Jasper County, South Carolina. Respondent is a political body organized pursuant to the South Carolina Constitution and the South Carolina Code of Laws and is charged with, among other things, the duty to ensure compliance with all applicable zoning ordinances for Jasper County, South Carolina. Defendant The Settings of Mackay Point, LLC was the developer of a property development of homes and certain amenities commonly known as "The Settings of Mackay Point" located in Jasper County. On June 19, 2006, Jasper County and The Settings of Mackay Point, LLC entered into a Development Agreement (pursuant to Jasper County Ordinance 06-18) concerning the project. The then-existing Jasper County Development Standards Ordinance and S.C. Code Ann. § 6-29-1180 addressed the development of the project, and the developer was required to complete the infrastructure construction or bond the infrastructure construction as a prerequisite to the recording of subdivision plats. The

developer needed recorded subdivision plats to sell lots. Accordingly, The Settings of Mackay Point, LLC posted five Bonds issued by Defendant Bond Safeguard Insurance Company concerning the infrastructure and, subsequently, recorded three subdivision plats. Ultimately, the developer sold and conveyed more than 120 residential lots at project, but did not complete construction of the infrastructure and has not shown any indication or interest in completing the infrastructure.

On March 15, 2010, Jasper County Council called the Bonds by adopting Resolution 10-06, which declared that the developer had not completed the work covered by the five Bonds. Plaintiff notified Defendant Bond Safeguard Insurance Company about the Resolution and that the developer had not completed the infrastructure improvements by a March 25, 2010 letter that included a copy of Resolution 10-06.

On April 19, 2010, Respondent filed this lawsuit. Defendant Bond Safeguard Insurance Company paid four of the five bonds in February 2014, and the remaining litigation involves the bond for Phase II-West of the project. The non-jury trial was set for December 10, 2014 before Appellant filed the Notice of Appeal after Judge Murphy denied its motion to stay the trial.

ARGUMENT

Absent some specialized statute, the immediate appealability of an interlocutory order depends on whether the order falls within one of the categories listed in S.C. Code Ann. § 14-3-330. See Woodard v. Westvaco Corp., 319 S.C. 240, 460 S.E.2d

392 (1995). In relevant part, section 14-3-330 states that appellate courts have jurisdiction to review:

- (1) Any intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas;
- (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action

S.C. Code Ann. § 14-3-330.¹ For the challenged order to be immediately appealable, it must fall squarely into one of the categories set forth in section 14-3-330. Otherwise, the Court must dismiss the appeal for lack of subject matter jurisdiction. See State v. Castleman, 219 S.C. 136, 139, 64 S.E.2d 250, 252 (1951).

A review of the case law interpreting section 14-3-330 demonstrates the limited nature of its scope. To “involve the merits” for purposes of Section 14-3-330(1), an order “must finally determine some substantial matter forming the whole or part of some cause of action or defense.” Mid-State Distributors, Inc. v. Century Importers, Inc., 310 S.C. 330, 334, 426 S.E.2d 777, 780 (1993). Similarly, the provisions of section 14-3-330(2) only apply “when [the] order would discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.” Id. at 334-35, 426 S.E.2d at 780. When an order can be reviewed following a trial on the merits, the order does not affect a “substantial right,” and, thus, does not fall within the scope of section 14-3-330. Breland v. Love Chevrolet Olds., Inc., 339 S.C. 89, 93, 529 S.E.2d 11, 13 (2000).

¹ Subsections (3) and (4) deal with, respectively, final orders and orders dealing with injunctions or the appointment of a receiver. The present appeal does not concern either of those categories.

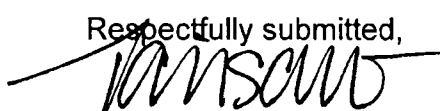
Clearly, these standards are intended to be restrictive because judicial policy favors waiting until the end of a case to pursue an appeal. As Chief Justice Toal and her co-authors have explained, "It is only in exceptional cases that the appellate court views with approval an appeal from an interlocutory order; it is usually far better for the party to await the final decree or judgment." Toal, et al., *Appellate Practice in South Carolina* 88 (2d ed. 2002).

Applying these principles, the South Carolina Supreme Court has held that an order granting a stay is not immediately appealable. Edwards v. SunCom, 369 S.C. 91, 631 S.E.2d 529 (2006). In Edwards, the Court defined an order "affecting a substantial right" as an order that "discontinued an action [or] prevent[ed] an appeal." Id. Similar logic applies to a motion to deny a stay because Judge Murphy's order did not involve the merits, affect a substantial right, or prevent a judgment from which an appeal may later be taken. Judge Murphy's order denying the stay did not discontinue any pending lawsuit and did not prevent any appeal over any issues raised by Appellant at the eve of trial. Accordingly, the Court lacks jurisdiction to hear Appellant's challenges to this interlocutory order, and the Court should dismiss the appeal of the order staying the case.

CONCLUSION

For these reasons, the Court lacks jurisdiction and should dismiss this appeal as interlocutory pursuant to Rule 240, SCACR.

Respectfully submitted,



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December 11, 2014

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM JASPER COUNTY
Court of Common Pleas

The Honorable Maité Murphy, Circuit Court Judge

Jasper County Case No. 2010-CP-27-252

Appellate Case No. 2014-002609

Jasper County, Respondent,

v.

The Settings of Mackay Point,
LLC and Bond Safeguard
Insurance Company, Defendants,

Of which Bond Safeguard
Insurance Company is Appellant.

BOND SAFEGUARD INSURANCE COMPANY'S RETURN
TO JASPER COUNTY'S MOTION TO DISMISS APPEAL

Bond Safeguard Insurance Company hereby responds to Jasper County's motion to dismiss Bond Safeguard's appeal. Bond Safeguard has appealed an order that, under the unusual circumstances in this case, effectively removed several of Bond Safeguard's defenses from the case. Contrary to Jasper County's assertion, that order is immediately appealable.

BACKGROUND¹

This appeal arises from a dispute involving the development of a neighborhood along the Pocotaligo River. The Settings at Mackay Point, LLC ("Mackay Point, LLC") served as the

¹ Bond Safeguard objects to the factual statements Jasper County alleges in its motion. They are not supported by documentation as Rule 240(c)(3), SCACR, requires.

neighborhood's owner and developer. (Affidavit of Bruce Maas, attached hereto as Exhibit A, at ¶ 6). In a development agreement with Jasper County, Mackay Point, LLC agreed to build infrastructure for the neighborhood's several phases, as "dictated largely by market conditions." (Development Agreement, attached hereto as Exhibit B, at p. 46).

Bond Safeguard acted as Mackay Point, LLC's surety for the project. It issued five performance bonds, each of which relates to a specific aspect of the project. For example, Bond No. 5025755 relates to the installation of infrastructure in Phase II West of the neighborhood. (*See* Bond, attached hereto as Exhibit C). The penal sum of that bond is \$3,049,161.14. (*Id.*).

The development agreement, which was created in June 2006, initially had a ten-year term but provides ultimately that "[d]evelopment activity may occur faster or slower than the forecast schedule, as a matter of right, depending upon market conditions." (Devel. Agreement at p. 46). The market conditions turned out to be infamously poor. Following the collapse of the housing market in 2008, South Carolina's development industry fell into what the General Assembly described in 2010 and 2013 as "a state of economic emergency" that affected "none as severely as the state's banking, real estate, and construction sectors." (Permit Extension Joint Resolution of 2013, attached hereto as Exhibit D, at p. 1; Permit Extension Joint Resolution of 2010, attached hereto as Exhibit E, at p. 1). Mackay Point, LLC and the proposed neighborhood were not immune to the collapse. (*See* Maas Aff. at ¶¶ 8, 27). Sales, and thus development, ground to a halt. (*See id.*).

Jasper County sued Bond Safeguard and Mackay Point, LLC. (*See generally* Summons & Compl., attached hereto as Exhibit F). Jasper County alleges that Mackay Point, LLC defaulted on its contractual obligations to develop the neighborhood, and that as a result, Bond Safeguard must either pay the County the penal sums of the bonds or hire companies to perform that development work. (*See generally id.*).

Since Jasper County filed its lawsuit, it and Bond Safeguard have diligently litigated the issues in the case.² They have resolved the majority of their dispute; the case now involves only the bond for Phase II West. (Maas Aff. at ¶ 25). On that issue, many of Bond Safeguard's defenses have turned on the factual premise that Bond Safeguard and Mackay Point, LLC own all of the lots in Phase II West, and thus there is no owner of a Phase II West lot asking for or needing that phase's infrastructure to be built. Accordingly, Bond Safeguard has argued, Mackay Point, LLC is not in default with respect to Phase II West, and in any event, building the infrastructure for that phase would be wasteful and paying the County would give the County a windfall. (*See, e.g.*, Mem. in Opp. to Summ. J. dated Aug. 9, 2012, attached hereto as Exhibit G, at pp. 3-4; Suppl. Mem. in Opp. to Summ. J. dated Nov. 23, 2013, attached hereto as Exhibit H, at pp. 2-3; Motion to Alter or Amend dated Dec. 20, 2013, attached as Exhibit I, at pp. 9, 12-14).

In 2014, Bond Safeguard learned that a deed had been filed in the Jasper County Register of Deeds' office purporting to show that in September 2013—while Jasper County's lawsuit was being litigated—Mackay Point, LLC had sold one of the Phase II West lots to a third party. (Maas Aff. ¶ 29). On its face, the deed looks legitimate. (*See* Deed, attached hereto as Exhibit J). In reality, however, Mackay Point, LLC did not sell or otherwise convey title to that lot, which is known as Lot 228. (Affidavit of James Cate, attached hereto as Exhibit K, at ¶¶ 8-13). No one with authority to act on behalf of Mackay Point, LLC authorized any transfer of Lot 228. (*Id.* ¶¶ 10-11). Rather, it appeared that the deed was signed by Richard McWhorter, a person whose company has some ownership of Mackay Point, LLC but who has had no control over Mackay Point, LLC since 2009. (*Id.* ¶¶ 2-8).

Even more curiously, the deed purports to convey ownership of Lot 228 to a company called

² Mackay Point, LLC has never appeared in the case.

Consolidated Ventures, LLC, an entity apparently controlled by Robert Wolfson. (*See* Maas Aff. ¶¶ 29, 31). Wolfson is the former owner of the land for the neighborhood. (*Id.* ¶ 2). While Jasper County's case was pending, Wolfson became the mortgagee of a mortgage on the neighborhood, and Wolfson attended an unsuccessful mediation between Jasper County and Bond Safeguard. (*Id.* ¶¶ 18-22).

All this led Bond Safeguard and Mackay Point, LLC to conclude that Consolidated Ventures' title was invalid and appeared to be the product of a fraudulent conveyance aimed at undermining Bond Safeguard's defenses in Jasper County's lawsuit. But regardless of the motivations of the persons involved in creating and filing the deed, the fact was that Jasper County's official property records show a third party owning Lot 228. In order for Bond Safeguard to preserve its defenses, Mackay Point, LLC's official title to Lot 228 had to be restored. That, however, could not happen within Jasper County's lawsuit—no party was seeking a form of relief that would restore Mackay Point, LLC's title, and neither Wolfson nor Consolidated Ventures were parties to the case. Therefore, for Mackay Point to protect its property rights to Lot 228, and for Bond Safeguard to remedy an apparent manipulation of the evidence in Jasper County's lawsuit, they filed a complaint against McWhorter, Consolidated Ventures, and Wolfson on November 14, 2014 (the "Lot 228 Lawsuit"). (*See* Lot 228 Lawsuit Summons & Compl., attached hereto as Exhibit L). Among other things, the complaint in the Lot 228 Lawsuit asks the circuit court to set aside the deed to Consolidated Ventures and declare Mackay Point, LLC the sole owner of Lot 228. (*See* Lot 228 Lawsuit Compl. at pp. 17-18).

The following week, the circuit court held oral argument on a motion for summary judgment filed by Jasper County in its case against Bond Safeguard. (Affidavit of Cordes Ford, attached hereto as Exhibit M, at ¶ 7). At the hearing, Bond Safeguard orally made a motion to stay the case in the

event summary judgment was denied. (*Id.* at ¶ 8). Counsel for Bond Safeguard asked the court that, in the event that it denied Jasper County's summary judgment motion, it stay the case pending resolution of the Lot 228 Lawsuit. (*Id.* at ¶ 9). Counsel explained that Bond Safeguard had only recently completed its investigation into the deed purporting to convey Lot 228 to Consolidated Ventures and that Bond Safeguard and Mackay Point, LLC had filed the Lot 228 Lawsuit in order to restore Mackay Point, LLC's ownership. (*Id.* at ¶ 10). Counsel further explained that ownership of Lot 228 is a question whose answer is crucial to defending Bond Safeguard in Jasper County's lawsuit. (*Id.* at ¶ 11). Because the deed to Consolidated Ventures was presumptively valid, Bond Safeguard could not prove certain of its defenses in a trial of Jasper County's claim without having that deed invalidated through the Lot 228 Lawsuit. (*Id.*). In essence, denying the stay would in effect be granting summary judgment on a number of Bond Safeguard's defenses. (*Id.* at ¶ 12).

On December 1, 2014, the circuit court notified the parties that it denied the County's summary judgment motion and Bond Safeguard's motion for stay. (Email from Judge Murphy's chambers dated Dec. 1, 2014, attached hereto as Exhibit N). It set the case for trial the following Wednesday, December 10. (*Id.*). Bond Safeguard appealed the circuit court's denial of stay on December 4, 2014.

ARGUMENT

Bond Safeguard acknowledges that the circuit court's order is interlocutory and that usually, such orders cannot be appealed until final judgment. But this is not a usual case. Here, while the case was pending, a key fact in the case was manipulated—perhaps deliberately, perhaps not—by outside forces, in a way that cannot be corrected within the confines of this case. By denying Bond Safeguard an opportunity to make that correction ahead of trial in this case, the circuit court put an end to all the defenses that were based on that fact.

To clarify, Bond Safeguard agrees with Jasper County that the question is whether this appeal fits into one of the categories in subsections (1) or (2) of South Carolina Code section 14-3-330. *See Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 300, 705 S.E.2d 475, 477 (Ct. App. 2011) (stating an interlocutory order not governed by a specialized appealability statute can be immediately appealed if “it fits into one of the categories listed in section 14-3-330 of the South Carolina Code.”). But as Bond Safeguard will explain, the order being appealed fits into both subsections, which means it is immediately appealable. Thus, this Court has jurisdiction.

I. This Court Has Jurisdiction Under Subsection 14-3-330(1).

This Court has jurisdiction to review “[a]ny intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas.” S.C. Code Ann. § 14-3-330(1) (1976 & Cum. Supp. 2013); *see also* S.C. Code Ann. § 14-8-200(a) (Cum. Supp. 2013) (setting forth this Court’s appellate jurisdiction). “An order ‘involves the merits’ when it finally determines a substantial matter forming the whole or a part of some cause of action or defense.” *Thornton*, 391 S.C. at 306, 705 S.E.2d at 480.

As discussed above, the keystone of certain of Bond Safeguard’s defenses is all of the Phase II West lots are owned by either Bond Safeguard or Mackay Point, LLC, neither of which has any desire or intention to build its own house in the neighborhood. But the actions of persons and entities not parties to this case have left Bond Safeguard unable, for the time being, to prove that key fact. According to the public records, Consolidated Ventures owns Lot 228. The law presumes Consolidated Ventures’ deed for Lot 228 is valid. *See Davis v. Monteith*, 289 S.C. 176, 182, 345 S.E.2d 724, 727 (1986) (“Where a deed is valid and regular on its face, it is presumed to be valid in all respects.”). Bond Safeguard cannot rebut that presumption at this time. To do so, Bond Safeguard needs to obtain a favorable resolution in the Lot 228 Lawsuit. By denying Bond

Safeguard a stay, the circuit court denied it an opportunity to do that in time for Bond Safeguard to defend itself in the trial of Jasper County's lawsuit.

Counsel for Bond Safeguard brought these unusual circumstances to the circuit court's attention, and then the court denied the stay. In light of those circumstances, the upshot of the court's order is that Bond Safeguard has lost its defenses. In other words, the order finally determined a substantial matter forming a key part of those defenses. Thus, the circuit court's order "involves the merits," and is therefore appealable, under subsection 14-3-330(1).

II. This Court Has Jurisdiction Under Subsection 14-3-330(2)(c).

This Court also may review "[a]n order affecting a substantial right made in an action when such order . . . strikes out an answer or any part thereof or any pleading in any action." S.C. Code Ann. § 14-3-330(2)(c) (1976 & Cum. Supp. 2013); *see also* S.C. Code Ann. § 14-8-200(a). "An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479; *see also id.* (stating that for the purposes of determining whether an interlocutory order is appealable under subsection 14-3-330(2)(c), an appellate court should look to the effect of the order rather than to its title).

Certainly, the circuit court's order removes a material issue—ownership of Lot 228—from the case, thereby preventing Bond Safeguard from proving at trial that the facially-valid deed to Consolidated Ventures is actually void. Moreover, Bond Safeguard will not be able to correct the circuit court's error during the trial. On the contrary, by effectively requiring Bond Safeguard to proceed to trial unable to prove several defenses, the court's order creates the problem Bond Safeguard now faces. Nor could Bond Safeguard correct the error after trial. It would lose a JNOV

motion involving ownership of Lot 228, it would lack the evidence needed to move for a new trial or to vacate, and it could not introduce on appeal evidence of whatever resolution it obtains in the Lot 228 Lawsuit. *See* Rules 50(b), 59 (a)-(b), & 60(b), SCRCF; Rule 210(c), SCACR. Accordingly, the circuit court's order fits squarely within the explanation of subsection 14-3-330(2)(c) this Court articulated in *Thornton*. Thus, the order is immediately appealable under subsection 14-3-330(2)(c).

Jasper County's motion relies heavily on *Edwards v. SunCom*, 369 S.C. 91, 631 S.E.2d 529 (2006). *Edwards* is distinguishable. That case involved an order staying proceedings until the FCC ruled on an issue relating to whether the case was preempted. *See* 369 S.C. at 93 & n.1, 631 S.E.2d 530 & n.1. That order clearly was not appealable under subsection (1) or (2). All it did was put the case on pause while an important issue in the case was resolved in the appropriate forum. The order did not affect any substantial rights or involve the merits; rather, it preserved those rights and questions regarding the merits for another day. Here, in contrast, the circuit court's order had the effect of removing Bond Safeguard's defenses from the case. Certainly, that involves the merits and affects Bond Safeguard's substantial rights.

Thus, Jasper County is mistaken to write that "similar logic [to that used in *Edwards*] applies to a motion to deny a stay [sic]." (Motion p. 5). Although a denial of stay might, in the abstract, have an effect (or lack thereof) similar to the order in *Edwards*, that will not always be the case. Rather, because the involving-the-merits inquiry focuses on the order's effect,³ an order denying a stay can involve the merits if, under the circumstances, denying the stay has the effect of finally determining part of a claim or a defense. Those rare circumstances are present here.

Finally, the County writes that in *Edwards*, the Supreme Court "defined an order 'affecting a

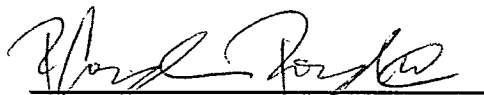
³ *See Thornton*, 391 S.C. at 306-07, 705 S.E.2d at 480 (holding order granting defendant partial summary judgment did not involve the merits because it did not affect plaintiffs' ability to pursue their claim).

substantial right' as an order that 'discontinued an action [or] prevent[ed] an appeal.'" (Motion p. 5). The County's quotation of *Edwards* is incomplete. What the Supreme Court really wrote was that "[o]rders affecting a substantial right 'discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.'" 369 S.C. at 94, 631 S.E.2d 530 (quoting *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335 n.4, 426 S.E.2d 777, 780 n.4 (1993)). That last clause, which Jasper County omitted, refers to subsection 14-3-330(2)(c)—the subsection that makes the circuit court's order immediately appealable. Notably, then, Jasper County's motion contains no argument on whether the circuit court's order fits in that category.

CONCLUSION

Contrary to Jasper County's suggestion that Bond Safeguard is attempting to delay the case on the eve of trial, (*see* Motion p. 5), Bond Safeguard requested a stay as part of its efforts to counteract the manipulation of this case's facts by outsiders. The circuit court's denial of a stay had the effect of ending the defenses Bond Safeguard is attempting to preserve. As such, the order is appealable, which means this Court has jurisdiction over Bond Safeguard's appeal. Respectfully, Bond Safeguard asks that this Court deny Jasper County's motion.

Respectfully submitted this 11th day of December, 2014.



F. Cordes Ford IV
Womble Carlyle Sandridge & Rice LLP
Post Office Box 999
Charleston, South Carolina 29402
843-720-4631
Attorney for Appellant

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF JASPER	)	Docket No.: 2010-CP-27-252
	)	
Jasper County,	)	
	)	
Plaintiff,	)	ATTORNEY AFFIDAVIT
	)	
v.	)	
	)	
The Settings of Mackay Point, LLC and	)	
Bond Safeguard Insurance Company,	)	
	)	
Defendants.	)	
	)	

STATE OF NEW YORK)
COUNTY OF MONROE) ss:

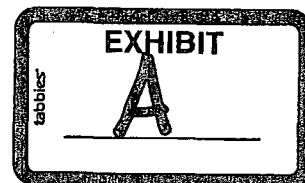
BRUCE L. MAAS, being duly sworn, deposes and says:

I am an attorney admitted to practice law in the State of New York and I serve as general outside claims counsel for Bond Safeguard Insurance Company. This Affidavit is being submitted in opposition to Plaintiff's Motion for Summary Judgment and to advise the Court of possible improper conduct by third parties which may be and/or has been perpetrated against either this Court, the County and/or Bond Safeguard Insurance Company.

1. The property which is the subject matter of this litigation is commonly known as the Settings of Mackey Point ("Mackay Point").

2. Upon information and belief, prior to 2006, Mackay Point was owned by Robert Wolfson and/or a company controlled by Mr. Wolfson.

3. Upon information and belief, prior to 2006, Mr. Wolfson sold the property to The Settings of Mackay Point, LLC ("Mackay Point, LLC"). As set forth in the annexed affidavit of James P. Cate (the "Cate Affidavit") at the time of the purchase, Mackay Point, LLC was owned/managed/or controlled by either James Cate and/or Richard McWhorter or companies



controlled by them respectively. As detailed below and in the Cate Affidavit, at all times relevant to this action, Mackay Point, LLC was and currently is under the sole control of James Cate. Attached hereto as **Exhibit A** is a January 29, 2009 letter agreement between Mr. McWhorter and Mr. Cate. Attached as **Exhibit B** is a Co-Management Agreement and attached as **Exhibit C** is a Membership and Control Agreement. Together, these documents confirm that Mr. Cate has sole control of Mackay Point, LLC. Paragraph 2 of the Membership Transfer and Control Agreement states:

2. **Transfer of Control Rights.** Control Assignor hereby assigns...to Assignee [Glenfield Capital which is controlled by Cate] all control rights with respect to the Company [Mackey Point, LLC]...

BACKGROUND

4. In 2006 and 2007, Lexon Insurance Company and Bond Safeguard Insurance Company (collectively "Bond Safeguard") executed Subdivision Bonds ("Bonds") on behalf of The Settings of Black Mountain, LLC, ("Black Mountain"), The Settings of Lake Rhodhiss, LLC ("Rhodhiss"), and Mackay Point, LLC.

5. Rhodhiss and Black Mountain were single purpose entities formed to develop mountainside housing subdivisions in North Carolina and are not involved in the current litigation.

6. Mackay Point, LLC was a single purpose entity formed to develop a single family home subdivision in Jasper County, South Carolina.

7. At the time the Bonds were executed, Bond Safeguard received General Agreements of Indemnity ("GAI") (attached hereto as **Exhibit D** and made a part hereof as if set

forth in full) under which the indemnitors agreed to hold Bond Safeguard harmless from any loss incurred in connection with the Bonds. The GAIs were executed by, among others, Richard W. McWhorter and James P. Cate.

8. As a result of the 2007-2008 financial crises, all three Settings entities were declared in default and the obligees on the respective bonds (including the Plaintiff in this case Jasper County) made claims against the respective Bonds.

9. As part of its investigation of the claims, Bond Safeguard learned that Richard McWhorter had filed for bankruptcy. Attempts to locate/contact him at the time were unsuccessful.

10. As the attorney for Bond Safeguard handling the claims, I was able to contact James Cate, who represented to me and Bond Safeguard that he was the individual "in control" of all three Settings entities. Mr. Cate's annexed Affidavit and the documents attached as Exhibits A-C confirm this fact. At the time, Mr. Cate also put me in touch with his attorney, Marshall Martin.

11. Msrs. Martin and Cate worked closely with me and others from Bond Safeguard to come up with a plan to resolve the Rhodhiss, Mackay and Black Mountain claims and Mr. Cate's liability to Bond Safeguard under the GAI.

12. Attached hereto as **Exhibit E** are copies of emails exchanged between me and Mr. Martin in February, 2012, setting forth the agreement reached between Bond Safeguard and Mr. Cate concerning Black Mountain, Rhodhiss and Mackey Point. Attached as **Exhibit F** is a more formalized Agreement that attaches Exhibit E as an exhibit.

THE MACKAY POINT PLAN

13. As shown on the maps attached hereto as **Exhibit G**, Phase 2 of Mackey Point is split into 2 Phases: 2 East and 2 West.

14. At the time of the default, only five lots in Phase 2 East and 2 lots in Phase 2 West were owned by third parties. Ironically, one of the lots in 2 East was (and may still be) owned by Richard McWhorter.

15. During its investigation of the claim, Bond Safeguard was concerned that: a) even if infrastructure was built in Phases 2 East and 2 West, there were not enough users (occupants) to provide the required water flows for any system to work; and b) that it was very unlikely that any further lots would be sold or any homes built in these phases.

16. Bond Safeguard believed, therefore, that the best way to resolve the County's claim would be to purchase the lots in 2 East and 2 West that were owned by third parties and then have Mr. Cate de-plat the property. This plan would a) benefit the owners of the lots by making them "whole" on property that had been virtually rendered worthless by the 2008 crises; b) relieve the County of any concerns it may have relative to lot owners' claims and c) cost less than the cost of building infrastructure which would not work and would no doubt deteriorate.

17. Under the terms of the Settlement Agreement with Mr. Cate, he agreed to help Bond Safeguard purchase the lots and implement this plan.

THE MEDIATION

18. In April, 2013, Bond Safeguard learned that BB&T's mortgage against the Mackay Point property had been assigned to Robert Wolfson – the same person that sold the property to Mackay Point, LLC.

19. On June 13, 2013, Bond Safeguard and Jasper County representatives attended a mediation in an attempt to resolve the bond claims/litigation.

20. Just prior to the mediation, the County told us Mr. Wolfson and his attorney were there and asked if they could be present at the mediation.

21. Typically, Bond Safeguard only meets/mediates with the municipality named as the obligee on the bond. It is also very unusual for non-parties to attend a mediation. However, since the County made the request and the people were there, Bond Safeguard agreed. It was hoped that the involvement of someone interested in the property would assist in reaching a resolution.

22. The mediation was unsuccessful. Because the parties agreed that anything discussed at the mediation would be confidential, I cannot provide specifics as to the proposals made and/or why they were rejected.

23. Following the mediation, Bond Safeguard decided it would still try to purchase the lots in Phases 2 East and 2 West.

24. Bond Safeguard/Mr. Cate were unable to get all of the lot owners in Phase 2 East to agree to sell their lots. As a result, Bond Safeguard paid the full penal sum of its Phase 2 East bonds (\$1,287,262.71) to Jasper County in full satisfaction of the County's claim against those bonds.

25. At the same time, Bond Safeguard also paid the full penal sum of the Phase 1 bonds (\$2,116,444.00) to the County. The only bond claim remaining, therefore, is the County's claim against the bonds for Phase 2 West.

PURCHASE OF LOTS 207 & 267

26. Bond Safeguard purchased lots 207 and 267 in Phase 2 West in July, 2013. Bond Safeguard paid \$150,000.00 for lot 207 and \$225,000.00 for lot 267.

27. Bond Safeguard believed at the time that purchasing these lots meant there were no lots owned by third-parties in Phase 2 West. Bond Safeguard also believes that because (i) there had been no development in Phase 2 West (ii), that there would likely never be development and that (iii) no lots were owned by third parties, a defense to the County's claim is available which will exonerate Bond Safeguard from any liability it may have had under the Phase 2 West bonds.

CONVEYANCE OF LOT 228

28. After purchasing Lots 207 and 267, Bond Safeguard began the process of trying to de-plat the property.

29. At that time, Bond Safeguard's counsel, Mr. Cordes Ford, advised Bond Safeguard that a title search revealed that Lot 228 in Phase 2 West had allegedly been conveyed in September, 2013 to "Consolidated Ventures, LLC" for \$2,500.00. A copy of the deed, (which was not filed until two (2) months later on November 5, 2013), is attached as **Exhibit H**.

30. The obvious questions, therefore, were: who owns Consolidated Ventures, LLC and who signed the deed?

31. On the deed, the address for Consolidated Ventures is 97 Bull Point Drive, Seabrook, SC. This is also Robert Wolfson's (Mackay Point's original owner) business address. Conceivably, Mr. Wolfson may own and/or otherwise have involvement with the company that

owns lot 228. Indeed, Mr. Wolfson is listed by the Secretary of State as registered agent for the entity. See **Exhibit I**.

32. James Cate was the only person in control of Mackey Point, LLC and therefore the only person authorized to convey lots. Given the agreement between him and Bond Safeguard, it would make no sense for him to have signed the deed as it would void his release and subject him to criminal penalties for insurance fraud.

33. The mystery of who signed the deed to Lot 228 remains unsolved, but the current motion for summary judgment, which includes an Affidavit from Richard McWhorter, may provide an answer as McWhorter's signature on the Affidavit looks very similar to the signature on the deed. The pages with both signatures are attached as **Exhibit J**.

34. The fact that lot 228 may now be owned by a third party is very important to Bond Safeguard and the resolution of this case because it affects the ability to de-plat the property and it changes the facts behind Bond Safeguard's defense that liability under the bonds has been exonerated. Bond Safeguard believes, therefore, it is important to get to the bottom of why, how and who is involved with the transfer of lot 228.

SUGGESTIONS OF IMPROPER CONDUCT

35. What we know is that Mr. Wolfson, as the previous owner of Mackay Point has made a lawful business transaction to become the assignee of the bank holding the mortgage on Mackay Point. As the current mortgage holder, Mr. Wolfson could foreclose and become the owner of Mackay Point.

36. We also know that any owners of Mackay Point would benefit if Bond Safeguard was required to build the infrastructure in Phase 2 West under its bonds as opposed to having its liability exonerated.

37. We also know Mr. Wolfson was at the mediation.

38. We also know that Bond Safeguard's plan was to buy the lots owned by third parties and then de-plat Phase 2 West so that no infrastructure was required.

39. We know that if the land is not de-platted and infrastructure is built, Mr. Wolfson, as mortgagee will greatly benefit.

40. We suspect that Mr. Wolfson may have an interest in the company that owns lot 228 and that ownership of this lot by a third party will make it more difficult, if not impossible to de-plat Phase 2 West.

41. What we do not know is whether and why Richard McWhorter knowingly deeded a lot in Phase 2 West without having any authority to do so.

42. What we do not know is whether there is any current business relationship between Consolidated Ventures, LLC, Wolfson and McWhorter.

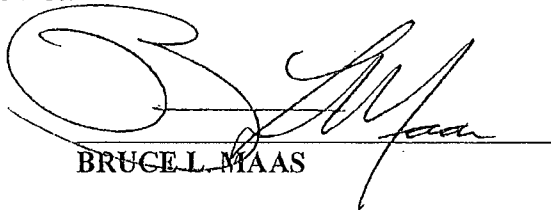
43. What we do know is: a) based upon the documents attached as Exhibits A-C and the Affidavit of Mr. Cate, annexed hereto, the statements in Mr. McWhorter's sworn Affidavit in support of the County's motion for summary judgment are 1) false 2) unauthorized, and 3) depending on the answers to the above questions, Consolidated, Wolfson and/or McWhorter may have interfered with Bond Safeguard's contract with Jasper County at best and/or may have been involved in a scheme to enrich themselves at Bond Safeguard's expense; which, depending on all the facts, could be considered insurance fraud.

REQUESTED RELIEF

44. It is respectfully submitted that the questionable veracity of McWhorter's affidavit is sufficient to raise a question of fact and that as a result, the County's current motion for summary judgment should be denied.

45. Bond Safeguard believes the answers to the above questions will also significantly change the facts of this case which would thereby affect its eventual outcome.

46. Bond Safeguard, therefore, respectfully requests that the current case be stayed to allow the complaint against Consolidated, Wolfson and McWhorter (attached as **Exhibit K** to be filed and litigated, which will allow all parties to determine; a) the answers to the above questions; b) whether any impropriety may have occurred and c) in what way these facts change the facts, defenses, and outcome of this case.


BRUCE L. MAAS

Sworn to before me this 18th
day of November, 2014.


NOTARY PUBLIC

MARY JO MILANO
Notary Public, State of New York
Qualified in Monroe County
My Commission Expires April 11, 2018

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER) (THE SETTINGS)

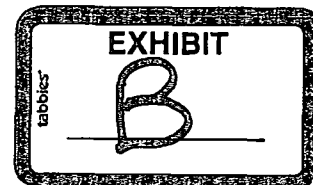
This Development Agreement ("Agreement") is made and entered this 19th day of _____, 2006, by and between The Settling Development Companies, LLC ("Owner") and Jasper County Council, as the governmental authority of Jasper County, South Carolina ("County").

WHEREAS, the legislature of the State of South Carolina has enacted the "South Carolina Local Government Development Agreement Act," (the "Act") as set forth in Sections 6-31-10 through 6-31-160 of the South Carolina Code of Laws (1976), as amended; and,

WHEREAS, the Act recognizes that "The lack of certainty in the approval of development can result in a waste of economic and land resources, can discourage sound capital improvement planning and financing, can cause the cost of housing and development to escalate, and can discourage commitment to comprehensive planning." [Section 6-31-10 (B)(1)]; and,

WHEREAS, the Act also states: "Development agreements will encourage the vesting of property rights by protecting such rights from the effect of subsequently enacted local legislation or from the effects of changing policies and procedures of local government agencies which may conflict with any term or provision of the Development Agreement or in any way hinder, restrict, or prevent the development of the project. Development Agreements will provide a reasonable certainty as to the lawful requirements that must be met in protecting vested property rights, while maintaining the authority and duty of government to enforce laws and regulations which promote the public safety, health, and general welfare of the citizens of our State." [Section 6-31-10 (B)(6)]; and,

WHEREAS, the Ad further authorizes local governments, including county governments, to enter Development Agreements with owners to accomplish these and other goals as set forth in Section 6-31-10 of the Act; and,



WHEREAS, Owner has acquired, or is in the process of acquiring approximately 327.92 acres, generally known as the The Settings of Mackay Point, or Settings Tract and proposes to develop, or cause to be developed, therein a mixture of residential, recreational and conservation uses; and,

WHEREAS, the County seeks to protect and preserve the natural environment and to secure for its citizens quality, well planned and designed development and a stable and viable tax base; and,

WHEREAS, the County finds that the program of development proposed by Owner for this Property is consistent with the County's comprehensive land use plan; and will further the health, safety, welfare and economic well being of the County and its residents; and,

WHEREAS, the program for development of the Property presents an unprecedented opportunity for the County to secure quality planning and growth to protect the environment and strengthen and revitalize the tax base; and,

WHEREAS, this Development Agreement is being made and entered between Owner and the County, under the terms of the Act, for the purpose of providing assurances to Owner that it may proceed with its development plan under the terms hereof, as hereinafter defined, consistent with its approved Planned Unit Development (PUD) plan, (as hereinafter defined) without encountering future changes in law which would materially affect the ability to develop under the plan, and for the purpose of providing important protection to the natural environment and long term financial stability and a viable tax base to the County, and for the purpose of providing certain funding and funding sources to assist the County in meeting the service and infrastructure needs associated with the development authorized hereunder;

NOW THEREFORE, in consideration of the terms and conditions set forth herein, and other good and valuable consideration, including the potential economic benefits to both the County and Owner by entering this Agreement, and to encourage well-planned

development by Owner, the receipt and sufficiency of such consideration being hereby acknowledged, the County and Owner hereby agree as follows:

I. INCORPORATION.

The above recitals are hereby incorporated into this Agreement, together with the South Carolina General Assembly findings as set forth under Section 6-31-10(B) of the Act.

II. DEFINITIONS.

As used herein, the following terms mean:

"Act" means the South Carolina Local Government Development Agreement Act, as codified in Sections 6-31-10 through 6-31-160 of the Code of Laws of South Carolina (1976), as amended; incorporated herein by reference.

"Adjacent Land" shall mean any real property adjacent to the The Sellings Tract.

"Adjustment Factor" shall mean: three percent (3 %) per annum simple interest.

"Agreement" shall mean this Development Agreement as amended by the County and Developer in writing from time to time.

"The Sellings of Mackay Point PDD" or "Property" means that certain tract of land described on Exhibit A, as may be amended with the Agreement of the County and Owner.

"Association" shall mean one (1) or more property owners' associations established to maintain portions of the Property.

"BJWSA" shall mean the Beaufort/Jasper Water and Sewer Authority, its successors or assigns.

"County" shall mean Jasper County, South Carolina.

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"Developer" means Owner and all successors in title or lessees of the Owner who undertake Development of the Property who are transferred in writing from the Owner portions of the Development Rights.

"Development" means the development of portions of the Property as contemplated in the Zoning Regulations.

"Development Fees" shall have the meaning set forth in Paragraph XI.1

"Development Rights" means the rights of the Owner or Developers in accordance with the Zoning Regulations and this Development Agreement.

"Owner" means The Settling Development Companies, LLC, its corporate successors and any assignee, whereby such interest is assigned in writing.

"PDD Plan" shall mean the Master Plan attached to the Planned Development District as same may be modified by agreement of the Owner and the County.

"Planned Unit Development" or PDD Ordinance" means the PDD approved by Jasper County on____, 2006, attached hereto as part of Exhibit B.

"Public Safety Fund" shall mean the segregated interest bearing Escrow Account into which all Development Fees for Fire and Police are contributed.

"Roadway Fund" shall mean the segregated interest bearing account into which all Development Fees for Roads are contributed until utilized for public roadway improvements within the Specified Area.

"Specified Area" shall mean that area bounded as described in Exhibit A - ("Specified Area")

"School Fund" shall mean the segregated interest bearing Escrow Account into which the Development Fees for School are contributed.

"Term" means the duration of this agreement as set forth in Section III hereof.

"Zoning Regulations" means The Sellings of Mackay Point Planned Development District and PDD establishing a Planned Development District for the Property, and all the attachments thereto, including but not being limited to the PDD Plan, all narratives, applications, and site development standards thereof, (a copy of all of which is attached hereto marked Exhibit C and incorporated herein by reference), this Development Agreement, and the Jasper County Development Ordinance(s) dated December 15, 2003 as amended through the date of this Agreement except as the provisions thereof may be clarified or modified by the terms of the PDD and this Agreement.

III. TERM.

The term of this Agreement shall commence on the date this Agreement is executed by the County and Owner and terminate Ten (10) years thereafter; provided however, that the terms of this Agreement may be renewed for two successive five (5) year periods absent a material breach of any terms of this agreement by the Owner or any Developer during the initial or any renewal terms, as applicable.

IV. DEVELOPMENT OF THE PROPERTY.

The Property shall be developed in accordance with the Zoning Regulations and this Agreement. All costs charged by or to the County for reviews required by the Jasper County Zoning Ordinance shall be paid by the Owner or Developer or other party applying for such review as generally charged throughout the County for plan review. The County shall, throughout the Term, maintain or cause to be maintained, a procedure for the processing of reviews as contemplated by the Zoning Regulations and this Agreement.

V. CHANGES TO ZONING REGULATIONS.

The Zoning Regulations relating to the Property subject to this Agreement shall not be amended or modified during the Term, without the express written consent

of the Owner except in accordance with the procedures and provisions of Section 6-31-80(B) of the Act, which Owner shall have the right to challenge. Owner does, for itself and its successors and assigns, including Developers and notwithstanding the Zoning Regulations, agrees to be bound by the following:

1. The Owner shall be required to notify the County, in writing, as and when Development Rights are transferred to any other party. Such Information shall include the identity and address of the acquiring party, a proper contact person, the location and number of acres of the Property transferred, and the number of residential units and/or commercial acreage, as applicable, subject to the transfer. Developers transferring Development Rights to any other party shall be subject to this requirement of notification, and any entity acquiring Development Rights hereunder shall be required to file with the County an acknowledgment of this Agreement and a commitment to be bound by it.

2. The Owners and Developers, and their respective heirs, successors and assigns agree that all Development, with the exception of irrigation, incidental maintenance facilities, earthwork and similar amenities which exist from time to time, and facilities existing at the date of this Agreement will be served by potable water and sewer prior to occupancy, except as otherwise provided herein for temporary use, temporary being defined as one year or less. Septic tanks and/or wells may be allowed with the permission of BJWSA where there is a specific finding that such use for specific portions of the Property will comply with the overall environmental standards.

3. No Initial Master Plan for any portion of the Property shall be submitted for processing unless that plan encompasses ten or more acres of high land which acres are not jurisdictional wetlands, with the exception of the platting of road sections.

VI. DEVELOPMENT SCHEDULE.

The Property shall be developed in accordance with the development schedule, attached as Exhibit D, or as may be amended by Owner or Developer(s) in the future to reflect actual market absorption. Pursuant to the Act, the failure of the Owner and any Developer to meet the initial development schedule shall not, in and of

449 175

itself, constitute a material breach of this Agreement. In such event, the failure to meet the development schedule shall be judged by the totality of circumstances, including but not limited to the Owners and Developer(s) good faith efforts to attain compliance with the development schedule. These schedules are planning and forecasting tools only, and shall not be interpreted as mandating the development pace initially forecast or preventing a faster pace if market conditions support a faster pace. The fact that actual development may take place at a different pace, based on future market forces, is expected and shall not be considered a default hereunder. Development activity may occur faster or slower than the forecast schedule, as a matter of right, depending upon market conditions. Furthermore, periodic adjustments to the development schedule which may be submitted unilaterally by Owner / Developers in the future, shall not be considered a material amendment or breach of the Agreement.

VII. DENSITY.

Residential, recreational and conservation development on the Property shall be the densities and uses as set forth in the Planned Unit Development approval, set forth below:

Up to a maximum of 412 residential density units, as more particularly set forth in the attached Planned Development District for the Property, together with accessory uses and other matters as set forth therein. Owner and County recognize the goal that the average market value of residential dwelling units should seek a target of \$180,000 per unit average, over the life of the development as was stated as the target value under both the East Argent and West Argent Development Agreements, recognizing that this goal is important, but non-binding. County may refuse to renew this Development Agreement beyond the initial 5 year term if this goal has not been met. No conversion of density to any other land uses, including but not limited to multi-family or duplex, will be permitted.

VIII. RESTRICTED ACCESS

The Owner and/or each Developer shall have the right (but not the obligation) to create restricted access communities within the Property as long as such

limited access does not adversely affect in any material respect adjacent traffic patterns located on public rights-of-way.

IX. EFFECT OF FUTURE LAWS.

Owner and Developers, with the approval of Owner, shall have vested rights to undertake Development of any or all of the Property in accordance with the Zoning Regulations, as defined herein and modified hereby, and as may be modified in the future pursuant to the terms of this Agreement for the entirety of the Term. Future enactments of, or changes or amendments to the County ordinances, including zoning or development standards ordinances, which conflict with the Zoning Regulations shall not apply to the Property unless the procedures and provisions of Section 6-31-80 (B) are followed, which Owner shall have the right to challenge. Notwithstanding the above, the Property will be subject to then current fire safety standards and state and/or federal environmental guidelines standards of general application.

The parties specifically acknowledge that this Agreement shall not prohibit the application of any present or future building, housing, electrical, plumbing, gas or other standard codes, or any ad valorem tax of general application throughout the County, found by the Jasper County Council to be necessary to protect the health, safety and welfare of the citizens of Jasper County.

X. INFRASTRUCTURE AND SERVICES

The County and Owner recognize that the majority of the direct costs associated with the Development of the Property will be borne by the Owner and Developers, and many other necessary services will be provided by other governmental or quasi-governmental entities, and not by the County. For clarification, the parties make specific note of and acknowledge the following:

A. Private Roads. All roads within the Property shall be constructed by the Owner, Developer or other parties and maintained by such party(ies) and/or Association(s), or dedicated for maintenance to other appropriate entities. Except as provided in this Agreement, the County will not be responsible for the construction of any private roads within the Property, unless the County specifically agrees to do so in the future. Owner acknowledges that it must comply with all applicable state statutes and

3674 DR 449 177

rules and regulations of the South Carolina Department of Transportation (SCDOT) or its successors regarding access, use and construction of all private roads. Deviations from SCDOT statutes, rules and regulations must be approved in advance by the County Engineer.

B. Public Roads. All public roads outside the Property that serve the Property are under the jurisdiction of the State of South Carolina regarding access, construction, improvements and maintenance. Owner acknowledges that it must comply with all applicable state statutes and rules and regulations of the South Carolina Department of Transportation or its successor regarding access and use of such public roads. Future public roads may serve the Property. The County shall not be responsible for construction, improvements or maintenance of the public roads which now or hereafter serve the Property, unless set forth in this Agreement or it otherwise agrees. Owner has no intent to construct new public roads on the Property, and if such public roads are constructed in the future, with the consent of the County at the request of Owner, Owner or an established property owners' association will be responsible for the maintenance of all landscaping. Additional public roads may be planned in the future, upon written agreement between Owner and the County. The Owner shall have the right to design and construct upon obtaining permits from applicable governmental authorities roadways designated on the PDD Plan, provided such design is in conformance with and capable of absorbing the traffic loading created by the Property. To the extent that any third party is permitted by the County to utilize any public road right-of-way within the Property to install underground utilities or other public services within such road right-of-way, then the County shall require that such party perform such work in a good and workmanlike manner and restore any damage to the right-of-way and/or landscaping or other improvements in connection therewith promptly. To the extent practical, Owner will utilize construction accesses and temporary construction roads to minimize the use by construction vehicles and construction supply trucks of the public roads to be constructed, to avoid undue wear and tear. The county makes no representations or guarantees that roadway access shown on the Conceptual Master Plan will be permitted or allowed. Access must meet the requirements of the SCDOT and Jasper County and will be based upon a properly prepared Transportation Access Management Plan to be developed by the Developer for the Property. As part of the Access Management Plan, Jasper County will work with the Owner/Developer to obtain two independent full access

points onto US 17 to serve the Property subject to consistency with the applicable Jasper County and SCDOT Access Management Plan. Any roadway and/or Intersection Improvements required by the Transportation Access Management Plan will be the sole responsibility of the Developer to design, permit and construct. The County reserves the right to integrate the needs and Transportation Access Management Plans of other Developers for common use roadways and Intersection Improvements into a single Transportation Access Management Plan that will be proportionally funded initially in full by each developer based upon projected traffic counts generated from each development with a reimbursement or credit mechanism against Development Fees – Roads if funded disproportionately by Developer relative to other benefited current and future developments.

C. Additional Roads. If Owner is required to construct two lanes of a roadway within a right of way sized to accommodate more lanes, then the Owner shall construct those two lanes on one side of the right of way, in accordance with plans approved by the County.

Maintenance for roadways dedicated to the County (or other governmental authority) may be funded through an ad valorem tax applied County-wide, or such other mechanism as may be selected by the County that is applied County-wide. The parties agree that the County may transfer ownership and maintenance responsibility for such roadways to SC Dept. of Transportation, in the event the State agrees to accept same and has a reasonable maintenance program in place.

C. Potable Water. Potable water will be supplied to the Property by BJWSA or some other legally constituted public or private provider allowed to operate in the County. The County shall not be responsible for any construction, treatment, maintenance or costs associated with water service to the Property unless the County elects to provide such services with the agreement of the applicable utility authority then providing such service to the Property. Owner will construct or cause to be constructed all related Infrastructure improvements within the Property, which will be maintained by it or the service provider as provided in any utility agreement between Owner and the service provider.

D. Sewage Treatment and Disposal. Sewage treatment and disposal will be provided by BJWSA or some other legally constituted public or private provider allowed to operate in the County. The County will not be responsible for any treatment, maintenance or costs associated with sewage treatment within the Property, unless the County elects to provide such service with the agreement of the applicable utility authority then providing such service to the Property. Nothing herein shall be construed as precluding the County from providing sewer services to its residents in accordance with applicable provisions of law. Owner will construct or cause to be constructed all related infrastructure improvements within the Property, which will be maintained by it or the provider as provided in any utility agreement between Owner and the service provider.

F. Police Services. County shall provide police protection services to the Property on the same basis as is provided to other similarly situated residents and businesses in the County with the exception of restricted access communities, which may elect to provide in-house patrol services by security forces and/or constables and elect in writing to forego regular County patrol functions. Owner acknowledges jurisdiction of the the sheriff of Jasper County on the Property and shall not interfere or in anyway hinder law enforcement activities of either on the Property regardless of whether such may be a restricted access community. Should owner desire an increased level of service above the normal County level of police service, Owner shall be responsible for either providing such services through the use of private security forces or shall pay the County's direct or indirect costs for providing such increased level of service.

G. Fire Services. County shall provide fire protection services to the Property on the same basis as is provided to other similarly situated residents and businesses in the County. Owner acknowledges the jurisdiction of the County's fire department on the Property and shall not interfere or in anyway hinder public safety activities on the Property regardless of whether such may be a restricted access community.

Notwithstanding the foregoing, fees for fire protection will be charged as if the Owner of the Property was a "non-resident" under the fire protection fee ordinance

(Section 8-120 of the County Code of Ordinances) until such time as a site specific development plan is approved for an area of the Property, at which time the non-resident treatment shall be removed as to that area only.

H. Sanitation Services. County shall provide sanitation and trash collection services to the Property on the same basis as is provided to other similarly situated residents and businesses in the County.

I. Recreation Services. County shall provide recreation services to the Property on the same basis as it provided to other similarly situated residents and businesses in the County. Notwithstanding the above, the County shall not be obligated to improve the Park Site until such time as Developer Fees-Park are adequate to fund the design and construction of the site or bond such improvement. Should the Owner desire to construct such Park Site or park thereon prior to these funds being adequate, it may do so, upon electing in writing to pay to the County the cost of providing such services and improvements. Should the Owner make such election, Recreational Developer Fees then collected shall be made available to Owner for such improvements and services and Owner shall receive a credit against future Development Fees-Parks for expenditures in excess of then collected Development Fees-Parks to construct and operate such park improvements, provided such expenditures are approved in advance by the County, which approval shall not be unreasonably withheld.

J. Library Services. County shall provide Library services to the Property on the same basis as is provided to other similarly situated residents in the County.

K. Emergency Medical Services (EMS). County shall provide EMS services to the Property on the same basis as is provided to other similarly situated residents and businesses in the County.

L. Drainage System. All stormwater runoff, treatment and drainage system improvements within the Property will be designed in accordance with the Zoning Regulations and Best Management Practices then current. All stormwater runoff, treatment and drainage system improvements for the Property shall be constructed by

Owner or the Association. The County will not be responsible for any construction or maintenance cost associated with the stormwater runoff, treatment and drainage system within the Property.

1. Storm Water Quality. Protection of the quality in nearby waters and wetlands is a primary goal of the County. The Owners shall be required to abide by all provisions of federal and state laws and regulations, including those established by the Department of Health and Environmental Control, the Office of Ocean and Coastal Resource Management, and their successors for the handling of storm water. Further provisions regarding Storm Water are included within the PDD for this Project. The Property will be subject to any future Storm Water regulations in the same manner as are applied County-wide.

XI. CONVEYANCES AND CONTRIBUTIONS.

The County and Owner understand and agree that future development of the Property shall result in additional public services being required to be provided by the County and other governmental agencies. The County and Owner acknowledge it is desirable that certain public facilities be located in the vicinity of the Property. The Owner agrees to participate in mitigating certain initial costs of the County for such services as provided in this Agreement. The County and the Owner further recognize, however, that there are important differences between the circumstances of this Development Agreement and the circumstances of other Development Agreements which have been adopted elsewhere in Jasper County. Among those important differences are the following:

- The Property which is the subject of this Development Agreement is located in an area of limited economic growth and opportunity where certain properties have been maintained in a substandard manner or abandoned altogether. This area needs to expand job opportunities for its citizens and tax base for the County. Economic development in this area of the County will serve these needs and should therefore be encouraged. It is envisioned that through the cooperation of the Owner, other property owners, and the County that this area of the County may come to be defined as an Overlay District subject to certain rules and incentives which will foster real estate and other economic development activities, although this Development Agreement imposes no obligation on the County to provide such incentives.
- The Property which is the subject of this Development Agreement is located in unincorporated Jasper County where overall levels of service are below that which exists in certain other areas of the County such as the Town of Hardeeville whose Development Agreement served as the template for this Development Agreement.
- Traffic Infrastructure in the immediate area has excess capacity at this time. Unlike development in the southern area of the County, particularly along Highway 278, this immediate area has substantial excess road capacity and is not subject to the immediate pressure of high growth and destination tourism traffic.

- The term of this Development Agreement, which is limited by South Carolina law to five years, is substantially shorter than the twenty to fifty year terms of recent Development Agreements in southern Jasper County. Because a Development Agreement imposes certain limitations on local government regarding its power to change development standards and adopt appropriate impact fees on new development, the length of the Development Agreement term is an important consideration. Landowners and developers derive a considerable benefit from long term limitations on governmental fees and controls, for which it is appropriate that governments extract larger fees and donations in return. Conversely, Development Agreements of shorter term require less commitment by government and thus, less consideration from the landowner.
- The property which is subjected to this Development Agreement is considerably smaller than previous agreements in southern Jasper County. This point is closely associated with the length of term discussed above. A smaller property has less impact on government services and infrastructure, in general, than a large property, and thus the commitment and risks of both the government and the landowner are less.

These points lead to the conclusion that a smaller property, seeking a shorter term agreement, located in an economically depressed area of the County, where existing infrastructure is sufficient to handle short term growth, should be treated differently regarding fees and donations than larger properties located elsewhere.

Given all of the factors discussed above, the following items are hereby agreed upon to be provided by Owner, its successors and assigns, to offset future costs and expenditures created by the development of the Property:

A. Public Safety. Police and Fire Services are to be provided from off site locations and funds to provide such services and related capital improvements will be

generated from future property taxes, other current sources of income, and supplemented by the Development Fees payable hereunder.

All Development Fees for Police and Fire as hereafter provided shall be placed in a segregated interest bearing account and such funds ("Public Safety Fund") maybe allocated for police/fire services for construction and equipping of police and fire services for the immediate service area, as the County determines at its discretion. Owner consents that any Developer Fees collected for Public Safety purposes may be available for both land acquisition, construction and equipment costs, and debt service.

C. Park. The Property is planned for a small, private development, which will include recreational amenities for its residents, but not for the general public. Park fees are provided hereunder, however, which may be utilized for off-site public park site acquisition or improvements at the discretion of the County. Residential Open space shall be calculated based upon current Jasper County ordinances and regulations.

All Development Fees for Parks shall be placed in a segregated interest bearing account to be utilized solely for the acquisition of the Park Site(s) and for park improvements to the Park Site(s) and within reasonable proximity to the Property ("Park Fund"). Neighborhood or local parks may be integrated into master plan subdivisions within the Property and may be private or public as determined by the Owner or Developer creating such parks. Unless otherwise agreed, Recreation Developer Fees shall not be used for private neighborhood or private local parks.

D. School. The Owner and the County acknowledge that all Development Fees for School shall be collected and placed in a segregated interest bearing account ("School Fund") to be utilized for the acquisition of a total of school site(s) in the immediate area, or the providing of school services in the area.

E. Except with respect to the dedications and/or conveyances of the properties referred to in Article XI subsections A through E, inclusive, no other

dedications or conveyances of lands for public facilities shall be required in connection with the development of the Property.

F. All conveyances and dedications of lands pursuant to this Agreement shall mean upland gross acres of highlands, net of wetlands.

G. Development Fees.

(i) To assist the County in meeting expenses resulting from ongoing development, Owner shall pay development fees for Road, Public Safety, School, Library and Parks ("Development Fees") as follows:

DEVELOPMENT FEES	AMOUNT
Commercial and Retail Space	NOT APPLICABLE
Residential Dwelling Units	\$1,500 per unit- Road ¹ \$320- per unit - Public Safety \$250 per unit - School \$100 per unit - Library \$318 per unit - Park
Multifamily Dwelling Units	NOT APPLICABLE

¹ Road Developer Fees may be adjusted by the County as a result of development and adoption by the County of recommendations of future Transportation Master Planning or other comprehensive Transportation Access Management Plan developed for either Jasper County as a whole or for the proposed future overlay district as described in Section XI and elsewhere in this document.

(ii) Except as provided in Article XI.I(i) above, all Development Fees in this item I. shall be collected at the time of obtaining a building permit and placed in separate interest bearing accounts established for Roads, Public Safety, School, Library and

Parks which may be utilized for the purposes set forth in this Agreement. It is envisioned that when this part of the County is defined in an Overlay District, that all Development Fees collected as per this item I shall be applied to the geographic region contained within the Overlay District.

(iii) Notwithstanding any provision to the contrary contained within this Agreement, the Development Fees are being paid in lieu of any other impact fees, development fees or any other similar fees presently existing or adopted by the County at any time hereafter during the term of this Agreement; provided, however, the Owner and/or Developers shall be subject to the payment of any and all present or future permitting fees enacted by the County that are of County-wide application and that relate to processing applications, development permits, building permits, review of plans, or inspections (but no other capital improvement related impact, development or other extractions). Portions of the Public Safety Fees collected shall be used to upgrade the fire protection facilities of the Jasper County in the Point South Area.

(iv) Except as set forth in this Agreement, nothing herein shall be construed as relieving the Owner, its successors and assigns, from payment of any such fees or charges as may be assessed by entities other than the County, provided however, if an entity other than the County imposes, or is permitted by County to impose, fees or obligations similar in nature to those contemplated by this Agreement, the Owner shall be entitled to an offset against the Development Fees of this Agreement the amount of such fees or obligations which are collected. It is the intent of the parties that the fees and obligations contemplated by this Agreement are the only obligations which will be imposed upon the Property and that County shall not permit any other governmental authority to impose fees or obligations of a similar nature to that which are contemplated by this Agreement; provided, however, the provisions of this paragraph shall not preclude the County or another governmental authority from imposing a fee of a nature which is not for services or improvements contemplated under this Agreement (i.e., police, fire, roads, parks, schools, libraries and other obligations contemplated under this Agreement or services and improvements contemplated by this Agreement), which are imposed on a consistent basis throughout the area regulated by such governmental authority imposing such obligations. The County or other governing body shall not be precluded by this Agreement from charging fees for delivery of services to citizens or residents (i.e., an EMS response fee or the like), nor from charging fees

statutorily authorized in the future (i.e., a real estate transfer fee or the like) which are not collected as a prerequisite to approval of a plat, plan or construction.

(v) The Development Fees set forth above are vested for the entire Property and shall not be increased and no other Development Fee or development obligation imposed in connection with the Property, except for the Adjustment Factor as provided in this Agreement.

(vi) The County agrees that no other PDD within the boundaries of the County or otherwise regulated by the County having a cumulative land area of fifty acres or more will be approved without paying fees, making dedications or contributions, or performing obligations substantially equivalent to or greater than the Development Fees set forth above and performing obligations substantially equivalent to or greater than the Development Fees set forth above and performing obligations required to be performed by Owner pursuant to this Agreement and the Zoning Regulations, (except as may be reduced for Affordable Housing pursuant to the South Carolina Development Impact Fee Act, or FILOT or Multi-County Business Park) and the County agrees to use its best efforts to obtain an interlocal agreement with the municipalities for the same. Notwithstanding anything contained herein to the contrary, in the event that any other such property, located within the County, is permitted to develop with payment of Developer Fees for Public Safety, Park, Library and off-site road improvements, which are less than the Development Fees set forth above, or obligations for performance of non-fee responsibilities, which are less restrictive than those imposed with respect to the Owner, Developer, or Property, then, without waiving any other right or remedy available to the Owner, the Owner and Developer shall be entitled to adjust downward the amount of Development Fees and/or reduce its obligations which are thereafter payable or required to be performed in connection with the Property so that the aggregate Development Fees payable by Owner and/or Developer do not exceed the lower of the amount of Development Fees set forth above or that which is collected by the County in connection with any other such property and the Owner and Developer obligations shall not exceed on a comparable basis, the obligations required to be performed by such other party, and Owner shall be relieved of such excess obligations.

(vii) Any Development Fees paid and/or credits for Development Fees with respect to property conveyed, services performed and/or money paid as provided in this

449 188

Agreement may be assigned by the Owner and/or Developer owning such credits and all such credits shall remain valid until utilized. The County shall recognize all such written assignments of such rights and shall credit same against any Development Fees which are owed pursuant to this Agreement.

(viii) All Development Fees for Off-Site Roads which are collected shall be held by the County in a separate insured interest bearing account ("Off-Site Roadway Fund") and all such monies shall be utilized, unless otherwise agreed by the County and Owner, for public roadway improvements. In the event that the Owner or Developer shall choose, at its exclusive option, to construct certain off-site road improvements on US 17 in the immediate vicinity of the Property that would also benefit other current and future developments (including but not limited to signalization, median cuts, acceleration / deceleration lanes, and other access improvements that could be shared with other properties directly or indirectly), the County agrees that the Owner shall have the right to construct such off-site road improvements provided that they have been approved by the County and SCDOT, whereupon the Owner or Developer would be entitled to reimbursement and/or a credit for others' reasonable, proportionate share of all such costs and expenses incurred by the Owner or Developer, on such sums against Development Fees-Roads which are owed pursuant to this Agreement. Reimbursement may be accomplished through development fees paid by the Owner or Developer under this agreement or by other parties under similar agreements, or from other sources as the County may deem appropriate.

(ix) Nothing in this Agreement shall be construed to prevent the establishment by the County or other governmental entity, solely or in conjunction with each other, of a Tax Increment, FILOT, Multi-County Business Park, or other special tax district or financing vehicle authorized by applicable provisions of the Code of Laws of South Carolina (1976 as amended), so long as such do not operate to increase the ad valorem taxes or assessment against the Property or cost to the Owner or Developer, unless the Owner or Developer (as applicable) otherwise agrees or same is otherwise expressly permitted pursuant to the terms of this Agreement. It is acknowledged that at the written election of Owner a municipal improvement district and/or special taxing district may be implemented for the Property as set forth in this Agreement. The Owner and the County recognize that the subject Property is located in an area of the County which has a great need for economic growth, expansion of tax base, and creation of jobs, and that

this area suffers from dilapidation, obsolescence, deterioration, presence of structures below minimum code standards, abandonment, excessive vacancies, lack of community planning, and potentially area-wide economic decline. The Owner and County further agree to work collaboratively together and with adjacent property owners to see that this area of the County becomes defined as an Overlay District subject to certain rules and incentives which will foster real estate and other economic development activities. To that end and to the degree that certain financing vehicles would be beneficial to the County, the taxing entities of the County, and the citizens and residents of the County, and to the degree that these financing vehicles will allow for development activities that would directly and indirectly benefit the general public welfare and serve a public purpose of the County by providing services, employment, addition to the tax base, recreational opportunities, promotion of tourism, or other public benefits not otherwise provided locally to the degree possible, the County agrees to work with the Owner, utilizing such approaches as Multi-County Business Parks, Tax Increment Financing Districts (or other financing vehicles desired by the Owner) to assist with area infrastructure costs and encourage economic development of the areas.

(x) As an alternative to payment of all or a portion of the Public Safety and Park Fees, as set forth above, at the time of building permit issuance, Owner shall have the option of making a one time payment in lieu of per unit fees, to be utilized for construction of Police, Fire, or Park facilities in the immediate area. This option shall be subject to Owner and the Jasper County Administrator reaching agreement on the exact amount of payment, construction and staffing schedule, and potential donation of additional land on Highway 17 upon which to construct such facilities. Neither Owner nor Jasper County shall be obligated to utilize this alternative unless such agreement is reached in the future between Owner and the Jasper County Administrator. (xi) Owner agrees to pay the costs and expenses of the County's consultants and professionals incurred in negotiating, processing and evaluating this Agreement and the accompanying PDD. County will provide sufficient documentation of these charges. Owner shall pay such fees within 60 days of the delivery of the invoice(s).

XI. PERMITTING PROCEDURES:

1. The County agrees to allow the Developer the ability to permit and construct model homes without utilities (i.e., "dry models") and to relocate the models as necessary within each subdivision.
2. The County agrees that the Owner and/or any Developer is not required to phase development but shall have the right to do so.
3. The County agrees to review all land use changes, land development applications, and plats in an expeditious manner in accordance with the County Regulations as modified by the PDD for this Project. Developer may submit these items for concurrent review with the County and other governmental authorities. County may give final approval to any submission, but will not grant authorization to record plats or begin development construction activities until all permitting agencies have completed their reviews.
4. Signage for the Project is governed by the provisions of the PDD for this Project.
5. The County acknowledges that the Developer has an internal set of architectural guidelines and employs an architectural review board, which are to be adopted as provided in the PDD.
6. The County agrees to allow plat recording with a bond prior to completion of infrastructure development and to issue building permits and permit sale of lots prior to completion of such bonded infrastructure; in accordance with the County Regulations as modified by the PDD for this Property.
7. The County agrees the Property shall be governed by Zoning Regulations. If future codes are more desirable to Property, then Developer may elect to have such regulations become applicable to any portion of the Project that Owner designates.
8. The County agrees that the Property is approved and fully vested for intensity, density, development fees, uses and height, and shall not have any obligations for on or off site transportation or other facilities or improvements other than

as specifically provided in this Agreement, but must adhere to then current PDD Plan and subdivision plat and development plan procedural guidelines. The County may not impose additional development obligations or regulations in connection with the ownership or development of the Property, except in accordance with the procedures and provisions of § 6-31-80 (B) of the Act, which the Owner shall have the right to challenge..

9. Roadways (public or private) may utilize swale drainage systems and are not required to have raised curb and gutter systems, provided that pedestrian and non-vehicular pathways or sidewalks are provided in order to provide interconnectivity between interior subdivisions, commercial or institutional areas and public gathering areas. Roadway cross sections utilizing swale drainage will be designed, constructed and maintained to meet BMP standards (imposed by regulatory agencies) for stormwater quality. Roadway cross sections will be reviewed at time of proposed construction of such Roadway based upon engineering and planning standards consistent with the PDD Plan prepared by Developer, subject to the approval of the County Planning Administrator.

10. All plan review fees shall be consistent with the fees charged generally in the County.

XII. DEVELOPER ENTITLEMENTS:

County acknowledges that Developer is vested with the following items:

2. The Owner or its written designee may own and operate an internal irrigation company and system that serves the Property and the County will grant a franchise and such easements over public rights-of-way as may be reasonably required by the Owner (or its designee) to implement such irrigation system. The County agrees to cooperate with the Owner in connection with providing such irrigation water in connection with development of the Property.

3. The County will, to the extent available, promote public transportation which exists within the County to service the Property.

4. The County agrees to grant a non-exclusive franchise for an on-site telecommunications company to Owner on terms consistent with then current franchise agreements. The County acknowledges that the Owner shall not be required to provide easements to any utility companies other than over public streets which may be located within the Property. The County agrees that, upon the request of the Owner, the County will grant easements within public rights-of-way to telecommunication providers which Owner authorizes to provide service within the Property, upon payment of applicable franchise fees to the County. Additionally, the County agrees that it will franchise on terms consistent with then current franchise agreements to such party providing telecommunication services to the Property, a franchise to enable such company to perform such service; provided, however, the County shall have the right to grant other franchises to third party telecommunication companies providing telecommunication services within the County.

5. All drainage systems constructed within the Project shall be owned and maintained by one (1) or more Association(s) which may be established for various portions of the Property and the County shall have no responsibility for the construction, operation or maintenance of such systems.

6. Sidewalks will not be required within the Property, provided that pedestrian and non-vehicular pathways or sidewalks are provided in order to provide interconnectivity between interior subdivisions, other public areas, commercial or institutional areas, public gathering areas, and in areas of high pedestrian traffic such as schools, institutions, parks and commercial areas. Direct connectivity by roads, sidewalks or non-vehicular pathways through private subdivisions is not required.

7. On-site burning will be permitted within the Property upon obtaining applicable permits.

8. The County agrees to cooperate with the Owner and each Developer with county, state and federal roadway permitting in connection with the Development of portions of the Property.

9. County services, including, but not limited to, police, fire, sanitation, recreational parks and other governmental services shall be supplied to the Property in the same manner and to the same extent as provided to other properties within the County, subject to the limitations (if any) of Section X above. Subject to the limitations of Section X above (if any), should the Owner require enhanced services beyond that which is routinely provided within the County, then the County agrees that upon the written request of Owner, it shall negotiate in good faith with the Owner to provide such enhanced services to the Property.

10. The County shall not oppose private schools, charter schools, and other alternate educational systems which Owner may desire to have located within the Property.

XIII. COMPLIANCE REVIEWS.

As long as Owner owns any of the Property, Owner or its designee, shall meet with the County, or its designee, at least once, per year, during the Term to review Development completed by Owner in the prior year and the Development anticipated to be commenced or completed by Owner in the ensuing year. The Owner, or its designee, shall provide such information as may reasonably be requested, to include but not be limited to, acreage of the Property sold in the prior year, acreage of the Property under contract, the number of certificates of occupancy issued in the prior year, and the number anticipated to be issued in the ensuing year, Development Rights transferred in the prior year, and anticipated to be transferred in the ensuing year. The Owner, or its designee, shall be required to compile this information within a reasonable time after written request by the County.

XIV. DEFAULTS.

The failure of the Owner, Developer or the County to comply with the terms of this Agreement not cured within fifteen (15) days after written notice from the non-defaulting party to the defaulting party (as such time period may be extended with regard to non-monetary breaches or a reasonable period of time based on the circumstances, provided such defaulting party commences to cure such breach within such fifteen (15) day period and is proceeding diligently and expeditiously to complete such cure) shall constitute a default, entitling the non-defaulting party to pursue such remedies as deemed appropriate, including specific performance; provided however no termination of this Agreement may be declared by the County absent its according the Owner and any relevant Developer the notice, hearing and opportunity to cure in accordance with the Act; and provided any such termination shall be limited to the portion of the Property in default, and provided further that nothing herein shall be deemed or construed to preclude the County or its designee from issuing stop work orders or voiding permits issued for Development when such Development contravenes the provisions of the Zoning Regulations or this Agreement. A default of the Owner shall not constitute a default by Developers, and default by Developers shall not constitute a default by the Owner. The parties acknowledge that individual residents and owners of completed buildings within the Project shall not be obligated for the obligations of the Owner or Developer set forth in this Agreement.

XV. MODIFICATION OF AGREEMENT.

This Agreement may be modified or amended only by the written agreement of the County and the Owner; such written agreement may be by resolution or ordinance at the County's sole discretion. No statement, action or agreement hereafter made shall be effective to change, amend, waive, modify, discharge, terminate or effect an abandonment of this Agreement in whole or in part unless such statement, action or agreement is in writing and signed by the party against whom such change, amendment, waiver, modification, discharge, termination or abandonment is sought to be enforced.

This Agreement may be modified or amended as to a portion of the Property only by the written agreement of the County and the Owner of said portion of the Property.

No statement, action or agreement hereafter made shall be effective to change, amend, waive, modify, discharge, terminate, or effect an abandonment of this Agreement in whole or in part unless such change, amendment, waiver, modification, discharge, termination or abandonment is sought to be enforced.

If an amendment affects less than all the persons and entities comprising the Property Owners, then only the County and those affected persons or entities need to sign such written amendment. Because this Agreement constitutes the plan for certain planned unit development under the zoning ordinance, minor modifications to a site plan or to development provisions may be made without a public hearing or amendment to applicable ordinances. Any requirement of this Agreement requiring consent or approval of one of the Parties shall not require amendment of this Agreement unless the text expressly requires amendment, and such approval or consent shall be in writing and signed by the affected parties. Wherever said consent or approval is required, the same shall not be unreasonably withheld.

The master plans are not intended to be rigid, exact site plans for future development. The location of roads, buildings, recreational amenities and other elements may vary at the time of permit applications when more specific designs are available, as long as the maximum densities set herein and the general concept of environmentally sensitive residential developments suggested by the master plans are followed and respected.

XVI. NOTICES.

Any notice, demand, request, consent, approval or communication which a signatory party is required to or may give to another signatory party hereunder shall be in writing and shall be delivered or addressed to the other at the address below set forth or to such other address as such party may from time to time direct by written notice given in the manner herein prescribed, and such notice or communication shall be deemed to have been given or made when communicated by personal delivery or by independent courier service or by facsimile or if by mail on the fifth (5th) business day after the deposit thereof in the United States Mail, postage prepaid, registered or

County Administrator
Jasper County
P.O. Box 1149
Ridgeland, SC 29936

With Copy To: Law Office of Lewis J. Hammet, PA
Post Office Box 2960
Bluffton, South Carolina, 29910

Any party herelo shall have the right to enforce the terms, provisions and conditions of this Agreement (if not cured within the applicable cure period) by any remedies available at law or in equity, including specific performance, and the right to recover attorney's fees and costs associated with said enforcement.

A. Subsequent Laws. In the event state or federal laws or regulations are enacted after the execution of this Agreement or decisions are Issued by a court of competent jurisdiction which prevent or preclude compliance with the Act or one or more provisions of this Agreement ("New Laws"), the provisions of this Agreement shall be modified or suspended as may be necessary to comply with such New Laws. Immediately after enactment of any such New Law, or court decision, a party designated by the Owners and Developer(s) and the County shall meet and confer in good faith in order to agree upon such modification or suspension based on the effect such New Law would have on the purposes and intent of this Agreement. During the time that these parties are conferring on such modification or suspension or challenging the New Laws, the County may take reasonable action to comply with such New Laws. Should these parties be unable to agree to a modification or suspension, either may petition a court of competent jurisdiction for an appropriate modification or suspension of this Agreement. In addition, the Owner, developers and the County each shall have the

right to challenge the New Law preventing compliance with the terms of this Agreement. In the event that such challenge is successful, this Agreement shall remain unmodified and in full force and effect.

B. Estoppel Certificate. The County, the Owner or any Developer may, at any time, and from time to time, deliver written notice to the other applicable party requesting such party to certify in writing:

- (1) that this Agreement is in full force and effect,
- (2) that this Agreement has not been amended or modified, or if so amended, identifying the amendments,
- (3) whether, to the knowledge of such party, the requesting party is in default or claimed default in the performance of its obligations under this Agreement, and, if so, describing the nature and amount, if any, of any such default or claimed default, and
- (4) whether, to the knowledge of such party, any event has occurred or failed to occur which, with the passage of time or the giving of notice, or both, would constitute a default and, if so, specifying each such event.

C. Entire Agreement. This Agreement sets forth, and incorporates by reference all of the agreements, conditions and understandings among the County and the Owner relative to the Property and its Development and there are no promises, agreements, conditions or understandings, oral or written, expressed or implied, among these parties relative to the matters addressed herein other than as set forth or as referred to herein.

D. No Partnership or Joint Venture. Nothing in this Agreement shall be deemed to create a partnership or joint venture between the County, the Owner or any Developer or to render such party liable in any manner for the debts or obligations of another party.

E. Exhibits. All exhibits attached hereto and/or referred to in this Agreement are incorporated herein as though set forth in full.

F. Construction. The parties agree that each party and its counsel have reviewed and revised this Agreement and that any rule of construction to the effect that ambiguities are to be resolved against the drafting party shall not apply in the interpretation of this Agreement or any amendments or exhibits hereto.

G. Assignment. Subject to the notification provisions hereof, Owner may assign its rights and responsibilities hereunder to a subsidiary or sister company, or subsequent land owners and Developers.

H. Governing Law. This Agreement shall be governed by the laws of the State of South Carolina.

I. Counterparts. This Agreement may be executed in several counterparts, each of which shall be deemed an original, and such counterparts shall constitute but one and the same instrument.

J. Agreement to Cooperate. In the event of any legal action instituted by a third party or other governmental entity or official challenging the validity of any provision of this Agreement, the parties hereby agree to cooperate in defending such action; provided, however, each party shall retain the right to pursue its own independent legal defense.

K. Eminent Domain. Nothing contained in this Agreement shall limit, impair or restrict the County's right and power of eminent domain under the laws of the State of South Carolina.

L. No Third Party Beneficiaries. The provisions of this Agreement may be enforced only by the County, the Owner and Developers. No other persons shall have any rights hereunder.

M. Contingencies. This Agreement is contingent on Owner, The Settings Development Companies, LLC, or its assign, acquiring title to the Property and the approval of the County Council of Jasper County, South Carolina. Notwithstanding the above, Owner agrees to remain responsible for the payment of the processing fees incurred by the County in reviewing and approving the Planned Unit Development application and Development Agreement as set forth in Section X (xi) above.

XIX. STATEMENT OF REQUIRED PROVISIONS

A. Specific Statements. The Act requires that a development agreement must include certain mandatory provisions, pursuant to Section 6-31-60 (A). Although certain of these items are addressed elsewhere in this Agreement, the following listing of the required provisions is set forth for convenient reference. The numbering below corresponds to the numbering utilized under Section 6-31-60 (A) for the required items:

1. Legal Description of Property and Legal and Equitable Owners. The legal description of the Property is set forth in Exhibit A attached hereto. The present legal Owner of the Property is The Settings Development Companies, LLC,, or its affiliated entity, and the equitable owner is The Settings Development Companies, LLC,, who will take title prior to the recording hereof.
2. Duration of Agreement. The duration of this Agreement shall be as provided in Article III..
3. Permitted Uses, Densities, Building Heights and Intensities. A complete listing and description of permitted uses, population densities, building intensities and heights, as well as other development - related standards, are contained in Zoning Regulations, as supplemented by this Agreement. Based on prior experience with the type of Development contemplated by the Zoning Regulations, it is estimated that the average size

household of the Property will be 2.2 persons. Based on maximum density build out, the population density of the Property is anticipated to be no more than 906 persons (unless optional additional density is granted).

4. **Required Public Facilities.** The utility services available to the Property are described generally above regarding water service, sewer service, cable and other telecommunication services, gas service, electrical services, telephone service and solid waste disposal. The mandatory procedures of the Zoning Regulations will ensure availability of roads and utilities to serve the residents on a timely basis.
5. **Dedication of Land and Provisions to Protect Environmentally Sensitive Areas.** All requirements relating to land transfers for public facilities are set forth in Article XI above. The Zoning Regulations described above, and incorporated herein, contain numerous provisions for the protection of environmentally sensitive areas. All relevant State and Federal laws will be fully complied with, in addition to the important provisions set forth in this Agreement.
6. **Local Development Permits.** The Development standards for the Property shall be as set forth in the Zoning Regulations. Specific permits must be obtained prior to commencing Development, consistent with the standards set forth in the Zoning Regulations. Building Permits must be obtained under applicable law for any vertical construction, and appropriate permits must be obtained from the State of South Carolina (OCRM) and Army Corps of Engineers, when applicable, prior to any impact upon freshwater wetlands. It is specifically understood that the failure of this Agreement to address a particular permit, condition, term or restriction does not relieve the Owner, its successors and

assign, of the necessity of complying with the law governing the permitting requirements, conditions, terms or restrictions, unless otherwise provided hereunder.

7. Comprehensive Plan and Development Agreement. The Development permitted and proposed under the Zoning Regulations and permitted under this Agreement is consistent with the Comprehensive Plan and with current land use regulations of the County, which include a Planned Development District for the Property.
8. Terms for Public Health, Safety and Welfare. The County Council finds that all issues relating to public health, safety and welfare have been adequately considered and appropriately dealt with under the terms of this Agreement, the Zoning Regulations and existing laws.
9. Historical Structures. Any cultural, historical structure or sites will be addressed through applicable federal and state regulations the permitting process at the time of development, as required by applicable state regulations.

IN WITNESS WHEREOF, the parties hereby set their hands and seals, effective the date first above written.

SIGNATURES AND ACKNOWLEDGMENTS BEGIN ON THE FOLLOWING
PAGE

WITNESSES: The Settling Development Companies,
 LLC, *Judith M. Kent* By: *[Signature]*
Donna L. McElhiney Its: Manager

STATE OF)
) ACKNOWLEDGMENT
 COUNTY OF JASPER)

I HEREBY CERTIFY, that on this 19 day of June, 2006, before me, the undersigned Notary Public of the State and County aforesaid, personally appeared the duly authorized official of The Settling Development Companies, LLC,, known to me (or satisfactorily proven) to be the person whose name is subscribed to the within document, who acknowledged the due execution of the foregoing document.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal the day and year last above mentioned.

Evelyn A. Lee
 Notary Public for South Carolina

My Commission Expires:
 8-30-9



WITNESSES:

JASPER COUNTY, SOUTH CAROLINA

[Signature]
[Signature]

By: George M. Hood
 Its: Chairman

STATE OF SOUTH CAROLINA.

)

ACKNOWLEDGMENT

COUNTY OF JASPER.

)

I HEREBY CERTIFY, that on this 19 day of June, 2006,
 before me, the undersigned Notary Public of the State and County aforesaid, personally
 appeared George M. Hood, known to me (or satisfactorily proven) to be
 the person whose name is subscribed to the within document, as the appropriate
 officials of Jasper County, South Carolina, who acknowledged the due execution of the
 foregoing document.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal
 the day and year last above mentioned.

Evelyn A. Lee
 Notary Public for South Carolina
 My Commission Expires: 8-30-09



EXHIBIT A
TO DEVELOPMENT AGREEMENT
PROPERTY DESCRIPTION OF THE SETTINGS TRACT

למלך המשיח אמן

BK 1 Vol 331 Pg 281

200500004177
Filed for Record in
JASPER COUNTY
MARGARET BUSTICK
10-21-2005 AK 0310P pk.
DEED 145.53
Volume JPL Page 281 - 287

200500004177
MARGARET BUSTICK
CLERK OF COURT
JASPER COUNTY
10-21-2005 0310P pa-
REC FEE: 10.00
STATE TAX 1042.00
LOCAL TAX 411.45

Instrument Volume Page
200500004177 331 281

Prepared by:
Betsy L. Johnson, P.H.
10 Pinchberry Colony Road, Delta 2900
Charlottesville, South Carolina 22902

STATE OF SOUTH CAROLINA ;)
COUNTY OF JASPER :)

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS THAT the undersigned, POINT SOUTH INVESTORS, LLC, a South Carolina limited liability company, in consideration of TWO MILLION THREE HUNDRED THOUSAND AND NA/100 (\$2,300,000.00) Dollars, including as portions thereof the assumptions by THE SETTINGS OF MACKAY POINT, LLC of the indebtednesses of POINT SOUTH INVESTORS, LLC (1) in the present, principal amount of \$1,198,593.75 in Greenville First Bank, secured by the mortgage of POINT SOUTH INVESTORS, LLC in Greenville First Bank in the amount of \$1,200,000.00, dated January 31, 2005 and recorded February 3, 2005 in the Office of the Clerk of Court for Jasper County, South Carolina in Mortgage Book 354 at Page 70 (as to Parcel Five identified below); and (2) in the present, principal amount of \$700,000.00 to Darrell Thomas Johnson, Jr. and Wanda J. Johnson, secured by the mortgage of POINT SOUTH INVESTORS, LLC to Darrell Thomas Johnson, Jr. and Wanda J. Johnson in the amount of \$700,000.00, dated March 31, 2005 and recorded April 6, 2005 in the Office of the Clerk of Court for Jasper County, South Carolina in Mortgage Book 360 at Page 314 (as to Parcels One, Two and Three identified below), in it in hand paid at and before the signing of these presents by THE SETTINGS OF MACKAY POINT, LLC, a South Carolina limited liability company, of 4380 Paces Ferry Road, Suite 580, Atlanta, GA 30339, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the said THE SETTINGS OF MACKAY POINT, LLC, its successors and assigns, in fee simple, forever, the following described real property to-wit:

SEE ATTACHED EXHIBIT 'A' METHOD INCORPORATED HEREIN BY
REFERENCE .

This instrument was prepared in the law offices of Barry L. Johnson, P.A., 10 Placenty Colony Road, Suite 200, Okalla, South Carolina, 29909, by Barry L. Johnson, Esq.

Tax Map No.: Parcel One: 091-00-03-011; Parcel Two: 091-00-01-021; Parcel Three: 091-00-01-020; Parcel Four: Portion 091-00-01-051; Parcel Five: 091-00-01-016 - sp, to 091-00-01-059

Licensing Council of Gov

20000000017 UN 177 100

Instrument Volume Page
2000000001779 331 282

TOGETHER with all and singular, rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD the said bargained premises heretofore mentioned unto the said THE SETTINGS OF MACKAY POINT, LLC, its successors and assigns, forever and POINT SOUTH INVESTORS, LLC, does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the premises unto the said THE SETTINGS OF MACKAY POINT, LLC, its successors and assigns, and against it and its successors and against all other persons whomsoever lawfully claiming or to claim the same or any part thereof.

IN WITNESS WHEREOF, POINT SOUTH INVESTORS, LLC has executed this Title to Real Estate, by the hand and seal of its duly authorized Manager(s), this 20th day of October, in the year of our Lord Two Thousand and Nine and in the Two Hundred and Thirtieth year of the Sovereignty and Independence of the United States of America.

Signed, sealed and delivered in the presence of:

[Signature]
Witness

[Signature]
Witness

[Signature]
Witness

[Signature]
Witness

[Signature]
Witness

[Signature]
Witness

POINT SOUTH INVESTORS, LLC,
a South Carolina limited liability company.

[Signature]
By: Robert L. Wolfson
Its: Manager and Member

[Signature]
By: Eugene Way
Its: Manager and Member

[Signature]
By: Harry L. Hoffman
Its: Manager and Member

Tax Map No.: Parcel One: 091-00-03-011; Parcel Two: 091-00-01-021; Parcel Three: 091-00-01-020; Parcel Four: Portion 091-00-01-051; Parcel Five: 091-00-01-016

Instrument Value Date
200300091179 \$0.00 2003

STATE OF SOUTH CAROLINA

COUNTY OF BEAUFORT

PERSONALLY appeared before me, BARRY L. THOMAS, Notary Public for South Carolina, who says that (s) he saw the within named POINT SOUTH INVESTORS, LLC, by ROBERT L. WOLFSON, EUGENE WAY and HARRY L. HUFFMAN, its Managing Members, Agent for the within deed, and by his/their act and deed, deliver the same, and that (s) he, with ALENA K. SLICE, witnessed the execution thereof.

Sworn to before me this 20 day of October, 2003.

Notary Public for South Carolina
My Commission Expires: 8-23-12

Exhibit A

PARCEL ONE:

All that certain piece, parcel or lot of land lying and being situate near Pocotaligo in Jasper County, South Carolina and consisting of 74.95 acres, more or less, and being more particularly described as follows:

Beginning at a point along the 66' Right-of-Way of S-27-33 (a County Road) and running N 65°38'25"E for a distance of 1787.93' feet, more or less, along lands N/F of the heirs of Benjamin Clark, Jr., to a point; then turning and running N08°09'35"W for a distance of 1204.32' feet, more or less, along lands N/F of the heirs of Benjamin Clark, Jr., to a point; then turning and running N65°41'47"E for a distance of 1123.33' feet, more or less, along lands N/F of the heirs of Dick Hayward, to a point; then turning and running various courses and distances along the Marshes of the Pocotaligo River to a point; then turning and running S66°43'21"W for a distance of 1033.57' feet, more or less, along lands N/F of Boyd B. Massagoe, Jr., to a point; then running S67°09'47"W for a distance of 527.05' feet, more or less, along lands N/F of Ruby Newton, to a point; then running S67°00'19"W for a distance of 1205.08' feet, more or less, along lands N/F of Ruby Newton, to a point; then turning and running S70°06'48"E for a distance of 235.13' feet, more or less, along lands N/F of Ruby Newton, to a point; then turning and running S87°49'52"W for a distance of 722.94' feet, more or less, along lands N/F of B. Wyman Bledsoe, to a point; then turning and running N00°06'43"E for a distance of 444.17' feet, more or less, along the 66' Right-of-Way of S-27-33 (a County Road), to the point of beginning.

Also any interest in and to any contiguous interests

091-00-03-011 ✓

Tax Map No.: Parcel One: 091-00-03-011; Parcel Two: 091-00-01-021; Parcel Three: 091-00-01-030; Parcel Four: Parcel 091-00-01-051; Parcel Five: 091-00-01-076

Instrument Volume Page
20050009(127) 231 224

For a more particular description reference is made to that certain Plat made at the request of William Oscar Tysinger by Michael J. Gardner, RLS, dated March 27, 1999 and recorded in Plat Book 23 at Page 443, in the Office of the Clerk of Court for Jasper County, South Carolina, and also shown as "Parcel E" on that certain plat entitled "A Boundary Survey of a 327.92 Acre Parcel, Poochatigee Area, Jasper County, South Carolina," dated March 1, 2005, last revised March 28, 2005, prepared by TGS Land Surveying, certified by Thomas G. Stanley, Jr., PLS (S.C. # 18269), and recorded in the Office of the Clerk of Court for Jasper County, South Carolina in Plat Book 28 at Page 234.

TOGETHER WITH AND SUBJECT TO: Easement as shown on the above referenced plat.

This is the same property conveyed to Point South Investors, LLC by Deed from Darrell Thomas Johnson and Wanda J. Johnson dated March 31, 2005, recorded April 6, 2005 in the office of the Clerk of Court for Jasper County in Deed Book 316 at Page 103.

Tax Map No. 091-00-03-011

PARCEL TWO:

All that certain piece, parcel or lot of land, situate, lying and being in the State of South Carolina, County of Jasper, Coopersblanchie Township and containing Fifteen (15) acres, more or less, and bounded as follows: On the North by U.S. Hwy #17; on the East by lands NW of S.P. Hamilton; on the South by lands NW of Cornelia Middleton and on the West by lands NW of Colin Campbell, and also shown as "Parcel D" on that certain plat entitled "A Boundary Survey of a 327.92 Acres Parcel, Poochatigee Area, Jasper County, South Carolina," dated March 1, 2005, last revised March 28, 2005, prepared by TGS Land Surveying, certified by Thomas G. Stanley, Jr., PLS (S.C. # 18269), and recorded in the Office of the Clerk of Court for Jasper County, South Carolina in Plat Book 28 at Page 234.

RESERVING unto Darrell Thomas Johnson and Wanda J. Johnson, their heirs and assigns, an easement over the road to be constructed thereon for access to any properties Darrell Thomas Johnson and Wanda J. Johnson own or might come to own in the future. Darrell Thomas Johnson and Wanda J. Johnson may freely assign such rights to any purchaser of such property.

This is the same property conveyed to Point South Investors, LLC by Deed from Darrell Thomas Johnson and Wanda J. Johnson dated March 31, 2005, recorded April 6, 2005 in the office of the Clerk of Court for Jasper County in Deed Book 316 at Page 103.

Tax Map No. 091-00-01-021

PARCEL THREE:

All that certain piece, parcel or lot of land, situate, lying and being in the County of Jasper, State of South Carolina, Area of Point South, being a portion of what was formerly a thirty-four (34) acre tract, now being four (4) acres, more or less, and being further described as follows:

Instrument Volume Page
100500001779 231 285

Bounded on the north by lands N/P of Cornelia Middleton, or her heirs, bounded on the east by lands N/P of William Grant, running approximately 89 B for a distance of approximately 560 feet; on the south by lands N/P of Isaac Bluff; and on the west by lands N/P of John Priggle, running approximately 89 B for a distance of approximately 560 feet, and also shown as "Parcel C" on that certain plat entitled "A Boundary Survey of a 327.92 Acres Parcel, Pocotaligo Area, Jasper County, South Carolina," dated March 1, 2005; last revised March 28, 2005, prepared by TGS Land Surveying, certified by Thomas G. Stanley, Jr., PLS (S.C. # 18269), and recorded in the Office of the Clerk of Court for Jasper County, South Carolina in Plat Book 234 at Page 234.

RESERVING unto Darrell Thomas Johnson and Wanda J. Johnson, their heirs and assigns, an easement over the road to be constructed thereon for access to any properties Darrell Thomas Johnson and Wanda J. Johnson own or might come to own in the future. Darrell Thomas Johnson and Wanda J. Johnson may freely assign such rights to any purchaser of such property.

This is the same property conveyed to Point South Investors, LLC by Deed from Darrell Thomas Johnson and Wanda J. Johnson dated March 31, 2005, recorded April 6, 2005 in the office of the Clerk of Court for Jasper County in Deed Book 316 at Page 103.

Tax Map No.: 091-00-01-020 ✓

PARTIAL PLOT:

A Four (4) Acre portion of ALL that certain piece, parcel or tract of land with all improvements thereon, situate, lying and being in Jasper County, South Carolina, containing 103.34 acres, being a portion of a tract being shown and described as "Pocotaligo Estates", a tract of Four Hundred Twenty-Five and fifty Four One Hundredth (425.54) acres, more or less, on a Plat of Tulliferry and Pocotaligo Estates, a section of Point South, Jasper County, South Carolina, prepared by Coastal Surveying Co., Inc., Hilton Head Island, South Carolina, dated February 6, 1975, as revised February 18, 1975, and recorded in the Office of the Clerk of Court for Jasper County in Plat Book 13 at Page 237, and also shown as "Parcel R" on that certain plat entitled "A Boundary Survey of a 327.92 Acres Parcel, Pocotaligo Area, Jasper County, South Carolina," dated March 1, 2005, last revised March 28, 2005, prepared by TGS Land Surveying, certified by Thomas G. Stanley, Jr., PLS (S.C. # 18269), and recorded in the Office of the Clerk of Court for Jasper County, South Carolina in Plat Book 234 at Page 234.

This is a portion of the same property conveyed to Point South Investors, LLC by deed from Stanford W. Heizer, Jr., dated November 9, 2004, recorded November 16, 2004 in the office of the Clerk of Court for Jasper County in Deed Book 306 at Page 291.

Partial Tax Map No. 091-00-01-031 ✓ from

Jasper County Volume Page
201300004179 231 284

PARCEL NINE

ALL that certain piece, parcel or tract of land with all improvements thereon, situate, lying and being in Jasper County, South Carolina, containing 11.07 acres, more or less, as depicted on a plat prepared for Southern Heritage Properties, by TGS Land Surveying, certified to by Thomas G. Stanley, Jr., PLS #18269, entitled "A Boundary Survey Of A Portion of Tax Map # 091-00-091-016, Near Pocotaligo, Jasper County, South Carolina" dated January 3, 2005, recorded in the Register of Deeds for Jasper County in Volume 27 at Page 470 on January 18, 2005, and also shown as "Parcel A" and "Parcel B" on that certain plat entitled "A Boundary Survey of a 327.92 Acres Parcel, Pocotaligo Area, Jasper County, South Carolina," dated March 1, 2005, last revised March 28, 2005, prepared by TGS Land Surveying, certified by Thomas G. Stanley, Jr., PLS (S.C. # 18269), and recorded in the Office of the Clerk of Court for Jasper County, South Carolina in Plat Book 28 at Page 231.

This is the same property conveyed in Point South Investors, LLC by deed from Stanford W. Boozer, Jr., dated January 27, 2005, recorded February 3, 2005 in the office of the Clerk of Court for Jasper County in Deed Book 313 at Page 1.

Portion Tax Map No. 091-00-01-016.

Paul A - 091-00-01-059
Paul B - 091-00-01-060

The within instrument has been transferred
this 26 day of Oct. 2015 at
1:05 o'clock P. M., and recorded
in Transfer Book 3 Page 581
In Assessor's Office. Tax Map No. 091-00-03-011
Transfer No. 15-27-1173 021
020
051
016
JASPER COUNTY, S.C.

Bk 1 Vol 331 Pg 287

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

AFIDAVIT OF TRUE CONSIDERATION
and
EXEMPTION FOR EXISTING ENCUMBRANCE

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

1. I have read the information on this affidavit and I understand such information to be true and complete to the best of my knowledge and belief. In accordance with Sect. 12-24-70, I am the responsible person connected with this transaction.

2. Description/location of the property being transferred is: Parcel One: 74.95 acres; Parcel Two: 13 acres; Parcel Three: 4 acres; Parcel Four: 4 acres; and Parcel Five: 111.87 acres, near Potomacville in Jasper County, SC

Tax District: 01-00-01-01; Parcel One: 01-00-01-01; Parcel Two: 01-00-01-01; Parcel Three: 01-00-01-01; Parcel Four: 01-00-01-01; Parcel Five: 01-00-01-01.

This property was transferred by: POINTSOUTH INVESTORS, LLC

to: THE SETTINGS OF MACKAY POINT, LLC

3. The Deed is:

- i) X subject to the Deed recording fee as a transfer for consideration paid or to be paid in money or money's worth; or, is subject to the Deed recording fee as a transfer between a corporation, a partnership, or other entity, and a stockholder, partner, or owner of the entity; or is a transfer to a trust or as a distribution to a trust beneficiary.
- b) except from the Deed recording fee under 12-24-40 subsection , SC Code.

4. Check one of the following if (a), above has been checked:

- a) X The Recording Fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$2,100,000.00.
- b) Fee is computed on the full market value of the realty, which is \$
- c) The Fee is computed on the full market value of the realty as established for property tax purposes, which is \$

5. EXEMPTION FOR EXISTING ENCUMBRANCE: A lien or encumbrance existed on the land, interest, or realty before the transfer and remained on the land, interest or realty after the transfer. The amount of the outstanding balance of this lien or encumbrance is: \$1,198,993.75 and 1700,000.00 = \$1,898,993.75.

The Deed Recording Fee is computed as follows:

- | | | |
|----|------------------------------------|----------------|
| a) | Amount listed in item 4, above: | \$2,100,000.00 |
| b) | Amount listed in item 5, above: | \$1,198,993.75 |
| c) | Subtract Line 5(a) from line 5(b): | \$ 401,006.25 |

The Deed Recording Fee due, which are calculated against the net amount listed on Line 4 X , above is: \$ or 5.c), above is: \$1,483.72

Signature of Responsible Person Connected with Transaction: [Signature]

Printed/Typed Name and Capacity/Title of Responsible Person: Eugene Way, Manager of Point South Investors, LLC

SWORN to before me this 20th day of October, 2009.

Signed: [Signature]

NOTARY PUBLIC for South Carolina

My Commission Expires: 07/25/09

DEED BOOK

PAGE 0025

DATE

10-20-09

NOTARY JASPER COUNTY SC

Instrument Being Filed
20091020177
287

EXHIBIT B
TO DEVELOPMENT AGREEMENT
PLANNED DEVELOPMENT DISTRICT

The Planned Development District approval for the The Sellings of Mackay Point(the Property hereunder), as approved by the County Council on _____, 2006, is hereby incorporated herein by reference, to include all drawings, plans, narratives and documentation submitted therewith, as fully as if attached hereto. The parties hereto may elect to physically attach said documents hereto, or may rely upon the above stated incorporation by reference, at their discretion.

EXHIBIT C
TO DEVELOPMENT AGREEMENT
Zoning Regulations

1. The Jasper County Zoning Ordinance, as codified through Supplement
2. The Planned District Development (PDD) Conceptual Master Plan and adopted
by Jasper County by Ordinance Number _____
3. Architectural Design Standards and Guidelines, The Settings of Mackay Point

EXHIBIT D

TO DEVELOPMENT AGREEMENT

DEVELOPMENT SCHEDULE

Development of the Property is expected to occur over the five (5) year term of the Agreement, with the sequence and timing of development activity to be dictated largely by market conditions. The following estimate of expected activity is hereby included, to be updated by Owner as the development evolves over the term:

Year	Residential (dwelling units)
2006	_____
2007	_____
2008	_____
2009	_____
2010	_____

As stated in the Development Agreement, Section VI, actual development may occur more rapidly or less rapidly, based on market conditions and final product mix.

EXHIBIT E
TO DEVELOPMENT AGREEMENT

Commercial Fees

(NOT APPLICABLE)

SUBDIVISION BOND

Bond No.: 5026755Principal Amount: \$3,049,161.14

KNOW ALL MEN BY THESE PRESENTS, that we The Settings of Mackay Point, LLC, 4300 Paces Ferry Road, Suite 500, Atlanta, GA 30339 as Principal, and Bond Safeguard Insurance Company, 1919 S. Highland Avenue, Bldg. A-Suite 300, Lombard, IL 60148 an Illinois Corporation, as Surety, are held and firmly bound unto Jasper County, 651 Grays Highway, Ridgeland, SC 29936, as Obligee, in the penal sum of Three Million Forty Nine Thousand one Hundred Sixty One and 14/100 (Dollars) (\$3,049,161.14), lawful money of the United States of America, for the payment of which well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

WHEREAS, The Settings of Mackay Point, LLC has agreed to construct in The Settings of Mackay Point, Phase II West Subdivision, in Jasper County, SC the following improvements:

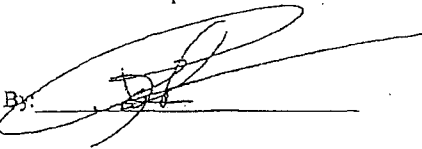
Site clearing, earthwork, grading, erosion control, water & sewer, stormwater, pavement, traffic control.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Principal shall construct, or have constructed, the improvements herein described, and shall save the Obligee harmless from any loss, cost or damage by reason of its failure to complete said work, then this obligation shall be null and void, otherwise to remain in full force and effect, and the Surety, upon receipt of a resolution of the Obligee indicating that the improvements have not been installed or completed, will complete the improvements or pay to the Obligee such amount up to the Principal amount of this bond which will allow the Obligee to complete the improvements.

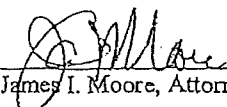
Upon approval by the Obligee, this instrument may be proportionately reduced as the public improvements are completed.

Signed, sealed and dated, this 18th day of April, 2007.

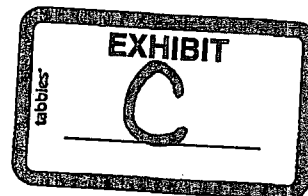
The Settings of Mackay Point, LLC
Principal

By: 

Bond Safeguard Insurance Company
Surety

By: 

James I. Moore, Attorney-in-Fact



South Carolina General Assembly
120th Session, 2013-2014

R123, H3774

STATUS INFORMATION

Joint Resolution

Sponsors: Reps. Loftis, Hardwick, Clemmons, Hamilton, Huggins, J.R. Smith, Goldfinch, Hixon, Ryhal, Sottile and Spires

Document Path: I:\council\bill\ncbd\11158ac13.docx

Introduced in the House on March 7, 2013

Introduced in the Senate on April 30, 2013

Last Amended on June 19, 2013

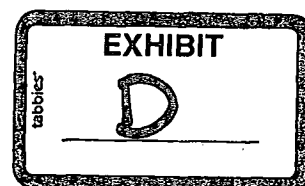
Passed by the General Assembly on June 19, 2013

Governor's Action: June 20, 2013, Signed

Summary: Development of real property

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
3/7/2013	House	Introduced and read first time (House Journal-page 13)
3/7/2013	House	Referred to Committee on Agriculture, Natural Resources and Environmental Affairs (House Journal-page 13)
4/18/2013	House	Committee report: Favorable with amendment Agriculture, Natural Resources and Environmental Affairs (House Journal-page 7)
4/24/2013	House	Amended (House Journal-page 40)
4/24/2013	House	Read second time (House Journal-page 40)
4/24/2013	House	Roll call Yeas-103 Nays-0 (House Journal-page 41)
4/25/2013	House	Read third time and sent to Senate (House Journal-page 27)
4/30/2013	Senate	Introduced and read first time (Senate Journal-page 11)
4/30/2013	Senate	Referred to Committee on Agriculture and Natural Resources (Senate Journal-page 11)
5/28/2013	Senate	Recalled from Committee on Agriculture and Natural Resources (Senate Journal-page 3)
6/5/2013	Senate	Amended (Senate Journal-page 42)
6/5/2013	Senate	Read second time (Senate Journal-page 42)
6/5/2013	Senate	Roll call Ayes-41 Nays-0 (Senate Journal-page 42)
6/6/2013	Senate	Read third time and returned to House with amendments (Senate Journal-page 38)
6/6/2013	House	Non-concurrence in Senate amendment (House Journal-page 80)
6/6/2013	House	Roll call Yeas-0 Nays-87 (House Journal-page 81)
6/6/2013	Senate	Senate insists upon amendment and conference committee appointed Hutto, Cleary, Hembree (Senate Journal-page 49)
6/6/2013	House	Conference committee appointed Hardwick, Hodges, Clemmons (House Journal-page 100)
6/19/2013	Senate	Conference report received and adopted (Senate Journal-page 4)
6/19/2013	Senate	Roll call Ayes-41 Nays-0 (Senate Journal-page 4)
6/19/2013	House	Conference report received and adopted (House Journal-page 9)
6/19/2013	House	Roll call Yeas-100 Nays-0 (House Journal-page 12)
6/19/2013	House	Ordered enrolled for ratification (House Journal-page 26)
6/19/2013		Ratified R 123



6/20/2013 Signed By Governor
6/26/2013 Effective date 06/20/13

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VERSIONS OF THIS BILL

[3/7/2013](#)

[4/18/2013](#)

[4/24/2013](#)

[5/28/2013](#)

[6/5/2013](#)

[6/19/2013](#)

NOTE: THIS COPY IS A TEMPORARY VERSION. THIS DOCUMENT WILL REMAIN IN THIS VERSION UNTIL PUBLISHED IN THE ADVANCE SHEETS TO THE ACTS AND JOINT RESOLUTIONS. WHEN THIS DOCUMENT IS PUBLISHED IN THE ADVANCE SHEET, THIS NOTE WILL BE REMOVED.

(R123, H3774)

A JOINT RESOLUTION TO SUSPEND THE RUNNING OF CERTAIN GOVERNMENTAL APPROVALS AFFECTING THE DEVELOPMENT OF REAL PROPERTY WITHIN THE STATE FOR THE PERIOD BEGINNING JANUARY 1, 2013 AND ENDING DECEMBER 31, 2016; AND TO PROVIDE GOVERNMENTAL ENTITIES ISSUING SUCH APPROVALS SHALL PUBLISH NOTICE IN THE STATE REGISTER LISTING THE TYPES OF THESE APPROVALS IT ISSUES AND NOTING THE SUSPENSION OF THE RUNNING OF THE PERIOD OF THE APPROVAL AND TO PROVIDE AN EXCEPTION FOR UNITS OF LOCAL GOVERNMENT.

Whereas, there exists a state of economic emergency in the State of South Carolina and the nation, which has drastically affected various segments of the South Carolina economy, but none as severely as the state's banking, real estate, and construction sectors; and

Whereas, the real estate finance sector of the economy is in severe decline due to the creation, bundling, and widespread selling of leveraged securities, such as credit default swaps, and due to excessive defaults on subprime mortgages and the resultant foreclosures on a vast scale, thereby widening the mortgage finance crisis. The extreme tightening of lending standards for home buyers and other real estate borrowers has reduced access to the capital markets; and

Whereas, as a result of the crisis in the real estate finance sector of the economy, real estate developers and redevelopers, including home builders, commercial, office, and industrial developers, have experienced an industry-wide decline, including reduced demand, canceled orders, declining sales and rentals, price reductions, increased inventory, fewer buyers who qualify to purchase homes, layoffs, and scaled-back growth plans; and

Whereas, the process of obtaining planning board and zoning board of adjustment approvals for subdivisions, site plans, and variances can be difficult, time consuming, and expensive, both for private applicants and governmental bodies; and

Whereas, the process of obtaining the myriad of other governmental approvals, such as wetlands permits, land disturbance and stormwater management permits, treatment works approvals, on-site wastewater disposal permits, highway access permits, critical area permits and coastal zone consistency certifications, and numerous waivers and variances, can be difficult and expensive. Changes in the law can render these approvals, if expired or lapsed, difficult to renew or reobtain; and

Whereas, the citizens of this State and county and municipal governments, including local sewer and water authorities, obtain permits and approvals from state governmental agencies, particularly the Department of Health and Environmental Control, which permits and approvals may expire or lapse due to the state of the economy and the inability of both the public sector and the private sector to proceed with projects authorized by the permit or approval; and

Whereas, the citizens of this State and county and municipal governments also obtain determinations of consistency, conformance, or endorsement with state or regional plans from state and regional governmental entities that may expire or lapse without implementation due to the state of the economy; and

Whereas, the current national recession has severely weakened the building industry, and many landowners and developers are seeing their life's work destroyed by the lack of credit and dearth of buyers and tenants due to the crisis in real estate financing and the building industry, uncertainty over the state of the economy, and increasing levels of unemployment in the construction industry; and

Whereas, the construction industry and related trades are sustaining severe economic losses, and the lapsing of governmental development approvals would exacerbate, if not addressed, those losses; and

Whereas, financial institutions that loaned money to property owners, builders, and developers are experiencing erosion of collateral and depreciation of their assets as permits and approvals expire, and the extension of these permits and approvals is necessary to maintain the

value of the collateral and the solvency of financial institutions throughout the State; and

Whereas, due to the current inability of builders and their purchasers to obtain financing under existing economic conditions, more and more once-approved permits are expiring or lapsing, and, as these approvals lapse, lenders must reappraise and thereafter substantially lower real estate valuations established in conjunction with approved projects, thereby requiring the reclassification of numerous loans, which, in turn, affects the stability of the banking system and reduces the funds available for future lending, thus creating more severe restrictions on credit and leading to a vicious cycle of default; and

Whereas, as a result of the continued downturn of the economy and the continued expiration of approvals that were granted by state and local governments, it is possible that thousands of governmental actions will be undone by the passage of time; and

Whereas, obtaining an extension of an approval pursuant to existing statutory or regulatory provisions can be both costly in terms of time and financial resources and insufficient to cope with the extent of the present financial conditions; moreover, the costs imposed fall on the public as well as the private sector; and

Whereas, it is the purpose of this joint resolution to prevent the wholesale abandonment of already approved projects and activities due to the present unfavorable economic conditions by tolling the term of these approvals for a finite period of time as the economy improves, thereby preventing a waste of public and private resources. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

Citation

SECTION 1. This joint resolution may be cited as the "Permit Extension Joint Resolution of 2013".

Definitions

SECTION 2. As used in this joint resolution:

(1) "Department" means the South Carolina Department of Health and Environmental Control.

(2) "Development" means the division of a parcel of land into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any building or other structure or facility, or any grading, soil removal or relocation, excavation or landfill, or any use or change in the use of any building or other structure or land or extension of the use of land.

(3) "Development approval" means an approval issued by the State, an agency or subdivision of the State, or a unit of local government, regardless of the form of the approval, that is for the development of land or for the provision of water or wastewater services by a governmental entity, including:

(a) an approval of an erosion and sedimentation control plan, land disturbance permit application, or stormwater management plan granted by a local government or by the department;

(b) a water or wastewater permit issued by the department, including authorization for construction and installation of lines and infrastructure extending water and sewer service and authorization to connect to available or proposed lines and infrastructure;

(c) an NPDES permit issued by the department for the construction, operation, and expansion of a publicly owned treatment works;

(d) a 401 water quality certification issued by the department;

(e) an air quality permit issued by the department;

(f) an approval by a county or its authorized boards and commissions of sketch plans, preliminary plats, plats regarding a subdivision of land, a site specific development plan or a phased development plan, or a building permit;

(g) an approval by a city or its authorized boards and commissions of sketch plans, preliminary plats, plats regarding a subdivision of land, a site specific development plan or a phased development plan, or a building permit;

(h) a permit issued by the Office of Coastal Resource Management.

Issuance of expired building permits

SECTION 3. A governmental entity that issued a building permit that has expired and has not been renewed by the governmental entity for one year, shall issue the building permit at no additional cost; however, the building permit must comply with existing rules and regulations in effect at the time the building permit is reissued.

Retroactive suspension of the running of the period of development approvals and vested rights for valid development approvals

SECTION 4. This joint resolution is intended to apply retroactively. For development approval that is current and valid on December 31, 2012, the running of the period of the development approval and any associated vested right is suspended during the period beginning January 1, 2013, and ending December 31, 2016.

Restrictions on the application of provisions

SECTION 5. This joint resolution may not be construed or implemented to:

- (1) extend a permit or approval issued by the United States or its agencies or instrumentalities;
- (2) extend a permit or approval for which the term or duration of the permit or approval is specified or determined pursuant to federal law;
- (3) shorten the duration that a development approval would have had in the absence of this joint resolution;
- (4) prohibit the granting of additional extensions provided by law;
- (5) affect an administrative consent order issued by the department in effect or issued at any time from the effective date of this joint resolution to December 31, 2016;
- (6) affect the ability of a governmental entity to revoke or modify a development approval pursuant to law;
- (7) modify a requirement of law that is necessary to retain federal delegation by the State of the authority to implement a federal law or program; or
- (8) affect a Certificate of Need issued pursuant to Article 3, Chapter 7, Title 44 or a Demonstration of Need issued pursuant to Article 2, Chapter 96, Title 44.

Public notice of development approvals and applicable suspensions

SECTION 6. Within thirty days after the effective date of this joint resolution, each agency or subdivision of the State to which this joint resolution applies shall submit a notice for publication to the State Register listing the types of development approvals that the agency or subdivision issues and noting the suspension provided in this joint resolution. This section does not apply to units of local government.

Provisions to be liberally construed

SECTION 7. The provisions of this joint resolution must be liberally construed to effectuate the purposes of this joint resolution.

Time effective

SECTION 8. This joint resolution takes effect upon approval by the Governor.

Ratified the 19th day of June, 2013.

Approved the 20th day of June, 2013. -- T.

---XX---

South Carolina General Assembly
118th Session, 2009-2010

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A297, R215, H4445

STATUS INFORMATION

Joint Resolution

Sponsors: Reps. Loftis, Norman, Merrill, Hardwick, Erickson, Wylie, Chalk, Stewart, Pinson, Bedingfield, Huggins, Frye, Clemmons, Rice, Parker, G.R. Smith, Lowe, Hiott, Allison, Allen, Anthony, Bales, Ballentine, Bannister, Barfield, Bingham, Bowen, Cato, Cole, Cooper, Crawford, Daning, Delleney, Duncan, Edge, Gambrell, Hamilton, Harrell, Hearn, Horne, Kelly, Limehouse, Littlejohn, Long, Lucas, D.C. Moss, V.S. Moss, Nanney, Owens, M.A. Pitts, Sandifer, Scott, Simrill, D.C. Smith, G.M. Smith, Spires, Stringer, Thompson, Toole, Umphlett, Viers, White, Whitmire, Willis, A.D. Young, T.R. Young and Weeks

Document Path: l:\council\bill\sgm\19598ab10.docx

Introduced in the House on January 27, 2010

Introduced in the Senate on March 2, 2010

Last Amended on April 27, 2010

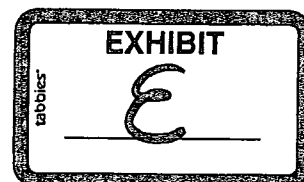
Passed by the General Assembly on May 6, 2010

Governor's Action: May 19, 2010, Signed

Summary: Property

HISTORY OF LEGISLATIVE ACTIONS

Date	Body	Action Description with journal page number
1/27/2010	House	Introduced and read first time <u>HJ-32</u>
1/27/2010	House	Referred to Committee on <u>Labor, Commerce and Industry</u> <u>HJ-33</u>
2/4/2010	House	Committee report: Favorable with amendment <u>Labor, Commerce and Industry</u> <u>HJ-11</u>
2/8/2010		Scrivener's error corrected
2/24/2010	House	Member(s) request name added as sponsor: Weeks
2/25/2010	House	Debate adjourned <u>HJ-25</u>
2/25/2010	House	Amended <u>HJ-48</u>
2/25/2010	House	Read second time <u>HJ-49</u>
2/25/2010	House	Unanimous consent for third reading on next legislative day <u>HJ-49</u>
2/26/2010	House	Read third time and sent to Senate <u>HJ-3</u>
3/2/2010	Senate	Introduced and read first time <u>SJ-18</u>
3/2/2010	Senate	Referred to Committee on <u>Judiciary</u> <u>SJ-18</u>
3/24/2010	Senate	Committee report: Favorable with amendment <u>Judiciary</u> <u>SJ-12</u>
4/27/2010	Senate	Committee Amendment Amended and Adopted <u>SJ-53</u>
4/27/2010	Senate	Read second time <u>SJ-53</u>
4/28/2010		Scrivener's error corrected
4/28/2010	Senate	Read third time and returned to House with amendments <u>SJ-25</u>
5/6/2010	House	Concurred in Senate amendment and enrolled <u>HJ-35</u>



5/6/2010	House	Roll call Yeas-100 Nays-1 HJ-35
5/13/2010		Ratified R 215
5/19/2010		Signed By Governor
5/26/2010		Effective date 05/19/10
9/9/2010		Act No. 297

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[1/27/2010](#)
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[3/24/2010](#)
[4/27/2010](#)
[4/28/2010](#)

(Text matches printed bills. Document has been reformatted to meet World Wide Web specifications.)

(A297, R215, H4445)

A JOINT RESOLUTION TO EXTEND CERTAIN GOVERNMENT APPROVALS AFFECTING THE DEVELOPMENT OF REAL PROPERTY WITHIN THE STATE.

Whereas, there exists a state of economic emergency in the State of South Carolina and the nation, which has drastically affected various segments of the South Carolina economy, but none as severely as the state's banking, real estate, and construction sectors; and

Whereas, the real estate finance sector of the economy is in severe decline due to the creation, bundling, and widespread selling of leveraged securities, such as credit default swaps, and due to excessive defaults on sub-prime mortgages and the resultant foreclosures on a vast scale, thereby widening the mortgage finance crisis. The extreme tightening of lending standards for home buyers and other real estate borrowers has reduced access to the capital markets; and

Whereas, as a result of the crisis in the real estate finance sector of the economy, real estate developers and redevelopers, including home builders, commercial, office, and industrial developers, have experienced an industry-wide decline, including reduced demand, canceled orders, declining sales and rentals, price reductions, increased inventory, fewer buyers who qualify to purchase homes, layoffs, and scaled-back growth plans; and

Whereas, the process of obtaining planning board and zoning board of adjustment approvals for subdivisions, site plans, and variances can be difficult, time consuming, and expensive, both for private applicants and governmental bodies; and

Whereas, the process of obtaining the myriad of other government approvals, such as wetlands permits, land disturbance and stormwater management permits, treatment works approvals, on-site wastewater disposal permits, highway access permits, critical area permits and coastal zone consistency certifications, and numerous waivers and variances, can be difficult and expensive. Changes in the law can render these approvals, if expired or lapsed, difficult to renew or reobtain; and

Whereas, the citizens of this State and county and municipal governments, including local sewer and water authorities, obtain permits and approvals from state governmental agencies, particularly the Department of Health and Environmental Control, which permits and approvals may expire or lapse due to the state of the economy and the inability of both the public sector and the private sector to proceed with projects authorized by the permit or approval; and

Whereas, the citizens of this State and county and municipal governments also obtain determinations of consistency, conformance, or endorsement with state or regional plans from state and regional governmental entities that may expire or lapse without implementation due to the state of the economy; and

Whereas, the current national recession has severely weakened the building industry, and many landowners and developers are seeing their life's work destroyed by the lack of credit and dearth of buyers and tenants due to the crisis in real estate financing and the building industry, uncertainty over the state of the economy, and increasing levels of unemployment in the construction industry; and

Whereas, the construction industry and related trades are sustaining severe economic losses, and the lapsing of government development approvals would exacerbate, if not addressed, those losses; and

Whereas, financial institutions that loaned money to property owners, builders, and developers are experiencing erosion of collateral and depreciation of their assets as permits and approvals expire, and the extension of these permits and approvals is necessary to maintain the value of the collateral and the solvency of financial institutions throughout the State; and

Whereas, due to the current inability of builders and their purchasers to obtain financing under existing economic conditions, more and more once-approved permits are expiring or lapsing, and, as these approvals lapse, lenders must reappraise and thereafter substantially lower real estate valuations established in conjunction with approved projects, thereby requiring the reclassification of numerous loans, which, in turn, affects the stability of the banking system and reduces the funds available for future lending, thus creating more severe restrictions on credit and leading to a vicious cycle of default; and

Whereas, as a result of the continued downturn of the economy and the continued expiration of approvals that were granted by state and local governments, it is possible that thousands of government actions will be undone by the passage of time; and

Whereas, obtaining an extension of an approval pursuant to existing statutory or regulatory provisions can be both costly in terms of time and financial resources and insufficient to cope with the extent of the present financial conditions; moreover, the costs imposed fall on the public as well as the private sector; and

Whereas, it is the purpose of this joint resolution to prevent the wholesale abandonment of already approved projects and activities due to the present unfavorable economic conditions by tolling the term of these approvals for a finite period of time as the economy improves, thereby preventing a waste of public and private resources. Now, therefore,

Be it enacted by the General Assembly of the State of South Carolina:

Cite as Permit Extension Joint Resolution of 2010

SECTION 1. This joint resolution must be known and may be cited as the "Permit Extension Joint Resolution of 2010".

Definitions

SECTION 2. As used in this resolution:

- (1) "Department" means the South Carolina Department of Health and Environmental Control.
- (2) "Development" means the division of a parcel of land into two or more parcels, the construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any building or other structure or facility, or any grading, soil removal or relocation, excavation or landfill, or any use or change in the use of any building or other structure or land or extension of the use of land.
- (3) "Development approval" means an approval issued by the State, an agency or subdivision of the State, or a unit of local government, regardless of the form of the approval, that is for the development of land or for the provision of water or wastewater services by a governmental entity, including:
 - (a) an approval of an erosion and sedimentation control plan, land disturbance permit application, or stormwater management plan granted by a local government or by the department;
 - (b) a coastal zone consistency certification issued by the department's Office of Ocean and Coastal Resource Management;
 - (c) a water or wastewater permit issued by the department, including authorization for construction and installation of lines and infrastructure extending water and sewer service and authorization to connect to available or proposed lines and infrastructure;
 - (d) an NPDES permit issued by the department for the construction, operation, and expansion of a publicly owned treatment works;
 - (e) a 401 water quality certification issued by the department;
 - (f) a critical area permit issued by the department's Office of Ocean and Coastal Resource Management;
 - (g) an air quality permit issued by the department;
 - (h) an approval by a county or its duly authorized boards and commissions of sketch plans, preliminary plats, plats regarding a subdivision of land, a site specific development plan or a phased development plan, or a building permit. For building permits that have expired and not been renewed by the county for one year, the building permit must be issued at no additional cost; however, the building permit must comply with existing rules and regulations in effect at the time the building permit is reissued; and
 - (i) an approval by a city or its duly authorized boards and commissions of sketch plans, preliminary plats, plats regarding a subdivision of land, a site specific development plan or a phased development plan, or a building permit. For building permits that have expired and not been renewed by the city for one year, the building permit must be issued at no additional cost; however, the building permit must comply with existing rules and regulations in effect at the time the building permit is reissued.

Application and termination

SECTION 3. This joint resolution is intended to apply retroactively. For development approval that is current and valid at any point during the period beginning January 1, 2008, and ending December 31, 2012, the running of the period of the development approval and any associated vested right is suspended during the period beginning January 1, 2008, and ending December 31, 2012.

Limitations on construction and implementation

SECTION 4. This joint resolution may not be construed or implemented to:

- (1) extend a permit or approval issued by the United States or its agencies or instrumentalities;
- (2) extend a permit or approval for which the term or duration of the permit or approval is specified or determined pursuant to federal law;
- (3) shorten the duration that a development approval would have had in the absence of this act;
- (4) prohibit the granting of additional extensions provided by law;
- (5) affect an administrative consent order issued by the department in effect or issued at any time from the effective date of this act to December 31, 2012;
- (6) affect the ability of a governmental entity to revoke or modify a development approval pursuant to law;
- (7) modify a requirement of law that is necessary to retain federal delegation by the State of the authority to implement a federal law or program;
- (8) affect a Certificate of Need issued pursuant to Article 3, Chapter 7, Title 44 or a Demonstration of Need issued pursuant to Article 2, Chapter 96, Title 44231; or
- (9) affect SCDHEC-OCRM permits issued pursuant to R.30-12(N) Access to Coastal Islands.

Affected agencies must provide certain notice in State Register

SECTION 5. Within thirty days after the effective date of this joint resolution, each agency or subdivision of the State to which this joint resolution applies shall place a notice in the State Register listing the types of development approvals that the agency or subdivision issues and noting the extension provided in this joint resolution. This section does not apply to units of local government.

Provisions of Joint Resolution to be liberally construed

SECTION 6. The provisions of this joint resolution must be liberally construed to effectuate the purposes of this joint resolution.

Time effective

SECTION 7. This joint resolution takes effect upon approval by the Governor.

Ratified the 13th day of May, 2010.

Approved the 19th day of May, 2010.

This web page was last updated on February 18, 2011 at 9:28 AM

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

JASPER COUNTY,

Plaintiff,

v.

THE SETTINGS OF MACKEY POINT,
LLC and BOND SAFEGUARD
INSURANCE COMPANY,

Defendants.

IN THE COURT OF COMMON PLEAS

Docket No.: 2010-CP-27-252

SUMMONS

FILED
2010 APR 19 PM 3:12
MARGARET BOSTICK
CLERK OF COURT
JASPER COUNTY SC

YOU ARE HEREBY SUMMONED and required to answer the Complaint, a copy of which is served upon you, and to serve a copy of your written response to the Complaint on the subscribers at the law office of Turner Padget, 40 Calhoun Street, Suite 200, Charleston, SC 29401, within thirty (30) days after the date of service, exclusive of the day of service. If you fail to answer the Complaint within that time, Plaintiff will apply to the Court for the relief demanded in the Complaint.

TURNER PADGET

David S. Cobb

Post Office Box 22129

Charleston, South Carolina 29413-2129

Direct: (843) 576-2803

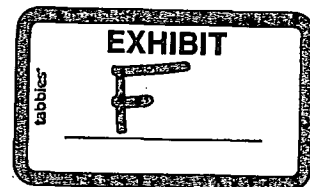
Fax: (843) 577-1629

DCobb@TurnerPadget.com

Charleston, South Carolina

April 16, 2010

ATTORNEYS FOR PLAINTIFF



TPGL 3200921v1

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)
JASPER COUNTY,)
Plaintiff,)
v.) **COMPLAINT**
THE SETTINGS OF MACKAY POINT,)
LLC and BOND SAFEGUARD)
INSURANCE COMPANY,)
Defendants.)

IN THE COURT OF COMMON PLEAS
Docket No.: 2010-CP-27-_____

2010 APR 19 PM 3:13
MARGARET BOSTICK
CLERK OF COURT
JASPER COUNTY SC

Plaintiff complains of Defendants and alleges unto this Court:

THE PARTIES AND JURISDICTION

1. Plaintiff is a political body organized pursuant to the South Carolina Constitution and the South Carolina Code of Laws and is charged with, among other things, the duty to ensure compliance with all applicable zoning ordinances for Jasper County.

2. Defendant The Settings of Mackay Point, LLC is a limited liability company organized under the laws of one of the states of the United States and is the developer of property commonly known as The Settings of Mackay Point in Jasper County, South Carolina.

3. Defendant Bond Safeguard Insurance Company is a corporation organized and existing under Illinois law that conducted business in Jasper County, South Carolina. Bond Safeguard Insurance Company, as Surety, Issued numerous bonds with Defendant The Settings of Mackay Point, LLC as Principal and Jasper County as Oblige.

4. The bonds included the following: (a) Subdivision Bond No. 5023141 dated August 9, 2006 in the penal sum of Five Million Four Hundred Fifty-Eight Thousand Four Hundred Fifty-Six and 25/100 (\$5,458,456.25) Dollars for "Roads, curbs & gutter, sewer, water & storm drainage." The parties reduced that bond to Two Million

TPGL 3200921v1

One Hundred Sixteen Thousand Four Hundred Forty-Four and no/100 (\$2,116,444.00) Dollars effective September 19, 2008; (b) Subdivision Bond No. 5026751 dated April 18, 2007 in the penal sum of Forty-Two Thousand Six Hundred Ninety-Four and 38/100 (\$42,694.38) Dollars for improvements to "Site clearing, earth work, grading, erosion control, stormwater, pavement, traffic control for Mackay Point Road;" (c) Subdivision Bond No. 5026754 dated April 18, 2007 in the penal sum of One Million Two Hundred Eighty-Seven Thousand Two Hundred Sixty-Two and 71/100 (\$1,287,262.71) Dollars for improvements at The Settings of Mackay Point, Phase II East for "Site clearing, earth work, grading, erosion control, water & sewer, stormwater, pavement, traffic control;" (d) Subdivision Bond No. 5026755 dated April 18, 2007 in the penal sum of Three Million Forty-Nine Thousand One Hundred Sixty-One and 14/100 (\$3,049,161.14) Dollars for improvements at The Settings of Mackay Point, Phase II West for "Site clearing, earth work, grading, erosion control, water & sewer, stormwater, pavement, traffic control;" and (e) Subdivision Bond No. 5026756 dated April 18, 2007 in the penal sum of One Hundred Forty-Seven Thousand Eight Hundred Twenty-Five and no/100 (\$147,825.00) Dollars for Improvements to "Site clearing, earth work, grading, erosion control, stormwater, pavement, traffic control – Hwy 17-A."

5. This Court has jurisdiction over the parties in the subject matter.

6. On June 19, 2006, pursuant to Ordinance 06-18, Jasper County and Defendant, The Settings of Mackay Point, LLC entered into a Development Agreement. The then existing Jasper County Development Standards Ordinance, which governed the development of the project, required completion of the infrastructure construction or the bonding of the Infrastructure construction as a prerequisite to recording of subdivision plats. Recorded subdivision plats were necessary in order to sell lots. The Settings of Mackay Point, LLC posted the bonds referred to in paragraph 4 and recorded three subdivision plats. The Settings of Mackay Point, LLC has sold and conveyed more than 120 residential lots at The Settings of Mackay Point Development.

7. Defendant The Settings of Mackay Point, LLC has not completed construction of the Infrastructure and has indicated an unwillingness to complete this construction at this time.

8. On March 15, 2010, Jasper County Council adopted a resolution declaring the bonds in default.

FOR A FIRST CAUSE OF ACTION
(Negligence)

9. Plaintiff repeats the allegations stated previously and incorporates them verbatim.

10. Defendant The Settings of Mackay Point, LLC undertook construction of this project.

11. Defendant The Settings of Mackay Point, LLC owed a duty to Plaintiff to design, construct, and complete the infrastructure in a workmanlike fashion, using suitable supplies and details, in accordance with good design, the applicable building codes, and in compliance with the applicable zoning, land development regulations, and Development Agreement.

12. Defendant The Settings of Mackay Point, LLC was negligent in failing to complete the construction in accordance with the applicable standards, zoning, and Development Agreement in one or more of the following:

- (A) In failing to use due care in the development and construction of the infrastructure;
- (B) Failing to take required actions to complete the development and construction of the infrastructure;
- (C) Failing to adhere to the applicable zoning, land development regulations, and Development Agreement; and
- (D) Other deficiencies and failures that may be proven at trial.

13. As a direct and proximate result of the negligence by Defendant The Settings of Mackay Point, LLC, Plaintiff has incurred actual, incidental, consequential, and special damages including, but not limited to, the expense of having to hire persons to investigate the deficiencies, and the potential to have to spend substantial monies in order to correct, complete, and restore the Infrastructure at the project.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

14. Plaintiff repeats the allegations stated previously and incorporates them verbatim.

15. Plaintiff and Defendant The Settings of Mackay Point, LLC entered into a Development Agreement that required Defendant The Settings of Mackay Point, LLC to complete certain infrastructure development.

16. Defendant The Settings of Mackay Point, LLC and its agents, servants, officers, and employees had an obligation and duty to design, develop, and complete the infrastructure and to provide materials and services in accordance with the applicable building codes, zoning, and Development Agreement.

17. Defendant The Settings of Mackay Point, LLC has breached the contract with Plaintiff by failing to develop and complete the infrastructure in accordance with the applicable building codes, in conformance with accepted construction industry standards, in conformance with the applicable zoning, and in conformance with the Development Agreement. Defendant The Settings of Mackay Point, LLC's breach has directly and proximately caused defects and deficiencies in the project, which will need to be corrected and completed, and is a breach of the Development Agreement. Such breaches include, but are not limited to, the following:

- (A) In failing to use due care in the development and construction of the infrastructure;
- (B) Failing to take required actions to complete the development and construction of the infrastructure;
- (C) Failing to adhere to the applicable zoning, land development regulations, and Development Agreement; and
- (D) Other deficiencies and failures that may be proven at trial.

18. As a direct and proximate result of the breach by Defendant The Settings of Mackay Point, LLC, Plaintiff has suffered actual, incidental, consequential, and special damages including, but not limited to, the expense of having to hire persons to investigate the deficiencies, and the potential to have to spend substantial monies in order to correct, complete, and restore the infrastructure at the project.

FOR A THIRD CAUSE OF ACTION
(Bond)

19. Plaintiff repeats the allegations stated previously and incorporates them verbatim.

20. Defendant Bond Safeguard Insurance Company issued Subdivision Bond Numbers 5023141, 5026751, 5026754, 5026755, and 5026756 naming itself as Surety, Defendant The Settings of Mackay Point, LLC, as Principal, and Jasper County as Obligee. Each bond specifically stated:

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Principal shall construct, or have constructed, the improvements herein described, and shall save the Obligee harmless from any loss, cost or damage by reason of its failure to complete said work, then this obligation shall be null and void, otherwise to remain in full force and effect, and the Surety, upon receipt of a resolution of the Obligee indicating that the improvements have not been installed or completed, will complete the improvements or pay to the Obligee such amount up to the Principal amount of this bond which will allow the Obligee to complete the improvements.

21. The bonds provide, inter alia, that Defendants, jointly and severely, bind themselves, their heirs, executors, administrators, successors, and assigns to Plaintiff for performance of the work subject to the bonds. The bonds further provide, inter alia, that in the event of default by Defendant The Settings of Mackay Point, LLC, Defendant Bond Safeguard Insurance Company, as Surety, is obligated for the responsibilities of Defendant The Settings of Mackay Point, LLC for correction of defective work and completion of the improvements.

22. Pursuant to the terms of each bond, Defendant Bond Safeguard Insurance Company is liable to Plaintiff based upon the failings by Defendant The Settings of Mackay Point, LLC.

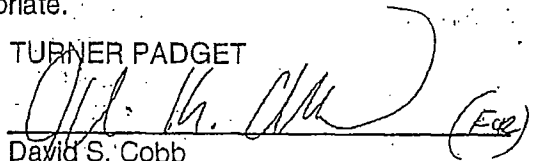
23. Plaintiff has performed all obligations required of it under the terms of the bonds.

24. Defendant The Settings of Mackay Point, LLC is in default within the meaning of the bonds. As a result of this breach, Plaintiff is entitled to judgment against Defendant Bond Safeguard Insurance Company in an amount to be determined by the trier of fact, together with attorneys' fees and costs. Alternatively, Defendant Bond Safeguard Insurance Company, as surety, should complete the improvements involving the Bonds.

WHEREFORE, Plaintiff respectfully prays this Court hold the Defendants jointly and severally liable for the conduct complained of in this Complaint, including, but not

limited to, an Order requiring Defendant Bond Safeguard Insurance Company to complete the improvements pertaining to the bonds or to pay Plaintiff such amount up to the Principal amounts of the bonds that will allow Plaintiff to complete the improvements, award Plaintiff costs and attorneys' fees, and award such other and further relief as this Court deems appropriate.

TURNER PADGET


David S. Cobb
Post Office Box 22129
Charleston, South Carolina 29413-2129
Direct: (843) 576-2803
Fax: (843) 577-1629
DCobb@TurnerPadget.com

Charleston, South Carolina

April 16, 2010

ATTORNEYS FOR PLAINTIFF

TPGL 3200921v1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER	)	FOURTEENTH JUDICIAL CIRCUIT
	)	CASE NO. 2010-CP-27-252
Jasper County,	)	
	)	
Plaintiff,	)	
	)	
v.	)	BOND SAFEGUARD INSURANCE
	)	COMPANY'S MEMORANDUM IN
The Settings of Mackey Point, LLC and Bond	)	OPPOSITION TO PLAINTIFF'S MOTION
Safeguard Insurance Company,	)	FOR SUMMARY JUDGMENT
	)	
Defendants.	)	

TO: DAVID S. COBB, ATTORNEY FOR JASPER COUNTY:

INTRODUCTION

Defendant Bond Safeguard Insurance Company ("BSI") hereby objects to Plaintiff's Motion for Summary Judgment. Pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, such a motion is only appropriate when "there is no genuine issue as to any material fact and [when] the moving party is entitled to a judgment as a matter of law." In this case, neither of these criteria can be satisfied.

First, genuine issues of material fact exist as to whether the bond Principal, The Settings of Mackey Point, LLC ("Settings"), or BSI as its surety, are in default under the terms of the Development Agreement. The Development Agreement does not mandate completion of infrastructure as asserted by Plaintiff, and even if it does, the obligation to complete has an indefinite term that does not expire until at least June 19, 2016.

Second, the Development Agreement pegs the completion of the development to "market conditions." Market conditions do not support further development at this time, and this fact is reflected by the Permit Extension Joint Resolution of 2010, wherein the General Assembly



proclaims a state of economic emergency and the severe decline of the real estate sector. Investment of money in completion of the project at this time presents a practical impossibility and would constitute economic waste.

Third, the Permit Extension Joint Resolution of 2010 tolls any rights and obligations of the Development Agreement by five years. As such, the term of the agreement now expires on June 19, 2021, as a matter of law.

SUMMARY JUDGMENT STANDARD

Summary judgment is a “drastic remedy.” Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). It “is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.” Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011). “When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.” Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Under this summary judgment standard, the Court gives “every benefit of the doubt” to the non-moving party. Watters v. Terminix Service, Inc., 376 S.C. 632, 635, 658 S.E.2d 110, 111 (Ct. App. 2008).

“In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment.’ This standard requires merely ‘the slightest amount of relevant evidence’ on an issue to warrant denial of summary judgment. Harris Teeter, Inc. v. Moore & Van Allen, PLLC, 390 S.C. 275, 294-95, 701 S.E.2d 742, 752 (2010) (Hearn, J., concurring in part, dissenting in part) (quoting Hancock v. Mid-S. Mgmt. Co., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) and Black’s Law Dictionary 635 (3d pocket ed. 2006)).

DISCUSSION

In this case, summary judgment is absolutely inappropriate.

In its Complaint and Motion, Plaintiff asserts that BSI issued bonds for the development and construction of certain infrastructure at the Settings of Mackey Point and that such work has not been completed. Plaintiff argues that these facts alone justify summary judgment. However, Plaintiff fails to disclose material and fundamental facts, which, at a minimum, require a full hearing at trial, if not summary judgment for BSI. The omitted facts derive primarily from the terms of the Development Agreement that underlie the purported bond obligations.

The Development Agreement, mentioned by Plaintiff on the first page of its Motion, was entered into between Plaintiff and the Settings on June 19, 2006. It is attached hereto as Exhibit 1. On page three of its Motion, Plaintiff indicates correctly that a surety stands in the place of its Principal. In other words, the surety's obligations are no broader than the terms of the bond and the underlying agreement. Further, the surety is entitled to any rights or defenses available to the Principal arising from the underlying agreement or other applicable law. However, Plaintiff does not disclose any of the terms of the Agreement in its Motion.

A. By the terms of the Agreement, there is no default.

The Agreement was entered into pursuant to the South Carolina Local Government Development Agreement Act, as codified in Sections 6-31-10 through 6-31-160 of the Code of Laws of South Carolina (1976), as amended. (Agreement at 3.) The express term of the Agreement is for ten years, as stated in Section III. The development schedule is found in Section VI and in Exhibit D¹ of the Agreement. Contrary to the inference of Plaintiff, the Agreement does not provide a bright-line, mandatory completion schedule for the project. Rather, the terms of completion are practical.

Exhibit D states that "[d]evelopment of the Property is *expected* to occur over the [ten (10) year] term of the Agreement, with the sequence and timing of development activity *to be dictated largely by market conditions*. . . . *[A]ctual development may occur more rapidly or less*

¹ Exhibit D contains an apparent typographical error, as it states that the term of the Agreement is five years, which conflicts with Section III. As this development encompasses 327.92 acres (between 250 and 1000 acres), S.C. Code § 6-31-40 allows a ten year term, consistent with Section III of Agreement.

rapidly, based on market conditions.” (Emphasis added.) Section VI states further that “Development activity *may occur faster or slower* than the forecast schedule, *as a matter of right*, depending on market conditions.” (Emphasis added.) Again, this section provides that the schedule may be amended “to reflect *actual* market absorption.” (Emphasis added.)

Given the terms, Plaintiff’s efforts to enforce the obligations of the Agreement against BSI in a rigid fashion are patently inappropriate. Indeed, the Agreement expressly states that “the failure of the Owner and any Developer to meet the initial development schedule *shall not*, in and of itself, constitute a material breach of this Agreement.” (Emphasis added.) Further, “[t]he fact that actual development may take place at a different pace, based on future market forces, is *expected* and *shall not* be considered a default hereunder.” (Emphasis added.) Given these terms, Plaintiff’s pending Motion seems to be an effort to hold BSI to a completion obligation that the Developer does not even have. As a matter of fact - derived from the Agreement, the Developer’s default has not been established, as the failure to complete “shall not” itself be considered a default. Indeed, the terms of the Agreement indicate, or at least give rise to an inference, that completion is not mandatory. In any event, completion is plainly not required to be accomplished before the end of the term of the Agreement. As it stands, the express term is ten years, which is nearly four years away from expiration.

B. Market conditions make completion a practical impossibility and wasteful.

Further, given the prevailing market conditions, development of this property at this time would be impracticable or otherwise constitute an economic waste. By the language of the Agreement, it is clear that the parties recognized such a possibility. In support of their foresight, and the terms as drafted, are the doctrines of impossibility and impracticability of performance, which constitute “legal excuses for nonperformance.” 4A Philip L. Bruner & Patrick J. O’Connor, Jr., Construction Law § 12:62 (2009) (**Exhibit 2**). In the Agreement, the parties cite as a potential excuse for non-performance the future, prevailing economic conditions. Here, completion of the project can only be performed at great risk of excessive and unreasonable cost,

primarily because the likelihood is that the improvements, if completed, would lie untended and for the benefit of non-existent lot owners.

Indeed, the South Carolina General Assembly and Governor have recognized our unfortunate economic reality by approving a joint resolution to address the problem as it relates to development projects. The Permit Extension Joint Resolution of 2010, attached hereto as Exhibit 3, makes crystal clear the present reality for real estate development in this State:

[T]here exists a state of economic emergency . . . which has drastically affected various segments of the South Carolina economy, but none as severely as the state's banking, real estate, and construction sectors; . . . the real estate finance sector is in severe decline; . . . real estate developers . . . have experienced an industry-wide decline, including reduced demand, canceled orders, declining sales and rentals, price reductions, increased inventory, fewer buyers who qualify to purchase homes, layoffs, and scaled-back growth plans.

Reading the terms of the Development Agreement together with the language of the Joint Resolution makes clear that whatever the Developer's obligations (and BSI's as surety) might be with regard to completion of infrastructure, the prevailing market conditions in our State mandate that development occur "less rapidly" or in a manner that reflects "actual market absorption," if it occurs at all.

C. The Agreement Term is tolled 5 years by Joint Resolution.

At a minimum, the Joint Resolution, at Section 3, tolls any obligations for the subject development for five years: "This joint resolution is intended to apply retroactively. For development approval that is current and valid at any point during the period beginning January 1, 2008, and ending December 31, 2012; the running of the period of the development approval and any associated vested right is suspended during the period beginning January 1, 2008, and ending December 31, 2012." In other words, the original ten year term stated in the Agreement

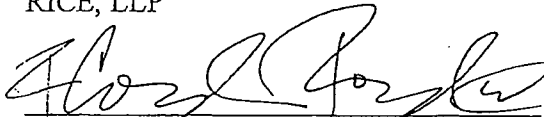
is extended, by law, from ten years to fifteen years. Accordingly, the end of the term of the subject Agreement is now June 19, 2021.

CONCLUSION

Given the above, Plaintiff's Motion for Summary Judgment should be denied. Further, as Plaintiff cannot establish default under the terms of the Agreement, this suit is premature and should be dismissed or stayed until such time as the term of the Agreement expires and the economic circumstances allow the project to proceed in a viable manner, as contemplated in the Agreement. At a minimum, the terms of the Agreement raise material questions of fact which should be determined at a full trial of this matter.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE &
RICE, LLP



F. Cordes Ford IV, S.C. Bar No. 16872

C. Allen Gibson, Jr., S.C. Bar No. 2467

5 Exchange Street

P.O. Box 999

Charleston, SC 29402

(843) 722-3400

ATTORNEYS FOR BOND SAFEGUARD
INSURANCE COMPANY

August 9, 2012
Charleston, South Carolina

EXHIBIT 2

BRUNER AND O'CONNOR
ON
CONSTRUCTION
LAW

PHILIP L. BRUNER
PATRICK J. O'CONNOR, JR.

VOLUME 4A
CHAPTERS 12 to 14

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§ 12:62

BRUNER & O'CONNOR ON CONSTRUCTION LAW

**§ 12:62 Performance bond surety's "contract defenses"—
Impossibility/impracticability of performance**

Construction contracts are sometimes simply impossible or impracticable to complete in strict conformance with their requirements. The doctrines of impossibility and impracticability of performance constitute legal excuses for nonperformance.¹ Impossibility excuses contractual nonperformance found to be impossible by supervening causes beyond the control and not foreseeable by either party, such as weather² or acts of the government. Impracticability, also called "practical impossibility," excuses nonperformance of contracts made impossible "as a practical matter" because they only can be performed at an excessive or unreasonable cost. "Practical impossibility" thus excuses nonperformance of contracts actually possible, but commercially impracticable, within the basic contract objectives contemplated by the parties.³

**§ 12:63 Performance bond surety's "contract defenses"—
Owner's implied waiver of contract requirements**

The owner may impliedly waive requirements of the contract and thereafter may be estopped from compelling a contractor to

[Section 12:62]

¹See §§ 9:98, 14:44, 15:28. See also *Miller v. Mills Const., Inc.*, 352 F.3d 1166 (8th Cir. 2003) (citing treatise and upholding finding of impracticability of performance of a steel erection contract).

²A classic illustration of impossibility due to weather was presented in *Northern Corp. v. Chugach Elec. Ass'n*, 562 P.2d 1053 (Alaska 1977), on reh'g on other grounds, 563 P.2d 883 (Alaska 1977), in which the contractor was unable to complete performance of the contract to repair a dam. Although the contract contemplated that the contractor would haul crushed rock to the dam site, the contract was silent about the site access. The mountainous terrain surrounding the lake made rock hauling across winter ice the only practical method for getting access to the site. After the contractor was prevented by ice conditions over two winters from hauling the rock across the ice, the contractor sought to be excused from contract performance because of impracticability. The Alaska Supreme Court agreed with the contractor. See also § 7:230.

³See *Transatlantic Financing Corp. v. U.S.*, 363 F.2d 312, 315, 1966 A.M.C. 1717, 3 U.C.C. Rep. Serv. 401 (D.C. Cir. 1966) ("The doctrine of [practical impossibility] ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring enforcement . . .").

See also Restatement Second, Contracts §§ 261 to 272.

(f) an approval by a county or its authorized boards and commissions of sketch plans, preliminary plats, plats regarding a subdivision of land, a site specific development plan or a phased development plan, or a building permit.

Id. Applying this Act to the Development Agreement in question extends the term until June 19, 2025 (original 10-year term + 5-year extension + 4-year extension). This additional tolling further undermines the County's allegation of a Developer default, as the County and Developer did not establish any intervening development deadlines short of the term of the Development Agreement. Further, the renewed finding of the legislature provides additional evidence contrary to the County's assertion that the Developer has failed to timely conduct development activity. Completion of the development is pegged to "market conditions," and the legislature has once again found "a state of economic emergency . . . which has drastically affected . . . the state's banking, real estate, and construction sectors." Id. As it stands, the Developer has over eleven years to perform under the terms of the Development Agreement and applicable state law. In summary, the County cannot establish a right to call any of the bonds in the absence of the Developer's default under the Development Agreement.

Second, the status of lot ownership in Phase II West, which is the subject of Bond No. 5026755, has changed. The Developer only ever sold 3 of the 101 lots making up Phase II West. One of the lots, Lot 267, was sold to Michael Lane in November 2007. (Lane Aff. ¶ 2.) Plaintiff previously relied on Lane's affidavit as evidence of the lot owners' desire for the completion of infrastructure and development in Phase II West. (Lane Aff. ¶ 3.) However, Bond Safeguard purchased Lot 267 from Michael Lane in July 2013. (See Title to Real Estate (General Warranty), attached as Exhibit B.) Accordingly, Lane's Affidavit is now moot, and Bond Safeguard, of course, does not require the infrastructure improvements at Phase II West. Additionally, Bond Safeguard purchased the only other outstanding lot in Phase II West, Lot

207, from Barbara Brunialti in July 2013.¹ (See Warranty Deed, attached as Exhibit C.) Accordingly, there is no existing purchaser of lots in Phase II West other than Bond Safeguard. Thus, no purchaser of any lot in Phase II West seeks the infrastructure improvements subject to the Phase II West Bond.

Accordingly, in this current factual scenario, where there is no owner in Phase II West with any intent to seek the bonded improvements, Jasper County should be prohibited from recovering any amounts for said infrastructure pursuant to the subject bond. In this factual scenario, there is no material distinction from the case of Westchester Fire Ins. Co. v. City of Brooksville, 731 F.Supp.2d 1298 (M.D. Fla. 2010), which Bond Safeguard previously cited:

Because no homeowner exists in Phase Two for whom the City must ensure the availability of utility services, requiring payment on the bonds both creates a cash windfall for the City and fails to achieve the purpose of the City's ordinance. Because no home exists in Phase Two that requires the City's utility services, requiring the City to install improvements on undeveloped land (and requiring Westchester to reimburse the City's cost to install the improvements) imposes an unreasonable forfeiture against Westchester and promotes an unreasonable windfall for the City.

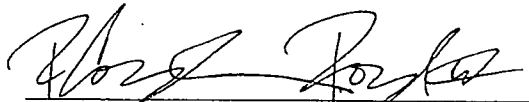
Id. at 1307. Here, as in Westchester Fire, there is no owner in Phase II West requiring the local government's provision of utilities or roads to their property. As such, the County has no obligation to any owner or any damage to be remedied. Accordingly, requiring payment by Bond Safeguard to the County under these facts would impose an unreasonable forfeiture on the former and provide an unreasonable windfall to the latter.

Accordingly, for the reasons cited above and in prior submissions to the Court, Defendant Bond Safeguard Insurance Company requests that this Court deny Jasper County's Motion.

¹ The third lot in Phase II West ever sold by the developer was Lot 228. Melinda Cavicchia purchased that lot in July 2007, (see Title to Real Estate, attached as Exhibit D), but sold the lot back to the Developer in July 2008. (See Title to Real Estate, attached as Exhibit E.)

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP



F. Cordes Ford IV, S.C. Bar No. 71644

5 Exchange Street

P.O. Box 999

Charleston, SC 29402

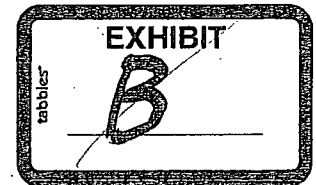
(843) 722-3400

ATTORNEYS FOR BOND SAFEGUARD
INSURANCE COMPANY

November 25, 2013
Charleston, South Carolina

5/1/14
After Recording Return to:
Qualey Law Firm
P.O. Box 10
Hilton Head, SC 29938
(843) 785-3525

DEED BOOK: 0855 PAGE: 1090
DATE: 07/30/2013 12:38:47 PM
Hazel Holmes / PG
AUDITOR JASPER COUNTY, SC



201300003691 07/29/2013 AT 10:21 AM
OR Volume 0855 Page 0316 - 0318
Filed for Record in JASPER COUNTY ROD
Deed Fee: \$10.00
State Tax: \$585.00 Local Tax: \$247.50

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

TITLE TO REAL ESTATE
(General Warranty)

KNOW ALL MEN BY THESE PRESENTS, that Michael L. Lane and Nancy J. Lane, hereinafter referred to as "Grantors," in the State aforesaid, for and in consideration of the sum of Two Hundred Twenty-Five Thousand and 00/100 Dollars (\$225,000.00) to Grantors in hand paid by

Bond Safeguard Insurance Company
10002 Shelbyville Road, Ste. 100
Louisville, KY 40223

hereinafter referred to as "Grantee," the receipt of which is hereby acknowledged, have granted, bargained, sold and released and by these presents do grant, bargain, sell and release, subject to the easements, restrictions, reservations and conditions set forth in the legal description below, unto the said Grantee, the following described property:

ALL that certain piece, parcel or lot of land, situate, lying and being in Jasper County, South Carolina, shown and described as Lot 267 The Settings of Mackay Point on a plat entitled "The Settings of Mackay Point - Phase 2 West, A Subdivision of Tax Map #091-00-01-059 and a Portion of Tax Map #091-00-01-060, Pocotaligo Area, Jasper County, South Carolina," which plat is dated December 10, 2006, and last revised January 4, 2007, prepared by TGS Land Surveying and certified to by Thomas G. Stanley, Jr., PLS #18269, and recorded in the Jasper County Records on March 27, 2007 in Plat Book 29 at Page 384-385. For a more detailed description as to the location, courses, metes, bounds and distances, reference may be had to the above referenced plat.

Said property is conveyed subject to those certain covenants, conditions, restrictions and affirmative obligations as contained in the Declaration of Covenants, Conditions and Restrictions for The Settings of Mackay Point recorded on August 31, 2006 in the office of the Jasper County Clerk of Court in Book 463 at Page 135 and as hereafter amended.

The property intended to be conveyed herein is the same property conveyed to the within Grantor by Deed from The Settings of Mackay Point, LLC, a Limited Liability Company, dated November 26, 2007, and recorded in Book 618 at Page 107, Jasper County Records, on December 18, 2007.

PIN #091-03-00-267

- 1 -

The within instrument has been transferred on 07/30/2013 02:50:13 PM, and recorded in the Jasper County Assessor's Office.
Tax Map No.: 091-03-00-267
Transfer No.: 13-27-836
Fran Goethe - JASPER COUNTY, SC

This deed was prepared by Sarah F. Robertson of McNair Law Firm, P.A.,
4 Clarks Summit Drive, Suite 200, Bluffton, South Carolina 29910.

THIS CONVEYANCE IS MADE SUBJECT TO all other easements and restrictions
of record and otherwise affecting the property.

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

TO HAVE AND TO HOLD all and singular the said premises before mentioned, unto
the Grantee, its successors and assigns forever; subject, however, to the rights, conditions and
restrictions that constitute covenants running with the land, all as set forth herein.

AND Grantors do hereby bind themselves and their heirs, executors, administrators and
assigns to warrant and forever defend all and singular the said premises unto Grantee, its
successors and assigns, against Grantors and their heirs and assigns, and all persons whomsoever
lawfully claiming or to claim the same, or any part thereof.

[Signatures on Following Page]

WITNESS our Hands and Seals this 6TH day of July, 2013.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

(2) Bertrand H. Holodnak
Signature of 1st Witness

(1) Michael L. Lane (SEAL)
Michael L. Lane

(3) Susan K. Nabbe
Signature of 2nd Witness/Notary Public

(1) Nancy J. Lane (SEAL)
Nancy J. Lane

STATE OF INDIANA)

COUNTY OF x Dearborn)

ACKNOWLEDGMENT

I, the undersigned Notary Public, do hereby certify that **Michael L. Lane and Nancy J. Lane**, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

Witness my hand and official seal this the 6th day of July, 2013.

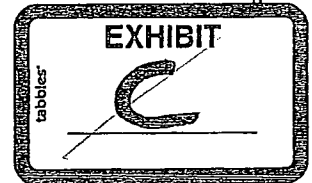
(4) Susan K. Nabbe
Notary Public for Indiana
My Commission Expires: September 25, 2020

Instructions for Execution of Deed
(Please Follow Carefully - and Use Blue Ink Only)

- A. Grantors sign on line numbered (1) exactly as name is typed under the line.
- B. Two (2) disinterested Witnesses sign on lines numbered (2) and (3).
Notary may be one of the witnesses.
- C. Notary Public signs on line numbered (4) and affixes seal and expiration date.

After Recording Return to:
Qualey Law Firm
 P.O. Box 10
 Hilton Head, SC 29938
 (843) 785-3525

DEED BOOK: 0855 PAGE: 1090
 DATE: 07/30/2013 12:39:19 PM
 Hazel Holmes / PG
 AUDITOR JASPER COUNTY, SC



The within instrument has been transferred
 on 07/30/2013 02:51:06 PM, and recorded in
 the Jasper County Assessor's Office.
 Tax Map No.: 091-03-00-207
 Transfer No.: 13-27-837
 Fran Goethe - JASPER COUNTY, SC

201300003694 07/29/2013 AT 10:40 AM
 OR Volume 0855 Page 0324 - 0326
 Filed for Record in JASPER COUNTY ROD
 Deed Fee: \$10.00
 State Tax: \$390.00 Local Tax: \$165.00

(Please do not write above this line - Reserved for Register of Deeds Office)

Prepared By: C. Scott Graber
 Graber Law Firm
 605 Carteret Street
 Beaufort, South Carolina 29902

STATE OF SOUTH CAROLINA
 COUNTY OF BEAUFORT

WARRANTY DEED

KNOW ALL MEN BY THESE PRESENTS, that Barbara E. Brunialti, in the State aforesaid, for and in consideration of the sum of One Hundred Fifty Thousand and No/100 (\$150,000.00) Dollars, to me in hand paid at and before the sealing of these presents by Bond Safeguard Insurance Company, an Illinois Corporation, in the State aforesaid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and released and by these presents do grant, bargain, sell, and release unto the said Bond Safeguard Insurance Company, its Successors and Assigns forever, the following described property, to wit: *Grantee's Address: 10602 Shelbyville Rd, Ste 100 Louisville, KY 40223*

All that certain piece, parcel or lot of land, situate, lying and being in Jasper County, South Carolina, shown and described as lot 207, The Settings of Mackey Point on a plat entitled "The Settings of Mackey Point - Phase 2 West, A Subdivision of Max Map #901-00-01-059 and a Portion of Tax Map #901-00-01-060, Pocotaligo Area, Jasper County, South Carolina", which plat is dated December 10, 2006 and last revised January 4, 2007, prepared by TGS Land Surveying and certified to by Thomas G. Stanley, Jr., PLS #18269, and recorded in the Jasper County Records on Marcy 27, 2007 in Plat Book 29 at Page 384-385. For a more detailed description as to the location, courses, metes, bounds and distances, reference may be had to the above referenced plat.

Said property is conveyed subject to those certain covenants, conditions, restrictions and affirmative obligations as contained in the Declaration of Covenants, Conditions and

091-03-00-207

Restriction for The Settings of Mackey Pont recorded on August 31, 2006 in the Office of the Jasper County Clerk of Court in Book 463 at Page 135, and as hereafter amended.

This is the same property conveyed to the Grantor herein by virtue of a deed from The Settings of Mackey Point, LLC, a South Carolina limited liability company, dated July 18, 2007 and recorded on July 25, 2007 in the Office of the Register of Deeds for Jasper County, South Carolina in Book 0572 at Page 0041-0043.

TOGETHER WITH all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Bond Safeguard Insurance Company, its Successors and Assigns, forever.

AND I, the Grantor, do hereby bind myself and my heirs and assigns, to warrant and forever defend all and singular the said premises unto the said Bond Safeguard Insurance Company, its Successors and Assigns forever, and against us and our heirs and against every person whomsoever lawfully claiming, or to claim, the same or any part thereof.

IN WITNESS WHEREOF my Hand and Seal this 10 day of July, 2013

SIGNED, SEALED AND
DELIVERED IN THE PRESENCE OF:

Sharon C. Rains
Witness #1

Barbara E. Brunialti (L.S.)
Barbara E. Brunialti

[Signature]
Witness #2/Notary

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT,)

ACKNOWLEDGEMENT

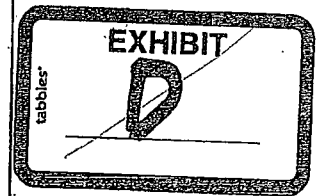
I, (Notary) C. Scott Gruber do hereby certify that Barbara E. Brunialti personally appeared before me this day and acknowledged the due execution of the forgoing instrument.

WITNESS MY HAND THIS 10 DAY
OF July, 2013.

C. Scott Gruber
Notary Public for

My Commissions Expires: _____





DEED BOOK: 0571 PAGE: 186
 DATE: 07/24/2007 09:41:12 AM
 Hazel Holmes / EM
 AUDITOR JASPER COUNTY, SC

200700004444 07/23/2007 AT 11:41 AM
 OR Volume 0571 Page 0150-0152
 Filed for Record in JASPER COUNTY
 Deed Fee: \$10.00
 State Tax: \$447.20 Local Tax: \$189.20

3/10
 Cavigchia
 BHT 2007060365
 STATE OF SOUTH CAROLINA)
)
 COUNTY OF JASPER)

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS, that THE SETTINGS OF MACKAY POINT, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, in the State aforesaid, for/and in consideration of the sum of ONE HUNDRED SEVENTY TWO THOUSAND AND 00/100 DOLLARS (\$172,000.00), to it in hand paid at and before the sealing of these Presents by MELINDA ANN CAVICCHIA, in the State aforesaid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release unto the said MELINDA ANN CAVICCHIA, the following described property, to-wit:

SEE EXHIBIT "A" ATTACHED HERETO
 AND INCORPORATED HEREIN BY REFERENCE FOR LEGAL DESCRIPTION.

TMS Number: 091-01-00-228

Address of Grantee:
 245 Clearwater Harbor
 Sanford, NC 27332

The within instrument has been transferred
 on 07/24/2007 09:50:28 AM, and recorded in
 the Jasper County Assessor's Office.
 Tax Map No.: 091-01-00-228
 Transfer No.: 7-27-891
 Lisa Malphrus - JASPER COUNTY, SC

This being a portion of the property conveyed to the within Grantor by deed from Point South Investors, LLC, dated October 20, 2005 and recorded October 21, 2005 in the Office of the Clerk of Court for Jasper County, South Carolina in Deed Book 331 at Page 281.

The within Deed was prepared in the law offices of Buist, Byars & Taylor, LLC, P.O. Box 1470, Bluffton, S.C. 29910 by Helen R. Roper.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said MELINDA ANN CAVICCHIA, her heirs and assigns, forever.

AND THE SETTINGS OF MACKAY POINT, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY does hereby bind itself and its successors and assigns, to warrant and forever defend, all and singular, the premises before mentioned unto the said MELINDA ANN CAVICCHIA, her heirs and assigns, against it and its successors and assigns, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.

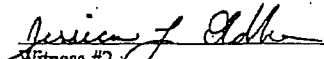
IN WITNESS WHEREOF, THE SETTINGS OF MACKAY POINT, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, has caused these presents to be executed in its name by Shannon Morris, its duly Authorized Agent, this 16th day of July, in the year of our Lord Two Thousand and Seven and in the Two Hundred Thirty-Second year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

THE SETTINGS OF MACKAY POINT, LLC,
A SOUTH CAROLINA LIMITED LIABILITY
COMPANY

BY:  (SEAL)
Shannon Morris
Its: Authorized Agent


Witness #1


Witness #2

STATE OF GEORGIA)
)
COUNTY OF Forsyth)

The foregoing instrument was acknowledged before me by The Settings of Mackay Point, LLC, a South Carolina limited liability company, by Shannon Morris, its duly Authorized Agent, this 16th day of July, 2007.

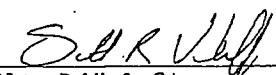
 (SEAL)
Notary Public for GA
My commission expires: 06-05-2010



EXHIBIT A

All that certain piece, parcel or lot of land, situate, lying and being in Jasper County, South Carolina, shown and described as Lot 228, The Settings of Mackay Point on a plat entitled "The Settings of Mackay Point - Phase 2 West, A Subdivision of Tax Map #091-00-01-059 and a Portion of Tax Map #091-00-01-060, Pocotaligo Area, Jasper County, South Carolina", which plat is dated December 10, 2006 and last revised January 4, 2007, prepared by TGS Land Surveying and certified to by Thomas G. Stanley, Jr., PLS #18269, and recorded in the Jasper County Records on March 27, 2007 in Plat Book 29 at Page 384-385. For a more detailed description as to the location, courses, metes, bounds and distances, reference may be had to the above referenced plat.

Said property is conveyed subject to those certain covenants, conditions, restrictions and affirmative obligations as contained in the Declaration of Covenants, Conditions and Restrictions for The Settings of Mackay Point recorded on August 31, 2006 in the Office of the Jasper County Clerk of Court in Book 463 at Page 135, and as hereafter amended.

DEED BOOK: 0687 PAGE: 243
 DATE: 08/11/2008 12:49:27 PM
 Hazel Holmes / RM
 AUDITOR JASPER COUNTY, SC

200800004203 08/07/2008 AT 02:34 PM
 OR Volume 0687 Page 0074 - 0076
 Filed for Record in JASPER COUNTY
 Deed Fee: \$10.00
 State Tax: \$403.00 Local Tax: \$170.50
 TITLE TO RECORD BOOK

STATE OF SOUTH CAROLINA)

COUNTY OF JASPER)

KNOW ALL MEN BY THESE PRESENTS, that MELINDA ANN CAVICCHIA, in the State aforesaid, for/and in consideration of the sum of ONE HUNDRED FIFTY FOUR THOUSAND EIGHT HUNDRED AND 00/100 DOLLARS (\$154,800.00), to me in hand paid at and before the sealing of these Presents by THE SETTINGS OF MACKAY POINT, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, in the State aforesaid, the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these Presents does grant, bargain, sell and release, subject to the restrictions, reservations and conditions as set forth in the legal description described on the attached exhibit, unto the said THE SETTINGS OF MACKAY POINT, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, the following described property, to-wit:

SEE EXHIBIT "A" ATTACHED HERETO
 AND INCORPORATED HEREIN BY REFERENCE FOR LEGAL DESCRIPTION.

TMS Number: 091-03-00-228

Address of Grantee:
 1117 Mackay Point Road
 Yemassee, SC 29945

The within Instrument has been transferred
 on 08/11/2008 02:13:13 PM, and recorded in
 the Jasper County Assessor's Office.
 Tax Map No.: 091-03-00-228
 Transfer No.: 8-27-896
 Lisa Malphrus - JASPER COUNTY, SC

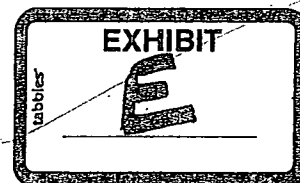
This being the same property conveyed to the within Grantor by deed from The Settings of Mackay Point, LLC, dated July 16, 2007 and recorded July 23, 2007 in the Office of the Clerk of Court for Jasper County, South Carolina in Deed Book 571 at Page 150.

The within Deed was prepared in the law offices of Buist, Byars & Taylor, LLC, P.O. Box 1470, Bluffton, S.C. 29910 by J. Tindal Hart.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular, the said Premises before mentioned unto the said THE SETTINGS OF MACKAY POINT, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, its successors and assigns, forever.

AND MELINDA ANN CAVICCHIA does hereby bind herself and her heirs and assigns, to warrant and forever defend, all and singular, the premises before mentioned unto the said THE SETTINGS OF MACKAY POINT, LLC, A SOUTH CAROLINA LIMITED LIABILITY COMPANY, its successors and assigns, against her and her heirs and assigns, and all persons whomsoever lawfully claiming, or to claim the same or any part thereof.



WITNESS my Hand and Seal this 31st day of July, in the year of our Lord Two Thousand and Eight and in the Two Hundred and Thirty-Third year of the Sovereignty and Independence of the United States of America.

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

*Melinda Ann Cavicchia, by
J. T. Hart, her Attorney-in-Fact* (SEAL)
Melinda Ann Cavicchia by
J. Tindal Hart, her Attorney-in-Fact

Mark M. Bailey
Witness #1

Kimberly G. Bennett
Witness #2

STATE OF SOUTH CAROLINA)
COUNTY OF BEAUFORT)

The foregoing instrument was acknowledged before me by Melinda Ann Cavicchia by J. Tindal Hart, her Attorney-in-Fact this 31st day of July, 2008.

Kimberly G. Bennett
Notary Public for SC
My commission expires: _____

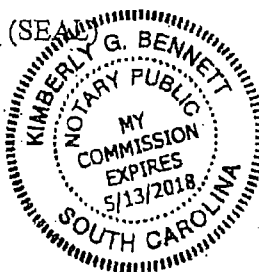


EXHIBIT A

All that certain piece, parcel or lot of land, situate, lying and being in Jasper County, South Carolina, shown and described as Lot 228, The Settings of Mackay Point on a plat entitled "The Settings of Mackay Point - Phase 2 West, A Subdivision of Tax Map #091-00-01-059 and a Portion of Tax Map #091-00-01-060, Pocotaligo Area, Jasper County, South Carolina", which plat is dated December 10, 2006 and last revised January 4, 2007, prepared by TGS Land Surveying and certified to by Thomas G. Stanley, Jr., PLS #18269, and recorded in the Jasper County Records on March 27, 2007 in Plat Book 29 at Page 384-385. For a more detailed description as to the location, courses, metes, bounds and distances, reference may be had to the above referenced plat.

Said property is conveyed subject to those certain covenants, conditions, restrictions and affirmative obligations as contained in the Declaration of Covenants, Conditions and Restrictions for The Settings of Mackay Point recorded on August 31, 2006 in the Office of the Jasper County Clerk of Court in Book 463 at Page 135, and as hereafter amended.

STATE OF SOUTH CAROLINA)
COUNTY OF JASPER)

Jasper County,

2013 DEC 23 AM 10:33

MARGARET BOSTON
CLERK OF COURT
vs. JASPER COUNTY SC

The Settings of Mackey Point, LLC and Bond
Safeguard Insurance Company,

Defendants.)

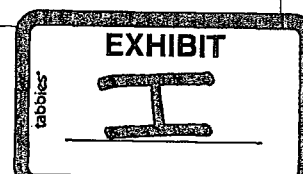
IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

CASE NO.: 2010-CP-27-252

**MOTION AND ORDER INFORMATION
FORM AND COVERSHEET**

Plaintiff's Attorney: David S. Cobb Turner, Padgett, Graham & Laney, P.A. PO Box 22129 Charleston, SC 29413 (843) 576-2803; dcobb@turnerpadgett.com	Defendant's Attorney: F. Cordes Ford IV, Esq.. (SC Bar No. 71644) Womble Carlyle Sandridge & Rice, LLP 5 Exchange Street; PO Box 999 Charleston, SC 29402 843-722-3400; cford@wcsr.com		
☒ MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) ☐ FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) ☐ PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)			
SECTION I: Hearing Information			
Nature of Motion: <u>Motion to Alter or Amend Order Granting Motion for Summary Judgment</u> Estimated Time Needed: <u>30 minutes</u> Court Reporter Needed: ☒ YES / ☐ NO			
SECTION II: Motion/Order Type			
☒ Written motion attached ☐ Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. Signature of Attorney for ☐ Plaintiff / ☒ Defendant <u>December 20, 2013</u> Date submitted			
SECTION III: Motion Fee			
☒ PAID - AMOUNT: \$ _____ ☐ EXEMPT: (check reason) <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; vertical-align: top;"> ☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____ </td> <td style="width: 50%;"></td> </tr> </table>		☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____	
☐ Rule to Show Cause in Child or Spousal Support ☐ Domestic Abuse or Abuse and Neglect ☐ Indigent Status ☐ State Agency v. Indigent Party ☐ Sexually Violent Predator Act ☐ Post-Conviction Relief ☐ Motion for Stay in Bankruptcy ☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRPC) ☐ Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ ☐ Other: _____			
JUDGE'S SECTION ☐ Motion Fee to be paid upon filing of the attached order. ☐ Other: _____	JUDGE CODE _____ Date: _____		
CLERK'S VERIFICATION			
Collected by: _____ Date Filed: _____ ☐ MOTION FEE COLLECTED: \$ _____ ☐ CONTESTED - AMOUNT DUE: \$ _____			

SCCA 233 (11/2003)



STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF JASPER) FOURTEENTH JUDICIAL CIRCUIT

2013 DEC 23 AM 10:33 CASE NO. 2010-CP-27-252

Jasper County,

MARGARET BOSNICK
CLERK OF COURT
JASPER COUNTY, SC
Plaintiff,

v.

The Settings of Mackay Point, LLC and Bond
Safeguard Insurance Company,

Defendants.

DEFENDANT BOND SAFEGUARD
INSURANCE COMPANY'S MOTION TO
ALTER OR AMEND ORDER GRANTING
PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT

Defendant Bond Safeguard Insurance Company ("Bond Safeguard") hereby moves, pursuant to Rule 59(e), SCRCP; that this Court reconsider its decision to grant Plaintiff Jasper County summary judgment.¹ Respectfully, the Court misapprehended several important points of law and fact and did not rule on several other points Bond Safeguard raised in its memoranda opposing the County's summary judgment motion. Bond Safeguard therefore submits this motion both for the Court to reconsider its prior rulings and to obtain rulings on issues the Court has not yet addressed. See Elam v. S.C. Dep't of Transp., 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004) ("[O]ur rules contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party may wish to file such a motion when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party must file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.")

¹ Bond Safeguard received written notice of entry of the Court's decision on December 10, 2013. (See Acknowledgment, attached as Exhibit A.)

I. Points the Court Misapprehended

Respectfully, this Court's decision was based a misapplication of the summary judgment standard and a misapprehension of several facts.

A. Abandonment

As this Court's email to counsel indicates, the Court's decision turns on the premise that The Settings of Mackay Point, LLC ("the Developer") committed "an anticipatory breach" of the Development Agreement between the Developer and the County. (See Email of the Court, attached as Exhibit B.) While not explicitly stating it, the Court correctly recognized that the Developer's default under the Development Agreement is a condition precedent to Bond Safeguard's obligation to pay or perform under the bonds. Although Bond Safeguard argued (and maintains) that there is no provision of the Development Agreement under which the Developer could be in default, the Court made the factual determination that the Developer had abandoned the project and therefore was in default. (Order 1, 6, attached as Exhibit C.)

The Court felt that the "undisputed evidence shows Developer has abandoned this project" and then cited excerpts of the Rule 30(b)(6), SCRCF, deposition of Bond Safeguard's representative Christopher Parish. (Order 6.) Although the excerpts arguably show that the Developer has been absent from the land, abandonment is a concept that involves more than mere absence. To abandon something, one must intend never to return to it. See Webster's New World College Dictionary 1 (4th ed. 1999) (defining "abandon" as "to give up (something) completely or forever"). The testimony the Court cited does not establish that the Developer intends not to return to the project. Rather, the testimony demonstrates that Bond Safeguard lacks knowledge about the Developer's future intentions. For example, Parish testified the Developer "could very well pick up and start work on the development in a year from now or six

months from now or a month from now. We just don't simply know whether or not they are abandoning the project." (Tr. of Parish Depo. 25:7-11.²) Parish also testified, "We just—we don't know if he intends or intends not to return to the project. We just simply aren't aware of his internal business operations that would make that decision." (Tr. of Parish Depo. 27:17-20.) The pieces of Parish's testimony on which this Court based its abandonment finding are replete with similar statements about Bond Safeguard's lack of knowledge of the Developer's intent. (See Tr. of Parish Depo. 14:12-15; 20:10-13; 24:17-24; 26:14-17; 26:22-27:12; 29:2-30:11; see also Order 6.)

As this Court knows, the evidence has to be construed in the light most favorable to Bond Safeguard, and if that light reveals a scintilla of evidence favoring Bond Safeguard, summary judgment must be denied. See Turner v. Milliman, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011). Here, the Court has found the fact that Bond Safeguard knows nothing of another entity's intent and future plans conclusively proves that the other entity intends never to resume the project. Such a finding cannot be the product of viewing the evidence in the light most favorable to Bond Safeguard.

The Court's abandonment finding was also based on Parish's testimony that the Developer had not worked on the project in 2011 or 2012 and that the sales office appeared not to have been used in several months. (Order 6.) This testimony establishes only the Developer's absence. It does not conclusively establish intent. A jury might reasonably infer from it that the Developer intends not to resume the project. However, a jury could also take a different view of the evidence—one that happens to favor Bond Safeguard—and find that the Developer has merely temporarily suspended its infrastructure construction during this time of "crisis in real estate financing and the building industry." (Permit Extension Joint Resolution of 2010, attached

² Portions of Parish's deposition transcript cited in the Court's Order are attached as Exhibit D.

as Exhibit E; Permit Extension Joint Resolution of 2013, attached as Exhibit F.) Accordingly, this Court should not have found that the Developer has abandoned the project.

There is ample evidence that, when viewed in the proper light, casts doubt on the Court's finding that the Developer intends to never resume the project. As mentioned above, the Court's abandonment finding is the premise for the Court's decision to grant summary judgment to the County. Because that premise is flawed, the Court should vacate its prior order and issue a new order denying the County's summary judgment motion.

B. Exhibit D to the Development Agreement

Section VI of the Development Agreement, titled "Development Schedule," provides that "the Property shall be developed in accordance with the development schedule, attached as Exhibit D, or as may be amended by Owner or Developer(s) in the future to reflect actual market absorption." (Devel. Agreement 6, attached as Exhibit G.) Exhibit D, in turn, provides that "Development of the Property is expected to occur over the five (5) [sic]³ year term of the Agreement, with the sequence and timing of development activity to be dictated largely by market conditions. . . . [A]ctual development may occur more rapidly or less rapidly, based on market conditions." (Devel. Agreement 46 (emphasis added).) Bond Safeguard relied on this language to argue that because the Development Agreement sets no firm completion schedules for any part of the project—in fact, it intentionally avoids setting any firm schedules—the Developer cannot be in default not meeting a deadline that never existed. (Memo. in Opp. 3-4, attached as Exhibit H.)

The Court discounted Exhibit D, stating "it is clear that Exhibit 'D' did not pertain to the infrastructure at the project." (Order 9.) The Development Agreement makes it clear that the

³ Exhibit D contains an apparent typographical error, as it states that the term of the Development Agreement is five years, which conflicts with Section III. (See Devel. Agreement 5.) As this development encompasses 327.92 acres (between 250 and 1000 acres), S.C. Code Ann. § 6-31-40 allows a ten-year term, consistent with Section III.

opposite is true. Both Section VI and Exhibit D refer to development of “the Property,” a term defined in the agreement as “that certain tract of land described on Exhibit A” to the Development Agreement. (Devel. Agreement 3.) Exhibit A is a copy of the deed conveying to the Developer the entire 327.92 acres of land for the project. (Devel. Agreement 36-43.) The deed makes no distinctions between the parts of the land on which the Developer anticipated homes would be built and the parts on and in which infrastructure would be built. Thus, “the Property” in Exhibit D means all the land in the project, which necessarily includes the portions of that land to be used for infrastructure. Accordingly, the Court’s conclusion that Exhibit D has no bearing on the Developer’s obligations to install infrastructure conflicts with the plain language of the Development Agreement. The Court should amend its decision regarding the significance of Exhibit D and alter its analysis accordingly.

C. Parish’s Testimony Regarding the Time for Completing Infrastructure

In concluding that the Development Agreement does not support Bond Safeguard’s position in the case, the Court stated, “[i]mportantly, Bond Safeguard acknowledges no specific provision in the Development Agreement allows the developer to start construction of the infrastructure, then abandon the entire project, and still have additional years for the bond surety to complete the infrastructure. Deposition of Parish, page 42, lines 17-25.” (Order 9.) Parish did not say such a thing and was not even asked about it. The cited portion of the deposition reads as follows:

Q: Okay. Let’s start very basically. You would agree with me there is—the Development Agreement does not contain any specific provision that allows the developer to have ten years to complete infrastructure, correct?

MR. FORD: Object to the form.

BY MR. COBB:

A: There's not a specific paragraph that states that.

The question and answer involved only whether the Development Agreement provides an explicit ten-year deadline for the Developer to complete infrastructure. There was no discussion of the effect that the Developer's abandonment of the project may have had on any deadlines or of what rights and deadlines Bond Safeguard would have after such an event. The Court's statement appears to be the product of viewing this evidence in the light most favorable to the County. The Court was not permitted to do so. Because this impermissible inference was "[i]mportant[]" to the Court's decision, (Order 9), the Court should alter its decision.

D. The Permit Extension Joint Resolution of 2010

Bond Safeguard argued that the Developer cannot be in default of the Development Agreement because under the Permit Extension Joint Resolution of 2010, the Developer had until 2021 to complete its obligations under the Development Agreement. (Memo. in Opp. 5-6.) Further, Bond Safeguard argued that the 2010 Joint Resolution's findings about the "state of emergency" in the construction and real estate industries demonstrated that the Developer's performance does reflect "actual market absorption," as the Development Agreement provides. (Memo in Opp. 5.)

Although the Court correctly recognized that the 2010 Joint Resolution did in fact "extend[] the term of the applicable Development Agreement by five years," the Court concluded that for three reasons, the 2010 Joint Resolution did not support Bond Safeguard's position. (Order 9-10.)

First, the Court held the 2010 Joint Resolution did not impact any substantive provisions of the Development Agreement: "Specifically, the Resolution did not alter the order or timing for

infrastructure improvements because the applicable Development Agreement did not establish the order or timing for infrastructure construction.” (Order 9 (emphasis added).) This is precisely the point Bond Safeguard has made in opposing summary judgment—there is no provision of the Development Agreement that the Developer has breached by not yet finishing the infrastructure. This fact alone is a sufficient reason to deny summary judgment, not to grant it.

Second, the Court held that the 2010 Joint Resolution does not affect a surety’s obligations or the right of obligees to make claims on bonds or to sue sureties. (Order 9-10.) Bond Safeguard takes no position on the correctness of that interpretation at this time, but even assuming it is correct, it has no effect on Bond Safeguard’s position. Bond Safeguard is not arguing that the 2010 Joint Resolution makes it immune from suit or from bond claims. It is arguing that the 2010 Joint Resolution is additional evidence that the County’s bond claims and lawsuit have no merit. Whether or not the County had the right to make claims on the bonds and then file suit against Bond Safeguard is not an issue.

Third, despite having previously held that the 2010 Joint Resolution applies to the Development Agreement, (Order 9), the Court concluded that affording Bond Safeguard the rights provided by the Resolution was inappropriate. (Order 10.) Noting that the stated purpose of the 2010 Joint Resolution was to “prevent the wholesale abandonment” of projects, the Court stated that applying the Resolution’s protections would not further that purpose because the Developer had already abandoned the project when the Resolution took effect. (Order 10.) Because applying the Resolution could not prevent a past event from happening, the Court refused to apply the Resolution. (Order 10.)

For several reasons, the Court should reconsider that conclusion. First, its factual premise—abandonment—is flawed. As discussed above, it was inappropriate for the Court to find that the Developer has abandoned the project.

Second, even assuming it was proper to find that the Developer abandoned the project at some point, the evidence on which the Court relied to make that finding does not conclusively support a finding that abandonment occurred before the 2010 Joint Resolution became effective on May 19, 2010. Parish testified that the Developer did no work on the project in 2011 or 2012; he did not say the same thing for 2010. (Tr. of Parish Depo. 24:1-12). On the contrary, Parish recalled that some time in 2010, the Developer communicated to the County that it wanted to move forward with the project. (Tr. of Parish Depo. 27:22-28:10.)

Finally, the Court's conclusion turns on the belief that the 2010 Joint Resolution is prospective—that is, that it was intended only to discourage developers from abandoning projects after the Resolution's effective date. (See Order 10.) However, the 2010 Joint Resolution states unequivocally that it “is intended to apply retroactively.” (2010 Joint Resolution, § 3.) The tolling period applies to any development approval “that is current and valid at any point during the period beginning January 1, 2008, and ending December 31, 2012.” (*Id.*) Moreover, the General Assembly's extensive findings in the recitals of the 2010 Joint Resolution demonstrate that the General Assembly was addressing the serious problems that had already been harming the construction and real estate industries for some time. These facts all indicate that, contrary to the Court's interpretation, the purpose of the 2010 Joint Resolution is not only to “prevent” future abandonments of projects but also to “prevent” projects that had already gone dormant from lapsing completely. Therefore, even assuming the Developer abandoned the project and did so before May 2010, that fact alone would not justify disregarding

the 2010 Joint Resolution. On the contrary, it would be reason to hold that the Resolution applies in this case, thereby extending the term of the Development Agreement to 2021. The Court should reconsider its analysis of the significance of the 2010 Joint Resolution.

E. Waste

In response to Bond Safeguard's argument that granting the County the relief it seeks would constitute waste, the Court reasoned that completing the infrastructure would not be wasteful because the County and three lot owners⁴ want the infrastructure. (Order 10-11.) However, a party's mere expectation or desire for performance does not defeat an argument that the performance would be wasteful. On the contrary, the concept of economic waste contemplates that a party desires the performance and then holds that the desire is not a sufficient reason for giving the party what it wants.

In addition, the Court stated Bond Safeguard presented no evidence that completing the infrastructure would be wasteful. (Order 10.) However, Bond Safeguard did present such evidence. It demonstrated in its Supplemental Memorandum in Opposition that there are no landowners in Phase II West who desire installation of infrastructure. (Supp. Memo. in Opp. 2-3 & Exs. B-E thereto, attached as Exhibit I.) Even under the Court's conception of waste, this evidence is more than sufficient to defeat summary judgment with respect to Phase II West.

F. Jasper County Resolution 10-06

The Court found significant Parish's acknowledgment that when the County passed Resolution 10-06 to make a claim on the bonds, the infrastructure had not been completed. (Order 6.) However, the County's bald assertion in Resolution 10-06 that the Developer failed to complete the infrastructure "in a timely manner" does not, by itself, establish that the Developer

⁴ As discussed in section II.C below and in Bond Safeguard's Supplemental Memorandum in Opposition, since July 2013—four months before the Court granted summary judgment—there has been no owner of a Phase II West lot who desires completion of the infrastructure.

is in default of the Development Agreement. To the extent that the Court's order suggests that the Resolution is sufficient proof of default, Bond Safeguard asks that the Court reconsider that decision.

In its discussion of how the County fulfilled all conditions precedent to Bond Safeguard's obligations on the bonds, the Court wrote, "Bond Safeguard admitted Jasper County Resolution 10-06 was valid and proper. Deposition of Christopher Parish, page 45, lines 2-8." (Order 7.) To the extent the Court was finding that Bond Safeguard has conceded that Resolution 10-06 was a meritorious claim on the bonds, such a finding is not based on a proper reading of the deposition testimony. The cited testimony reads as follows:

Q: Does Bond Safeguard contend Jasper County, in any way, improperly enacted or, I'm sorry, improperly acted when it passed that Resolution?

A: We don't believe so.

Q: Okay. Does Bond Safeguard contend, in any way, that Resolution 10-06 is improper or invalid?

A: I don't think so, no.

Taking this testimony in the light most favorable to Bond Safeguard, as the Court must do, it is not an admission that the County made a meritorious claim on the bonds or that a default by the Developer—a condition precedent to Bond Safeguard paying or performing under the bonds—has occurred. Rather, it is only a statement that Bond Safeguard has not challenged the procedural validity of Resolution 10-06. Bond Safeguard has had no reason to assert such a challenge, because even if the County Council validly passed Resolution 10-06, the Resolution is merely the County's assertion that a default has occurred. It does not conclusively establish default as a fact, and it does not automatically trigger Bond Safeguard's obligations under the bonds. Parish's testimony does not concede in any way that Resolution 10-06 is sufficient proof

of default. Thus, to the extent this Court drew from this testimony an inference that Bond Safeguard concedes anything regarding the merits of the County's claim of developer default, the Court erred.

G. Notice to Bond Safeguard of Resolution 10-06

The Court found that by mailing copies of Resolution 10-06 to Bond Safeguard, the County met its requirement in the bonds to provide Bond Safeguard notice of the Resolution. (Order 7.) The Court then stated that Bond Safeguard was required to act once it received that notice. (Order 7-8.) The Court appears to have held Bond Safeguard was automatically required to pay or perform upon receipt of the notice. To the extent the Court's order holds that a resolution and notice are the only prerequisites to Bond Safeguard's obligations—and that default by the Developer is not a prerequisite—Bond Safeguard asks the Court to reconsider. As the Court itself acknowledged in its Order, the bonds in this case were created specifically to operate in the event of the Developer's default. (Order 4.) A holding that the County can enforce the bonds even when a default has not occurred would therefore be contrary to the Court's acknowledged purpose for the bonds.

H. The Court's Email to Counsel

Finally, the Court's email to counsel indicates the Court's decision might have been motivated in part by the hope that granting summary judgment would conserve resources and expedite appellate review:

I signed and forwarded to the Jasper County Clerk of Court the order granting summary judgment which hopefully will assist the litigants in resolving this dispute. To deny the motion at this stage would force a lengthy and expensive trial which would still leave unresolved issues including whether the Permit Extension Joint Resolution of 2010 would toll completion until June of 2021. A reading of all documents indicates an anticipatory breach of the infrastructure has occurred.

Hopefully an appellate court can rule before 2016 or at least give guidance as to any issues they need developed if this order is not affirmed.

(Email of the Court.) While Bond Safeguard believes that a trial would resolve that issue, the more important takeaway of the Court's email is that it proves Bond Safeguard's point: there are important unanswered questions—i.e., “unresolved issues”—in this case, and Bond Safeguard's obligations cannot be determined without answering those questions. This posture is precisely what makes summary judgment inappropriate, even if a trial may be lengthy or costly. The Court should vacate summary judgment and allow this matter to proceed for a proper means of resolving the issues that the Court acknowledges exist.

II. Points the Court Overlooked

The Court did not address several points that Bond Safeguard raised in its memoranda opposing summary judgment. Bond Safeguard submits these points, if addressed, would change the Court's opinion on whether summary judgment for the County is appropriate. In any event, Bond Safeguard requests that the Court rule on the following points.

A. Development Agreement Provisions Relating to Default

Section VI of the Development Agreement provides as follows:

the failure of the Owner and any Developer to meet the initial development schedule shall not, in and of itself, constitute a material breach of this agreement. In such event, the failure to meet the development schedule shall be judged by the totality of the circumstances, including but not limited to the Owners and Developer(s) good faith efforts to attain compliance with the development schedule. . . . The fact actual development may take place at a different pace, based on future market forces, is expected and shall not be considered a default hereunder. Development activity may occur faster or slower than the forecast schedule, as a matter of right, depending on market conditions.

(Devel. Agreement 6-7.) Bond Safeguard argued in its initial Memorandum in Opposition that this language defeated the County's argument that the Developer defaulted on the Development Agreement by not completing infrastructure as quickly as the County might have liked. (Memo.

in Opp. 4.) On the contrary, it gives the Developer the right to proceed more slowly in accordance with market conditions, which have been “in a state of economic emergency” for years. (2010 Joint Resolution; 2013 Joint Resolution.) These provisions bear directly upon the legal significance of the Developer’s inactivity on the project. As discussed above, the Court used evidence of the Developer’s inactivity to find that the Developer had abandoned the project and therefore was in default. However, the Court never addressed the above provisions. In other words, the Court interpreted evidence of inactivity without considering the parties’ agreement on how such evidence is to be interpreted. Bond Safeguard asks that the Court address these provisions of the Development Agreement and why they do, or do not, support Bond Safeguard’s position.

B. Absence of a Defined Schedule or Deadline for Completion of Infrastructure

Although the Court concluded that the Development Agreement does not support Bond Safeguard’s opposition to summary judgment, the Court never squarely addressed a central point of Bond Safeguard’s argument: the Developer cannot be in default for failing to meet a non-existent deadline. Bond Safeguard recognizes that the Court may have concluded that its abandonment finding implicitly addressed this argument. However, especially since Bond Safeguard disagrees with the Court’s abandonment finding, Bond Safeguard asks that this Court explicitly address its argument regarding the fact that the Development Agreement does not set a completion deadline or schedule.

C. Sales of the Phase II West Parcels

In its discussion of Bond Safeguard’s impracticability and waste arguments, the Court reasoned that completing the infrastructure would not be wasteful because lot owners want to build houses on their land. (Order, at 10.) In support of this reasoning, the Court cited affidavits

from a lot owner in each of the three phases: Terri Germann (Phase I), Michael Lane (Phase II West), and Robert Wolfson (Phase II East). (Order 10-11.)

With respect to Phase II West, this Court did not address the portion of Bond Safeguard's Supplemental Memorandum in Opposition showing that Mr. Lane sold his lot to bond Safeguard in July 2013, and that the only other two people who ever bought lots in that phase have sold their lots to Bond Safeguard or back to the Developer. (Supp. Memo. in Opp. 2-3 & Exs. B-E.)

Bond Safeguard does not concede that a handful of lot owners' general desire to build on their land constitutes a legitimate basis for holding that Bond Safeguard must either complete the infrastructure or pay the County money. However, even assuming it does, this rationale has no evidentiary support with regard to Phase II West. As Bond Safeguard pointed out before the Court entered its order, there are no Phase II West lot owners who have a desire to have infrastructure installed in that phase. Bond Safeguard asks that the Court address this change of ownership and its effect on the court's reasoning.

D. The Westchester Fire Insurance Co. Opinion

In its Supplemental Memorandum in Opposition, Bond Safeguard argued that because Phase II West has no owners seeking to develop land, requiring Bond Safeguard to pay any sums related to Phase II West would impose an unreasonable forfeiture on Bond Safeguard and provide an unreasonable windfall to the County. (Supp. Memo. in Opp. 3.) In support of that argument, Bond Safeguard cited Westchester Fire Ins. Co. v. City of Brooksville, 731 F. Supp. 2d 1298 (M.D. Fla. 2010), aff'd, 465 F. App'x 851 (11th Cir.), cert. denied, 133 S. Ct. 546 (2012), in which a district court reached the same conclusion on a materially indistinguishable set of facts. (Supp. Memo. in Opp. 3.) This Court did not address Westchester Fire Insurance Co. in its Order. Bond Safeguard asks that this Court address Westchester Fire Insurance Co., as

well as Bond Safeguard's point that Phase II West has no owners desiring installation of infrastructure.

E. The Permit Extension Joint Resolution of 2013

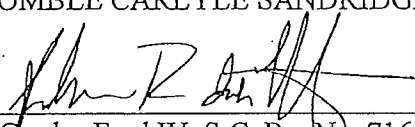
Finally, in its Supplemental Memorandum in Opposition, Bond Safeguard argued that, in conjunction with the Permit Extension Joint Resolution of 2010, the 2013 Joint Resolution extends the Development Agreement's term to 2025. (Supp. Memo. in Opp. 1-2.) Bond Safeguard also argued that the General Assembly's finding in the 2013 Joint Resolution—that South Carolina is in “a state of economic emergency . . . which has drastically affected . . . the state's banking, real estate, and construction sectors”—is additional evidence opposing the factual premise of the County's summary judgment motion, which is that the Developer has not acted in a timely manner. (Supp. Memo. in Opp. 2.) In its Order and in its email to counsel, the Court addressed only the 2010 Joint Resolution. (Order 9-10; Email of the Court.) It did not address Bond Safeguard's arguments regarding the 2013 Joint Resolution. Bond Safeguard asks that the Court address those arguments.

III. Conclusion

For the reasons stated above and in prior submissions to the Court, Defendant Bond Safeguard Insurance Company requests that this Court vacate its earlier decision granting Jasper County's Motion for Summary Judgment and enter a written order denying that Motion. Should the Court continue to believe summary judgment is proper, Bond Safeguard asks that this Court enter a written order that addresses the points discussed in Section II of this motion.

Respectfully submitted,

WOMBLE CARLYLE SANDRIDGE & RICE, LLP



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ATTORNEYS FOR BOND SAFEGUARD
INSURANCE COMPANY

December 20, 2013
Charleston, South Carolina

TURNER PADGET

TURNER PADGET GRAHAM & LANEY P.A.

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Direct Fax: (843) 577-1629

dcobb@turnerpadget.com

CHARLESTON
COLUMBIA
FLORENCE
GREENVILLE
MYRTLE BEACH

December 10, 2013

by hand

F. Cordes Ford, IV

5 Exchange Street

Charleston, South Carolina 29401

Re: Jasper County v. The Settings of Mackay Point, LLC and Bond
Safeguard Insurance Company

Docket No.: 2010-CP-27-252

TP File No.: 10535.101

Dear Cordes:

I have enclosed the filed Order Granting Plaintiff's Motion for Summary Judgment. With kind regards,

TURNER PADGET

David S. Cobb/sec

David S. Cobb

DSC/sec
enclosure

Acknowledgement of Receipt

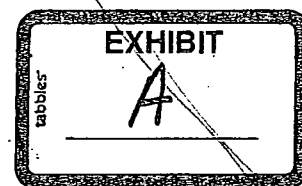
[Signature]

F. Cordes Ford, IV

December 10, 2013

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Phone (843) 576-2800 • Fax (843) 577-3369 • turnerpadget.com



Fagan, Amy

From: Kinard, J. Ernest Jr. Law Clerk (James R. Davidson) <EKinardLC@sccourts.org>
 Sent: Wednesday, November 27, 2013 12:29 PM
 To: Cobb, David S. (DCobb@TurnerPadget.com); Ford, Cordes
 Subject: Jasper County v. Bond Safeguard, Case No.: 2010-CP-27-252

Attorneys,

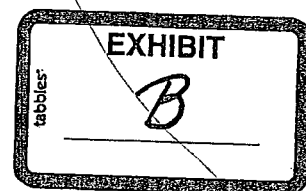
I signed and forwarded to the Jasper County Clerk of Court the order granting summary judgment which hopefully will assist the litigants in resolving this dispute. To deny the motion at this stage would force a lengthy and expensive trial which would still leave unresolved issues including whether the Permit Extension Joint Resolution of 2010 would toll completion until June of 2021. A reading of all documents indicates an anticipatory breach of the infrastructure has occurred.

Hopefully an appellate court can rule before 2016 or at least give guidance as to any issues they need developed if this order is not affirmed. Incidentally, all references in this order to "this court retains jurisdiction" refer to the Circuit Court, in general, as I obviously do not retain jurisdiction.

Respectfully,

Judge J. Ernest Kinard, Jr.

James "Jamie" Davidson IV
 Clerk to the Honorable J. Ernest Kinard, Jr.
 P.O. Box 1707
 Camden, SC 29021
 Telephone: 803-425-7182
 Fax: 803-425-5519



STATE OF SOUTH CAROLINA

COUNTY OF JASPER

Jasper County,

Plaintiff,

v.

The Settings of Mackay Point, LLC and,
Bond Safeguard Insurance Company,

Defendants.

IN THE COURT OF COMMON PLEAS

Docket No.: 2010-CP-27-252

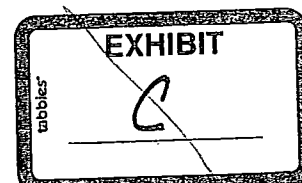
FILED
2013 DEC -2
MARGARET POSTICK
CLERK OF COURT
JASPER COUNTY SCORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY JUDGMENT
AGAINST DEFENDANT BOND
SAFEGUARD INSURANCE COMPANY

This matter came before the Court on Plaintiff's motion for summary judgment against Defendant Bond Safeguard Insurance Company pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. After review of the submitted memoranda, the record for this lawsuit, and the applicable law, the Court grants Plaintiff's motion.

Plaintiff is a political body organized pursuant to the South Carolina Constitution and the South Carolina Code of Laws that is charged with, among other things, the duty to ensure compliance with all applicable zoning ordinances and land development regulations for Jasper County, South Carolina. Defendant The Settings of Mackay Point, LLC ("Developer") was the developer of a property development of homes and certain amenities known as "The Settings of Mackay Point" located in Jasper County, South Carolina ("the project"). Developer ultimately sold approximately 120+ residential lots at the project after securing a subdivision plat with bonds issued by Defendant Bond Safeguard Insurance Company ("Bond Safeguard"). Developer ultimately abandoned the project without completing the necessary infrastructure, and Jasper County filed this lawsuit to recover on the bonds.

Bond Safeguard (as Surety) issued five bonds concerning the infrastructure at the project with Developer as Principal and Jasper County as Oblige. Exhibit 1. The bonds were:

- (a) Subdivision Bond No. 5023141 dated August 9, 2006 in the penal



12/2/13

sum of Five Million Four Hundred Fifty-Eight Thousand Four Hundred Fifty-Six and 25/100 Dollars (\$5,458,456.25) for "Roads, curbs & gutter, sewer, water & storm drainage."¹;

- (b) Subdivision Bond No. 5026751 dated April 18, 2007 in the penal sum of Forty-Two Thousand Six Hundred Ninety-Four and 38/100 Dollars (\$42,694.38) for improvements to "Site clearing, earth work, grading, erosion control, stormwater, pavement, traffic control for Mackay Point Road;"
- (c) Subdivision Bond No. 5026754 dated April 18, 2007 in the penal sum of One Million Two Hundred Eighty-Seven Thousand Two Hundred Sixty-Two and 71/100 Dollars (\$1,287,262.71) for improvements at The Settings of Mackay Point, Phase II East for "Site clearing, earth work, grading, erosion control, water & sewer, stormwater, pavement, traffic control;"
- (d) Subdivision Bond No. 5026755 dated April 18, 2007 in the penal sum of Three Million Forty-Nine Thousand One Hundred Sixty-One and 14/100 Dollars (\$3,049,161.14) for Improvements at The Settings of Mackay Point, Phase II West for "Site clearing, earth work, grading, erosion control, water & sewer, stormwater, pavement, traffic control;" and
- (e) Subdivision Bond No. 5026756 dated April 18, 2007 in the penal sum of One Hundred Forty-Seven Thousand Eight Hundred Twenty-Five and no/100 Dollars (\$147,825.00) for improvements to "Site clearing, earth work, grading, erosion control, stormwater, pavement, traffic control – Hwy 17-A."

Each of these Bonds contained the following language:

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the said Principal shall construct, or have constructed; the improvements herein described, and shall save the Obligee harmless from any loss, cost or damage by reason of its failure to complete said work, then this obligation shall be null and void, otherwise to remain in full force and effect, and the Surety, upon receipt of a resolution of the Obligee indicating that the improvements have not been installed or completed, will complete the improvements or pay to the Obligee such amount up to the Principal amount of this bond which will allow the Obligee to complete the improvements.

¹ The parties reduced that bond to Two Million One Hundred Sixteen Thousand Four Hundred Forty-Four and no/100 Dollars (\$2,116,444.00) effective September 19, 2008

Bond Safeguard admits the bonds pertain to The Settings project and Developer has not completed the improvements covered by the bonds. Defendant Bond Safeguard Insurance Company's Responses to Plaintiff's First Request for Admission, ¶¶ 17-21 (Exhibit 2); Deposition of Bond Safeguard Rule 30(b)(6) witness, Christopher Parish, page 34, line 18; page 21, lines 22-24; page 21, line 25-page 22, line 20; and page 47, lines 17-18 (Exhibit 3). Further, photographs taken on August 2, 2012 by Lisa Lamb (the Acting Director of Planning for Jasper County) illustrate the current incomplete infrastructure at the project. Affidavit of Lisa Lamb, ¶ 1-2 with attachments. Exhibit 4.

BACKGROUND

On June 19, 2006, Jasper County and Developer entered into a Development Agreement (pursuant to Jasper County Ordinance 06-18) concerning the project. Exhibit 5. The Development Agreement established certain guidelines for the project, including that Developer assumed responsibility for infrastructure construction, including, but not limited to, private roads, certain improvements to public roads, water, sewer, sewer treatment disposal, and storm water drainage. In exchange, the Development Agreement provided a ten-year moratorium beginning in 2006 against subsequent changes in zoning to the property.

In addition, certain land development regulations apply to the project. In 1994, the South Carolina General Assembly adopted the "Local Comprehensive Planning Enabling Act, which is codified at S.C. Code Ann. § 6-29-100 et seq. (the "Planning Act"). One of the purposes of this Act was "to assure the timely provision of required streets, utilities, and other facilities, and other facilities and services to new land developments." S.C. Code Ann. § 6-29-1120(2). The Act allowed counties the authority to include specific procedures for the submission and approval of subdivision plats. Of critical importance to this project, the Act made it illegal for the owner of property being developed to transfer title to lots before plan approval and plat recordation. S.C. Code Ann. § 6-29-1190. The Act also allows counties to require the installation of infrastructure before granting approval for plat recording. The statute provides, however, that a county may allow a developer to post a surety bond of at least 125% of

the cost of improvements made in favor of the local government "to insure that in the event of default by the developer, funds will be used to install the required improvements at the expense of the developer." S.C. Code Ann. § 6-29-1180. Using this procedure, the developer could post the required bond and, assuming it met other requirements, could secure plat approval and record the subdivision plat before completing the required infrastructure. This process allows a developer to sell lots, which generates revenue for construction of the infrastructure. In this matter, Developer and Bond Safeguard gave the bonds to Jasper County in response to this statutory authority.

As related to this project, the implementing Jasper County Land Development Regulations were adopted on December 15, 2003. On July 11, 2006, the Jasper County Planning Commission gave "Conditional Approval" to Phase I of the project, which consisted of 134 lots. The Planning Commission approved Phase II of the projects and the bonds on March 13, 2007. Thereafter, on March 19, 2007, the Jasper County Council Chairman stamped three separate plats "FINAL PLAT APPROVED FOR RECORDING W/ SURETY BOND." The three plats were: (1) "The Settings of Mackay Point" dated March 2, 2006; (2) "The Settings of Mackay Point-Phase II East" dated December 10, 2006; and (3) "The Settings of Mackay Point-Phase II West" dated December 10, 2006. Exhibit 6.

Subsequently, Developer posted the bonds at issue in the case, which allowed the plats to be recorded and Developer to sell lots before the installation of the infrastructure required by the Planning Act, the relevant Jasper County Ordinances, and the Development Agreement. Developer ultimately sold and conveyed more than 120 residential lots at the project, but did not complete construction of the infrastructure. To date, Developer has not shown any indication or interest in completing the infrastructure at the project.

APPLICABLE LAW

"A performance bond guarantees that the work will be performed according to the specifications of the contract by providing a surety to stand in the place of the contractor should the contractor be unable to perform as required under the contract."

L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 124, 621 S.E.2d 33, 37 (2005). The purpose of a performance bond is "to assure completion of the contract." United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co., 369 F.3d 34, 67 (2d Cir. 2004). "A suretyship is a three-party relationship where the surety undertakes to perform to an obligee, if the principal fails to do so." See Elm Haven Constr. Ltd. Partnership v. Neri Const., LLC, 281 F. Supp.2d 406 (D. Conn. 2003), *aff'd*, 376 F.3d 96 (2d. Cir. 2004).

A performance bond is a contract, and the court should "look to standard principles of contract interpretation to determine the rights and obligations of a surety under a bond." *Id.* "If language used by a bond is plain and unambiguous the bond should be interpreted like any other contract to determine the intention of the parties." Employers Ins. of Wausau v. Constr. Mgmt. Eng'rs of Florida, Inc., 297 S.C. 354, 357, 377 S.E.2d 119, 121 (Ct. App. 1989). Thus, "it is the terms of a performance bond which control the surety's liability." South Carolina Public Service Comm. v. Colonial Constr. Co., 274 S.C. 581, 585, 266 S.E.2d 76, 78 (1980).

In this litigation, Bond Safeguard admits the existence and face amounts of the bonds. Defendant Bond Safeguard Insurance Company's Responses to Plaintiff's First Request for Admission, ¶¶ 6-16 (Exhibit 2). Further, Bond Safeguard acknowledges that "the bonds issued by BSI are for the benefit of Jasper County, the sole named obligee." See Defendant Bond Safeguard Insurance Company's Memorandum in Support of its Motion to Dismiss or for Summary Judgment in Anders et al. v. The Settings of Mackay Point, LLC et al. (Jasper County Docket No.: 2011-CP-27-11) (Exhibit 7).

In addition, Bond Safeguard acknowledges Jasper County had standing to sue on the bonds. *Id.* Bond Safeguard also admits "[a]s the bonds state, BSI bound itself ... to Jasper County for the construction of certain improvements according to the terms of the underlying agreement between the developer and Jasper County." *Id.* Moreover, Bond Safeguard concedes "... the bonds in question protect Jasper County from the developer's failure to perform in accord with their underlying development agreement." *Id.*

DISCUSSION

AS discussed, Bond Safeguard admits Developer has not completed the infrastructure covered by the bonds. Defendant Bond Safeguard Insurance Company's Responses to Plaintiff's First Request for Admission, ¶¶ 17-21 (Exhibit 2); Deposition of Bond Safeguard Rule 30(b)(6) witness, Christopher Parish, page 34, line 18; page 21, lines 22-24; page 21, line 25-page 22, line 20; and page 47, lines 17-18 (Exhibit 3). Further, the undisputed evidence shows Developer has abandoned this project. Bond Safeguard's Rule 30(b)(6) deponent (Christopher Parish) admits he saw no evidence Developer had been on site in months when he made his only visit to the project in 2011. Deposition of Parish, page 25, line 12-page 26, line 13. Parish acknowledges the property has an abandoned sales office with no working equipment or employees at the time of his visit. Id. Further, he admits Developer did not performed any work at the project in 2011 or 2012. Id., page 24, lines 1-12.

Parish admits Bond Safeguard lacks any knowledge that Developer intends to complete the project. Id., page 26, lines 22-25. In fact, he acknowledges Bond Safeguard has not discussed the future of the project with Developer. Id., page 14, lines 12-15; page 20, lines 10-13. Parish testified Bond Safeguard does not possess any information or document to support any contention that Developer intends to complete the infrastructure. Id., page 20, line 22-page 31, line 9. Parish also acknowledges that Bond Safeguard has not communicated to Jasper County "in the last couple of years" that Developer would return to the project or complete the infrastructure. Id. In short, Bond Safeguard did not present any evidence that Developer, who abandoned the project, had any intention or ability to complete the infrastructure at any point in the future.

Further, Bond Safeguard admitted Developer had not completed the infrastructure by March 15, 2010, which was when Jasper County Council adopted Resolution 10-06 that called the bonds. Id., page 33, lines 8-13. Resolution 10-06 stated, in relevant part,:

WHEREAS, The Settings of Mackay Point, LLC has failed to complete the infrastructure improvements described in the Bonds in a timely manner;

NOW, THEREFORE, BE IT RESOLVED by Jasper County Council ... that we find that the required infrastructure improvements for The Settings of Mackay Point subdivision have not been installed or completed in a timely manner; and

BE IT FURTHER RESOLVED, the Jasper County Council calls upon The Settings of Mackay Point, LLC as Principal and Bond Safeguard Insurance Company as surety to forthwith complete the infrastructure improvements as required in a prompt and workmanlike manner or to pay to Jasper County the amount necessary to complete the improvements....

Exhibit 8. By letter dated March 25, 2010, Jasper County notified Defendant Bond Safeguard Insurance Company about Resolution 10-06 and that Developer had not completed the infrastructure improvements. Exhibit 9.

Bond Safeguard admitted Jasper County Resolution 10-06 was valid and proper. Deposition of Christopher Parish, page 45, lines 2-8. Bond Safeguard also admitted the March 25, 2010 letter from Jasper County properly notified Bond Safeguard about the bond claims. Id., page 8, lines 19-22 and page 38, lines 14-22. Bond Safeguard also admitted Jasper County did not need to do anything else to properly notify Bond Safeguard about the bond claims. Id., page 38, line 23-page 39, line 2.

Jasper County gave the required notice to Bond Safeguard

Jasper County complied with the notice requirement to Bond Safeguard because, without question, Resolution 10-06 constituted "a resolution of the Oblgee [Jasper County] indicating that the improvements have not been installed or completed." Jasper County mailed a copy of Resolution 10-06 to Bond Safeguard by letter dated March 25, 2010, and Defendant Bond Safeguard Insurance Company admitted it received the letter and Resolution 10-06. Defendant Bond Safeguard Insurance Company's Responses to Plaintiff's First Request for Admission, ¶ 28 (Exhibit 2). Thus, Jasper County met the notice required by each bond.

Moreover, each bond specifically required Bond Safeguard to act upon "receipt of a resolution of the Oblgee indicating that the improvements have not been installed or

completed." Significantly, Bond Safeguard admitted the bonds were not ambiguous. Deposition of Parish, page 34, line 19-page 35, line 6. Bond Safeguard also admitted it did not have any evidence or knowledge that Jasper County prevented Developer from completing the infrastructure. Id., page 33, lines 14-18.

Bond Safeguards reliance on the Development Agreement does not defeat summary judgment

Bond Safeguard incorrectly argues the June 19, 2006 Development Agreement between Jasper County and Developer defeats Jasper County's summary judgment motion. The South Carolina General Assembly authorized development agreements in 1993 legislation titled "South Carolina Local Government Development Agreement Act," which is codified at S.C. Code Ann. § 6-31-10 et seq. The purpose of a development agreement is to provide assurances to a developer, at an early stage, that the local government will not impose onerous zoning regulations during the build-out of a particular project and to assure the local government how future capital costs (including infrastructure and public services to the project) will be funded based on the general parameters of the project. Therefore, development agreements are often entered into early in the development process and in advance of contracting for infrastructure installation.

In this case, Developer assumed responsibility for infrastructure construction, and Developer (or his assignee) was also required to pay an agreed development fee for each new residential structure at the time of issuing a building permit. In exchange, Jasper County acknowledged that it would not amend the zoning regulations applicable to the project for the term of the Development Agreement. The duration of a development agreement is limited by law based on the acreage of the project, and, in this case, Developer and Jasper County agreed to a ten-year term.

Separately, the applicable Development Agreement also contains a schedule for the completion of construction for residential structures. Exhibit "D" to the Development Agreement outlined the number of residential single-family dwelling units Developer anticipated to be constructed on a yearly basis from 2006-2010. The parties did not

complete this form (for some unknown reason), but it is clear that Exhibit "D" did not pertain to the infrastructure at the project. In addition, the bonds at issue apply only to the infrastructure at the project and not to residential home construction. Further, Bond Safeguard admits the applicable Development Agreement does not reference the bonds at issue with this litigation. Deposition of Parish, page 49, line 2-page 50, line 5.

Consequently, Bond Safeguard incorrectly argues the ten-year term for development of the entire project provides at least four years from the current date for the infrastructure to be completed. Importantly, Bond Safeguard acknowledges no specific provision in the Development Agreement allows the developer to start construction of the infrastructure, then abandon the entire project, and still have additional years for the bond surety to complete the infrastructure. Deposition of Parish, page 42, lines 17-25. In any event, Developer never completed the residential home construction schedule stated in Exhibit "D". Moreover, failure by Developer to complete the project within the stated ten years subjected Developer to potential changes to the applicable zoning.

Bond Safeguard's reliance on the 2010 Permit Extension Joint Resolution does not defeat summary judgment

Bond Safeguard also incorrectly relies on the Permit Extension Joint Resolution of 2010 (the "Resolution")² passed by the South Carolina General Assembly as a basis to defeat Jasper County's summary judgment motion. The Resolution had the practical effect of extending the term of the applicable Development Agreement by five years. The Resolution did not impact, however, any other substantive provisions of the Development Agreement. Specifically, the Resolution did not alter the order or timing for infrastructure improvements because the applicable Development Agreement did not establish the order or timing for infrastructure construction.

Further, the specific language of the Resolution did not address or discuss the effect of this legislation on performance bond sureties and did not toll any litigation against performance bond sureties after the bond principal abandoned a project.

² Exhibit 10.

Moreover, the Resolution did not restrict or preclude claims made against performance bonds or sureties and did not state that existing failures could be excused or the time for performance extended.

In addition, the Resolution took effect on May 19, 2010, which was months after the developer abandoned The Settings project and two months after the Jasper County Council called the bonds. The Resolution specifically stated that its "purpose" was to "prevent the wholesale abandonment of already approved projects." (emphasis added). Giving relief to Bond Safeguard Insurance Company under these facts, therefore, would not further the stated purpose of the Resolution because Developer had already abandoned the project before the effective date of the Resolution and none of the provisions of the Resolution would "prevent the wholesale abandonment" of The Settings project.

In addition, assuming the surety "steps into the shoes of the developer," Developer abandoned any rights it may or may not have had under the Resolution or other laws when it abandoned the project. Accordingly, the Resolution did not provide a defense to Bond Safeguard in this matter.

Bond Safeguard's assertion that alleged "market conditions making the completion of the infrastructure a practical impossibility and wasteful" does not defeat summary judgment

First, Bond Safeguard did not present any evidence that completion of the infrastructure at the project would be "wasteful" or constitute "an economic waste." In fact, Bond Safeguard admits it has not performed any study to determine the economic viability of the project. Deposition of Parish, page 15, lines 16-24.

Further, Jasper County is not asking to be put in any better position than it would be in had Developer completed the infrastructure. Jasper County wants the infrastructure completed. Moreover, completion of the infrastructure at this property would not result in a substantial windfall to Jasper County or to the 120+ lot owners at the property. In addition, several lot owners filed Affidavits indicating a desire to build at the property, which they cannot do until the infrastructure is completed. See Affidavits

of Terri Germann, Michael Lane, and Robert Wolfson (Exhibit 11).

Bond Safeguard has issued performance bonds throughout the country and clearly understood the risks and opportunities when it contracted with Developer. In this case, Bond Safeguard did not present any evidence that the costs of completing the infrastructure are out of proportion to the benefit that the development, the lot owners, and Jasper County will receive when the infrastructure is completed.

CONCLUSION

Jasper County moved for summary judgment because, as a matter of law, the failure by Developer to complete or have completed the stated infrastructure improvements at The Settling of Mackay Point project in Jasper County (and Developer's abandonment of the project) triggered Defendant Bond Safeguard Insurance Company's obligations under the five bonds it issued as surety. Jasper County provided the required notice to Bond Safeguard that the improvements have not been installed or completed. Accordingly, Bond Safeguard now has the obligation to complete the improvements or to pay Jasper County up to the principal amounts of the bonds that will allow Jasper County to complete the improvements.

Therefore, this Court grants summary judgment to Jasper County and orders Defendant Bond Safeguard Insurance Company either to (a) complete the improvements covered by the five bonds at issue; or (b) pay Jasper County such amount up to the principal amounts of each bond that will allow Jasper County to complete the improvements. Bond Safeguard shall have twenty (20) days from the date of this Order to select the option it chooses.

If Bond Safeguard elects to complete the improvements covered by the five bonds at issue, the work shall be done in compliance with all applicable codes and industry standards, and in conformance with the plans and specifications for this project. In addition, the work shall be performed by competent contractors and at a schedule to ensure prompt completion of the work covered by the bonds. This Court retains jurisdiction to resolve any dispute between the parties about the quality or timing of construction.

If Bond Safeguard elects to pay money to Jasper County, Bond Safeguard shall pay Jasper County within twenty-five (25) days from the date of this Order. If Bond Safeguard does not pay the principal amount for any bond, Bond Safeguard shall pay the undisputed amount of each bond and shall provide a written and detailed explanation to Jasper County, with the payment, why Bond Safeguard did not pay the full amount of that bond. In the event any dispute arises over the amount owed under any of the bonds, this Court retains jurisdiction to resolve any dispute between the parties about the amount of the payment owed by Bond Safeguard to Jasper County.

IT IS SO ORDERED.

Comde, South Carolina
11/27, 2013

J. Ernest Kinard
 Judge J. Ernest Kinard

TRUE COPY
 MARGARET BOSTICK
 CLERK OF COURT
 JASPER COUNTY, SC
 BY: Edie M. Smith
 DATE: 12/3/13

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 2 COUNTY OF JASSPER)

3 Jasper County,)

4 Plaintiff,)

5 v.) Case No.:
 6) 2010-CP-27-252

7 The Settings of Mackey Point, LLC)
 and Bond Safeguard Insurance)
 8 Company,)

9 Defendants.)

10 DEPOSITION OF: CHRISTOPHER PARISH -
 11 Bond Safeguard Insurance
 Company 30(b)(6)

12 DATE TAKEN: Thursday, September 20, 2012

13 TIME: 1:00 P.M.

14 PLACE: Womble Carlyle Sandridge & Rice
 15 5 Exchange Street
 Charleston, South Carolina

16 REPORTED BY: MARY ANN RIDENOUR, RPR, CLR
 17 Registered Professional Reporter,
 18 Certified LiveNote Reporter
 and Notary Public

19

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21

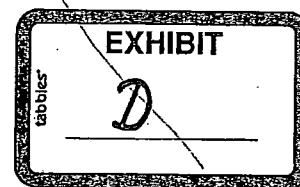
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POST OFFICE BOX 21784
 CHARLESTON, SC 29413-1784



1 insufficiency of process or service of process.

2 Do you have any factual statements about that
3 defense?

4 A. I do not.

5 Q. The fourth defense is venue.

6 Do you have any complaints about the venue being
7 in Jasper County?

8 A. No, I do not.

9 Q. The fifth defense, Bond Safeguard alleges
10 that Jasper County failed to satisfy conditions
11 precedent to the assertion of bond claim.

12 What conditions does Bond Safeguard allege Jasper
13 County did not comply with or did not meet before
14 asserting the bond claim?

15 A. That's -- I really don't have any knowledge
16 regarding that. That's kind of outside of my, my role.
17 So it's typically through counsel that that would
18 arise.

19 Q. Are you aware of any failure by Jasper County
20 to properly notify Bond Safeguard about the bond
21 claim?

22 A. No.

23 Q. The sixth defense alleges that the developer
24 fully performed its obligations under the Development
25 Agreement, making the subdivision bonds null and void

1 failed to mitigate its damages?

2 A. I don't have an answer to that right now.

3 Q. Okay. And there are two other defenses, but
4 we'll talk about those in a second.

5 Does Bond Safeguard have an opinion of whether or
6 not the project is suitable for development at this
7 stage?

8 A. No.

9 Q. Is that, no, you don't have an opinion or you
10 believe the project is not suitable for development?

11 A. No, we don't have an opinion.

12 Q. Has Bond Safeguard consulted with any person
13 other than its lawyers regarding the validity of the
14 development moving forward?

15 A. Not that I'm aware of, no.

16 Q. Has Bond Safeguard obtained any opinion from
17 any person other than its lawyers that it would
18 constitute "economic waste" to develop the
19 infrastructure at the project?

20 MR. FORD: I'll object to the form of that
21 question.

22 BY MR. COBB:

23 A. The question was -- ask me the question
24 again.

25 Q. One of the assertions is that it would be ---

1 it would constitute economic waste for the
2 infrastructure to be developed.

3 A. Uh-huh.

4 Q. Does Bond Safeguard take that position?

5 A. Yes.

6 Q. All right. What's the basis? What factors
7 leads Bond Safeguard to conclude it would be economic
8 waste to complete the infrastructure at The Settings
9 project?

10 A. I think it would probably hinge around the
11 economics at this time.

12 Q. What do you mean by that?

13 A. Whether the economics would dictate that
14 there would be demand for the product or lots, I guess,
15 would be a better way of saying it.

16 Q. Has Bond Safeguard undertaken any study or
17 made any contact with any person to do such a study, to
18 determine whether or not there is a marketplace for the
19 project or the lots?

20 A. No.

21 Q. Has Bond Safeguard done any analysis or study
22 to determine the economic viability of The Settings
23 project?

24 A. No.

25 Q. Other than the one time we were at the

1 Mr. McWhorter about this development?

2 A. I have not, no.

3 Q. Have you had any correspondence or any kind
4 of communication with him about this project?

5 A. I have not, no.

6 Q. Have you had any discussions with the --
7 with any person who would be considered a part of the
8 development team for this project?

9 A. No, not to my knowledge.

10 Q. All right. To your knowledge, has anyone at
11 Bond Safeguard had any discussions with any member of
12 the developer?

13 A. Not to my knowledge, no.

14 Q. Okay. We know that Mr. Moss, because he
15 represented to us at the mediation, was going to have
16 conversations with the developer. Have you been privy
17 to those conversations?

18 A. I have not.

19 Q. All right. Have you been told by anyone what
20 the results of those discussions were?

21 A. Not -- I haven't been told what the results
22 are, but I have been told that there were conversations
23 with Mr. McWhorter.

24 Q. What were the subjects --

25 A. Maybe it wasn't Mr. McWhorter. Maybe it was

1 someone else.

2 Q. What were the topics that were being
3 discussed?

4 A. The topics were -- I believe it was the
5 flipping out of lots associated with Phase II East,
6 essentially what we had talked about at the mediation.
7 That's about as far as I was told about the situation.

8 Q. Have you had any discussions with any of the
9 lot owners at either is Phase II East or Phase II
10 West?

11 A. I have not, no.

12 Q. Have you had any discussions with any of the
13 Phase I lot owners?

14 A. No, I have not.

15 Q. Is anyone employed by Bond Safeguard handling
16 the discussions with the lot owners or is that
17 something that Mr. Moss and his staff are taking care
18 of?

19 A. It would be through Mr. Moss and his staff.

20 Q. How would you describe the current status of
21 The Settings development?

22 A. The physical infrastructure, you mean?

23 Q. Yes.

24 A. Partially complete.

25 Q. You would agree with me that the

1 infrastructure is not entirely completed, correct?

2 A. The infrastructure in Phase Number 1 is not
3 fully completed.

4 Q. All right. What's the status of the
5 infrastructure in Phase II East?

6 A. Phase II East, providing that that's the
7 section that comes off of Phase I, is incomplete.

8 Q. How about Phase II West?

9 A. Phase II West, which would be the phase
10 that's across the street from Phase I, has a sanitary
11 and water system installed, which ultimately feeds
12 Phase I. Outside of that, Phase II West would be
13 incomplete.

14 Q. And the entrance into the project off of
15 Mackey Road, that work has not been done, correct?

16 A. I believe those improvements are associated
17 with Phase II West, and they have not been completed.

18 Q. And then the highway improvement on Highway
19 17, that has not been completed, correct?

20 A. Correct.

21 Q. Have you done any analysis to determine or
22 has Bond Safeguard done any analysis to determine the
23 current status of what is installed, whether or not it
24 works or whether or not it needs to be replaced?

25 A. We have reviewed what has been installed.

1 Q. Okay. Would Bond Safeguard agree with me
2 that no work on the infrastructure has been done in
3 calendar year 2012?

4 A. To the best of my knowledge, that would be
5 true.

6 Q. Would Bond Safeguard agree with me that no
7 work on the infrastructure was done in calendar year
8 2011?

9 A. In 2011, we did hire a clearing contractor to
10 clear the right-of-ways so we could do the as-built
11 survey. Other than that, that's the only work that I
12 know of that was done in 2011.

13 Q. If testimony shows that the construction of
14 the infrastructure began to lag around winter 2008,
15 would Bond Safeguard dispute that?

16 A. If the facts showed that, no.

17 Q. Would Bond Safeguard agree with me that the
18 developer shows no intentions or capability of
19 completing the infrastructure?

20 A. I don't -- we would not agree because we
21 don't really know the business operations of the
22 principal/developer. It's really -- we don't have
23 knowledge of what his business operations are going to
24 be in the future.

25 Q. Would Bond Safeguard agree with me that the

1 developer has abandoned this project?

2 A. No.

3 Q. What evidence do you have that the developer
4 did not and has not abandoned this project?

5 A. The -- we don't know that -- let me say that
6 another way. Because we don't have knowledge of their
7 business operation, they could very well pick up and
8 start work on the development in a year from now or six
9 months from now or a month from now. We just don't
10 simply know whether or not they are abandoning the
11 project or not.

12 Q. When we went out there for the site visit,
13 you were there. We were there for roughly two hours?

14 A. That's fair.

15 Q. And the sales center used by the developer
16 clearly showed no signs of life, correct?

17 A. I would say that's true, at that time, yeah.

18 Q. All right. The only items remaining in the
19 sales center were sprinkles of brochures and placards,
20 and the building clearly looked like it had been
21 vandalized or rummaged through, correct?

22 A. Yes. Yeah, it was in that state.

23 Q. All right. Clearly, was not an active sales
24 center, correct?

25 A. It was not an active sales center, no.

1 Q. Do you recall seeing any telephones
2 installed?

3 A. No, I don't remember seeing any telephones.

4 Q. Did you recall seeing any type of desk or any
5 type of office equipment?

6 A. There may have been some miscellaneous office
7 equipment, but not really desk or something of that
8 nature. I don't -- I don't remember seeing that.

9 Q. Was there anything about that setup that gave
10 you any indication that anyone on behalf of the
11 developer had been utilizing that office to market the
12 project within the last three to six months?

13 A. No.

14 Q. Have you or Bond Safeguard had any
15 discussions with the developer about his intentions
16 with this project?

17 A. Not to my knowledge.

18 Q. Does Bond Safeguard have any indication that
19 the developer intends to complete this development or
20 in any way ever return to the project?

21 A. I'm sorry, ask me that again.

22 Q. Does Bond Safeguard have any knowledge or
23 information that the developer intends to complete this
24 project?

25 A. Not that I am aware of. I don't -- we don't

1 know what he's going to do with the project or, I
2 should say, The Settings, the developer.

3 Q. Does Bond Safeguard have any knowledge that
4 the developer intends to return to this project?

5 A. They may choose to return to the project;
6 they might not. We really don't know the answer to
7 that.

8 Q. All right. Do you have any -- does Bond
9 Safeguard have any knowledge that the developer intends
10 to return to the project?

11 A. Again, I don't really -- I don't know if the
12 developer intends to return to the project or not.

13 Q. I apologize. My question wasn't artfully
14 worded.

15 What evidence does Bond Safeguard have that the
16 developer intends to return to this project?

17 A. We just -- we don't know if he intends or
18 intends not to return to the project. We just simply
19 aren't aware of his internal business operations that
20 would make that decision. We just -- we don't know
21 that, in either scenario.

22 Q. What indications has the developer given Bond
23 Safeguard that it intends to return to this project or
24 complete the project?

25 A. Well, outside -- I mean, there's -- the

1 not doing the development.

2 Q. I'm just trying to get you to acknowledge
3 that you do not have any current knowledge that the
4 developer intends to complete the infrastructure.

5 MR. FORD: Object to the form.

6 BY MR. COBB:

7 Q. Is that a fair statement?

8 MR. FORD: Same objection.

9 BY MR. COBB:

10 A. I just -- we don't know in either direction
11 whether the developer would do it or not move forward
12 with the job, with the project.

13 Q. What has Bond Safeguard done to ascertain
14 from the developer his intentions in the last two
15 years, if anything?

16 A. That would really be -- that's not typically
17 something that we go into when we're trying to
18 settle -- investigate and settle a claim. That's -- so
19 I guess the answer would be nothing, I guess.

20 Q. Have you personally done anything to, in any
21 way, communicate with the developer, whether or not the
22 developer intends to return to this project or complete
23 the infrastructure?

24 A. Have not, no.

25 Q. To your knowledge, has anyone at Bond

1 Safeguard made an attempt to contact the developer
2 about its intention to either complete the
3 infrastructure or return to the project?

4 A. Not that I know of.

5 Q. You would agree with me that you're not aware
6 and Bond Safeguard is not aware of any current plans by
7 the developer to return to the project or to complete
8 the infrastructure?

9 A. At this time, we don't have any documentation
10 from the developer that says he's going to move forward
11 or not move forward with the project.

12 Q. All right. And if you had some indication
13 and Bond Safeguard had some indication from the
14 developer that he intended to move forward with the
15 project, you would have communicated that to the
16 County, at some point, correct?

17 MR. FORD: Object to the form.

18 BY MR. COBB:

19 A. As long as -- I would -- and, again, I'm not
20 an attorney, so as long as it wouldn't somehow
21 prejudice any of our rights, I would think so.

22 Q. To your knowledge, has Bond Safeguard ever
23 communicated to Jasper County in the last couple of
24 years that the developer intended to move forward with
25 the infrastructure or in any way return to the

1 Q. And your testimony is that no one from Bond
2 Safeguard had any given you any information or
3 indication that the developer intends to return to the
4 project or complete the infrastructure?

5 A. No one has given me any information that the
6 developer is going to complete or not complete the
7 project.

8 Q. You would agree with me that the
9 infrastructure at The Settings was not completed by
10 March 15, 2010, which is the date of the Resolution
11 passed by Jasper County Council?

12 A. A portion of the infrastructure was
13 completed, but infrastructure was not fully completed.

14 Q. Do you have any -- does Bond Safeguard have
15 any opinion whether Jasper County did anything to
16 prevent the developer from completing the
17 infrastructure at this project?

18 A. I don't have any knowledge of that.

19 Q. Do you have -- does Bond Safeguard have any
20 documentation, information or knowledge about what
21 representations were made by the developers to the
22 individual lot purchasers about either the quality of
23 construction, the time of construction?

24 A. We don't have any information regarding
25 communication between the developer and the lot

1 purchasers.

2 Q. To your knowledge, did Bond Safeguard have
3 any discussions with the developer about its
4 construction time line?

5 A. Not to my knowledge.

6 Q. This litigation involves five bonds issued by
7 Bond Safeguard Insurance Company, correct?

8 A. The five sounds correct.

9 Q. Have you reviewed those bonds?

10 A. I have read through the bonds.

11 Q. And would you agree with me that those bonds
12 clearly cover The Settings project?

13 A. They cover particular phases of The Settings
14 project.

15 Q. In other words, Bond Safeguard doesn't
16 dispute that the bonds are pertaining to some other
17 project other than The Settings property, correct?

18 A. The bonds pertain to The Settings project.

19 Q. Okay. Does Bond Safeguard take any position
20 that there is some ambiguous term in the wording of the
21 bond, on any of the bonds?

22 MR. FORD: Object to the form.

23 BY MR. COBB:

24 A. Can you give me an example?

25 Q. I don't believe there is any ambiguous term

1 Bond Safeguard admits that it did receive this letter,
2 so did you have any discussions about this letter in
3 the March-April 2010 time frame?

4 A. I did not have any discussions regarding this
5 letter.

6 Q. When did you first become aware this letter
7 existed?

8 A. I want to say it would have been around the
9 time that we received the earliest -- I received the CD
10 information from the County. I believe it's in there.
11 I'm not sure what date or what time that was. It
12 probably would have been around the end of 2010, first
13 part of 2011 time frame.

14 Q. Does Bond Safeguard contend this March 25,
15 2010, letter is deficient in any way with notifying
16 Bond Safeguard about the claim by Jasper County on
17 these bonds?

18 A. No.

19 Q. Does Bond Safeguard contend in any way that
20 Jasper County did not properly notify Bond Safeguard
21 about the bond claims?

22 A. No. I think that letter stands for itself.

23 Q. Does Bond Safeguard contend Jasper County
24 needs to do something in addition to that letter to, in
25 any way, quote, unquote, properly notify, quote, Bond

1 Q. All right. The question was for you to give
2 me the specific provisions in the Development Agreement
3 that specifically state the developer had ten years to
4 complete the construction of the infrastructure.

5 MR. FORD: And I objected to the form.

6 BY MR. COBB:

7 A. The develop -- from reading the Development
8 Agreement, the term of the Development Agreement, I
9 think it's under Paragraph 3 -- once I get back to
10 it -- was for ten years. And although there's not any
11 specific line in the term that ties the completion of
12 the infrastructure to the ten years, there is a section
13 that contemplates the development schedule and puts
14 certain conditions to that schedule which impact the
15 term. That's what I was able to determine from reading
16 it.

17 Q. Okay. Let's start very basically. You would
18 agree with me there is -- the Development Agreement
19 does not contain any specific provision that allows the
20 developer to have ten years to complete infrastructure,
21 correct?

22 MR. FORD: Object to the form.

23 BY MR. COBB:

24 A. There's not a specific paragraph that states
25 that.

1 resolution of the County internally.

2 Q. Does Bond Safeguard contend Jasper County, in
3 any way, improperly enacted or, I'm sorry, improperly
4 acted when it passed that Resolution?

5 A. We don't believe so.

6 Q. Okay. Does Bond Safeguard contend, in any
7 way, that Resolution 10-06 is improper or invalid?

8 A. I don't think so, no.

9 Q. I'm going to hand you as an example a copy of
10 Subdivision Bond 5023141, dated August 9, 2006. I'm
11 not going to mark this as an exhibit, but it's Bates
12 stamped Jasper 0128. You would agree with me that that
13 is one of the bonds involving this project, correct?

14 MR. FORD: I'll object to the form of that
15 question. For the record, the document presented is
16 Jasper 128 and Jasper 56.

17 BY MR. COBB:

18 Q. Why don't you deal with that's Bates stamped
19 as Jasper 0128? Have you seen -- that's a photocopy of
20 the bond, correct, of one of the bonds?

21 A. It appears to be a photocopy of one of the
22 bonds.

23 Q. And do you -- would you agree that Bond
24 Number 5023141 is one of the bonds applicable to this
25 project?

1 Otherwise to remain in full force and effect and the
2 surety -- that would be Bond Safeguard, correct?

3 A. Correct.

4 Q. Upon receipt of a resolution of the obligee
5 indicating that the improvements have not been
6 installed or completed, will complete the improvements
7 or pay to the obligee such amount up to the principal
8 amount of this bond, which will allow the obligee to
9 complete the improvements.

10 And I read that correctly; did I not?

11 A. You did.

12 Q. All right. And you would agree with me that
13 the work contemplated or -- sorry -- the work covered
14 by Bond 5023141 has not been completed, correct?

15 MR. FORD: Object to the form.

16 BY MR. COBB:

17 A. Portions of the work that would be covered by
18 Bond Number 5023141 have not been completed.

19 Q. Okay. Would you agree with me that Jasper
20 County has given or -- I'm sorry -- that Bond Safeguard
21 has received a Resolution by Jasper County, indicating
22 that the improvements have not been installed or
23 completed, correct?

24 A. We've received a Resolution from the County,
25 yes.

1 that I can tell.

2 Q. You would agree with me, would you not, that
3 the specifics of the bond say if there is a failure to
4 complete the infrastructure and there is a receipt of a
5 resolution indicating that fact, then Bond Safeguard
6 has two options: Either complete the work or pay the
7 County up to the amount of the bond so the County can
8 complete the work?

9 MR. FORD: Object to the form.

10 BY MR. COBB:

11 A. There is language in the bond that says those
12 two items. But it also, we believe, references the
13 Development Agreement, which has certain conditions
14 within it, through the "Whereas" section of the bond,
15 has agreed to construct; and then "agreed" is better
16 defined by the Development Agreement.

17 Q. Does the bond specifically mention the
18 Development Agreement?

19 A. It does not specifically mention the
20 Development Agreement. Doesn't say "development
21 agreement."

22 Q. And what provision of the Development
23 Agreement does Bond Safeguard contend ~~allows~~ Bond
24 Safeguard to investigate or delay or refuse to pay or
25 have the work performed?

1 MR. FORD: Object to the form.

2 BY MR. COBB:

3 A. Well, I don't think the Development Agreement
4 specifically mentions the right of the surety to
5 investigate a claim on its bond.

6 Q. The sample bond that we're looking at here
7 for Jasper, is marked Jasper 0128. Did Bond Safeguard
8 draft this bond?

9 A. I don't know the answer to that.

10 Q. Okay. Does this appear to be, in any way,
11 different from any bond that Bond Safeguard would draft
12 of a similar subject matter?

13 A. There are portions of this bond that contain
14 the same information: Principal, obligee, surety.
15 I really -- I'm not familiar with the drafting of the
16 bonds. As I mentioned before, a lot of times each
17 obligee has its own specific bond form, so they're
18 all -- they all take a different shape. It's not a
19 standard, the same bond form on every project.

20 Q. Who from Bond Safeguard would know who
21 drafted this document?

22 A. That would probably, probably be
23 underwriting. I really -- I don't know ~~for sure~~.

24 Q. Does Bond Safeguard have any information or
25 evidence that Jasper County or anyone on Jasper

The within instrument has been transferred
on 11/05/2013 09:55:51 AM , and recorded in
the Jasper County Assessor's Office.
Tax Map No.: 091-03-00-228
Transfer No.: 13-27-1190
Fran Goethe - JASPER COUNTY, SC

Prepared by:
Alysoun M. Eversole
Eversole Law Firm, P.C.
1509 King St.
Beaufort, SC 29902

DEED BOOK: 0861 PAGE: 1145
DATE: 11/04/2013 12:27:02 PM
Hazel Holmes / PG
AUDITOR JASPER COUNTY, SC


201300005340 10/30/2013 AT 12:24 PM
OR Volume 0861 Page 0469 - 0471
Filed for Record in JASPER COUNTY ROD
Deed Fee: \$10.00
State Tax: \$6.50 Local Tax: \$2.75
TITLE TO REAL ESTATE

STATE OF SOUTH CAROLINA)
)
COUNTY OF JASPER)

KNOW ALL MEN BY THESE PRESENTS, that **THE SETTINGS OF MACKAY POINT, LLC**, a
South Carolina Limited Liability Company for and in consideration of the sum of **TWO THOUSAND
FIVE HUNDRED AND 00/100 (\$2,500.00) DOLLARS** to it in hand paid at and before the sealing of these
presents by **CONSOLIDATED VENTURES, LLC**, 97 Bull Point Drive, Seabrook, SC 29940, in the state
aforesaid, the receipt of which is hereby acknowledged, have granted, bargained, sold and released, and by
these presents do grant, bargain, sell and release unto the said **CONSOLIDATED VENTURES, LLC**, its
successors and assigns forever, in fee simple, the following described real property, to-wit:

ALL that certain piece, parcel or lot of land, situate, lying and being in Jasper County, South
Carolina, shown and described as Lot 228, The Settings of Mackay Point on a plat entitled
"The Settings at Mackay Point, A Subdivision of Tax Map #091-00-01-059 and a Portion of
Tax Map #091-00-01-060, Pocatoligo Area, Jasper County, South Carolina", which plat is
dated December 10, 2006 and last revised January 4, 2007, prepared by TGS Land
Surveying and certified to by Thomas G. Stanley, Jr., PLS #18269, and recorded in the
Jasper County Register of Deeds Office in Plat Book 29 at Page 384-385. For a more
complete description as to metes and bounds, courses and distances, reference may be had to
the aforementioned plat of record.

This being the same property conveyed to the within-named Grantor by Deed of Melinda
Ann Cavicchia, dated July 31, 2008 and recorded with the Register of Deeds Office for
Jasper County, South Carolina in Deed Volume 687 at Page 74.

Tax Map Reference No. 091-03-00-228

EXHIBIT

J

Instrument	Volume	Page
201300005340	OR 0861	0470

This instrument prepared by Eversole Law Firm, PC, Alysoun M. Eversole, 1509 King Street, Beaufort, SC 29902 without the benefit of title examination or opinion of title.

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging, or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said Premises before mentioned unto the said **CONSOLIDATED VENTURES, LLC**, its successors and assigns, and Grantor does hereby bind itself and its successors and assigns to warrant and forever defend all and singular said premises unto the said **CONSOLIDATED VENTURES, LLC**, its successors and assigns as hereinabove provided against Grantor

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Instrument Volume Page
 201300005340 OR 0861 0471

and its successors and any person or persons whomsoever lawfully claiming, or to lawfully claiming, or to claim the same or any part thereof.

WITNESS our hands and seals this _____ day of September, 2013.

SIGNED, SEALED AND DELIVERED
 IN THE PRESENCE OF:

Andrew [Signature]
 Witness 1

Donna Hearn
 Witness 2

THE SETTINGS OF MACKAY POINT, LLC

BY: [Signature]

Its: Manager Mackay

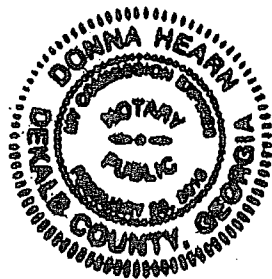
STATE OF Georgia)
)
 COUNTY OF Cobb)

ACKNOWLEDGEMENT

I, (Notary) Donna Hearn do hereby certify that The Settings of Mackay Point, LLC by its appropriate officer, personally appeared before me this day and acknowledged the due execution of the foregoing instrument.

SWORN TO BEFORE ME, this 11 day of September, 2013.

Donna Hearn
 Notary Public for DeKalb Co, GA
 My Commission Expires: 2.29.16



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF JASPER	)	Docket No.: 2010-CP-27-252
	)	
Jasper County,	)	
	)	
Plaintiff,	)	AFFIDAVIT
	)	
v.	)	
	)	
The Settings of Mackay Point, LLC and	)	
Bond Safeguard Insurance Company,	)	
	)	
Defendants.	)	
	)	

STATE OF GEORGIA)
COUNTY OF FULTON) ss:

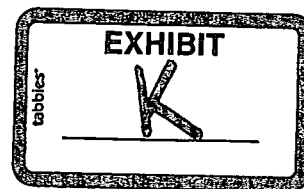
JAMES P. CATE, being duly sworn, deposes and says:

1. I am an individual residing in the State of Georgia and I am the person referred to in the annexed affidavit of Bruce L. Maas. I am familiar with the facts and circumstances set forth herein and I make this affidavit in support of Bond Safeguard Insurance ("Bond Safeguard") Company's opposition to Jasper County's motion for summary judgment.

2. In 2005, The Settings Development Companies, LLC (owned by Richard McWhorter) and GC Mackay Point I, LLC (owned by a company which I controlled) formed an entity known as The Settings of Mackay Point, LLC ("Mackay Point, LLC").

3. Mackay Point owns the property involved in this litigation.

4. By letter agreement dated January 29, 2009 (Exhibit A) Mr. McWhorter and I, acting through our respective companies, agreed that all of Mr. McWhorter's authority to unilaterally act for Mackay Point LLC was taken away and it was further agreed that my company (GC Mackay Point I) would have the right to unilaterally act for Mackay Point LLC.



5. GC Mackay Point I, LLC's sole control of Mackay Point, LLC was confirmed in a Co-Management Agreement dated December 31, 2010 (Exhibit B).

6. Glenfield Capital, LLC ("Glenfield") is a limited liability company in which I hold sole ownership and control.

7. By Membership Transfer and Control Agreement dated December 21, 2011 (Exhibit C), the sole control of Mackay Point, LLC was transferred to Glenfield.

8. The practical effect of these transfers is that I have had full control of Mackay Point, LLC since 2009. In this capacity, I am the only person (through Glenfield) that was authorized to deed any property/lots in Mackay Point.

9. I have looked at the deed (Exhibit F) purporting to convey Lot 228. That is not my signature on the deed.

10. I have never authorized anyone to sign a deed or to otherwise convey lots in Mackay Point.

11. Whoever signed the deed had no authority to do so. If it was Mr. McWhorter who signed the deed, he was very aware of the fact that he had no authority to sign the deed.

12. I notice the deed says it is being given in consideration of \$2,500.00. Neither Mackay Point LLC nor Glenfield received this money.

13. To make a long story short, the deed was signed by someone that had absolutely no authority to do so.

14. I have also read Mr. McWhorter's affidavit in support of the County's motion for summary judgment.

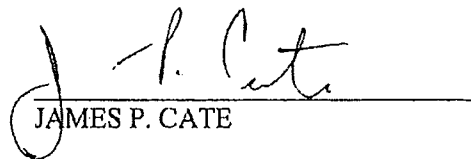
15. As detailed above, Mr. McWhorter has no authority to speak for Mackay Point, LLC. I am astounded by the fact that he would falsely represent himself in this manner.

16. In fact, as set forth in Mr. Maas' affidavit, I agreed to help Bond Safeguard buy the remaining lots in Phases 2E and 2W, with the intent of having the land de-platted.

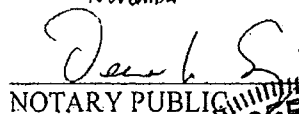
17. This plan would negate the need for the bonds and minimize Bond Safeguard's exposure. As Bond Safeguard's indemnitor, any plan minimizing Bond Safeguard's exposure was obviously good for me as it would minimize my exposure to Bond Safeguard in like amount.

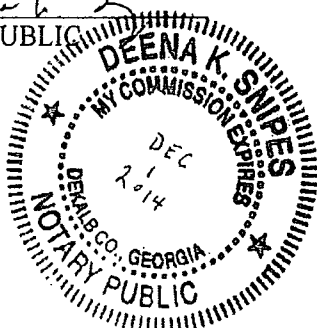
18. I totally support all efforts by Bond Safeguard to get to the bottom of the transfer of lot 228 and any impropriety that may have been involved with the hope that the transfer to Consolidated Ventures can be rescinded.

19. Once ownership of lot 228 is rescinded, all property in Phase 2 West is again under either my control and or Bond Safeguard's control and (contrary to the unauthorized information provided by Mr. McWhorter in his Affidavit) I will be able to move forward with the plan to de-plat the property.


JAMES P. CATE

Sworn to before me this 6th
day of ~~October~~, 2014.
November


NOTARY PUBLIC



STATE OF SOUTH CAROLINA

COUNTY OF JASPER

The Settings of Mackay Point, LLC and
Bond Safeguard Insurance Company,

Plaintiff(s)

vs.

Richard McWhorter, Consolidated Ventures,
LLC, et al.

Defendant(s)

IN THE COURT OF COMMON PLEAS

CIVIL ACTION COVERSHEET

2014-CP-27-493

Submitted By: F. Cordes Ford IV

Address: Womble Carlyle Sandridge & Rice, LLP
5 Exchange Street, Post Office Box 999
Charleston, SC 29402

SC Bar #: 71644

Telephone #: 843-722-3400

Fax #: 843-723-7398

E-mail: cford@wcsr.com

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

DOCKETING INFORMATION (Check all that apply)

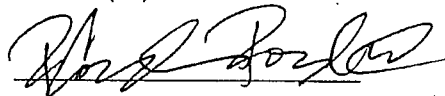
*If Action is Judgment/Settlement do not complete

- ☒ JURY TRIAL demanded in complaint. ☐ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

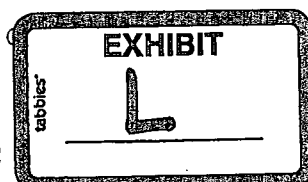
- | | | | |
|--|--|---|---|
| ☐ Contracts | ☐ Torts - Professional Malpractice | ☐ Torts - Personal Injury | ☐ Real Property |
| ☐ Constructions (100) | ☐ Dental Malpractice (200) | ☐ Assault/Stander/Libel (300) | ☐ Claim & Delivery (400) |
| ☐ Debt Collection (110) | ☐ Legal Malpractice (210) | ☐ Conversion (310) | ☐ Condemnation (410) |
| ☐ Employment (120) | ☐ Medical Malpractice (220) | ☐ Motor Vehicle Accident (320) | ☐ Foreclosure (420) |
| ☐ General (130) | Previous Notice of Intent Case # | ☐ Premises Liability (330) | ☐ Mechanic's Lien (430) |
| ☐ Breach of Contract (140) | 20 -NI- | ☐ Products Liability (340) | ☐ Partition (440) |
| ☐ Other (199) | ☐ Notice/ File Med Mal (230) | ☐ Personal Injury (350) | ☐ Possession (450) |
| | ☐ Other (299) | ☐ Wrongful Death (360) | ☐ Building Code Violation (460) |
| | | ☐ Other (399) | ☒ Other (499) |
| ☐ Inmate Petitions | ☐ Administrative Law/Relief | ☐ Judgments/Settlements | ☐ Appeals |
| ☐ PCR (500) | ☐ Reinstate Drv. License (800) | ☐ Death Settlement (700) | ☐ Arbitration (900) |
| ☐ Mandamus (520) | ☐ Judicial Review (810) | ☐ Foreign Judgment (710) | ☐ Magistrate-Civil (910) |
| ☐ Habeas Corpus (530) | ☐ Relief (820) | ☐ Magistrate's Judgment (720) | ☐ Magistrate-Criminal (920) |
| ☐ Other (599) | ☐ Permanent Injunction (830) | ☐ Minor Settlement (730) | ☐ Municipal (930) |
| | ☐ Forfeiture-Petition (840) | ☐ Transcript Judgment (740) | ☐ Probate Court (940) |
| | ☐ Forfeiture-Consent Order (850) | ☐ Lis Pendens (750) | ☐ SCDOT (950) |
| | ☐ Other (899) | ☐ Transfer of Structured Settlement Payment Rights Application (760) | ☐ Worker's Comp (960) |
| ☐ Special/Complex /Other | ☐ Pharmaceuticals (630) | ☐ Confession of Judgment (770) | ☐ Zoning Board (970) |
| ☐ Environmental (600) | ☐ Unfair Trade Practices (640) | ☐ Petition for Workers Compensation Settlement Approval (780) | ☐ Public Service Comm. (990) |
| ☐ Automobile Arb. (610) | ☐ Out-of State Depositions (650) | ☐ Other (799) | ☐ Employment Security Comm (991) |
| ☐ Medical (620) | ☐ Motion to Quash Subpoena in an Out-of-County Action (660) | | ☐ Other (999) |
| ☐ Other (699) | ☐ Sexual Predator (510) | | |

Submitting Party Signature:



Date: November 14, 2014

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



STATE OF SOUTH CAROLINA
COUNTY OF JASPER

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO. 2014-CP-27-_____

The Settings of Mackay Point, LLC and
Bond Safeguard Insurance Company,

Plaintiffs,

v.

Richard McWhorter, Consolidated Ventures,
LLC, Rivers Reach at Pocotaligo LLC f/k/a
Rivers Reach at Pocataligo LLC, Robert
Wolfson, and all other persons unknown,
claiming any right, title, estate, interest in or
lien upon the real estate described in the
complaint herein,

Defendants.

**SUMMONS
(JURY TRIAL DEMANDED)**

TO: THE DEFENDANTS—RICHARD MCWHORTER; CONSOLIDATED VENTURES, LLC; RIVERS REACH AT POCOTALIGO LLC f/k/a RIVERS REACH AT POCATALIGO LLC; ROBERT WOLFSON; AND ALL OTHER PERSONS UNKNOWN, CLAIMING ANY RIGHT, TITLE, ESTATE, INTEREST IN OR LIEN UPON THE REAL ESTATE DESCRIBED IN THE COMPLAINT HEREIN:

YOU ARE SUMMONED and required to answer the Complaint in this action, a copy of which is served on you, and to serve a copy of your answer to the Complaint on the plaintiffs' attorneys at 5 Exchange Street, Charleston, SC 29401 within 30 days after service, excluding the day of service. If you fail to do, judgment by default will be rendered against you for the relief demanded in the Complaint.

November 14, 2014
Charleston, South Carolina


F. Cordes Ford IV (SC Bar 71644)
Womble Carlyle Sandridge & Rice, LLP
5 Exchange Street
P.O. Box 999
Charleston, SC 29402
ATTORNEY FOR PLAINTIFFS

STATE OF SOUTH CAROLINA
COUNTY OF JASPER

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO. 2014-CP-27-_____

The Settings of Mackay Point, LLC and
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Plaintiffs,

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Richard McWhorter, Consolidated Ventures,
LLC, Rivers Reach at Pocotaligo LLC f/k/a
Rivers Reach at Pocotaligo LLC, Robert
Wolfson, and all other persons unknown,
claiming any right, title, estate, interest in or
lien upon the real estate described in the
complaint herein,

Defendants.

**COMPLAINT
(JURY TRIAL DEMANDED)**

Plaintiffs, complaining of the defendants, allege as follows:

THE PARTIES

1. Plaintiff The Settings of Mackay Point, LLC ("Mackay Point, LLC") is a limited liability company organized under South Carolina law and conducting business in Jasper County, South Carolina.

2. Plaintiff Bond Safeguard Insurance Company ("Bond Safeguard") is a corporation organized under Illinois law and conducting business in Jasper County, South Carolina.

3. Defendant Richard McWhorter ("McWhorter") is an individual who is a citizen of the state of Georgia.

4. Defendant Consolidated Ventures, LLC ("Consolidated Ventures") is a limited liability company organized under the laws of South Carolina and has its principal place of business in South Carolina.

5. Defendant Rivers Reach at Pocatigo LLC f/k/a Rivers Reach at Pocatigo LLC ("Rivers Reach") is a limited liability company organized under the laws of South Carolina and has its principal place of business in South Carolina.

6. Defendant Robert L. Wolfson ("Wolfson") is an individual who is a citizen of South Carolina and, upon information and belief, resides in Beaufort County.

7. All other persons unknown, claiming any right, title, estate, interest in or lien upon the real estate described in the complaint herein, as identified in the caption of this Complaint, are collectively referred to as the "John Doe Defendants."

JURISDICTION AND VENUE

8. This Court has subject matter jurisdiction over this action and the claims set forth in this Complaint.

9. This Court has personal jurisdiction over McWhorter because, among other reasons, the claims against McWhorter arise from the business he transacted in South Carolina and tortious acts he committed in South Carolina, which are described below.

10. This Court has personal jurisdiction over Consolidated Ventures, LLC because it is, and has at all relevant times been, a South Carolina limited liability company that transacts business in South Carolina and has its principal place of business in South Carolina.

11. This Court has jurisdiction over Wolfson because he is, and has at all relevant times been, a citizen and resident of South Carolina.

12. Venue in Jasper County is appropriate because—

- a. the plaintiffs seek recovery of real property or an interest in it, a determination of the parties' rights or interest in it, and damages for injuries to real property (*see* S.C. Code Ann. § 15-7-10(1)); and
- b. the most substantial parts of the acts and omissions giving rise to the plaintiffs' claims occurred in Jasper County (*see* S.C. Code Ann. § 15-15-7-30).

FACTUAL BACKGROUND

Mackay Point, LLC buys The Settings at Mackay Point

13. Mackay Point, LLC is the developer of real property commonly known as The Settings of Mackay Point ("The Settings"), a residential subdivision in Jasper County.

14. Prior to 2005, The Settings was owned by Wolfson and/or a company he controlled.

15. At that time, McWhorter was the sole owner of The Settings Development Companies, LLC, and James Cate ("Cate") solely controlled a company that solely owned GC Mackay Point I, LLC.

16. In 2005, The Settings Development Companies, LLC and GC Mackay Point I, LLC formed Mackay Point, LLC for the purpose of developing The Settings as a single family home neighborhood.

17. In 2005, Wolfson and/or a company he controlled sold The Settings to Mackay Point, LLC.

Cate Obtains Exclusive Control Over Mackay Point, LLC

18. On or about January 29, 2009, McWhorter and Cate, acting as representatives of The Settings Development Companies, LLC and GC Mackay Point I, LLC, respectively, entered

into a written agreement whereby McWhorter and his company lost all authority to act unilaterally for Mackay Point, LLC on any matter.

19. In that agreement, McWhorter and Cate further agreed that going forward, CG Mackay Point I, LLC would have the sole right to control and act unilaterally for Mackay Point, LLC.

20. On or about December 31, 2010, McWhorter and Cate, acting as representatives of The Settings Development Companies, LLC and GC Mackay Point I, LLC, respectively, entered into a written co-management agreement. The co-management agreement confirmed that GC Mackay Point I, LLC has sole control of Mackay Point, LLC.

21. On or about December 21, 2011, a membership transfer and control agreement was executed. The agreement transferred complete and exclusive control of Mackay Point, LLC to Glenfield Capital, LLC. Cate is the sole owner and controller of Glenfield Capital, LLC.

22. By virtue of his ownership and control of GC Mackay Point I, LLC and Glenfield Capital, LLC, Cate has had complete and exclusive control of Mackay Point, LLC without interruption since January 29, 2009. He continues to have that complete and exclusive control.

23. By virtue of his sole ownership and control of Glenfield Capital, LLC, Cate has had, since December 21, 2011, the complete and exclusive authority to sell, transfer, encumber, execute deeds, or take any other action affecting title and ownership to property within The Settings. He continues to have that complete and exclusive authority.

Mackay Point, LLC Attempts to Develop The Settings

24. On or about June 19, 2006, Mackay Point, LLC and Jasper County entered into a development agreement regarding development of The Settings.

25. Mackay Point, LLC planned to develop The Settings in three phases: Phase One, Phase Two East, and Phase Two West.

26. In connection with the development of The Settings, Bond Safeguard executed bonds that designated Mackay Point, LLC as principal and Jasper County as obligee.

27. Each bond that Bond Safeguard issued related to a particular phase of The Settings.

28. The national financial crisis that began in 2008 had profound negative impacts on Mackay Point, LLC's ability to develop The Settings.

29. By early 2010, only five lots in The Settings were owned by third parties—three lots in Phase Two East, and two lots in Phase Two West.

The County Sues Mackay Point, LLC and Bond Safeguard

30. On March 15, 2010, Jasper County Council passed Ordinance 10-06, in which the Council alleged Mackay Point, LLC had not timely completed infrastructure improvements in the Settings and called on Mackay Point, LLC and Bond Safeguard to either complete those improvements or pay the County the amount necessary to complete them.

31. On April 19, 2010, the County filed a summons and complaint in a lawsuit in the Court of Common Pleas for Jasper County styled *Jasper County v. The Settings of Mackay Point, LLC and Bond Safeguard Insurance Company*, Case No. 2010-CP-27-252 ("the County's Lawsuit").

32. In the County's Lawsuit, the County sued Mackay Point, LLC for negligence and breach of contract, asserted a claim against Bond Safeguard seeking to have it either complete the infrastructure improvements or pay the County the penal sums of the bonds that Bond Safeguard issued.

33. The County's Lawsuit was based on the County's concerns that people who owned lots in The Settings were not getting the infrastructure systems they needed in order to build houses and live there.

34. In investigating the County's claims on the bonds, Bond Safeguard believed Phase 2 East and Phase 2 West has too few lot owners for infrastructure systems to be operable, and it is very unlikely that any homes would actually be built or that any other lots would be sold.

35. Based on those determinations, Bond Safeguard concluded it would attempt to buy back the five lots, and then Cate would "de-plat" The Settings. In addition to making the lot owners whole and satisfying the concerns underlying the County's Lawsuit, that course of action would have the added benefit of avoiding the economic and environmental waste of building infrastructure that would not work and would go unused.

36. The County and Bond Safeguard attempted to mediate the County's Lawsuit. At the County's request, Wolfson and his attorney attended the mediation. The mediation was unsuccessful.

37. Following mediation, Bond Safeguard continued its efforts to buy back the lots. It managed to buy back the two lots in Phase Two West. Bond Safeguard paid \$225,000.00 for Lot 267 and \$150,000.00 for Lot 207.

38. However, Bond Safeguard was not able to convince the owners of the three Phase Two East lots to sell back their lots.

39. As a result, Bond Safeguard paid the County the full penal sum of the bonds issued for Phase Two East. At the same time, Bond Safeguard also paid the County the penal sum of the bonds issued for Phase One.

40. The County's Lawsuit is still pending in circuit court. As a result of Bond Safeguard's payments to the County, the only remaining bond claim in the County's Lawsuit is the County's claim against the bond issued for Phase Two West.

41. The County has filed a motion for summary judgment against Bond Safeguard on that one remaining bond claim. The motion is pending.

42. Attached to the County's motion for summary judgment is a document titled "Affidavit of Richard McWhorter" and dated May 19, 2014.

43. In the affidavit, McWhorter represents that he is the managing member of Mackay Point, LLC. That representation is false, and at the time McWhorter made it, he knew or should have known that it was false.

44. In the affidavit, McWhorter also represents that—

- (a) Mackay Point, LLC abandoned development of The Settings in 2009;
- (b) Mackay Point, LLC does not intend to return to developing The Settings or complete the infrastructure work covered by the bonds that Bond Safeguard issued; and
- (c) Mackay Point, LLC does not intend to complete development at The Settings or meet any of the terms of the development agreement between it and the County.

45. McWhorter had no authority to make any of the statements in his affidavit on behalf of Mackay Point, LLC. Furthermore, as McWhorter has had no control or authority over Mackay Point since January 2009, he lacks information and personal knowledge to make any statements about Mackay Point's actions and intent regarding the Settings. The statements he made are not based on personal knowledge or information known to him.

BB&T Assigns to Wolfson the Mortgage on The Settings

46. For a time, BB&T bank was the mortgagee on a mortgage filed against The Settings.

47. On or about November 30, 2012, BB&T assigned its interest in the mortgage to Rivers Reach.

48. Wolfson is the registered agent for Rivers Reach, and upon information and belief, he has owned and controlled Rivers Reach at all relevant times.

49. The assignment took place before the mediation in the County's Lawsuit, which Wolfson attended.

50. As mortgagee, Rivers Reach—and by extension, Wolfson—stands to benefit greatly from having infrastructure built in The Settings.

51. As mortgagee, Rivers Reach—and by extension, Wolfson—stands to benefit greatly from foreclosing on The Settings, particularly if infrastructure is built there at someone else's expense.

McWhorter Purports to Sell Consolidated Ventures a Lot in Phase 2 West

52. After it bought Lot 207 and Lot 267, Bond Safeguard began working with Cate to de-plat Phase Two West.

53. In the course of that effort, Bond Safeguard and Cate learned that on or about November 5, 2013, a deed had been recorded in the Jasper County Register of Deeds' office relating to Lot 228, a lot in Phase Two West.

54. The deed is recorded in Deed Book 0861 at Page 1145. It describes Lot 228 as follows:

ALL that certain piece, parcel or lot of land, situate, lying and being in Jasper County, South Carolina, shown and described as Lot 228, The Settings of Mackay

Point on a plat entitled "The Settings at Mackay Point, A Subdivision of Tax Map #091-00-01-059 and a Portion of Tax Map #091-00-01-060, Pocotaligo Area, Jasper County, South Carolina", which plat is dated December 10, 2006 and last revised January 4, 2007, prepared by TGS Land Surveying and certified to by Thomas O. Stanley, Jr., PLS #18269, and recorded in the Jasper County Register of Deeds Office in Plat Book 29 at Page 384-385. For a more complete description as to metes and bounds, courses and distances, reference may be had to the aforementioned plat of record.

This being the same property conveyed to the within-named Grantor by Deed of Melinda Ann Cavicohia, dated July 31, 2008 and recorded with the Register of Deeds Office for Jasper County, South Carolina in Deed Volume 687 at Page 74.

Tax Map Reference No. 091-03-00-228

55. The deed is dated September 11, 2013. It states that Mackay Point, LLC was conveying Lot 228 to Consolidated Ventures in exchange for \$2,500.00.

56. The deed states Consolidated Ventures is located at 97 Bull Point Drive, Seabrook, South Carolina. That is Wolfson's address.

57. Wolfson is Consolidated Ventures' registered agent and, upon information and belief, owns and controls Consolidated Ventures.

58. Upon information and belief, McWhorter signed that deed.

59. Upon information and belief, on the deed, McWhorter represented that he was Mackay Point, LLC's managing member.

60. Upon information and belief, McWhorter's representation that he was Mackay Point, LLC's managing member was false at the time McWhorter made it.

61. Upon information and belief, when McWhorter represented that he was Mackay Point, LLC's managing member, McWhorter knew or should have known his representation was false.

62. McWhorter had no authority to attempt to sell, transfer, or sign a deed conveying Lot 228 or any other property in The Settings.

63. Cate has never signed any deed to transfer Lot 228.

64. Cate has never authorized anyone to sell, transfer, or execute a deed conveying any property within The Settings. He has never ratified any unauthorized attempts to sell, transfer, or execute a deed purporting to convey any property within The Settings.

65. The deed states that Consolidated Ventures paid \$2,500.00 for Lot 228. Neither Mackay Point, LLC nor Glenfield Capital, LLC has ever received any of that \$2,500.00.

66. Upon information and belief, \$2,500.00 is nominal, inadequate consideration for Lot 228.

67. The recording of that invalid deed has created a cloud on Mackay Point, LLC's title to Lot 228 and has impaired it and Bond Safeguard's plan to de-plat Phase Two West.

**FIRST CAUSE OF ACTION
(Quiet Title Against Consolidated Ventures,
Wolfson, and the John Doe Defendants)**

68. The plaintiffs incorporate their allegations in all the preceding paragraphs.

69. Mackay Point, LLC holds the sole valid legal title to Lot 228.

70. Mackay Point, LLC is the sole owner of all legal and equitable rights to Lot 228.

71. Mackay Point, LLC's interest in and title to Lot 228 is adverse to those that Consolidated Ventures, Wolfson (by virtue of his ownership and control of Consolidated Ventures), and the John Doe Defendants claim or might claim to have.

72. Consolidated Ventures is not a bona fide purchaser for value of Lot 228.

73. The deed purporting to convey Lot 228 to Consolidated Ventures is invalid.

74. McWhorter had no authority to execute the deed purporting to transfer Lot 228 to Consolidated Ventures. That conveyance has never been ratified by anyone with authority to do so.

75. The plaintiffs ask that the Court determine the status of title to Lot 228, declare that Mackay Point, LLC is the sole legal owner of Lot 228 and holder of its title, and declare that none of the defendants have any interest in, or hold any sort of title or rights to, or interest in, Lot 228.

**SECOND CAUSE OF ACTION
(Cancellation of Deed Against Consolidated Ventures and Wolfson)**

76. The plaintiffs incorporate their allegations in all the preceding paragraphs.

77. At all relevant times, McWhorter had no authority to speak or act on behalf of Mackay Point, LLC.

78. At all relevant times, McWhorter had no authority to sell, or to offer to sell, Lot 228 or any other property within The Settings.

79. At all relevant times, McWhorter had no authority to sign a deed purporting to transfer title to Lot 228 away from Mackay Point, LLC.

80. At all relevant times, Mackay Point, was never aware that, upon information and belief, McWhorter was offering to sell Lot 228 or that he signed a deed purporting to convey title to another entity. Mackay Point, LLC had no reason to know of either of these things.

81. Neither Mackay Point, LLC nor Glenfield Capital, LLC or Cate ever approved of or ratified the sale of Lot 228 or the transfer of title to Lot 228.

82. The sale and transfer of Lot 228 to Consolidated Ventures is void *ab initio*.

83. Mackay Point, LLC is, and at all relevant times has been, the sole true legal owner of the title and all rights to Lot 228.

84. At all relevant times, Consolidated Ventures knew or should have known McWhorter had no authority to sell Mackay Point, LLC's property, to transfer title to its property, or to otherwise act on behalf of Mackay Point, LLC.

85. Consolidated Ventures is not a bona fide purchaser for value of Lot 228.

86. Upon information and belief, the purported sale and transfer of title to Consolidated Ventures was a sham transaction in which McWhorter, Consolidated Ventures, and Wolfson knowingly participated.

87. The plaintiffs ask that the Court order that the deed purporting to convey title to Lot 228 from Mackay Point, LLC to Consolidated Ventures be cancelled.

THIRD CAUSE OF ACTION
(Rescission Against Consolidated Ventures and Wolfson)

88. The plaintiffs incorporate their allegations in the previous paragraphs.

89. The contract for the purported sale of Lot 288 from Mackay Point, LLC to Consolidated Ventures is completely null and void. It was never executed by someone with authority to act on behalf of Mackay Point, LLC, and Mackay Point, LLC never approved or ratified the contract.

90. Rather, upon information, and belief, the contract was part of a fraudulent, sham transaction, in which McWhorter, Consolidated Ventures, and Wolfson knowingly participated.

91. As a result, the contract and the deed executed pursuant to it must be rescinded, and the parties must be returned to the status quo before the contract was executed.

FOURTH CAUSE OF ACTION
(Constructive or Resulting Trust Against Consolidated Ventures and Wolfson)

92. The plaintiffs incorporate their allegations in the previous paragraphs.

93. Consolidated Ventures acquired title to Lot 228.

94. Upon information and belief, Consolidated Ventures used actual or constructive fraud, duress, abuse of confidence, or unconscionable conduct in order to acquire Lot 228.

95. Under the above circumstances, it is inequitable for Consolidated Ventures to retain possession or legal title to Lot 228.

96. The plaintiffs ask that the Court declare Consolidated Ventures and Wolfson to be constructive or resulting trustees of Lot 228, and order them to perform all duties required of such trustees and to execute a deed conveying title to Mackay Point, LLC.

**FIFTH CAUSE OF ACTION
(Civil Conspiracy Against McWhorter, Rivers Reach,
Consolidated Ventures, and Wolfson)**

97. The plaintiffs incorporate their allegations in the previous paragraphs.

98. Upon information and belief, McWhorter combined with Consolidated Ventures, Rivers, Reach, and/or Wolfson, and they conspired to improperly transfer title from Mackay Point, LLC to Consolidated Ventures.

99. The objects and purposes of the actions of McWhorter, Rivers Reach, Consolidated Ventures, and Wolfson were—

- a. to injure Mackay Point, LLC, by divestment of real property that rightfully belonged—and belongs—to Mackay Point, LLC;
- b. to injure Mackay Point, LLC by manipulating the facts in the Lawsuit to create an outcome adverse to Mackay Point, LLC;
- c. to injure Bond Safeguard by manipulating the facts in the Lawsuit to create an outcome adverse to Bond Safeguard;
- d. to ruin or damage the businesses of Mackay Point, LLC and Bond Safeguard; and
- e. to enrich themselves at the expense of Mackay Point, LLC and Bond Safeguard.

100. The actions of McWhorter, Rivers Reach, Consolidated Ventures, and Wolfson have proximately caused Mackay Point, LLC and Bond Safeguard special damages, separate and apart from the other damages alleged in this Complaint, and will continue to do so.

101. Mackay Point, LLC and Bond Safeguard are entitled to recover all damages proximately caused by the conduct of McWhorter, Consolidated Ventures, and Wolfson.

**SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty Against McWhorter)**

102. The plaintiffs incorporate their allegations in the previous paragraphs.

103. Mackay Point, LLC reposed special confidence in McWhorter.

104. McWhorter accepted or induced the special confidence Mackay Point, LLC reposed in him.

105. McWhorter owed Mackay Point, LLC the duty to act in good faith and with due regard to the interests of Mackay Point, LLC.

106. By, upon information and belief, offering for sale Lot 228 and executing a deed purporting to convey Lot 228 to Consolidated Ventures, McWhorter breached his fiduciary duty to Mackay Point, LLC.

107. Upon information and belief, McWhorter knowingly breached his duty, and he did so willfully, wantonly, and in reckless disregard of Mackay Point, LLC's rights.

108. McWhorter's breach of fiduciary duty has proximately caused Mackay Point, LLC substantial damages and is continuing to cause Mackay Point, LLC damages.

109. Mackay Point, LLC is entitled to recover actual, consequential, and punitive proximately caused by the acts and omissions of McWhorter.

SEVENTH CAUSE OF ACTION
(Interference with Contractual Relationships Against
McWhorter, Consolidated Ventures, and Wolfson)

110. The plaintiffs incorporate their allegations in the previous paragraphs.

111. At all relevant times, Mackay Point, LLC and the County have been parties to a contract—namely, the development agreement and all amendments thereto.

112. The bond executed by Bond Safeguard for Phase Two West infrastructure improvements was a contract. Bond Safeguard was the surety, Mackay Point, LLC was the principal, and the County was the obligee.

113. At all relevant times, McWhorter, Consolidated Ventures, and Wolfson knew about the development agreement and the bond.

114. Upon information and belief, McWhorter, Consolidated Ventures, and/or Wolfson intentionally participated in the execution and recordation of the deed purporting to transfer Lot 228 to Consolidated Ventures.

115. Upon information and belief, McWhorter, Consolidated Ventures, and/or Wolfson acted under the belief that executing and recording the deed would lead to determinations in the County's Lawsuit that Mackay Point, LLC had breached the development agreement and that bond safeguard was liable under the bond.

116. Upon information and belief, McWhorter, Consolidated Ventures, and/or Wolfson acted with the intent that their actions would cause the determinations described in the previous paragraph or, at the very least, would cause Mackay Point, LLC and Bond Safeguard to incur expenses investigating and addressing the recordation of the invalid deed.

117. The actions of McWhorter, Consolidated Ventures, and/or Wolfson were, and are, completely unjustifiable.

118. The actions of McWhorter, Consolidated Ventures, and/or Wolfson have caused Mackay Point, LLC and Bond Safeguard substantial damages and are continuing to cause Mackay Point, LLC and Bond Safeguard substantial damages.

119. Mackay Point, LLC and Bond Safeguard are entitled to recover all actual, consequential, and punitive damages proximately caused by the conduct of McWhorter, Consolidated Ventures, and Wolfson.

EIGHTH CAUSE OF ACTION

(Slander of Title Against McWhorter, Consolidated Ventures, and Wolfson)

120. The plaintiffs incorporate their allegations in the previous paragraphs.

121. The deed purporting to convey Lot 228 to Consolidated Ventures contains false statements, in that it represents to the public that Mackay Point, LLC has no title to or other rights in Lot 228 and that someone else holds all title and rights to Lot 228.

122. Those false statements of fact are derogatory to Mackay Point, LLC, as they disparage Mackay Point, LLC's claims to title and ownership of Lot 228.

123. McWhorter, Consolidated Ventures, and/or Wolfson published those false statements of fact by having them recorded in the public land records for Jasper County.

124. McWhorter, Consolidated Ventures, and/or Wolfson published those false statements with actual malice, in reckless and wanton disregard to Mackay Point, LLC's rights, and without any legal justification.

125. McWhorter, Consolidated Ventures, and/or Wolfson's conduct has proximately caused Mackay Point, LLC's title to Lot 228 to have diminished value in the eyes of third parties.

126. McWhorter, Consolidated Ventures, and/or Wolfson's conduct has proximately caused Mackay Point, LLC to incur expenses reasonably necessary to counteract the publication, including litigation costs.

127. Mackay Point, LLC is entitled to recover all damages proximately caused by McWhorter, Consolidated Ventures, and/or Wolfson's conduct, to an award of punitive damages, and to an injunction prohibiting McWhorter, Consolidated Ventures, and/or Wolfson from continuing to disparage Mackay Point, LLC's title.

**NINTH CAUSE OF ACTION
(Trespass Against McWhorter, Consolidated Ventures, and Wolfson)**

128. The plaintiffs incorporate their allegations in the previous paragraphs.

129. Mackay Point, LLC at all relevant times has owned, and been in legal possession of, Lot 228.

130. Upon information and belief, McWhorter and Wolfson—both as an individual and as a representative of Consolidated Ventures—have voluntarily entered onto Lot 228.

131. McWhorter and Wolfson entered onto Lot 228 without having, or even requesting, Mackay Point, LLC's permission.

132. Mackay Point, LLC is entitled to actual, exemplary, and punitive damages.

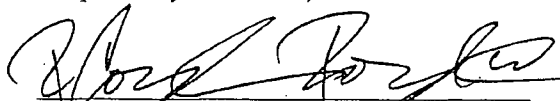
PRAYER FOR RELIEF

WHEREFORE, the plaintiffs pray that that the Court—

1. Enter judgment in favor of the plaintiffs and against all the defendants;
2. Order that the deed purporting to convey the real property described in this Complaint as Lot 228 from the The Settings of Mackay Point, LLC to Consolidated Ventures, LLC be cancelled;

3. Declare that The Settings of Mackay Point, LLC is the sole legal owner and holds sole valid title to the real property described in this Complaint as Lot 228;
4. Award the plaintiffs actual, consequential, and punitive damages, as well as reasonable attorney's fees and costs; and
5. Award the plaintiffs such other and further relief as the Court deems just and proper.

Respectfully submitted,



F. Cordes Ford IV (SC Bar 71644)

Womble Carlyle Sandridge & Rice, LLP

5 Exchange Street

P.O. Box 999

Charleston, SC 29402

ATTORNEY FOR PLAINTIFFS

Charleston, South Carolina
November __, 2014

STATE OF SOUTH CAROLINA

COUNTY OF JASPER

) IN THE COURT OF COMMON PLEAS
) FOURTEENTH JUDICIAL CIRCUIT
) CASE NO. 2010-CP-27-252

Jasper County,

Plaintiff,

v.

The Settings of Mackay Point, LLC and Bond
 Safeguard Insurance Company,

Defendants.

**AFFIDAVIT OF
 F. CORDES FORD IV**

Personally appeared before me, F. Cordes Ford IV, who being duly sworn, deposes and says:

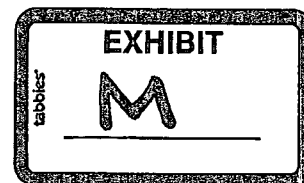
1. I am an attorney admitted to practice law in the state of South Carolina. I am in good standing with the South Carolina Bar.

2. I represent Bond Safeguard Insurance Company in the above-captioned action and in the appeal arising from that action that Bond Safeguard has filed. The appellate case number for that action is 2014-002609.

3. I am making this affidavit in support of Bond Safeguard's Return to Jasper County's Motion to Dismiss Bond Safeguard's appeal.

4. In the course of defending Bond Safeguard against Jasper County's claims, Bond Safeguard's representatives learned of a deed purporting to convey title to Lot 228, one of the lots in The Settings at Mackay Point, to a company called Consolidated Ventures, LLC.

5. After investigating the deed, Bond Safeguard and The Settings at Mackay Point, LLC decided to file an action in the Court of Common Pleas for Jasper County in order to restore The Settings at Mackay Point, LLC's title to Lot 228 (the "Lot 228 Lawsuit").



6. The summons and complaint for the Lot 228 Lawsuit, which I prepared and signed, are dated November 14, 2014. My office mailed them to the court for filing that day.

7. On November 18, 2014, the Honorable Maité Murphy held oral argument on a motion for summary judgment filed by Jasper County in its case against Bond Safeguard. I attended and participated in that hearing.

8. At the hearing, I argued in opposition to Jasper County's motion. I also orally made a motion to stay the case in the event summary judgment was denied.

9. I asked the court that, in the event that it denied Jasper County's summary judgment motion, it stay the case pending resolution of the Lot 228 Lawsuit.

10. I explained that Bond Safeguard had only recently completed its investigation into the deed purporting to convey Lot 228 to Consolidated Ventures and that Bond Safeguard and Mackay Point, LLC had filed the Lot 228 Lawsuit in order to restore Mackay Point, LLC's ownership and to counteract what appeared to be an attempt to undermine Bond Safeguard's defenses to Jasper County's claim.

11. I further explained that ownership of Lot 228 is a question whose answer is crucial to defending Bond Safeguard in Jasper County's lawsuit. Because the deed to Consolidated Ventures was presumptively valid, Bond Safeguard could not prove certain of its defenses in the trial of Jasper County's claim against it without having that deed invalidated through the Lot 228 Lawsuit.

12. Under the rather unusual circumstances in the case, denying Bond Safeguard a stay in essence was granting summary judgment on Bond Safeguard's defenses that are based on ownership of Lot 228.

13. I am reciting the above facts because at this time, I do not have a copy of the transcript of the November 18 hearing. I ordered a copy on December 12, 2014, but I have not yet received it.

FURTHER AFFIANT SAYETH NOT.



F. Cordes Ford IV

SWORN to before me this 22
day of December, 2014

Deanne Bryson

Notary Public for South Carolina

My Commission Expires: 2/2/19

Ford, Cordes

From: Murphy, Maite Law Clerk (William Crantford) <mmurphylc@sccourts.org>
Sent: Monday, December 01, 2014 11:25 AM
To: Ford, Cordes; 'Cobb, David S.'
Subject: Jasper County v. Bond Safeguard

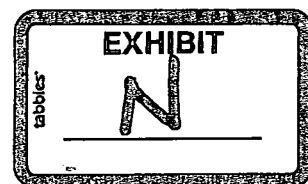
Good afternoon, this is William Crantford, Judge Maite Murphy's law clerk, I hope you're both well. Plaintiff's Motion for Summary Judgment and Defendant's Motion to Stay came before Judge Murphy on Tuesday, November 18th, 2014 in Charleston County. After considering the record and oral arguments of both parties, the court hereby denies both of the above referenced motions.

Judge Murphy's ruling is for your information and the Court will place the ruling on the record prior to the start of the trial.

If you have any questions, or if I can be of any assistance, please don't hesitate to contact me.

William Crantford
 Law Clerk to The Honorable Maité Murphy
 P.O. Box 802
 5200 E. Jim Bilton Blvd.
 St. George, SC 29477
 Office: (843) 832-0391

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THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM JASPER COUNTY  
Court of Common Pleas

The Honorable Maité Murphy, Circuit Court Judge

Jasper County Case No. 2010-CP-27-252  
Appellate Case No. 2014-002609

**RECEIVED**

FEB 20 2015

**SC Court of Appeals**

175122

Jasper County,

Respondent,

v.

The Settings of Mackay Point,  
LLC and Bond Safeguard  
Insurance Company,

Defendants,

Of which Bond Safeguard  
Insurance Company is

Appellant.

PETITION FOR REHEARING

Bond Safeguard Insurance Company asks a panel of this Court to reconsider a single judge's February 5, 2015 order granting Jasper County's motion to dismiss the appeal. Respectfully, the Court either overlooked important points of fact and law, misapprehended them, or a combination of both. Bond Safeguard is appealing an order that, under the unique circumstances in this case, effectively decided the merits of, and struck, defenses to a \$3 Million bond claim. Although the order certainly is appealable under two portions of South Carolina Code section 14-3-330, this Court, without explanation, reached the incorrect result. The panel should set aside that order and allow

Bond Safeguard to proceed to the merits of its appeal. Further, because the appealability of interlocutory orders is an important issue for this Court's jurisdiction and for appellate procedure, the issues Jasper County and Bond Safeguard have raised in this motion warrant a more detailed explanation than what the Court provided in its short order of dismissal.

### BACKGROUND AND PROCEDURAL HISTORY

This appeal arises from a dispute involving the development of a neighborhood along the Pocotaligo River. The Settings at Mackay Point, LLC ("Mackay Point, LLC") was the neighborhood's owner and developer. (Return Exhibit<sup>1</sup> A (Affidavit of Bruce Maas) at ¶ 6). In June 2006, Mackay Point, LLC and Jasper County entered into a development agreement for the project. (*See generally* Return Exhibit B (Development Agreement)). In that agreement, Mackay Point, LLC agreed to build infrastructure for the neighborhood's several phases, under a pace that was to be "dictated largely by market conditions." (*Id.* at p. 46).

Bond Safeguard was Mackay Point, LLC's surety for the project. It issued five bonds, each of which relates to a specific aspect of the project. For example, Bond No. 5025755 relates to infrastructure for Phase II West of the neighborhood. (*See* Return Exhibit C (Bond)). The amount covered by that bond is \$3,049,161.14. (*Id.*).

The development agreement initially had a ten-year term but provides ultimately that "[d]evelopment activity may occur faster or slower than the forecast schedule, as a matter of right, depending upon market conditions." (Devel. Agreement at p. 46). The market conditions turned out to be infamously poor. Following the collapse of the housing market in 2008, South Carolina's

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<sup>1</sup> Bond Safeguard submitted a number of exhibits with its return to Jasper County's motion to dismiss the appeal. Rather than resubmitting those documents, Bond Safeguard hereby incorporates its return exhibits into this petition.

development industry fell into what the General Assembly described in 2010 and 2013 as “a state of economic emergency” that affected “none as severely as the state’s banking, real estate, and construction sectors.” (Return Exhibit E (Permit Extension Joint Resolution of 2013) at p. 1; Return Exhibit F (Permit Extension Joint Resolution of 2010) at p. 1). Mackay Point, LLC and the proposed neighborhood were not immune to the collapse. (See Maas Aff. at ¶¶ 8, 27). For example, Mackay Point, LLC sold only three of Phase II West’s 101 lots. (Return Exhibit H (Suppl. Mem. in Opp. to Summ. J. dated Nov. 23, 2013) at p. 2). The last of those sales took place in November 2007, and Bond Safeguard and Mackay Point, LLC later bought back the lots. (*Id.* at pp. 2-3 & n.1).

#### Jasper County’s Lawsuit

Unsatisfied with the progress in development, Jasper County eventually sued Bond Safeguard and Mackay Point, LLC. (See generally Return Exhibit F (Summons & Compl.)). The County alleged that Mackay Point, LLC breached its contractual obligations to develop the neighborhood and that as a result, Bond Safeguard must either pay the County the penal sums of the bonds or hire companies to perform the work covered by the bonds. (See generally *id.*). Bond Safeguard answered, denying liability.<sup>2</sup>

Bond Safeguard and Jasper County have diligently litigated the issues in the case and have resolved the majority of their dispute. They have mediated twice, and although Judge Ernest Kinard granted the County summary judgment at one point, he later vacated that ruling after Bond Safeguard filed a motion to alter or amend. The case now involves only the bond for Phase II West. (Maas Aff. at ¶ 25).

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<sup>2</sup> Mackay Point, LLC did not appear in the case.

Lot 228

As to Phase II West, many of Bond Safeguard's defenses have turned on the factual premise that Bond Safeguard and Mackay Point, LLC own all the Phase II West lots, and thus there is no need for infrastructure there. Accordingly, Bond Safeguard has argued, neither it nor Mackay Point, LLC has any obligation to build infrastructure for Phase II West, and in any event, building the infrastructure for that phase would be wasteful and paying out the bond would give the County an unjustified windfall. *See Westchester Fire Ins. Co. v. City of Brooksville*, 731 F. Supp. 2d 1298 (M.D. Fla. 2010), *aff'd*, 465 F. App'x 851 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 546 (2012); *see also* Return Exhibit G (Mem. in Opp. to Summ. J. dated Aug. 9, 2012) at pp. 3-4; Suppl. Mem. in Opp. to Summ. J. at pp. 2-3; Return Exhibit I (Motion to Alter or Amend dated Dec. 20, 2013) at pp. 9, 12-14.

Lot 228 is a lot in Phase II West. In 2014, Bond Safeguard learned that a deed had been filed in the Jasper County Register of Deeds' office purporting to show that in September 2013—while Jasper County's summary judgment motion was pending—Mackay Point, LLC sold Lot 228 to a company called Consolidated Ventures, LLC. (Maas Aff. at ¶ 29; Return Exhibit J (Deed)). Bond Safeguard conferred with Mackay Point, LLC, whose representative denied that any such transfer had occurred or that anyone authorized to sign a deed on the company's behalf had done so. (*See* Return Exhibit K (Affidavit of James Cate) at ¶¶ 8-14).

Bond Safeguard investigated the deed. It learned that Consolidated Ventures is an entity controlled by Robert Wolfson. (*See* Maas Aff. at ¶¶ 29, 31 & Ex. I). While Jasper County's case was pending, Wolfson became the assignee of a mortgage on the land for the neighborhood. (*Id.* at ¶¶ 18, 35). Moreover, at Jasper County's request, Wolfson attended one of the mediations between

the County and Bond Safeguard, in which the parties discussed Bond Safeguard's position regarding Phase II West. (*See id.* at ¶¶ 19-21). That mediation took place before the purported sale of Lot 228 to Consolidated Ventures. (*Compare id.* at ¶ 19 (stating mediation took place June 13, 2013) *with* Deed (dated September 11, 2013)).

Bond Safeguard and Mackay Point, LLC concluded that Consolidated Ventures' deed was invalid and appeared to be the product of a fraudulent conveyance aimed at undermining Bond Safeguard's position in the County's lawsuit. (*See* Maas Aff. at Introduction, ¶¶ 35-43; Cate Aff. at ¶¶ 13, 18). In order for Mackay Point, LLC to protect its property rights to Lot 228, and for Bond Safeguard to remedy an apparent manipulation of the evidence in the County's lawsuit, they filed a complaint against Consolidated Ventures, Wolfson, and others on November 14, 2014 (the "Lot 228 Lawsuit"). (*See generally* Return Exhibit L (Lot 228 Lawsuit Summons & Compl.)). Among other things, the complaint in the Lot 228 Lawsuit asks the circuit court to set aside the deed to Consolidated Ventures and declare Mackay Point, LLC the sole owner of Lot 228. (*See id.* at Prayer for Relief).

*Bond Safeguard's Motion to Stay*

In June 2014, the County filed a second motion for summary judgment. Judge Maité Murphy held a hearing on that motion on November 18. Wolfson appeared at the hearing. At the hearing, Bond Safeguard made a motion to stay the case. Counsel for Bond Safeguard explained that the ownership of Lot 228 is a question whose answer is crucial to defending Bond Safeguard in Jasper County's lawsuit. (Return Exhibit M (Affidavit of Cordes Ford) at ¶ 11). Counsel further explained that Bond Safeguard had only recently completed its investigation into the deed purporting to convey Lot 228 to Consolidated Ventures and that Bond Safeguard and Mackay Point, LLC had filed the Lot

228 Lawsuit in order to restore Mackay Point, LLC's ownership. (*Id.* at ¶ 10).

On December 1, 2014, the circuit court summarily denied Jasper County's summary judgment motion and Bond Safeguard's motion for stay. (Return Exhibit N (Email from Judge Murphy's chambers dated Dec. 1, 2014)). The court set the case for trial Wednesday, December 10. (*Id.*). Bond Safeguard appealed the circuit court's denial of stay on December 4, 2014.

### Proceedings on Appeal

Before merits briefing began, Jasper County filed a motion to dismiss the appeal. It argued the circuit court's order is not immediately appealable. Bond Safeguard filed a return. On February 5, 2015, the Honorable Stephanie McDonald granted Jasper County's motion. In a terse order, Judge McDonald found the circuit court's order was not immediately appealable because it did not involve the merits or strike an answer or any pleading.

## ARGUMENT

The profound impact that the circuit court's order had on the merits of the case places the order squarely within two provisions of section 14-3-330. Respectfully, the Court either overlooked or misapprehended that impact, and it may well have employed the wrong analysis to rule on Jasper County's motion. Those errors require rehearing and reinstatement of the appeal.

### **I. This Court Has Jurisdiction Under Subsection 14-3-330(1).**

This Court has jurisdiction to review "[a]ny intermediate judgment, order or decree in a law case involving the merits in actions commenced in the court of common pleas." S.C. Code Ann. § 14-3-330(1) (1976 & Supp. 2014). "An order 'involves the merits' when it finally determines a substantial matter forming the whole or a part of some cause of action or defense." *Thornton v. S.C. Elec. & Gas Corp.*, 391 S.C. 297, 306, 705 S.E.2d 475, 480 (Ct. App. 2011).

As discussed above, the keystone of certain of Bond Safeguard's defenses is that all of the Phase II West lots are owned by either Bond Safeguard or Mackay Point, LLC, neither of which has any desire or intention to build its own house in the neighborhood. *See Weschester Fire Ins. Co.*, 731 F. Supp. 2d at 1307. But the actions of persons and entities not parties to this case have left Bond Safeguard unable, for the time being, to prove that key fact. According to the public records, Consolidated Ventures owns Lot 228. The law presumes Consolidated Ventures' deed for Lot 228 is valid. *See Davis v. Monteith*, 289 S.C. 176, 182, 345 S.E.2d 724, 727 (1986) ("Where a deed is valid and regular on its face, it is presumed to be valid in all respects."). Bond Safeguard cannot rebut that presumption at this time. To do so, Bond Safeguard needs to obtain a favorable resolution in the Lot 228 Lawsuit. By denying Bond Safeguard a stay, the circuit court denied it an opportunity to win the Lot 228 Lawsuit in time to make a difference in Jasper County's lawsuit.

Bond Safeguard brought these unusual circumstances to the circuit court's attention, and then the court denied the stay. In light of those circumstances, the upshot of the court's order is that Bond Safeguard has lost certain of its defenses. In other words, the order had the effect of finally determining a "substantial matter forming the" key part of those defenses. That means the circuit court's order "involves the merits," and therefore is appealable, under subsection 14-3-330(1).

This Court's basis for holding otherwise is not apparent from its order. After reciting Bond Safeguard's position on appealability, the Court stated without explanation that the circuit court's order does not involve the merits. While Bond Safeguard does not believe the Court acted arbitrarily, the Court's order fails to reveal what reasoning guided its decision or how it analyzed Bond Safeguard's arguments, the significance of Lot 228, and the effect of denying the stay. If anything, the order's brevity suggests that the controlling factor in the Court's analysis may have

been the label of the circuit court's order, rather than its effect.<sup>3</sup> If so, that analysis was flawed. See *Wetzel v. Woodside Dev. Ltd. P'ship*, 365 S.C. 589, 592, 615 S.E.2d 437, 438 (2005) (finding order relieving defendant from default on basis of improper service was appealable because it had "the effect" of dismissal under Rule 12(b)(5), SCRCP, and thus ended the action as to that defendant); cf. *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479 (stating that to determine whether an order is appealable under subsection 14-3-330(2)(c), an appellate court should look to the effect of the order rather than to its title). However, whatever analysis the Court employed, it led the Court to the wrong answer. Bond Safeguard asks that the panel reviewing this petition focus on the effect of the circuit court's order, which demonstrates it is appealable under subsection 14-3-330(1).

## II. This Court Has Jurisdiction Under Subsection 14-3-330(2)(c).

An order "affecting a substantial right" is immediately appealable when it has the effect of "striking out an answer or any part thereof or any pleading in any action." S.C. Code Ann. § 14-3-330(2)(c) (1976 & Supp. 2014); see also *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479 (stating that to determine whether an order is appealable under subsection 14-3-330(2)(c), an appellate court should look to the effect of the order rather than to its title). "An order affects a substantial right by striking a pleading if the order removes a material issue from the case, thereby preventing the issue from being litigated on the merits, and preventing the party from seeking to correct any errors in the order during or after trial." *Thornton*, 391 S.C. at 304, 705 S.E.2d at 479; see also *Edwards*, 369 S.C. at 94, 631 S.E.2d 530 ("Orders affecting a substantial right 'discontinue an action, prevent an

<sup>3</sup> Among other things, Bond Safeguard is concerned the Court may believe an order denying a stay categorically is unappealable. To be sure, the Supreme Court has held orders granting a stay and lifting a stay are not appealable. See *Carolina Water Serv., Inc. v. Lexington Cnty. Joint Mun. Water & Sewer Comm'n*, 373 S.C. 96, 97, 644 S.E.2d 681, 682 (2007) (per curiam) (order lifting stay); *Edwards v. SunCom*, 369 S.C. 91, 95, 631 S.E.2d 529, 531 (2006) (order granting stay). Those cases, however, are readily distinguishable. In addition to the fact that neither involved the outright denial of a stay, the orders at issue in those cases did not have an effect that would make them immediately appealable under section 14-3-330. See, e.g., *Edwards*, 369 S.C. at 94-95, 631 S.E.2d at 530-31 (analyzing the effect of the order granting stay on that particular case).

appeal, grant or refuse a new trial, or strike out an action or defense.” (quoting *Mid-State Distribs., Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335 n.4, 426 S.E.2d 777, 780 n.4 (1993))).

Certainly, the circuit court’s order removes a material issue—ownership of Lot 228— from the case, thereby preventing Bond Safeguard from establishing any of its defenses that are based on ownership of Phase II West lots. Moreover, Bond Safeguard will not be able to correct the circuit court’s error during the trial. On the contrary, by pushing Bond Safeguard into trial without several defenses, the court’s order creates the problem Bond Safeguard now faces. Nor could Bond Safeguard correct the error after trial. It would lose a JNOV motion involving ownership of Lot 228, it would lack the evidence needed to move for a new trial or to vacate, and it could not introduce on appeal evidence of whatever resolution it obtains in the Lot 228 Lawsuit. See Rules 50(b), 59 (a)-(b), & 60(b), SCRCP; Rule 210(c), SCACR. Accordingly, the circuit court’s order fits squarely within the explanation of subsection 14-3-330(2)(c) this Court articulated in *Thornton*. Thus, the order is immediately appealable under subsection 14-3-330(2)(c).

As mentioned above, this Court’s basis for concluding otherwise is not apparent from its order. Whatever that basis may have been, respectfully, it led the Court to the incorrect outcome. Bond Safeguard asks that the panel reviewing this petition focus on the effect of the circuit court’s order and hold that it is appealable under subsection 14-3-330(c)(2).

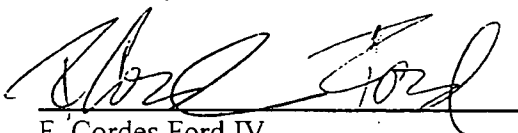
#### REQUEST FOR ORAL ARGUMENT

Bond Safeguard requests that the panel hold oral argument. Given the highly unusual history of the case and the importance of this appealability question to this Court’s jurisdiction and to the appellate process, oral argument may aid the panel. Cf. Rule 215, SCACR.

CONCLUSION

While the circuit court's order here is interlocutory, that characteristic does not prevent Bond Safeguard from immediately appealing it. What matters is its effect. Under the peculiar circumstances in this case, the order had the effect of striking defenses and involved the merits. Bond Safeguard therefore respectfully asks that the panel set aside Judge McDonald's order, hold the circuit court's order is immediately appealable, and deny Jasper County's motion to dismiss. Alternatively, if the panel agrees with Judge McDonald's decision, Bond Safeguard asks that the panel set forth the authorities and reasoning leading the panel to that conclusion.

Respectfully submitted this 19th day of February, 2015.



F. Cordes Ford IV  
Womble Carlyle Sandridge & Rice LLP  
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Charleston, South Carolina 29402  
843-720-4631  
Attorney for Appellant