

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

JUN 29 2016
SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Judge

Appellate Case No.: 2015-000263

Oak Pointe Homeowners' Association, Inc.,.....Respondent,

v.

Mackenzie E. Peffley,..... Appellant.

RECORD ON APPEAL

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ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

Oak Pointe Homeowners' Association, Inc.

Plaintiff,

v.

Mackenzie E. Peffley

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

C/A No.: 2013-CP-32-02386

ORDER GRANTING AND DENYING
SUMMARY JUDGMENT

JM
2014 OCT 3 P 2:18
FILED
BETH A. GARRIGUE
CLERK OF COURT
LEXINGTON, SC

This matter came before the Court on October 7, 2014, upon Plaintiff's Motion for Summary Judgment pursuant to Rule 56, SCRPC. This Court has received and reviewed the parties' submissions relating to this motion. For the reasons that follow, this Court hereby **DENIES** Plaintiff's Motion for Summary Judgment on (1) its foreclosure claim; (2) Defendant's counterclaim for a Declaratory Judgment that Plaintiff does not have the power or authority to fine Defendant; (3) Defendant's action for an accounting, and (4) Defendant's claim for violation of the Servicemembers Civil Relief Act, 50 U.S.C. Appx. § 501 *et seq.* ("SCRA").

This Court **GRANTS** Plaintiff's Motion for Summary Judgment as to Defendant's counterclaims for (1) violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 *et seq.*; (2) breach of contract; (3) breach of contract accompanied by fraudulent act; (4) negligent misrepresentation (5) slander of title, and (6) libel.

GRANTS OF SUMMARY JUDGMENT

Unfair Trade Practices Act

The South Carolina Unfair Trade Practices Act ("SCUTPA") prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." S.C. Code Ann. § 39-5-20(a). To prevail on a SCUTPA claim, Defendant must

show (1) that the opposing party engaged in an unlawful trade practice, (2) that the claimant suffered actual, ascertainable damages as a result of the opposing party's use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the opposing party had an adverse impact on the public interest. *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 291 (4th Cir. 1998). To establish an adverse impact on the public interest, Defendant must demonstrate that the complained of conduct has the potential for repetition. *Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47, 50 (1996). A potential for repetition may be demonstrated by showing that "similar unfair activities occurred in the past . . . or by showing [the current] procedures create a potential for repetition." *Beattie v. Nations Credit Finc. Svcs. Corp.*, 59 Fed.Appx 585, 589 (2003).

Defendant's Counterclaim alleges that Plaintiff acted unfairly and deceptively in levying and collecting non-compliance assessments against Defendant's property. However, the contract between the parties specifically authorizes the Plaintiff to take these actions. The restrictive covenants were recorded with the Lexington County Register of Deeds on December 12, 2002, nearly five years prior to Defendant accepting title to the property. By accepting title to the property Defendant agreed to follow the rules of the community and agreed to pay non-compliance assessments if she failed to do so. Accordingly, Defendant has failed to establish any facts that would constitute unfair or deceptive acts by Plaintiff.

Accordingly, Defendant has failed to establish evidence sufficient to withstand Plaintiff's Motion for Summary Judgment with respect to its claim that Plaintiff violated the SCUPTA. Therefore, the Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment with respect to this counterclaim.

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Breach of Contract

To bring an action for breach of contract the claimant has the burden "to prove the contract, its breach, and the damages caused by the breach" *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The necessary elements of a contract are offer, acceptance and valuable consideration" *Roberts v. Gaskins*, 327 S.C. 478, 484, 486 S.E.2d 771, 773 (Ct. App. 1997). "[B]efore a party can recover for the breach of a contract, he must allege and prove by competent, relevant testimony each one of the material elements of the contract sued on." *Rabon v. State Finance Corp.*, 203 S.C. 183, 26 S.E.2d 501, 502 (1943).

~~Defendant claims that the Plaintiff breached a contract with the Defendant by promising to remove a fine and failing to honor the promise. However, Defendant fails to allege each material element of the contract. While Defendant alleges that Plaintiff promised to waive a non-compliance assessment, Defendant fails to establish which non-compliance assessment was to be waived. Without this certainty the Defendant cannot establish that the parties had the requisite meeting of the minds to establish a contract. Defendant further fails to allege or establish any consideration that she gave to Plaintiff in exchange for its promise to waive the non-compliance assessment.~~

Further, there is no separate cause of action for breach of the implied covenant of good faith and fair dealing because it is subsumed in a claim for breach of contract. In *Ro Tec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. 467, 472, 597 S.E. 2d 881, 884 (Ct. App. 2004) the court concluded that, "the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract."

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Accordingly, Defendant has failed to set forth evidence sufficient to show a genuine issue of material fact exists as to its counterclaim for breach of contract. Therefore, this Court GRANTS summary judgment in favor of Plaintiff on this counterclaim.

Breach of Contract Accompanied by Fraudulent Act

To prevail on a claim for breach of contract accompanied by a fraudulent act, a claimant must prove: (1) a breach of contract; (2) fraudulent intent relating to the contract's breach (not merely its making); and (3) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 287 S.C. 51, 336 S.E. 2d 502 (Ct. App. 1985). A fraudulent act is broadly defined as "any act characterized by dishonesty in fact or unfair dealing." *Ro Tec Servs., Inc. v. Encompass Servs., Inc.*, 359 S.C. at 472, 597 S.E. 2d at 883 (Ct. App. 2004).

This cause of action fails as the Defendant has not set forth evidence sufficient to show a genuine issue of material fact exists as to her breach of contract claim. Moreover, Defendant failed to plead or establish any fraudulent intent, dishonesty or unfair dealing by Plaintiff such that she would be entitled to damages for breach of contract with fraudulent intent. Accordingly, Defendant has failed to set forth evidence sufficient to show a genuine issue of material fact exists as to her claim for breach of contract accompanied by fraudulent act. Therefore, this court GRANTS summary judgment in favor of Plaintiff on this counterclaim.

Negligent Misrepresentation

Defendant's Tenth Counterclaim avers that Plaintiff was negligent by falsely representing to the Defendant that it would rescind, remove or undo a fine levied against the Defendant. To establish a cause of action for negligence, a plaintiff must prove the following three elements: (1) a duty owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and

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(3) damages proximately resulting from the breach.” *Shaw v. City of Charleston*, 351 S.C. 32, 567 S.E. 2d 530 (2002).

This negligence claim is essentially the same argument set forth in Defendant’s claim for breach of contract and is defeated for the same reasons articulated above.

Accordingly, Defendant has failed to set forth evidence sufficient to show a genuine issue of material fact exists as to its claim for negligent misrepresentation. Therefore, this court GRANTS summary judgment in favor of Plaintiff on this counterclaim.

Slander of Title

In order to maintain an action for slander of title a party “must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff’s title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties” *Solley v. Navy Fed. Credit Union, Inc.*, 397 S.C. 192, 204, 723 S.E. 2d 597, 603 (Ct. App. 2012).

Defendant’s alleges her title was slandered when the Plaintiff recorded a notice of lien containing false statements. While Defendant does not specifically allege which statements were false, the court assumes that her argument is that Plaintiff’s lien contained amounts due for non-compliance assessments. However, as set forth more fully herein, Plaintiff was entitled to levy and collect all sums contained in its notice of lien.

Additionally, Defendant has failed to establish any specific facts to show such statement(s) were made with malice. “In slander of title actions, the malice requirement may be satisfied by showing the publication was made in reckless or wanton disregard to the rights of another, or without legal justification.” *Huff v. Jennings* 319 S.C. 142, 150, 459 S.E. 2d 886, 891 (Ct. App. 1995).

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Therefore, this Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment with respect to this counterclaim.

Libel

Libel is actionable per se if it involves "written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or render him odious, contemptible, or ridiculous . . . in other words, if the trial judge can presume, because of the nature of the statement, that the plaintiff's reputation was hurt as a consequence of its publication, the libel is actionable per se." *Holtzscheiter v. Thomson Newspapers, Inc.*, 332 S.C. 502, 510-511, 506 S.E.2d 497, 502 (1998).

Paragraph 56 of the Defendant's Answer avers that Plaintiff has published libelous statements to the effect that Defendant is currently delinquent in its payments "with regard to the loan subject of this action and is in default thereof." As stated earlier, this action is the foreclosure of an unpaid assessment lien. There is no loan at issue in this matter. Even Defendant's Affidavit contains no reference to a loan between Plaintiff and Defendant.

The Court finds that Defendant has not established evidence sufficient to withstand Plaintiff's Motion for Summary Judgment with respect to its claim for libel.

Therefore, this Court hereby **GRANTS** Plaintiff's Motion for Summary Judgment on this counterclaim.

DENIALS OF SUMMARY JUDGMENT

Foreclosure Action

Plaintiff placed a lien on Defendant's property to secure payment of the non-compliance assessments it levied against Defendant. Plaintiff asks this Court to grant summary judgment as to its foreclosure action.

The non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Having heard the arguments of counsel and considered the parties' pleadings, depositions, affidavits, and memoranda of law, this Court determines there are disputed issues of fact concerning Plaintiff's foreclosure action, and Plaintiff's Motion for Summary is hereby **DENIED.**

Declaratory Judgment

Defendant claims it is entitled to a Declaratory Judgment that Plaintiff lacks authority to levy non-compliance assessments against Defendant because it is not a government and no government has delegated the power to issue fines to Plaintiff.

The non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Having heard the arguments of counsel and considered the parties' pleadings, depositions, affidavits, and memoranda of law, this Court determines there are disputed issues of fact concerning Defendant's counterclaim for a Declaratory Judgment that Plaintiff can or cannot

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levy a fine for non-compliance with assessments. Plaintiff's Motion for Summary Judgment as to this counterclaim is hereby **DENIED**.

Accounting

Defendant claims it is entitled to an accounting. Plaintiff asks this Court to grant summary judgment in its favor with respect to the claim for an accounting.

The non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

~~Having heard the arguments of counsel and considered the parties' pleadings,~~
depositions, affidavits, and memoranda of law, this Court determines there are disputed issues of fact concerning Defendant's claim for an accounting, and Plaintiff's Motion for Summary Judgment as to this counterclaim is hereby **DENIED**.

Servicemembers Civil Relief Act

Defendant asserts she is entitled to relief under the Servicemembers Civil Relief Act, 50 App. U.S.C. § 527 ("SCRA"). Plaintiff asks this Court to grant summary judgment in its favor with respect to this claim.

The non-moving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

Having heard the arguments of counsel and considered the parties' pleadings, depositions, affidavits, and memoranda of law, this Court determines there are disputed issues of fact concerning the applicability of and Defendant's entitlement to relief under the SCRA, and Plaintiff's Motion for Summary Judgment as to this counterclaim is hereby **DENIED**.

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CONCLUSION

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For the reasons stated above, this Court **GRANTS** partial Summary Judgment in favor of Plaintiff as to the following of Defendant's counterclaims: (1) violation of the SCUTPA; (2) breach of contract; (3) breach of contract accompanied by fraudulent act; (4) negligent misrepresentation; (5) slander of title, and (6) libel. The Court **DENIES** Summary Judgment as to the following: (1) foreclosure of Plaintiff's lien; (2) a Declaratory Judgment that Plaintiff does not have the power or authority to fine Defendant; (3) an accounting, and (4) violation of the SCRA.

AND IT IS SO ORDERED.



The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge

October 23, 2014

BETH A. GARRIGUE
CLERK OF COURT
LEXINGTON, KY

2014 OCT 23 P 2:18

FILED

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

FILED IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

Oak Pointe Homeowners' Association, Inc.

C/A No.: 2013-CP-32-02386

Plaintiff,

2015 JAN - 7 A 9:16
BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

AM

v.

**ORDER DENYING DEFENDANT'S
MOTION TO RECONSIDER**

Mackenzie E. Peffley


Defendant.

This matter comes before the Court by way of Defendant's Motion to Reconsider pursuant to Rules 52(b) and 59(e), SCRCP. Specifically, Defendant asks this Court to reconsider its Order Granting and Denying Summary Judgment filed October 23, 2014.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered. Accordingly, this Court hereby **DENIES** Defendant's Motion under Rule 59(e), SCRCP, to Reconsider this Court's Order filed October 23, 2014. Pursuant to Rule 59(f), the Court is of the opinion that oral argument is not necessary.

IT IS SO ORDERED.

Columbia, South Carolina
January 6, 2015


G. Thomas Cooper, Jr., Judge
Fifth Judicial Circuit

COPY

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF Lexington

Oak Pointe Homeowners' Association, Inc

2013 CP 3202386

CIVIL ACTION COVERSHEET

Plaintiff(s)

vs.

Mackenzie E. Peffley et. al.

Defendant(s)

2013 JUL 16 11:48 -CP-

(Please Print)

Submitted By: Stephanie C. Trotter

McCabe, Trotter & Beverly, P.C.
140 Stoneridge Drive Suite 650 Columbia, SC 29210

SC Bar #: 77680
Telephone #: 803-724-5000
Fax #: 803-724-5001
Other:
E-mail: Stephanie.trotter@mccabetrotter.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: Constructions (100), Debt Collection (110), Employment (120), General (130), Breach of Contract (140), Other (199)
Torts - Professional Malpractice: Dental Malpractice (200), Legal Malpractice (210), Medical Malpractice (220), Previous Notice of Intent Case #, Notice/ File Med Mal (230), Other (299)
Torts - Personal Injury: Assault/Slander/Libel (300), Conversion (310), Motor Vehicle Accident (320), Premises Liability (330), Products Liability (340), Personal Injury (350), Wrongful Death (360), Other (399)
Real Property: Claim & Delivery (400), Condemnation (410), Foreclosure (420), Mechanic's Lien (430), Partition (440), Possession (450), Building Code Violation (460), Other (499)
Inmate Petitions: PCR (500), Mandamus (520), Habeas Corpus (530), Other (599)
Administrative Law/Relief: Reinstate Drv. License (800), Judicial Review (810), Relief (820), Permanent Injunction (830), Forfeiture-Petition (840), Forfeiture-Consent Order (850), Other (899)
Judgments/Settlements: Death Settlement (700), Foreign Judgment (710), Magistrate's Judgment (720), Minor Settlement (730), Transcript of Judgment (740), Lis Pendens (750), Transfer of Structured Settlement Payment Rights Application (760), Confession of Judgment (770), Petition for Workers Compensation Settlement Approval (780), Other (799)
Appeals: Arbitration (900), Magistrate-Civil (910), Magistrate-Criminal (920), Municipal (930), Probate Court (940), SCDOT (950), Worker's Comp (960), Zoning Board (970), Public Service Commission (990), Employment Security Commission (991), Other (999)
Special/Complex /Other: Environmental (600), Automobile Arb. (610), Medical (620), Other (699), Sexual Predator (510), Pharmaceuticals (630), Unfair Trade Practices (640), Out-of State Depositions, Motion to Quash Subpoena in Out-of-County Action (660)

Submitting Party Signature: [Signature] Date: July 12 2013

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

FOR MANDATED ADR COUNTIES ONLY

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

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

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

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

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

COPY

FILED IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

2013 JUL 10 AM 11:48 DOCKET NO.

Oak Pointe Homeowners' Association, Inc.,
Plaintiff,

**SUMMONS
(NON-JURY)
FORECLOSURE OF REAL ESTATE
NON-ELIGIBLE FOR HOME
MODIFICATION PROGRAM**

v.

Mackenzie E. Peffley ,

Defendant(s).

2013 CP 3202386

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to appear and defend by answering the Complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their offices, 140 Stoneridge Drive Suite 650, Post Office Box 212069, Columbia, South Carolina 29221, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to do so, judgment by default will be rendered against you for the relief demanded in the complaint. YOU WILL ALSO TAKE NOTICE that the Plaintiff will move for an order of reference or that the Court may issue a general order of reference of this action to a master/special referee, pursuant to Rule 53, South Carolina Rules of Civil Procedure.



Stephanie C. Trotter
McCabe, Trotter & Beverly, P.C.
140 Stoneridge Drive Suite 650
Post Office Box 212069 (29221)
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Email: Stephanie.Trotter@mccabetrotter.com
Attorneys for Plaintiff

Columbia, South Carolina
July 11, 2013

COPY

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

FILED
DOCKET NO.

Oak Pointe Homeowners' Association, Inc.,

2013 JUL 16 A 11:48

Plaintiff,

**COMPLAINT
(NON-JURY)
FORECLOSURE OF REAL ESTATE
NON-ELIGIBLE FOR HOME
MODIFICATION PROGRAM**

v.

Mackenzie E. Peffley ,

Defendant(s).

2013CP3202386

The Plaintiff herein, complaining of the acts or omissions of the Defendant(s) would show unto this Honorable Court as follows:

1. Upon information and belief, the Defendant(s) is/are a resident of the County of Lexington, State of South Carolina and the subject of this action is real property located in the County of Lexington, South Carolina.

2. Plaintiff is a corporation or other legal entity doing business in the State of South Carolina and has the right to bring this action.

3. Heretofore, on or about 08/31/2007 the Defendant(s) took possession of the property described in Exhibit A attached to this Complaint and incorporated herein by reference.

4. The herein described property is subject to governing documents for Oak Pointe Homeowners' Association, Inc. attached hereto as Exhibit B and incorporated herein by reference.

5. By taking possession of the property, Defendant(s) agreed to pay assessments and other charges allowed by the governing documents.

6. Pursuant to the governing documents a lien arises in favor of Plaintiff to secure payment of the unpaid charges.

7. Heretofore, on or about 03/23/2011, Plaintiff filed a Notice of Lien in connection with unpaid assessments on the herein referenced property owned by the Defendant(s).

8. Pursuant to the governing documents Plaintiff is entitled to foreclose on the aforementioned lien.

9. The Defendant(s) has failed to make consistent payments of the assessments and interest, although demand for payment has been made, and the Plaintiff after giving all required notices, has and does hereby elect to declare the entire balance payable at once. There is now due, owing and unpaid the

sum of \$933.37 in principal, late fees, interest and other charges. Plaintiff is further entitled to recover reasonable attorney's fees and the cost of litigating this proceeding.

10. If Plaintiff secures the premises being foreclosed herein, Plaintiff's cost of securing said premises should be added to any judgment rendered on its behalf. If Plaintiff pays any utility charges constituting a lien on said premises, Plaintiff's advances should be added to any judgment rendered on its behalf.

WHEREFORE, having fully set forth its Complaint, Plaintiff prays that this Honorable Court inquire into the matters as set forth herein:

1. Under the direction of this Court, ascertain and determine the amount due to Plaintiff as outlined by the governing documents, together with interest of 16.00% Per annum and reasonable attorney's fees and costs as outlined in the governing documents.

2. That said Plaintiff have judgment of foreclosure for the amount so found to be due and owing thereon, together with any taxes or insurance premiums which may be due, with a reasonable sum as attorney's fees, and for the costs of this proceeding.

3. That the premises be sold under the direction of this Court, the equity of redemption be barred, and that the proceeds of sale be applied as follows:

a. First, to the costs and expenses of the within proceeding and said sale;

b. Second, to the payment and discharge of the amount due under the governing documents, together with attorney's fees as aforesaid; and

c. Third, the surplus, if any, be distributed pursuant to Rule 71, of the South Carolina Rules of Civil Procedure.

4. Plaintiff have judgment against the Defendant(s) for the full amount found to be due Plaintiff.

5. For such other and further relief as may be just and proper.

MCCABE, TROTTER & BEVERLY, P.C.



Stephanie C. Trotter
140 Stoneridge Drive, Suite 650
Post Office Box 212069 (29221)
Columbia, SC 29210
Phone: 803-724-5000
Fax: 803-724-5001
Email: Stephanie.Trotter@mccabetrotter.com
ATTORNEY FOR THE PLAINTIFF

Columbia, South Carolina
July 11, 2013

COPY

STATE OF SOUTH CAROLINA
PLEAS

IN THE COURT OF COMMON

COUNTY OF LEXINGTON
Oak Pointe Homeowners' Association, Inc.
Plaintiff,

FILED
DOCKET NO

2013 JUL 16 A 4:48

CERTIFICATION

v.

Mackenzie E. Peffley ,
Defendant.

SETH A. GARRIGS
CLERK OF COURT
LEXINGTON


2013CP3202386

1. My name is Stephanie Trotter. I am the attorney for the Plaintiff in the above-captioned case. I have communicated with my client about its policies and procedures related to foreclosure intervention, and I have reviewed the documents my client sent me in anticipation of bringing this foreclosure action. Based on the foregoing, I can say that I have personal knowledge of the facts set forth in this certification and can say that I am authorized to execute this affidavit on the Plaintiff's behalf.

2. The Plaintiff in this foreclosure action does not offer any form of foreclosure intervention.

3. This lawsuit does not involve a promissory note or mortgage but instead involves the foreclosure of a homeowners' association lien for assessments.

4. This lawsuit therefore is not subject to the South Carolina Supreme Court Administrative Order No. 2011-5-02-01.

July 12, 2013
Columbia, South Carolina
Sworn to before me this
12 day July, 2013

Notary Public for S.C.
My Commission Expires: 04/02/14



Stephanie C. Trotter
McCabe, Trotter & Beverly, P.C.
P. O. Box 212069
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Telephone: 803-724-5000
Fax: 803-724-5001
Email: Stephanie.Trotter@mccabetrotter.com
Attorney for Plaintiff

Exhibit A

All that certain piece, parcel or lot of land, together with any improvements thereon, situate, lying and being in the County of Lexington, State of South Carolina, and being shown and delineated as Lot 99 on a plat of Oak Pointe, Phase Three prepared by Belter & Associates, Inc., dated March 30, 2003, last revised June 7, 2003 and recorded in Plat Slide 719 at Page 7 in the Office of the ROD for Lexington County; and being more particularly shown and delineated on a plat prepared for Robert H. McBride, II by Cox and Dinkins, Inc., dated March 24, 2005 and recorded in the Office of the ROD for Lexington County in Book 10037 at Page 125. For a more accurate description of said lot reference is made to latter mentioned plat.

This being the same property conveyed to Mackenzie E. Peffley by deed of Robert H. McBride II, dated 8/31/2007 and recorded 8/31/2007 in Book 12293 at Page 313.



Rec Fee:\$39.00 St Fee:\$0.00
Co Fee:\$0.00 Pages:33
Lexington County ROD Debra H. Gunter
RESTRICTIONS Bk:Pg 7748:294

**THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION PURSUANT
TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT
(S.C. CODE ANN. § 15-48-10 ET SEQ., AS AMENDED)**

STATE OF SOUTH CAROLINA) DECLARATION OF COVENANTS, CONDITIONS,
) RESTRICTIONS, EASEMENTS, CHARGES AND
COUNTY OF LEXINGTON) LIENS FOR OAK POINTE

THIS Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for the OAK POINTE is made this 12 day of December, 2002, by The Mungo Company, Inc., a corporation organized and existing under the laws of the State of South Carolina (the "Developer"). Any defined terms used herein shall have the meaning set out in Article I hereafter:

RECITALS

1. The Developer, is the owner of the real property described in Exhibit A of this Declaration, and desires to develop thereon a Community made up of Neighborhoods together which may include common lands and facilities, for the sole use and benefit of the Owner of each Lot to be located in such Community.
2. The Developer has or may from time to time acquire additional real property that it may desire to develop as additional phases of such Community which the Developer may incorporate as additional phases of this Community and bring same under this Declaration.
3. The Developer is desirous of maintaining control of design criteria, Structure location, Plans and construction specifications, and other controls to assure the integrity of the Community or each Neighborhood within the Community. Each purchaser of a Lot or Dwelling in the Community will be required to maintain, modify, change, and construct the Dwelling and any Structure in accordance with the design criteria contained herein and established by the Developer or Architectural Control Authority, When Empowered, as hereinafter provided.
4. The Developer desires to provide for the preservation of the value and amenities in such Community and for the maintenance of such common lands and facilities.
5. The Developer desires to subject the real property described in Exhibit A to the covenants, conditions, restrictions, easements, charges, and liens, hereinafter set forth and to the guidelines, policies, procedures, rules and regulations adopted by the Developer or the Association, When Empowered, for each Neighborhood of the Community as a whole. Each and all of which is and are binding upon and for the benefit of the Developer, the Community and each Owner and shall run with the title to the land.

contractor. The Association shall reimburse the Developer for any and all costs incurred by the Developer and the cost including collection costs incurred by the Developer shall be a lien on the Common Area. This Section shall not be amended or removed without the written consent of the Developer. Any entry by the Developer under the terms of this Section shall not be deemed a trespass, and an easement in gross of a commercial nature is reserved to the Developer for the purpose of entry onto the Common Area for the purpose of enforcing this paragraph. This provision shall not be construed as an obligation on the part of the Developer or its assigns to provide garbage or trash removal services. As provided herein, these rights may be assigned by the Developer. The Association shall hold harmless the Developer, its agents, officers, directors, and employees from any liability arising out of correcting the Association's breach of this Section. The maintenance, operation, and repair of the Common Area shall include, but not be limited to, repair of damage to pavements, roadways, walkways, outdoor lighting, buildings, if any, recreational equipment, if any, fences, storm drains, and sewer and water lines, connections, and appurtenances, except when such responsibilities are accepted by responsible parties, including public bodies, governmental bodies, districts, agencies or authorities and only for so long as they properly perform.

ARTICLE VI ASSESSMENTS

Section 1. ASSESSMENTS

(a) Each and every Owner of any Lot or Lots within The Property, by acceptance of a deed therefore, whether or not it shall be so expressed in any such deed or other conveyance, shall be personally obligated to pay to the Association, the Assessments, and the Association's collection fees, attorneys fees and court cost incurred in collecting the Assessments, or in enforcing or attempting to enforce the Declaration, By-Laws and the Architectural Guidelines and Regulations established or amended by the Developer or the Board of Directors, When Empowered.

(b) Assessments, together with such interest thereon, and other costs of collection; including the Association collection fees, attorney fees and court costs shall be a charge on the land and shall be a continuing lien upon the Lot or Lots against which such Assessments are levied. Owners of any Lot shall share in the obligation of any other Owner of that Lot and shall be jointly and severally liable for any Assessments, the cost of collection, attorney fees and court costs that are attributable to that Lot.

(c) The Association shall, upon demand at any time, furnish to any Owner or attorney representing the prospective purchaser of a Lot, a certificate in writing signed by an officer of the Association, setting forth whether said Assessments have been paid. Such certificate shall be conclusive evidence of payment of any Assessments therein stated to have been paid. At all times the Association's records with respect to payments made or due shall be deemed correct unless proper documentation to the contrary can be produced.

(d) This Article shall not be amended as provided in Article X, Section 5, to eliminate or

Section 1. OWNER'S MAINTENANCE RESPONSIBILITIES. Unless specifically identified herein or specifically elected by the Developer or the Board of Directors, When Empowered, as being the responsibility of the Association, all maintenance and repair of a Lot, together with all portions of the Dwelling, and other Structures or the Lot shall be the responsibility of the Owner of Such Lot. The responsibility of each Owner shall include, but not limited to, the painting, maintenance, repair, and replacement of walls or fences, and all siding, exterior doors, fixtures, equipment, and appliances (including, without limitation, the heating and air-conditioning system for the Dwelling) and all chutes, flues, ducts, conduits, wires, pipes, plumbing or other apparatus which are deemed to be a part of the Dwelling or Lot, and the lawns, trees, shrubs, fences, grass, driveways and walkways, on the Lot. The responsibility of the Owner shall also include, but not limited to, the maintenance, repair, and replacement of all glass, lights and light fixtures (exterior and interior), awnings, window boxes, window screens, and al screens or glass-enclosed porches, balconies, or decks which are a part of the Dwelling. Each owner shall also maintain roof, gutters and downspouts in a good state of repair.

Section 2. OWNER MUST PROVIDE INSURANCE OF DWELLING. Each Owner shall, at its own expense, insure the Dwelling and all other insurable improvements on the Lot in an amount not less than the then current maximum insurable replacement value thereof. Such coverage shall afford protection against loss or damage by fire and other hazards covered by the standard extended coverage endorsements and such other risks as from time to time customarily shall be covered with respect to buildings similar in construction, location and use, including, but not limited to, vandalism, malicious mischief, windstorm and water damage.

Section 3. RECONSTRUCTION OR REPAIR OF DAMAGED DWELLING. If any Dwelling shall be damaged by casualty, the Owner of such Dwelling shall promptly reconstruct or repair it so as to restore such Dwelling nearly as possible to its condition prior to suffering the damage. All such reconstruction and repair work shall be done in accordance with plans and specifications therefor, approved by the Developer, or Board of Directors, When Empowered. Encroachments upon or in favor of Dwelling or Lots, which may be necessary for or created as a result of such reconstruction or repair, shall not constitute a claim or basis of a proceeding or action by the Owner on whose Dwelling or Lot such encroachment exists, provided that such reconstruction or repair is done substantially in accordance with the plans and specifications approved by the Developer, or Architectural Control Authority, When Empowered, or as the building was originally constructed.

ARTICLE IX REMEDIES

Section 1. REMEDIES FOR NONPAYMENT OF ASSESSMENTS. Any Assessments not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of sixteen percent (16%) per annum or the highest rate allowed by law, whichever is higher. Said interest shall be charged at the discretion of the Developer or the Association's Board of Directors, When Empowered. In addition, the Developer or the Board of Directors of the Association, When Empowered, shall have the right to charge an Association collection fee or late charge on any

Assessment or installment thereof which shall not have been paid by its due date. In the event that the Developer or the Board of Directors of the Association, When Empowered, chooses an installment schedule for the method of payment for an Assessment or as a method of allowing an Owner to pay past due Assessments, and in the event that any installment is delinquent, the Developer or the Board of Directors of the Association, When Empowered, shall have the right to accelerate and immediately make due all or part of the Assessment due from that Owner of that Lot for that budgeted period. The Developer or the Board of Directors of the Association, When Empowered, may bring an action at law against the Owner personally obligated to pay the same or foreclose the lien created herein against the Lot in the same manner as prescribed by the laws of the State of South Carolina for the foreclosure of mortgages on Time Shares or for the foreclosure of mortgages by judicial proceedings, and may seek a deficiency judgment, and interest, court costs, all costs of collection, including reasonable attorney's fees. No Owner may waive or otherwise escape liability for the Assessments provided for herein by non-use of the Common Area or abandonment of his Lot nor shall damage to or destruction of any improvements on any Lot by fire or other casualty result in any abatement or diminution of the Assessments provided for herein. No disagreement on the part of any Owner with respect to the budget; the amount or installment schedule for any Assessment; any change to the amount or installment schedule for the Assessment; the Regulations established or amended by the Developer or the Board of Directors of the Association, When Empowered; the actions or lack of action on the part of the Developer or the Association; the purpose for any Assessment for Capital Repair or Improvements; or the amount or purpose of any Assessment for Budgetary Shortfall shall be reason for any Owner to fail to pay any Assessment at the time that it is due. Also, the Developer or Board of the Association, When Empowered, may at any time notify the holders of mortgages of the Lot of the failure of the Owner to pay Assessments or any other violation of the Declaration.

Section 2. REMEDIES FOR NONPAYMENT OF AD VALOREM TAXES OR LEVIES FOR PUBLIC IMPROVEMENTS BY THE ASSOCIATION. Upon default by the Association in the payment to the governmental authority entitled thereto of any ad valorem taxes levied against the Common Area or Assessments levied for public improvements to the Common Area, which default shall continue for a period of six (6) months, each Owner of a Lot shall become personally obligated to pay to the taxing or assessing governmental authority a portion of such unpaid taxes or Assessments in an amount determined by dividing the total taxes and/or Assessments due the governmental authority by the total number of Lots in the Community. If such sum is not paid by the Owner within thirty (30) days following receipt of notice of the amount due, then such sum shall become a continuing lien, subordinate to all other mortgages, on the Lot of the then Owner, his or their heirs, devisees, personal representatives and assigns, and the taxing or assessing governmental authority may either bring an action at law or may elect to foreclose the lien against the Lot of the Owner.

Section 3. REMEDIES FOR FAILURE TO MAINTAIN EXTERIOR OF DWELLING AND LOT. In the event that the Owner neglects or fails to maintain his Lot and/or the exterior of his or her Dwelling in the Community, the Developer or the Association, When Empowered, may in addition to any other remedy, provide such exterior maintenance. The Developer or the Association, When Empowered, shall first give written notice to the Owner of the specific items of the exterior maintenance or repair that the Association intends to perform and the Owner shall have

COPY

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

FILED
NOV -4 P 2:04 Case No. 2013-CP-32-2386

Oak Pointe Homeowners' Association,
Inc.,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

Plaintiff,

ANSWER AND COUNTERCLAIM
(JURY TRIAL DEMANDED)

vs.

Mackenzie E. Peffley,

Defendant.

The Defendant, in answer to the Plaintiff's Complaint and as counterclaim, answers and alleges as follows:

FOR A FIRST DEFENSE

1. Any allegation of the Complaint not herein admitted, qualified, or explained is denied. Any allegations of the Complaint subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the Complaint subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.

2. Answering the allegations of paragraph 1 of the Complaint, the Defendant admits the same upon information and belief.

3. Answering the allegations of paragraph 2 of the Complaint, the Defendant denies the same as written.

4. Answering the allegations of paragraphs 4 and 5 of the Complaint, the Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the paragraphs.

5. Answering the allegations of paragraph 5 of the Complaint, the Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the paragraph.

6. Answering the allegations of paragraph 6 of the Complaint, the Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the paragraph.

7. Answering the allegations of paragraph 7 of the Complaint, the Defendant is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations of the paragraph.

8. Answering the allegations of paragraph 8 of the Complaint, the Defendant denies the same.

9. Answering the allegations of paragraph 9 of the Complaint, the Defendant denies the same.

10. Answering the allegations of paragraph 10 of the Complaint, the Defendant denies the same.

11. No answer to the prayer in the Complaint is required.

FOR A SECOND DEFENSE

12. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

13. The Complaint fails to state facts sufficient to constitute a cause of action.

14. The Complaint fails to state that the Defendant is in breach of an obligation to the Plaintiff.

15. Rule 12(b)(6), SCRCP, provides for the dismissal of the Complaint.

16. The Complaint should be dismissed.

FOR A THIRD DEFENSE AND AS COUNTERCLAIM

17. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

18. Some or all of the amount(s) the Plaintiff claims the Defendant owes to it in this case are purported fines the Plaintiff has claimed to levy upon the Defendant.

19. The Plaintiff is not a sovereign, is not a federal, state, county, or municipal government, and is not an agency or other part, arm, or branch of any federal, state, county, or municipal government.

20. There is a justiciable controversy between the Plaintiff and the Defendant about whether the Plaintiff has the power or authority to fine the Defendant.

21. The Plaintiff claims that it has the power or authority to fine the Defendant.

22. The Plaintiff does not have the power or authority to fine the Defendant, including, but not limited to, for the following reasons:

a. The power to levy fines is a power of the government, and no federal, state, county, or municipal government has delegated to the Plaintiff any power to levy fines; and

b. The "Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens" at issue in this case does not state that it provides for the Plaintiff to levy fines.

23. The fine(s) the Plaintiff claims the Defendant owes it are unlawful and invalid.

24. The Defendant is entitled to a declaratory judgment that the Plaintiff does not have the power or authority to fine the Defendant and that the fines the Plaintiff claims the Defendant owes it are unlawful and invalid.

25. The Plaintiff is not entitled to any relief on the basis of it having levied purported fines on the Defendant.

FOR A FOURTH DEFENSE

26. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

27. The Plaintiff has engaged in such conduct with respect to the matters subject of this case as to make its hands unclean with regard to the matters subject of this case.

28. This conduct includes, but is not necessarily limited to, promising the Defendant that a fine levied against her by the Plaintiff would be rescinded or otherwise undone and failing to abide by that promise.

29. This conduct relates directly to the subject matter of this case.

30. The said conduct has proximately caused the Defendant prejudice and injury.

31. In the alternative, the Plaintiff is estopped by its conduct from pursuing this case against the Defendant.

FOR A FIFTH DEFENSE AND AS COUNTERCLAIM

32. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

33. Actions of the Plaintiff, such actions including, but not necessarily being limited to, those stated in this pleading (among them the purported levying of, collection of, and actions taken in an effort to collect purported fines of property owners in the subdivision at issue) constitute violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*

34. The Plaintiff knew or should have known that the said actions were violations of the Unfair Trade Practices Act and were unfair and deceptive acts in trade or commerce.

35. These actions are capable of repetition, including, but not necessarily limited to, in that the Plaintiff is a property owners' association with procedures for fining its member property owners, procedures which it uses to levy purported fines on members.

36. The Defendant has suffered damages as a result of the said actions.

37. The Defendant is entitled to treble damages, reasonable attorney's fees, and costs.

FOR A SIXTH DEFENSE AND AS COUNTERCLAIM

38. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

39. According to the Plaintiff, the Plaintiff and the Defendant have a binding contractual relationship concerning the matters subject of this case.

40. In the course of that relationship, the Plaintiff promised the Defendant that it would remove or otherwise undo a purported fine it had levied on her and that she would receive a credit toward her next year's assessments.

41. The Plaintiff has not honored this promise.

42. The Plaintiff has breached its contractual obligations to the Defendant.

43. The Plaintiff breached its duty to the Defendant under the covenant of good faith and fair dealing inherent in ever contractual relationship.

44. The Plaintiffs' breach or breaches of its obligations to the Defendant proximately caused damage to the Defendant.

45. The Defendant is entitled to recover from the Plaintiff for the damages caused by the Plaintiff's breaches of contract.

FOR A SEVENTH DEFENSE AND AS COUNTERCLAIM

46. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

47. The breach of contract by the Plaintiff was done with its fraudulent intent with regard to the breach and was accompanied by its fraudulent act or acts with regard to the breach.

48. The Defendant is entitled to recover actual damages, punitive damages, and the costs of this action from the Plaintiff as a result of this breach of contract accompanied by fraudulent act.

FOR AN EIGHTH DEFENSE AND AS COUNTERCLAIM

49. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

50. The Plaintiff slandered the Defendant's title by recording in the public land records a purported notice of lien that contains false statements that are derogatory to the Defendant's title.

51. These statements have diminished the value of the subject property in the eyes of third parties.

52. The Defendant has suffered damages as the consequent and proximate result.

53. The Defendant is entitled to recover actual damages, consequential damages, and the costs of this action from the Plaintiff.

FOR A NINTH DEFENSE AND AS COUNTERCLAIM

54. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

55. The Plaintiff has published statements concerning the Defendant in writing.

56. Such statements include statements to the effect that the Defendant is currently delinquent in its payments with regard to the loan subject of this action and is in default thereof.

57. These statements tended to impeach the honesty, integrity, virtue, creditworthiness, business soundness, and/or reputation of the Defendant.

58. These statements were false.

59. These statements were published with malice by the Plaintiff. These statements were published with the Plaintiff's knowledge of their falsity or with reckless disregard by the Plaintiff of whether they were true or false.

60. These statements were libelous *per se*.

61. The publication by the Plaintiff of these statements has proximately caused damages to the Defendant.

FOR A TENTH DEFENSE AND AS COUNTERCLAIM

62. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

63. The Plaintiff falsely represented to the Defendant that the Plaintiff would rescind, remove, or otherwise undo a purported fine levied against the Defendant.

64. The Plaintiff had a monetary interest in making that false representation.

65. The Plaintiff owed the Defendant a duty of care to see that it communicated truthfully with the Defendant.

66. The Plaintiff breached this duty by communicating falsely with the Defendant. This was a failure to exercise due care and was negligence.

67. The Plaintiff made these representations with at least reckless disregard for the Defendant's rights and well-being.

68. The Plaintiff should have known that its representations were false.

69. Justifiably, the Defendant relied on these representations.

70. The Defendant has suffered loss and damages as a direct and proximate result of her reliance on the representations.

FOR AN ELEVENTH DEFENSE AND AS COUNTERCLAIM

71. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

72. There is a long and complicated account history between the Plaintiff and the Defendant with regard to the matters subject of this case.

73. The Defendant is entitled to an accounting with regard to the same.

FOR A TWELFTH DEFENSE AND AS COUNTERCLAIM

74. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

75. During times when the Plaintiff claims that interest, late charges, penalties, and fines accrued or were assessed or levied against the Defendant, the Defendant was a servicemember in active-duty military service in the Armed Forces of the United States of America.

76. The interest, late charges, penalties, and fines accrued or were assessed or levied against the Defendant exceed and/or were assessed or levied in violation of the Servicemembers Civil Relief Act, 50 U.S.C. Appx. § 501, *et seq.*

77. The ability of the Defendant to perform any obligations she owed the Plaintiff were materially affected by her military service.

78. The Court should reduce or waive any such interest, late charges, penalties, and fines in accordance with the Servicemembers Civil Relief Act.

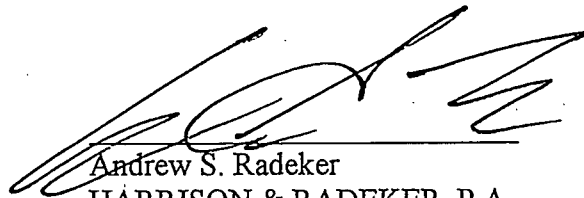
79. In accordance with the Servicemembers Civil Relief Act, the Court should limit the interest rate the Plaintiff is permitted to charge with regard to any unpaid assessments.

80. The Defendant is entitled to all relief available under 50 U.S.C. Appx. § 579a of the Servicemembers Civil Relief Act, including equitable and declaratory relief, the recovery of monetary damages, and reasonable attorneys' fees and costs.

WHEREFORE, the Defendant prays for the Court to:

- (a) Issue an Order dismissing the Complaint with prejudice;
- (b) Deny the Plaintiff the relief it seeks in this action;
- (c) Issue a declaratory judgment that the Plaintiff lacks the power and authority to fine the Defendant;
- (d) Render a verdict or judgment for the Defendant for actual damages, punitive damages, treble damages, and all applicable statutory penalties;
- (e) Award the Defendant reasonable attorney's fees;
- (f) Award the Defendant the costs and expenses of this action; and
- (g) Grant the Defendant such other and further relief as the court deems just and proper.

Respectfully submitted,



Andrew S. Radeker
HARRISON & RADEKER, P.A.
Post Office Box 50143
Columbia, South Carolina 29250
(803) 779-2211
(803) 779-6700 (facsimile)
drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANT

Columbia, South Carolina
November 4, 2013

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

Case No. 2013-CP-32-2386

Oak Pointe Homeowners' Association,
Inc.,

Plaintiff,

vs.

Mackenzie E. Peffley,

Defendant.

2013 NOV -4 P 2:01


BETH A. CARRICO
CLERK OF COURT
LEXINGTON, SC

CERTIFICATE OF SERVICE

COPY

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., attorneys for the Defendant, do hereby certify that I have, on this the 4th day of November, 2013, served the foregoing document in the above-captioned action by depositing the same in the United States Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows, to wit:

Stephanie C. Trotter, Esq.
McCabe Trotter & Beverly, PC
P.O. Box 212069
Columbia, SC 29221



Andrew S. Radeker

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Oak Pointe Homeowners' Association, Inc.

Plaintiff,

vs.

Mackenzie E. Peffley,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE ELEVENTH JUDICIAL CIRCUIT

CASE NO.: 2013-CP-32-2386

**PLAINTIFF'S REPLY TO DEFENDANT'S
ANSWER AND COUNTERCLAIM**

(13789.24)

TO: ANDREW S. RADEKER, ATTORNEY FOR ABOVE-NAMED DEFENDANT(S):

Comes Now, Plaintiff, by and through its undersigned counsel and replies to Defendant's Answer and Counterclaim as follows:

FOR A FIRST DEFENSE
(General Denial)

1. Each and every allegation not specifically admitted herein is denied. To the extent any allegation or part thereof is not expressly referred to and specifically answered it is hereby denied and legal proof thereof is demanded.

FOR A SECOND DEFENSE
(Specific Denial)

2. Paragraphs 1 through 11 are in response to Plaintiff's Complaint and do not require a response. To the extent a response is required, Plaintiff denies the same.

3. Paragraph 12 does not require a response. To the extent such paragraph could be construed to require a responsive pleading, then such paragraph is denied.

4. Paragraphs 13-16 are denied.

5. Paragraph 17 does not require a response. To the extent such paragraph could be construed to require a responsive pleading, then such paragraph is denied.

6. Paragraph 18 is denied.

7. Paragraph 19 is admitted.
8. The allegations of Paragraph 20 call for legal conclusions which, upon information and belief, the Plaintiff is not required to answer. To the extent an answer is required, the Plaintiff denies the allegations and demands strict proof thereof.
9. Paragraph 21 is admitted.
10. Paragraph 22 is denied.
11. Paragraphs 23-25 are denied.
12. Paragraph 26 does not require a response. To the extent such paragraph could be construed to require a responsive pleading, then such paragraph is denied.
13. Paragraphs 27-31 are denied.
14. Paragraph 32 does not require a response. To the extent such paragraph could be construed to require a responsive pleading, then such paragraph is denied.
15. Paragraphs 33-37 are denied.
16. Paragraph 38 does not require a response. To the extent such paragraph could be construed to require a responsive pleading, then such paragraph is denied.
17. Paragraph 39 is admitted.
18. Paragraph 40 is admitted to the extent that the Plaintiff agreed to remove and did remove a \$165.00 non-compliance assessment for unapproved signage. To the extent any allegations can be construed against the Plaintiff, they are denied and strict proof is demanded thereof.
19. Paragraphs 41-45 are denied.
20. Paragraph 46 does not require a response. To the extent such paragraph could be construed to require a responsive pleading, then such paragraph is denied.
21. Paragraphs 47-48 are denied.

22. Paragraph 49 does not require a response. To the extent such paragraph could be construed to require a responsive pleading, then such paragraph is denied.

23. Paragraphs 50-53 are denied.

24. Paragraph 54 does not require a response. To the extent such paragraph could be construed to require a responsive pleading, then such paragraph is denied.

25. Paragraph 55 is admitted.

26. Paragraph 56 is denied. Specifically, this lawsuit does not concern any "loan" and Plaintiff has not made any statements regarding any loan owed to or by the Defendant.

27. Paragraphs 57-61 are denied.

28. Paragraph 62 does not require a response. To the extent such paragraph could be construed to require a responsive pleading, then such paragraph is denied.

29. Paragraphs 63-64 are denied.

30. Paragraph 65 is denied.

31. Paragraphs 66-70 are denied.

32. Paragraph 71 does not require a response. To the extent such paragraph could be construed to require a responsive pleading, then such paragraph is denied.

33. Paragraphs 72-73 are denied.

34. Paragraph 74 does not require a response. To the extent such paragraph could be construed to require a responsive pleading, then such paragraph is denied.

35. Plaintiff lacks sufficient information or knowledge to form a belief as to the allegations of Paragraph 75 and therefore denies the same and demands strict proof thereof.

36. The allegations of Paragraph 76 call for legal conclusions which, upon information and belief, the Plaintiff is not required to answer. To the extent an answer is required, the Plaintiff denies the allegations and demands strict proof thereof.

37. Plaintiff lacks sufficient information or knowledge to form a belief as to the allegations of Paragraph 77 and therefore denies the same and demands strict proof thereof.

38. The allegations of Paragraphs 78-80 call for legal conclusions which, upon information and belief, the Plaintiff is not required to answer. To the extent answers are required, the Plaintiff denies the allegations and demands strict proof thereof.

FOR A THIRD DEFENSE
(Dismissal Pursuant to SCRCP 12(b)(6))

39. The Defendant's Counterclaims fail to state a claim against Plaintiff for which relief can be granted.

FOR A FOURTH DEFENSE
(Comparative Negligence)

40. The claims against the Plaintiff are barred or limited by the contributing, concurring, intervening or superseding fault or breach by persons or entities other than the Plaintiff.

FOR A FIFTH DEFENSE
(Accounting)

41. The Defendant's account is not so complicated that a jury cannot comprehend it.

FOR A SIXTH DEFENSE
(Prior Breach)

42. Defendant is barred from any recovery due to their prior breach of the restrictive covenants by failing to make timely payments of assessments as alleged in the Complaint.

FOR A SEVENTH DEFENSE
(Unclean Hands)

43. Some or all of the Defendant's Counterclaims are barred by the doctrine of unclean hands.

FOR AN EIGHTH DEFENSE
(Failure to Mitigate)

44. Defendant has failed to mitigate their damages as required by law.

FOR A NINTH DEFENSE
(Statutes of Limitations and Repose/Laches)

45. Some or all of the Defendant's counterclaims are barred by the applicable Statutes of Limitations and Repose and/or the equitable doctrine of laches.

FOR A TENTH DEFENSE
(Privilege)

46. Pleadings and Lis Pendens are privileged and cannot form the basis of a Slander of Title claim.

FOR A ELEVENTH DEFENSE
(Waiver)

47. Some or all of the Defendant's Counterclaims are barred by the doctrine of waiver.

FOR A TWELFTH DEFENSE
(Punitive Damages Unconstitutional)

48. Defendant is not entitled to recover punitive damages in this action because:

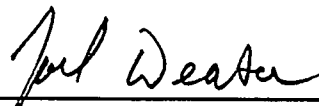
- i. An award of punitive damages would violate the Eighth Amendment to the United States Constitution and Article I Section XV of the South Carolina Constitution in that any award of punitive damages would constitute an excessive fine;
- ii. An award of punitive damages would violate both the Fourteenth Amendment to the United States Constitution and Article I Section III of the South Carolina Constitution in that the power of the court to award punitive damages in any amount it chooses would be wholly devoid of any meaningful standard and would be inconsistent with the guarantees of due process of law.
- iii. An award of punitive damages would violate the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I Section III of the South Carolina Constitution because even if a standard governing the

imposition of punitive damages exists, that standard is void for vagueness;

- iv. An award of punitive damages would violate the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution and Article I Section III of the South Carolina Constitution in that an award of punitive damages would be based in part on the wealth of Defendant; and
- v. An award of punitive damages would violate the Federal Doctrine of Separation of Powers and Article I Section VIII of the South Carolina Constitution because punitive damages are a creation of the judicial branch of government, the creation of which invades the province of the legislative branch.

WHEREFORE, Plaintiff, having fully responded to Defendant's Answer and Counterclaims, prays this Honorable Court as follows:

- a) For an Order dismissing Defendant's Counterclaims;
- b) Judgment in favor of Plaintiff;
- c) An award of costs and attorneys' fees; and
- d) For such other and further relief as may be deemed just and proper.


Stephanie C. Trotter (SC Bar #77680)
Joel M. Deason (SC Bar #72705)
McCabe, Trotter, & Beverly, PC
140 Stoneridge Drive, Suite 160 (29210)
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Attorneys for the Plaintiff

November 12, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF Lexington

Oak Pointe Homeowners' Association, Inc.

C/A No.: 2013-CP-32-02386

Plaintiff,

CERTIFICATE OF SERVICE

v.

Mackenzie E. Peffley

Defendant(s)

013789/00024

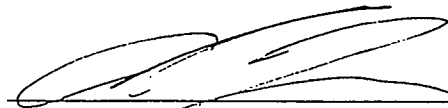
I, Andrew Moore, an employee with the law firm of McCabe, Trotter and Beverly, P.C., attorneys for Plaintiff, hereby certify that I have served or caused to be served a copy of the foregoing document upon the below named individuals and/or counsel this the 12th day of November, 2013 via Regular U.S. Mail as follows:

DOCUMENT SERVED

Plaintiff's Reply to Defendant's Answer and Counterclaim

PARTIES SERVED

Andrew S. Radeker
Harrison & Radeker, P.A.
P.O. Box 50143
Columbia, SC 29250
Attorney for Defendant



Andrew Moore

Columbia, South Carolina

**THIS COMMUNICATION IS FOR THE PURPOSE TO COLLECT A DEBT. ANY
INFORMATION OBTAINED MAY BE USED FOR THAT PURPOSE.**

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Oak Pointe Homeowners' Association, Inc.

Plaintiff,

v.

Mackenzie E. Peffley

Defendant(s)

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-32-2386

**PLAINTIFF'S MOTION FOR SUMMARY
JUDGMENT**

(13789.24)

TO: ANDREW S. RADEKER; ATTORNEY FOR ABOVE-NAMED DEFENDANT:

YOU WILL PLEASE TAKE NOTICE that ten (10) days after the service hereof, or as soon thereafter as counsel may be heard, the Plaintiff, Oak Pointe Homeowners' Association, will move before this Honorable Court for an Order granting summary judgment. Plaintiff moves for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure on the grounds that there are no genuine issues as to any material fact and that they are entitled to a judgment as a matter of law. This motion is based on the pleadings, discovery, Rules of Court, statutes, case law, affidavits and all other matters to be brought before the court. It may also be supported by a memorandum of law that may be filed and served prior to the hearing.

<Signature block on the following page>

Respectfully submitted,



Stephanie C. Trotter (SC Bar # 77680)
Joel M. Deason (SC Bar # 72705)
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ATTORNEYS FOR PLAINTIFF

July 31, 2014

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Oak Pointe Homeowners' Association, Inc.

Plaintiff,

v.

Mackenzie E. Peffley

Defendant(s)

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-32-02386

CERTIFICATE OF SERVICE

013789/00024

I, Andrew Moore, an employee with the law firm of McCabe, Trotter and Beverly, P.C., attorneys for Plaintiff, hereby certify that I have served or caused to be served a copy of the foregoing document upon the below named individuals and/or counsel this the 31st day of July, 2014 via Regular U.S. Mail as follows:

DOCUMENT SERVED

Plaintiff's Motion for Summary Judgment

PARTIES SERVED

Andrew S. Radeker
PO Box 50143
Columbia SC 29250
Attorney for Defendant



Andrew Moore

Columbia, South Carolina

THIS COMMUNICATION IS FOR THE PURPOSE OF COLLECTING A DEBT. ANY INFORMATION OBTAINED WILL BE USED FOR THAT PURPOSE.

Record on Appeal 41

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

Case No. 2013-CP-32-2386

Oak Pointe Homeowners' Association,
Inc.,

MOTION TO RECONSIDER

Plaintiff,

vs.

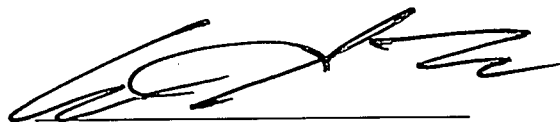
Mackenzie E. Peffley,

Defendant.

YOU WILL PLEASE TAKE NOTICE that the Defendant moves before this Court pursuant to Rules 52(b) and 59(e), SCRPC, as well as pursuant to all other applicable law, in the above-captioned action for an Order that reconsiders and/or alters or amends this Court's order filed October 23, 2014¹, insofar as it granted in part the Plaintiff's motion for summary judgment.

The grounds for this motion are more particularly shown in the attached memorandum, which is incorporated herein by reference as if here set forth verbatim.

Respectfully submitted,



Andrew S. Radeker
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(803) 779-2211
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drew@harrisonfirm.com (email)
ATTORNEY FOR DEFENDANT

Columbia, South Carolina
November 24, 2014

¹ The Plaintiff received written notice of the entry of this Order on November 14, 2014.

GETH A. CARRISON
CLERK OF COURT
LEXINGTON SC

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

2014 NOV 24 P 4: 55

Case No. 2013-CP-32-2386

Oak Pointe Homeowners' Association, Inc.,

BETH A. CARRIES
CLERK OF COURT
LEXINGTON, SC

Plaintiff,

vs.

Mackenzie E. Peffley,

Defendant.

**DEFENDANT'S MEMORANDUM IN
SUPPORT OF MOTION TO
RECONSIDER**

The Defendant (hereinafter, sometimes, "Captain Peffley") submits this memorandum in support of her motion to reconsider this court's order filed October 23, 2014¹, insofar as it granted in part the Plaintiff's motion for summary judgment in the above-referenced case. The court erred in doing so.

This memorandum will not repeat the background facts noted in the memorandum in opposition to the Plaintiff's summary judgment motion that was filed in connection with that motion's hearing.

NEGLIGENT MISREPRESENTATION

The court granted summary judgment as to Captain Peffley's negligent misrepresentation counterclaim. It appears that the court granted summary judgment on this claim because the covenant documents say that the Plaintiff can fine property owners in the subdivision for violating the covenants. Respectfully, Captain Peffley notes that the court misapprehended her argument on this claim, the facts of this case, or both.

"Negligent misrepresentation has been described as an 'emerging and developing field of law.'" Michael G. Sullivan & Douglas S. MacGregor, Elements of Civil Causes of Action 288

¹ The Plaintiff received written notice of the entry of this Order on November 14, 2014.

(3rd ed. 2006) (quoting Gruber v. Santee Frozen Foods, Inc., 309 S.C. 13, 419 S.E.2d 795 (Ct. App. 1992)). It is an action in negligence (thus, not one with a heightened burden of proof). Id. “Recovery in a negligent misrepresentation action is based upon negligent conduct and predicated upon a negligently made false statement where a party suffers either injury or loss as a consequence of relying upon the misrepresentation inducing him or her to enter a contract or business transaction.” Id.

Negligent misrepresentation has the following elements:

- 1) a false representation by a party;
- 2) that party’s pecuniary interest in making the statement;
- 3) that party owed a duty of care to see that he communicated truthful information to the other party;
- 4) the representing party breached the duty by failing to exercise due care;
- 5) the claimant party justifiably relied upon the representation; and
- 6) the claimant suffered damage as the proximate result of his reliance upon the representation.

Bishop Logging Co. v. John Deere Equip. Co. 317 S.C. 502, 528 n. 6, 455 S.E.2d 183 (Ct. App. 1995).

The negligent misrepresentation claim in this case has nothing to do with what the covenant documents purport to authorize the Plaintiff to do. It has to do with the Plaintiff representing to Captain Peffley that any debt she owed to the Plaintiff had been fully paid.

In 2010, the Plaintiff purported to fine the Defendant (i.e., levy an “assessment for non-compliance”) for placing a sign in her yard without the Plaintiff’s prior authorization. The Defendant requested that the fine be rescinded, but she paid the bill of \$490.00 the Plaintiff claimed to be owed (including the fine) in full on March 14, 2011. The Plaintiff “removed” the

fine, and the Plaintiff's president emailed the Defendant to tell her that she would be reimbursed for her overpayment.

She was not reimbursed. Instead, the Plaintiff hired a law firm to record a notice of lien, which it did, on the subject property, in which the Plaintiff claimed to be owed the fine and associated fees. This notice of lien was recorded after the Defendant had already paid the \$490.00. It was also recorded after the Defendant had emailed the Plaintiff's president and told her that she had overpaid the Plaintiff because of the removal of the fine, and it was recorded after the Plaintiff's president told the Defendant she would be reimbursed for her overpayment. The Plaintiff charged the Defendant \$375.00 for attorney's fees for recording the notice of lien, though it did not send the Defendant notice of that. The Plaintiff now takes the position that Captain Peffley owing this money for attorney's fees forms part of the basis for this lawsuit. The affidavits submitted by the Plaintiff indicate that the Plaintiff provided the Defendant notice that the Plaintiff *would* hire a law firm to take collection action if the Plaintiff did not pay the full balance the Plaintiff claimed to be owed within 10 days, which passed without payment; however, nothing in the record indicates that the Plaintiff *did* inform the Defendant that it had hired an attorney, recorded the notice of lien, or incurred charges for doing so. Indeed, *the Plaintiff never made any statement to change its president's statement that the Defendant would be reimbursed the money she had overpaid until 2013.*

Further, whether a party has the right to rely on a statement is ordinarily a fact question for the jury. See Armstrong v. Collins, 366 S.C. 204, 220, 621 S.E.2d 368 (Ct. App. 2005) (fact question concerning right to rely). The Defendant's affidavit indicates that, consistently with what the Plaintiff's president told her and in light of the overpayment, the Defendant believed that she had fully satisfied her payment obligations to the Plaintiff. Relying on the Plaintiff's

representation that she had overpaid any debt she owed the Plaintiff, in a large enough amount to have a credit for a year's annual assessment, the Defendant handled her payments accordingly.

A South Carolina case, Anchor Point, Inc. v. Shoals of Anderson, Inc., 309 S.C. 486, 424 S.E.2d 521 (Ct. App. 1992), has recognized that a fiduciary relation exists between a homeowners association and its members, and many cases in other jurisdictions have found a such fiduciary duty. E.g., Bd. of Managers of Weathersfield Condominium Ass'n. v. Schaumberg Ltd. Partnership, 717 N.E.2d 429 (Ill. App. 1999); Maercker Point Villa Condominium Ass'n. v. Szymiski, 655 N.E.2d 1192 (Ill. App. 1995); High Country Villas Management Corp. v. Sarnowsky, 14 Cal.Rptr. 62, 65 (Cal. App. 1992); Cohen v. Kite Hill Community Ass'n, 142 Cal.App.3d 642, 191 Cal.Rptr. 209, 214 (1983); Vernon Manor Co-op. Apts, Section I, Inc. v. Salatino, 15 Misc.2d 491, 178 N.Y.S.2d 895 (1958). This is consistent with general principles regarding the relationship between a corporation and its stockholders. See, e.g., Talbot v. James, 259 S.C. 73, 190 S.E.2d 759, 764 (1972). Consistently with this fiduciary relationship, the Plaintiff owed the Defendant a duty to be truthful or at least to use due care in its representations to her.

At times, nondisclosure may serve as the "representation" underlying fraud. This typically occurs in one of three ways:

- 1) If a party chooses to speak, he must disclose enough of what he knows to prevent his words from being misleading. In situations where a party has made an incomplete or ambiguous statement or half-truth that he knew was misleading, he is then under a duty to clarify and to disclose the whole truth.
- 2) If there is a confidential or fiduciary relationship, there is a duty of full disclosure.
- 3) A party may be held to a higher standard if he has a special knowledge not available to the other party. A duty to disclose can arise when one party has superior

knowledge of certain information and that information is not readily available to the other party and the first party knows or has reason to believe that the second party is acting on the basis of the mistaken knowledge.

Little v. Brown & Williamson Tobacco Corp., 243 F. Supp. 2d 480, 507 (D.S.C. 2001) (“[o]ne may deceive, though he says nothing which is itself untrue”, as “[t]he telling of but part of the truth may sometimes effectually mislead”); Manning v. Dial, 271 S.C. 79, 245 S.E.2d 120 (1978) (defendant stood in fiduciary relationship to plaintiff, and as such he had a duty to disclose all relevant facts when purchasing plaintiff’s stock); Jacobson v. Yaschik, 249 S.C. 577, 155 S.E.2d 601 (1967) (nondisclosure becomes fraudulent when it is the duty of the party having knowledge of the facts to uncover them to the other); Anthony v. Padmar, Inc., 320 S.C. 436, 465 S.E.2d 745 (Ct. App. 1995)(parties in fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud).

“Nondisclosure is fraudulent” – not to mention merely *negligent* – “when there is a duty to speak.” Ardis, 314 S.C. at 517.

“Proof that the statement was made in the course of the defendant’s business, profession, or employment is sufficient to show he has a pecuniary interest in making it, although he receives no consideration for it.” AMA Management Corp. v. Strasburger, 309 S.C. 213, 223, 420 S.E.2d 868, 874 (1992). Here, the Plaintiff made the representation that the Defendant would be reimbursed – thus, agreeing with the Defendant’s statement that she had paid the Plaintiff more than the Plaintiff was owed, not the other way around – in the course of its business of operating a homeowners’ association. This element is satisfied.

The Plaintiff was aware of incurring the attorney’s fee charges and its passing them on to the Defendant. The Plaintiff is the party that would know whether that happened. The Defendant

was not aware of that, and the Plaintiff made representations to her consistent with her not owing such sums to the Plaintiff. The Defendant acted in reliance on those statements and is now being sued by the Plaintiff, which takes the position that the Defendant *does* owe the money it had told her she did not. Either the Plaintiff lied to the Defendant about whether she had overpaid (thus, failing to use due care by making a statement it knew was untrue) or the Plaintiff made this statement with what would seem to be reckless or at least negligent disregard of whether the statement was true, thus failing to use due care that way.

BREACH OF CONTRACT BY THE PLAINTIFF AND
BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT

On page 23 of the declaration of covenants attached to Mary Kadar's affidavit in this case, it states that "[a]ny assessments not paid within thirty (30) days after *the due date* shall bear interest *from the due date* at the rate of sixteen percent (16%) per annum or the highest rate allowed by law, whichever is higher." (Emphasis added.) Here, the Plaintiff never gave Captain Peffley a due date by which to pay her fines. The Plaintiff never gave her any advance notice of the imposition of the fines at all. But the Plaintiff charged her interest on them.

By charging interest on the fine amounts, the Plaintiff has breached the contract between the parties itself, regardless of the merits of any of Captain Peffley's other claims.

Article IX § 1 of the restrictive covenants at issue provides for various remedies the Plaintiff has if assessments are not paid within 30 days after their due dates, including foreclosure of a lien for unpaid assessments. In the light most favorable to the Defendant, this implies that all assessments have due dates and that the Plaintiff cannot avail itself of these default remedies until the assessments are past due.

The concept of a due date for payment of an assessment embraces some notice to the party responsible for paying the assessment of when the payment is due. Here, there is no evidence that the Plaintiff ever provided such notice to the Defendant of the attorney's fee

charges for recording the notice of lien or of the 2011 assessments for noncompliance. In the light most favorable to the Defendant, the record indicates that none of these assessments ever had a due date; thus, no right of action in favor of the Plaintiff would have accrued for their non-payment. The Plaintiff appears to have been aware of what notices it did and did not send to the Defendant. Accordingly, it knew that it had never given the Defendant notice of these assessments or when they were due, yet it charged her interest on them anyway, applied her payments to them anyway, and sued her anyway. These are genuine issues of material fact that preclude summary judgment on the Plaintiff's claim and on the Defendant's claims for breach of contract and breach of contract accompanied by fraudulent act.

To recover for a breach of contract accompanied by fraudulent act, a party must show 1) a breach of contract, 2) fraudulent intent relating to the breach, and 3) a fraudulent act accompanying the breach. Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374, 378 (1986); Minter v. GOCT, Inc., 322 S.C. 525, 473 S.E.2d 67 (Ct. App. 1996). Fraudulent intent with regard to a breach of contract is "normally proved by circumstances surrounding the breach[.]" Floyd v. Country Squires Mobile Homes, Inc., 287 S.C. 51, 336 S.E.2d 502 (Ct. App. 1985). It may or may not involve false representations. Ball v. Canadian American Express Co., Inc., 314 S.C. 272, 442 S.E.2d 620 (Ct. App. 1994).

A fraudulent act is one characterized by dishonesty in fact, unfair dealing, or unlawful appropriation of someone else's property by design. Harper, 348 S.E.2d at 378; Ball, 314 S.C. 272; Perry v. Green, 313 S.C. 250, 437 S.E.2d 150 (Ct. App. 1993). It may happen before, along with, or after the breach. Floyd, 287 S.C. 51.

Viewed in the light most favorable to the Defendant, the Plaintiff's failure to even correct its representation that the Defendant had overpaid the Plaintiff, even while the Plaintiff recorded document in the land records stating that the Defendant was delinquent in paying the Plaintiff, is

at least characterized by unfair dealing. There is a scintilla of evidence, and more, that required denial of the Plaintiff's summary judgment motion on these claims.

SLANDER OF TITLE BY THE PLAINTIFF

"Wrongfully recording an unfounded claim against the property of another generally is actionable as slander of title." Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995). Particularly in light of the Plaintiff's president having let the Defendant's statement that she had overpaid the Plaintiff go uncontradicted and telling her that she would be reimbursed, there is at least a scintilla of evidence that the notice of lien involved here was wrongfully recorded. Further, whether South Carolina law permits the Plaintiff to levy "assessments for non-compliance" like those that led to the recording of the notice of lien remains an open question. If it does not permit this, then the Defendant definitely did not owe the Plaintiff for any such assessments, and the statement that she did is a false one. The Plaintiff argued that the Defendant had not shown any damages as to this claim; however, she has undoubtedly incurred attorney's fees, and attorney's fees can be an item of recoverable damages in a slander of title claim. Solley v. Navy Federal Credit Union, Inc., 397 S.C. 192, 723 S.E.2d 597 (Ct. App. 2012). Further, the Plaintiff, having represented that the Defendant did not owe the Plaintiff what it stated in the land records she did, *did* act with reckless disregard for the Defendant's rights in making this statement; thus, there is at least a scintilla of evidence of malice here.

UNFAIR TRADE PRACTICES BY THE PLAINTIFF

An action for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, lies where there is a violation of the Act (i.e., an unfair or deceptive act in trade or commerce that impacts the public interest) that proximately causes damages to the plaintiff. See, e.g., Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 417, 458 S.E.2d 431

(Ct. App. 1995). “‘Trade’ and ‘commerce’ shall include the . . . distribution of any services and any property, tangible or intangible, . . . and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.” S.C. Code Ann. § 39-5-10(b). Trade and commerce are interpreted broadly for purposes of the UTPA. The text of S.C. Code Ann. § 39-5-10(b) states that:

“Trade” and “commerce” shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

Our Court of Appeals has held that “[t]he statute’s use of the words ‘shall include’ clearly suggests the legislature did not intend to limit ‘trade’ and ‘commerce’ to only the listed transactions.” Baker v. Chavis, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603 (Ct. App. 1991). “[T]he UTPA ‘should be given a liberal construction.’” McTeer v. Provident Life and Accident Ins., 712 F. Supp. 512, 515 (D.S.C. 1989) (quoting Connolly v. People’s Life Ins. Co., 294 S.C. 355, 359, 364 S.E.2d 475, 477 (Ct. App. 1988)).

The Plaintiff provides the services of a homeowners’ association: maintenance of common elements, for example. That is “trade” or “commerce” for these purposes. Further, its actions at issue here impact the public interest: they are capable of repetition, as they are enshrined in the Plaintiff’s covenants as being applicable to all association members, and it is plain that the purported usurpation of the government’s power to fine impacts the public interest.

The court should have denied summary judgment on this claim.

LIBEL

To prove libel, a claimant must show publication by the adverse party of a false statement about the claimant having a defamatory meaning, with knowledge of the statement’s falsity or with reckless or negligent disregard thereof, and presumed damages or special damages. See

Parker v. Evening Post Publishing Co., 317 S.C. 236, 452 S.E.2d 640 (Ct. App. 1994). For the reasons noted above regarding the slander of title claim, summary judgment should have been denied on the libel claim.

THE COURT TOO RIDIGLY ASSESSED THE PLEADINGS

“All pleadings shall be so construed as to do substantial justice to all parties.” Rule 8(f), SCRPC. Like the Plaintiff did at the hearing, the court too rigidly assessed the allegations in the answer and counterclaim, which, it appears, helped to result in an erroneous grant of summary judgment to the Plaintiff on the counterclaims discussed above.

The “loan” allegation is simply a typographical error, as noted at the hearing. The pleadings served their function and put the Plaintiff on notice that the Defendant was claiming that the Plaintiff made a false statement in the notice of lien it filed. The court, recognizing the, should not have used the typo of the loan allegation as a basis to grant summary judgment.

It is the same with the failure-to-rescind-fine allegations. The Plaintiff is on notice of the nature of the Defendant’s claims. Given the absence of information the Plaintiff provided to the Defendant about why it claims she owes the money the Plaintiff claims she owes, any deviation between the pleading and the facts in this regard is perfectly understandable and does not provide a basis for summary judgment.

**THE ORDER MAKES UNWARRANTED STATEMENTS
INCONSISTENT WITH THE DENIALS OF SUMMARY JUDGMENT**

Though the court denied summary judgment on claims that relate to whether the Plaintiff has the power to levy fines, the court nonetheless made several statements in its order that are inconsistent with that result and are incorrect. The court should correct the following statements:

- a) That “the contract between the parties specifically *authorizes* the Plaintiff” to levy “non-compliance assessments against Defendant’s property.” The contract may *say* it

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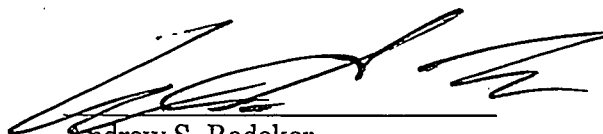
does that, but it cannot authorize something that the law provides the Plaintiff cannot have the authority to do.

b) The "Plaintiff was entitled to levy and collect all sums contained in its notice of lien."

CONCLUSION

The court should reconsider and change its rulings granting summary judgment on the claims noted above. In the event the court determines it was proper to grant summary judgment on some but not all of these claims, the court should reconsider and change its ruling as to the claims discussed above on which it believes summary judgment should not have been granted.

Respectfully submitted,



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drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANT

Columbia, South Carolina
November 24, 2014

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BETH A. CARRIGGS
CLERK OF COURT
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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

Case No. 2013-CP-32-2386

Oak Pointe Homeowners' Association,
Inc.,

CERTIFICATE OF SERVICE

Plaintiff,

vs.

Mackenzie E. Peffley,

Defendant.

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., attorneys for the Defendant, do hereby certify that I have, on this the 24th day of November, 2014, served the foregoing document in the above-captioned action by depositing the same in the United States Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows, to wit:

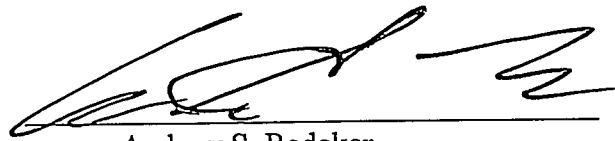
The Hon. G. Thomas Cooper, Jr.
Circuit Judge
P.O. Box 192
Columbia, SC 29202-0192

Joel M. Deason, Esq.
McCabe Trotter & Beverly, PC
P.O. Box 212069
Columbia, SC 29221

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

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Andrew S. Radeker

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State of South Carolina)
County of Lexington)

In the Court
Of Common Pleas

Docket No. 2013-CP-32-2386

Oak Pointe Homeowner's)
Association, Incorporated,)
Plaintiff,)

vs.

Transcript of Record

Mackenzie E. Peffley,)
Defendant.)

October 7, 2014
Lexington, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Judge.

A P P E A R A N C E S:

Joel M. Deason, Esquire
Attorney for the Plaintiff

Andrew Sims Radeker, Esquire
Attorney for the Defendant

Brenda J. Sigwald, Circuit Court Reporter
To The Honorable R. Knox McMahon
P.O. Box 206, Jackson, South Carolina 29831

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E X H I B I T S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>PAGE</u>
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(REPORTER'S NOTE: There were no exhibits entered during this hearing.)

MOTION HEARING

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THE CLERK: These gentlemen are here for No. 14.

THE COURT: All right.

You are?

MR. DEASON: Your Honor, my name is Joel Deason.
I'm here on behalf of the plaintiff.

THE COURT: All right. You may proceed. This your
motion?

MR. DEASON: Yes, Your Honor.

THE COURT: All right.

MR. DEASON: Your Honor, it's -- by way of a bit of
background, this is simply a -- this is a foreclosure
action that the homeowners association brought to -- they
foreclosed a lien for assessments and other charges
authorized by the Declaration of Covenants.

THE COURT: I had an attorney tell me one time with
your partner in Richland County that even though the
statute provides for a lien, there's no automatic right to
foreclose that lien. You care to address that issue?

MR. DEASON: Yes, sir. And I think -- if I -- I
don't want to make an incorrect assumption, but I think
this is slightly different than that. The Horizontal
Property Act does statutorily authorize that for --

THE COURT: A lien.

MR. DEASON: Yes, sir. For property subject to the

1 Horizontal Property Act. But then a lot of just
2 free-standing homes, you may --

3 THE COURT: It was a free-standing homeowner's
4 association.

5 MR. DEASON: Yes, sir, there's -- there's attorneys
6 in town, there's about two of them that have filed motions
7 to dismiss a civil judgment, about six or eight times
8 recently, and we've prevailed on all of those for a variety
9 of reasons. One of them was with you.

10 THE COURT: Don't call his name.

11 MR. DEASON: It went into a variety of theories as
12 far as equitable lien, to right and intent be found by the
13 declaration and such as that. And so that -- so far that
14 matter has been resolved in our favor every time.

15 THE COURT: At this level.

16 MR. DEASON: Yes, Your Honor.

17 THE COURT: Okay. It hasn't been resolved in
18 appellate court. But go ahead, Mr. Deason.

19 MR. DEASON: Okay. So this particular homeowner's
20 association is called Oak Pointe. It's here in Lexington
21 County. And just -- I guess as part of its development, a
22 declaration of covenants was filed with the Lexington
23 County register of deeds in 2002. The plaintiff took
24 possession of her property, I believe in 2007. And I would
25 like to point out, I think for efficiency sake, I spoke

1 with defense counsel ahead of time. Defense counsel had
2 sent us a request to admit and I simply attached the
3 declaration and said, do you admit that the defendant's
4 property is bound by these; and defense counsel said, Yes,
5 to the extent that they're lawful. And he'll be able to
6 expand on that further. He says that if the declaration
7 does apply, he wants to challenge the lawfulness of some of
8 the things in the declaration.

9 I'm trying to save you from handing up requests to
10 admit and a lot of extra paperwork. And I believe that he
11 would consent to that characterization.

12 MR. RADEKER: That's correct, that's what's we
13 said, yeah.

14 MR. DEASON: Okay. So starting in April of 2010,
15 the plaintiff levied a noncompliance assessment, the
16 declaration spells out several types of assessments,
17 regular ones, special ones, assessments for noncompliance.
18 And so in April of 2010, the plaintiff levied a
19 noncompliance assessment to the defendant for burning trash
20 in her backyard. Later on in June of 2010, the plaintiff
21 levied another noncompliance assessment of \$165 --

22 THE COURT: How much was the first one?

23 MR. DEASON: 150.

24 THE COURT: Go ahead.

25 MR. DEASON: And the -- in June of 2010, the

1 plaintiff levied another noncompliance assessment of \$165
2 for improper signage. I believe the defendant put some
3 type of for rent sign in the yard. And each time the
4 defendant was notified by mail.

5 So the defendant didn't pay for those assessments.
6 So in December of --

7 **THE COURT:** Just those two?

8 **MR. DEASON:** At that point in time.

9 So in December of 2010, the regular assessment for
10 the following year for everybody went out. That was \$175.
11 And the plaintiff mailed the defendant the billing package
12 which included the 175 assessment for the 2011 dues and
13 then those two prior noncompliance assessments that I
14 mentioned to you.

15 The defendant didn't pay those. Which the total of
16 that is \$490.

17 So then the plaintiff mailed the defendant a
18 past-due notice. And then when she didn't pay again on
19 February 25th, 2011, the plaintiff sent the defendant a
20 final warning letter saying, Look if you don't pay this
21 within 10 days or get in our office and resolve this matter
22 or something, we're going to turn it over to our attorney
23 for collections.

24 And the defendant did not contact them and so the
25 plaintiff directed his attorneys to file a lien against the

1 property to secure the balance. So they did. The
2 attorneys on March 23rd of 2011, they filed a lien in the
3 amount of \$870 and some change. And the plaintiff
4 charged -- the plaintiff incurred \$375 in attorney's fees
5 for this service of filing the lien.

6 Now, shortly thereafter -- right after the account
7 was turned over for collections, the defendant did pay the
8 \$490, but they paid it to the association or the
9 association's management company. But because the account
10 was already in collections, they forwarded it to the -- its
11 attorney for application to the defendant's account.

12 That's kind of the key process in there. We have
13 different players here: We have the association, which is
14 run by -- it's a volunteer board of people that, you know,
15 are members of the association by ownership in the property
16 and election to the board. The board actually hires an
17 association manager, which is MJS in this case, Ms. Mary J.
18 Kadar submitted an affidavit, she works for MJS, in support
19 of plaintiff's motion.

20 And then also another player in this that you'll
21 hear about is Stephanie Laurel. She, I believe at that
22 time, was the president of the plaintiff's board. She is
23 no longer now, but at that time, she was the president of
24 the plaintiff's board and her and the defendant had some
25 interaction.

1 So time goes on and in 2011, the plaintiff was
2 assessed three more noncompliance assessments for the
3 condition of her mailbox and again, this was not paid.
4 2012, the regular assessment that everybody gets came due
5 and it was \$150 and the defendant just remitted 150. That
6 didn't account for the outstanding attorney's fees and all
7 the other noncompliance assessments and such. So then
8 in -- again in 2013, the regular assessment came due. The
9 defendant didn't pay it, so the plaintiff decided to
10 foreclose its lien and so we filed this present action, I
11 believe, in July of 2013.

12 So the defendant, she filed an answer --

13 **THE COURT:** This is the first lien? This is the
14 2011 lien that you're seeking to foreclose?

15 **MR. DEASON:** Yes, Your Honor. And I have a copy of
16 that if that's helpful.

17 **THE COURT:** No. I don't need it right now.

18 **MR. DEASON:** Okay. So the defendant files a --
19 quite a number of -- an answer and quite a number of
20 counterclaims. Basically she says -- her answer says that,
21 you know, it's not lawful -- they questioned whether or not
22 the plaintiff has the right to charge assessments for
23 noncompliance. That's the way it's characterized in the
24 declaration. They call them fines, but -- they call them
25 fines, we call them noncompliance assessments; but,

1 whatever, the defendant says the plaintiff doesn't have the
2 right to do that. And then also the defendant claims that
3 out of those five noncompliance assessments that I
4 mentioned to you in 2010 and 2011, they claim that one of
5 them was promised to have been waived by the plaintiff and
6 that the plaintiff didn't do it. But -- and so as a result
7 they started counterclaims of breach of contract, unfair
8 trade practices act, breach of good faith and fair dealing,
9 breach of contract with fraudulent intent, slander of
10 title, liable, defamation, negligence accounting, and
11 violations of the service members civil relief act.

12 Now, I'll tell you we have filed two supporting
13 affidavits. The plaintiff contends, yes, the defendant did
14 ask for one particular fine to be waived and that
15 particular fine was waived. So going through the -- I
16 guess I'll go through their counterclaims one by one.

17 The first one is they asked for declaratory
18 judgment on the plaintiff's ability to levy fines for --
19 excuse me assessments for noncompliance --

20 **THE COURT:** Hold on. You're seeking summary
21 judgment on your claims --

22 **MR. DEASON:** In addition to their counterclaims, on
23 all the claims as --

24 **THE COURT:** On all the counterclaims too. Go
25 ahead.

1 **MR. DEASON:** Okay. So basically their argument for
2 the declaratory judgment is only a government or a
3 political subdivision thereof has the power of -- to issue
4 a fine and that -- and then on top of that that the
5 government hasn't delegated that power to the plaintiff;
6 and then also they contend that the plaintiff's declaration
7 of covenants doesn't even provide for it. But the
8 covenants are an exhibit to Ms. Kadar's affidavit and
9 clearly -- it is clearly set forth -- plainly and clearly
10 set forth that they have the right to do that.

11 There's no case law or otherwise -- or statutes
12 otherwise that say that the plaintiff cannot issue
13 noncompliance assessments. And I have prepared a
14 memorandum that I will hand up to Your Honor --

15 **THE COURT:** Ms. Who? I'm trying to follow you.
16 Kadar? Has this got the covenants with it?

17 **MR. DEASON:** Yes, sir.

18 **THE COURT:** All right. Go ahead.

19 **MR. DEASON:** Well --

20 **THE COURT:** Where do you say you have the right to
21 the assessments? The liens?

22 **MR. DEASON:** That's noted in the declaration --

23 **THE COURT:** Which one?

24 **MR. DEASON:** Are we going --

25 **MR. RADEKER:** I don't mean to speak out of turn,

1 but I think it's page 23, at the bottom.

2 THE COURT: That is assessments. I just got
3 started.

4 MR. DEASON: Are you specifically asking for a lien
5 or are you asking for noncompliance assessments?

6 THE COURT: Well --

7 MR. RADEKER: The noncompliance assessment thing is
8 what's at the bottom of page 23.

9 THE COURT: What does he say is --

10 MR. DEASON: There's -- the defendant is saying
11 that the plaintiff doesn't have the -- or the declaration
12 doesn't have --

13 THE COURT: The right to charge a collection fee or
14 late charge --

15 MR. DEASON: The defendant is specifically
16 saying -- I don't believe they're challenging the right to
17 lien and foreclose. I believe they're challenging the
18 right to levy assessments for noncompliance with the
19 declaration.

20 THE COURT: Show me where that is.

21 MR. DEASON: And that is on page 17. That is
22 Article 6, Section 3, Assessments for Noncompliance.

23 THE COURT: All right.

24 MR. DEASON: And so that section of the declaration
25 just sets forth the plaintiff's ability to levy such

1 assessments for noncompliance and it's pretty clear. In
2 the event -- actually, I'm not going to read it out loud,
3 it's just very clear. Short and sweet and just gives them
4 complete discretion and so the plaintiff is challenging --
5 excuse me, the defendant is challenging the plaintiff's
6 right to do that on two bases again; that one, only a
7 government can do it, the government hasn't delegated that
8 power and two the declaration doesn't authorize it.

9 So I pointed to the declaration where it does
10 authorize it. My memorandum sets forth -- it hasn't --
11 this issue hasn't been -- there's no law against it, so
12 again, it's how do you prove a negative. There's no
13 statute, there's no case law against it. There's AG
14 opinions out there that say that the plaintiff can do this
15 and then also I set forth an argument where it's inherent
16 in the power of a nonprofit corporation to be able to do
17 these things.

18 **THE COURT:** Did you submit a memo?

19 **MR. DEASON:** Not yet, Your Honor. I have it here.

20 **THE COURT:** Oh.

21 **MR. DEASON:** I just completed it this morning.

22 So going onto his second counterclaim, it's for
23 unfair trade practices act. Again, he says -- the
24 plaintiff -- the defendant claims that the plaintiff acted
25 unfairly and deceptively by levying and collecting

1 noncompliance assessments, but again, we point to the fact
2 that the declaration specifically authorizes it, that the
3 covenants were records before the defendant took title to
4 her property and the defendant hasn't alleged any facts
5 that would constitute unfair or deceptive acts by the
6 plaintiff.

7 In addition, another element that must be proved in
8 this is the adverse impact on the public interest. And
9 again, the plaintiff is only empowered to govern or
10 regulate the properties within that one subdivision in one
11 County -- I don't know how many homes it is, but it's
12 certainly -- it can't affect the public at large because
13 again, the nonprofit -- the plaintiff only has power over
14 that one nonprofit corporation.

15 So his third counterclaim is breach of contract.
16 You know, the -- it's a shaky predicate in the
17 counterclaim. It just says that the plaintiff agrees that
18 there's a binding contract in this, but it doesn't set
19 forth the elements of what contract. So we don't know
20 whether -- that the plaintiff is accused of breaching the
21 declaration, breaching a separate oral contract to waive
22 this fine or if a separate oral contract modified the
23 declaration and then it was subsequently breached. But
24 either way, the defendant didn't allege each material
25 element of the contract, so we don't even know what

1 contract they're saying that was breached. But they are
2 saying that the -- what the -- the actual breach was the
3 promise to waive the noncompliance assessment and that
4 supposedly the plaintiff didn't waive it.

5 There's no meeting of the minds established or even
6 averred there. There's no consideration averred
7 specifically, given on behalf of the defendant. And on top
8 of that, even if there was a contract, the plaintiff has
9 not breached such a contract because the plaintiff -- I
10 agree, they did promise to waive the fine for a
11 noncompliance assessment and they did. As set forth in
12 Ms. Kadar's affidavit. That's set forth in Ms. Laurel's
13 affidavit and it's also set forth in the defendant's
14 affidavit.

15 The defendant's affidavit states that she asked for
16 the fine to be removed and she -- she didn't say which, she
17 just says in 2010. I believe that's paragraph 6 of the
18 defendant's affidavit Mackenzie Peffley. She just said
19 sometime in 2010, I asked for it to be removed. And then
20 as supporting to bolster that, she puts an e-mail chain in
21 there.

22 Now, the e-mail chain, to me is a bit dubious, but
23 even taking it on its face, the plaintiff is still
24 entitled to summary judgment; because if you look in that
25 e-mail chain, you can tell it's not complete as far as the

1 days and the responses and the back and forth, but it says
2 that -- all it does is the defendant writes the president
3 of the association, Ms. Stephanie Laurel. She says, Hey,
4 you remember a previous conversation we had where you
5 agreed to waive that fine for the sign in the yard? And
6 Ms. Laurel, who again was an officer of the plaintiff
7 corporation at that time said, just send me -- I'm not sure
8 I know what you're talking about, just send me the stuff,
9 tell me what it's about. They go back and forth. There's
10 a few reminders in there. And then finally, I believe, on
11 March 14th 2011, at 10:07 p.m., Ms. Laurel says, it will be
12 waived, it will be credited to your account, or something
13 to that effect.

14 And then another exhibit to the defendant's
15 affidavit shows a statement produced by plaintiff's
16 counsel, there is no \$165 charge in June of 2010 for
17 unapproved signage. So it's not on their accounting.

18 And then, finally -- well, anyway, I don't want to
19 address that point at this time. So there's no proof --
20 the defendant offers no proof and doesn't aver any specific
21 fact that indeed points out that the \$165 noncompliance
22 assessment was not waived and the plaintiff's, both of
23 their affidavits say that it was waived and there's even an
24 additional exhibit to Ms. Kadar's affidavit, an e-mail from
25 the plaintiff's association manager that says it's been

1 waived. And so, again, the defendant presents no evidence
2 to say that the \$165 wasn't waived.

3 And then finally -- again, even if -- well, you
4 know, even if somehow there is a breach of contract, which
5 I don't believe that there is, the defendant was still in
6 arrears because of the attorney's fees and other charges at
7 that time. So that could -- you know a breach of covenant
8 of good faith and fair dealing can't stand if the parties
9 seeking damages for breach if they haven't fully performed
10 the contract themselves.

11 So -- and then moving on, I just put in there a
12 simple case cite to breach of covenant of good faith and
13 fair dealing. I put a case in there that says there's
14 no -- that's not a separate cause of action.

15 So moving onto breach of contract with fraudulent
16 intent, again, I -- I reassert that in order to prove that,
17 they've got to prove a breach of contract, they've got to
18 prove fraudulent intent relating to that breach and a
19 fraudulent act covering the breach. Again, I refer back to
20 our previous argument, I don't believe there was a breach
21 of contract. And then the defendant also fails to plead or
22 accomplish any fraudulent intent, dishonesty or unfair
23 dealing by the plaintiff. So that cause fails as well.

24 The next cause of action they assert is a
25 counterclaim of slander of title. I -- up, the elements

1 are that the -- the defendant's got to establish that the
2 publication with malice of a false statement is derogatory
3 to the plaintiff's title, it causes special damages and the
4 result diminished value in the eyes of a third party.

5 Okay. So the defendant claims that the plaintiff
6 slandered her title when they recorded a notice to lien
7 containing false statements. But there's no -- if you look
8 in their counterclaim, there's no specific averments as to
9 what statements in that -- in the lien were false. So how
10 are we to know what statements are false?

11 And, you know, the plaintiff was acting -- and then
12 again, there's nothing that speaks to the defendant -- I
13 mean that the plaintiff filed that lien with malice, which
14 is a requirement.

15 And then finally, I guess my biggest argument that
16 even if that lien contained defamatory statements, relevant
17 pleadings are absolutely privileged and can't form the basis
18 of an action for slander of title. And that is a
19 determination for a court. It's not a question of fact for
20 a jury; and I've got case cites on that too.

21 The next one is liable and defamation. I mean, the
22 defendant asserts a counterclaim for liable per se and I
23 just called it defamation because they're rolled into one
24 sometimes. That one will be the easiest one to dismiss
25 because if you look at the counterclaim, it references a

1 loan. It's speaking about a loan. There's no loan
2 involved in this case. If you look at the evidence, the
3 pleadings, everything; there's no mention of a loan except
4 in this one paragraph 56 of the defendant's answer. It's
5 an erroneous assertion. In fact, I would even give the
6 defendant a right to withdraw that claiming right now if
7 they're willing to.

8 MR. RADEKER: Well, what I was going to say, loan
9 is just a typo in the pleadings.

10 MR. DEASON: So any way, this case is about a lien,
11 a foreclosure of a lien. There's no loan, no promissory
12 note, nothing like that. And again, if -- if they're going
13 falling back on the same theory with the slander of title,
14 we're going to assert the privilege with the pleadings as
15 with the prior cause of action.

16 The next cause of action, counterclaim asserted by
17 the defendant is negligence. They claim that the plaintiff
18 was negligent by falsely representing to the defendant they
19 would rescind or undo the fine against the defendant and
20 breached a duty by not communicating truthfully to the
21 defendant. But, again, if you'll look in the -- in the
22 affidavits of Ms. Kadar and Ms. Laurel, matter of fact,
23 there was no untruthful communications. There was no
24 breach and they -- the defendant is also not specifically
25 averred any damages -- or that damages were proximately

1 caused by the plaintiff.

2 Then I put a note in there about the economic loss
3 rule. The final counterclaim is violations of the service
4 members civil relief act. The defendant claims that the
5 plaintiff has violated this -- actually she just claims
6 that this violates the act, period. Didn't give us a
7 reason why. No specific factual averments as to why the
8 service member civil relief act was violated. So I --
9 excuse me, they do. They say that during times that the
10 plaintiff claims the interest, late penalties and fines
11 were accrued, the defendant was active military and that
12 the interests penalties and fines were a violation of the
13 act.

14 Now, if you'll look -- taking the defendant, again,
15 at her word, if you look in her affidavit, I believe that
16 she was full-time military, Army until '05 or something
17 like that, '05 and then sometime around '05 or '06 she
18 transitioned to the guard. That's in her own affidavit.
19 These noncompliance assessments were levied in 2010, 2011.
20 She wasn't called to active duty, I think until 2012. And
21 so the service members civil relief act doesn't apply until
22 she's called to active duty. The interest, you know, of
23 course, upon application of somebody in their shoes, when
24 they are entitled to that relief, they have to ask for it
25 and then it can be reduced down to 6 percent. The

1 plaintiff's fine with that. There's nothing to indicate
2 that the plaintiff won't reduce the interest to 6 percent.
3 They weren't made aware by the defendant that she was
4 active duty military until after the complaint had been
5 filed. And so, you know, the plaintiff's happy to reduce
6 the interest. Any claim regarding as far as the
7 noncompliance assessments, the service member service
8 relief act doesn't capture that. It's set forth -- and I
9 more explain in detail in my memo because they were
10 assessed well before she was active -- called to active
11 duty.

12 And then -- so really what this comes down to is --
13 I guess I can point out some of the more important facts.
14 I think it would come down to some of the factual issues
15 in -- but there's not -- there's no question of material --
16 genuine issue of material fact in these. But it bears a
17 close look at both Ms. Kadar's affidavit and the
18 defendant's affidavit, Ms. Laurels affidavit and the
19 exhibits attached to them.

20 So her basic premise, was the fine waived or wasn't
21 it. Yes, it was. The defendant doesn't set forth any
22 specific factual averments that it wasn't waived. In fact,
23 the -- the exhibits to her own affidavit show that the
24 plaintiff agreed to waive it and -- and what's frustrating,
25 I think -- what probably frustrated her and me and anybody

1 else who's taken a look at this case is the timing of it
2 all. Then if you go back, we have a -- the first
3 noncompliance assessment was in April of 2010, 150. The
4 second one was in June of 2010, 165 for unapproved signage.
5 That's the one that's been the big hubbub about as far as
6 promising to resolve it and it being waived.

7 And then in January of 2011, the regular annual
8 assessment came due. Those added up to \$490. The
9 declaration, you know, says that the penalties, the late
10 fees incurs 30 days after an assessment has not been paid.
11 So I don't know -- it's been months after the noncompliance
12 assessments and she never paid them. And then the
13 defendant, by her own admission, says that she did not pay
14 for these three charges until, she says March 14 of 2011.
15 At that time, they're all in arrears and there's attorney's
16 fees to be considered as well. Those three charges and
17 attorney's fees is \$865. So if you withdraw the 165, that
18 leaves you with 700. Ms. Kadar's affidavit goes and
19 itemizes other charges.

20 In 2011, there were more noncompliance assessments
21 of \$395, which takes you up to, you know, almost \$1100.
22 And then -- and then another -- and she -- and then there
23 was another assessment of 150 in 2013. She didn't pay, so
24 we're talking about \$1200 in arrears that accounts for
25 the -- the only two payments she's made since April of 2010

1 is one of 490 and the second one of 150 in 2012. That's
2 laid out in Ms. Kadar's affidavit.

3 So, there's some issues with the back and forth of
4 all this. Is -- if you look at Ms. Kadar's affidavit, she
5 says when the all the assessments were levied and when the
6 defendant was notified and the plaintiff was not
7 particularly aggressive with this. They sent her a
8 past-due notice, and then again sent her a 10-day warning
9 letter, February 25th of 2011. The plaintiff sent her a
10 warning letter that says if you don't clear up these
11 charges, we're going to refer this to an attorney in 10
12 days. And the defendant, by her own admission did not
13 resolve it or did not pay it until -- let's see 17 days
14 later.

15 Now, there was -- I think there's some checks
16 crossing in the mail -- even if you take people at their
17 word, I'm not going to sit here and question her voracity.
18 I'm saying even if you take her at her word that these
19 charges are accurate and that they're well accounted for.

20 So, Ms. Kadar says that the plaintiff referred the
21 case to their attorneys on the 16th of March of 2011, and
22 that -- she didn't -- and then Ms. Kadar said that she
23 didn't receive the defendant's \$490 check, albeit late,
24 admittedly late, until the 17th. And then she forwarded it
25 onto the attorneys. Well, by that time, the attorneys had

1 filed the lien for the -- for all the owing assessments.
2 And mind you, as far as good faith is concerned,
3 Ms. Kadar's letter of February 25th, said that they would
4 turn it over in 10 days. She didn't turn it over until 19
5 days later. The defendant says that 17 days later that she
6 paid the \$490. But again, the plaintiff is saying that the
7 attorney's fees had already been incurred.

8 So -- but the plaintiff -- I mean, excuse me, the
9 defendant fails to say who did she pay and how did she pay.
10 If you look in her -- in her exhibits, she has the copy of
11 her check and that \$490 check was written on March 13th.
12 It doesn't when it was negotiated. If you look at her bank
13 statement, it says there was \$490 charge negotiated on the
14 22nd of March, which is after the lien was recorded. And
15 again, these matters weren't resolved. I mean, I guess
16 Ms. Peffley, the defendant, expects because of agent of the
17 plaintiff at 10:07 at night on March 14th said that the
18 fine would be waived that everything should have been done,
19 even though that that was, what, 17 days after the 10 day
20 warning letter. And at that point in time everything
21 should be done and she claims that she paid the 490 on the
22 14th, but doesn't offer any proof of that as well. But
23 that's not material -- that's not a material question of
24 fact. The material question of fact is simply did they
25 waive the darn thing or not. And there's no -- and the

1 plaintiff says they did. They've got proof that says they
2 did and the defendant doesn't offer any proof otherwise.

3 I apologize if my speech was a bit disjointed. I
4 would like to hand up a memorandum that does a better job
5 explaining my argument that I prepared to Your Honor.

6 **THE COURT:** That's fine. Be glad to.

7 Mr. Radeker?

8 **MR. RADEKER:** Thank you, Your Honor. I e-mailed
9 around that memorandum and I brought a copy of it as well.
10 So -- I see you handing up the copy, so if you need this
11 one, just let me know.

12 **THE COURT:** Just make sure you've supplied it to
13 plaintiff's counsel.

14 **MR. RADEKER:** I have, I have. I e-mailed it to him
15 at the time.

16 Yes, there are a lot of issues with the back and
17 forth in this case and many of them are issues of material
18 fact of the outcome of it. When we brought this case, we
19 thought that they must not have waived the fine. Once we
20 got in it, we figured out it's because they had assessed
21 this \$375 attorney's fee and this fine in 2011.

22 Now, what's important about that is what's not in
23 Ms. Kadar or Ms. Laurel's affidavits that the plaintiff has
24 presented. And that's any notice to my client, Kathy
25 Peffley, that any of those fines had been assessed, that

1 this \$375 attorney's fee had been charged. She wasn't
2 informed of any of that until 2013, shortly before this
3 action was brought.

4 And let's look at -- she doesn't say it will be
5 waived. Let's look at the e-mail exchange that's Exhibit D
6 to Kathy Peffley's affidavit. Starting at the bottom
7 because they go up as e-mails do.

8 On March 14, two days before this notice of lien is
9 recorded, Kathy Peffley sends an e-mail to Ms. Laurel, the
10 association president, saying I paid my debt to the HOA in
11 full today, so I should have a credit for next year's fees.
12 In other words, she paid them everything that they said
13 that she owed them, even though there was a pending request
14 to undo this \$165 fine.

15 Now, the response back is not: We've sent this to
16 a lawyer and there will be a charge for that. It's, You
17 will be reimbursed. Thanks. And that's the key to the
18 negligent misrepresentation cause of action right there.
19 Because she was not reimbursed. Instead they kept all of
20 that check, purported to assess her fines in 2011 that they
21 never notified her of. The declaration of covenants, on
22 page 23, speaks of a due date for assessments. Now, she's
23 never told that there's been any assessment for
24 noncompliance or that there's been an assessment for
25 attorney's fees incurred. She's never been given a due

1 date to pay these things. And so just on the merits of the
2 plaintiff's case, they're not entitled to summary judgment
3 on their complaint.

4 She is in the national guard and she incurred this
5 obligation, that is became a member of this homeowner's
6 association at a time when she was not in the, quote,
7 military service, unquote, as defined by the service
8 members because she wasn't on active duty and that's
9 specifically how that statute provides for that to be the
10 national standard. Later she went on active duty. That
11 was during some of the time in question in 2012 and 2013.

12 THE COURT: When did she buy the house?

13 MR. RADEKER: She bought the house -- I think it
14 was 2007. I can tell you exactly in a second.

15 THE COURT: She knew about the covenants since the
16 time she bought the house.

17 MR. RADEKER: She probably had record notice, I'm
18 sure.

19 But in any event, these covenants provide they can
20 charge you up to 16 percent interest --

21 Sir?

22 THE COURT: When did she get the house?

23 MR. RADEKER: I believe it was 2007. 2007.

24 THE COURT: So there were no assessments until
25 2011?

1 MR. RADEKER: None. None of these fines until this
2 \$150 one in 2010 and then \$165 one and then these in 2011.

3 THE COURT: She got annual dues notices, didn't
4 she?

5 MR. RADEKER: She did, and she paid them. And
6 that's not at issue. I mean, they're not coming in here
7 saying she owes the annual dues until they start applying
8 her over payment to the fines they never tell her about
9 instead of applying it to her assessment, which -- if they
10 weren't going to reimburse her and keep it, they should
11 have at least applied it to next year's assessment,
12 considering they never told her, Hey, you have fines that
13 are due.

14 There's nothing in these affidavits that come from
15 the plaintiffs saying they ever told her that they fined
16 her. And her affidavit says, I never got any notice of
17 these things until 2013 they're sending me letters saying
18 they're suing me when I'm coming back from Afghanistan.

19 So she's in the military service during this time.
20 She timely notifies them that she's invoking the service
21 members relief act. She timely provides them a copy of her
22 orders. That means they can't charge any interest in
23 excess of 6 percent. It is difficult to tell exactly what
24 interest rate these people were applying. If you look at
25 the paperwork they provided to her on what they say she

1 owes, but it's definitely in excess of 6 percent. Even the
2 interpretation of that, that's most favorable to the moving
3 party, has it at above 7 percent here. So they violated
4 the service members civil relief act. There's no question
5 about that.

6 And she's entitled to relief for that. Even if
7 they back off from those interest charges now, she's
8 entitled to get her attorney's fees for having to defend
9 this case as a result of that. And they're claiming to be
10 owed their attorney's fees for having brought this against
11 her.

12 And no, homeowner's associations can't fine people
13 in South Carolina because to fine is power of the
14 sovereign. It's never been delegated by a statute in this
15 state to property owner's associations. Across the
16 country, jurisprudence is uniform that there may be some
17 Wisconsin case that's cited in my opponent's memorandum I
18 have no time to read, but at least nearly mutual. About
19 the delegation by statute of power to fine to the property
20 owner's association, they don't have that power. There's
21 limits upon what people can contract to.

22 I don't think anyone here would disagree with me if
23 I said public policy prevents this homeowner's association
24 from agreeing that the if she doesn't abide by the
25 covenants they can kill her or imprison her.

1 Fining for our purposes is of the same character.
2 The reason why we can't contract to have somebody kill you
3 or imprison you is that's the power that a sovereign has.
4 There are plenty of states where homeowner's associations
5 can fine people because their legislators have passed
6 statutes saying that they can. We're not one of these
7 states.

8 And if there are no fines, she's paid up in this
9 action. So, yes, that matters. That's an issue of
10 material fact.

11 And they told her that she would be reimbursed and
12 didn't do it. There's your negligent misrepresentation
13 right there. They're representing to her that she's
14 correct, that she ought to get a credit for next year's
15 fees. And, in fact, they'll be refunding her money. But
16 they come along later and claim, Oh, by the way, you
17 actually owe us for these attorney's fees, but we're not
18 going to tell you about that for another couple of years.
19 Instead we're going to bring this lawsuit against you.

20 Recording an unfounded notice of lien is usually
21 slander of title. That's Huff versus Jennings cited in our
22 memorandum. That's here. This notice of lien wasn't
23 recorded until two days after the association president
24 acknowledges Katherine Peffley's e-mail saying I paid you
25 in full, considering that you just told me this fine's

1 going to be removed, I ought to get credit. And she agrees
2 with her and says you'll be reimbursed. Then two days
3 later, they turn around and say, oh by the way you owe us
4 this.

5 So yeah, that is unfounded. The loan thing, that's
6 just a typo in the pleadings on the account with the
7 plaintiff. I apologize for the typo if that's led to any
8 confusion.

9 There's no privilege for recording a notice of
10 lien. Second, as I said, the plaintiff is hardly in the
11 position to complain for lack of notice. If you look at
12 their motion for summary judgment, it just says we're
13 entitled to summary judgment, give it to us basically. It
14 doesn't say anything about what their grounds might be.

15 Katherine Peffley has had to defend this action and
16 there's plenty, plenty, plenty of fact issues here. The
17 back and forth is the most fact issues that need to be
18 resolved by a jury. If anything, we ought to be in here
19 for the summary judgment. Thank you.

20 **THE COURT:** Yes, sir?

21 **MR. DEASON:** Your Honor, I won't say much. I would
22 briefly just say that, Your Honor, by the defendant's own
23 admission, she paid late. Let's say that both of the fines
24 were waived, which has never been even brought up. Just
25 with her regular assessments she owed, plus the attorney's

1 fees, it still -- the 490 still doesn't cover it.

2 Since she still was in arrears at the time they
3 filed the notice of lien, I'm just speaking -- I also say
4 the rule -- the rule contemplates -- you know, I'm
5 certainly not the biggest expert on civil law, I admit that
6 to everybody. The rule contemplates, you know, the
7 pleadings and depositions and answers to interrogatories,
8 admissions on file with affidavits, show's no genuine issue
9 of fact. I don't know if this counts as a pleading. Your
10 Honor can take judicial notice, but the defendant was not
11 surprised about all this.

12 She has been through this before. I've got a
13 satisfaction of lien from the prior year where she had to
14 pay attorney's fees. It's written here for the homeowner's
15 association. She's already went through this with them
16 once before. I can hand you a copy -- I don't know if it's
17 appropriate or not, but I can show you that she had notice
18 of this back in 2008. So it's not -- I mean, all of a
19 sudden, we've got shock and awe because she has to pay
20 attorney's fees because she was turned over to collections
21 this second time? I find that disingenuous.

22 So I just -- you know, I apologize, I'm not the
23 most articulate man in the world. I feel like I made a
24 decent argument in my memo and that's really all about the
25 point I have today, Your Honor.

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THE COURT: Thank you.

MR. RADEKER: Thank you.

THE COURT: All right. Counsel, let me have proposed orders within 10 days.

Thank you very much.

MR. RADEKER: Thank you, Your Honor.

* * * * * END OF TRANSCRIPT * * * * *

STATE OF SOUTH CAROLINA 2014 SEP -5 AM 11:34 IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

Case No. 2013-CP-32-2386

Oak Pointe Homeowners' Association
Inc.,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC.

Plaintiff,

vs.

AFFIDAVIT OF
MACKENZIE PEFFLEY

Mackenzie E. Peffley,

Defendant.

Personally appeared before me Mackenzie Peffley, who, first being duly sworn, deposes and says as follows:

1. My name is Mackenzie Peffley, and I am the defendant in the above-captioned case. I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.
2. I entered the regular United States Army in 2004. I transitioned from that to the Army National Guard, a reserve component of the Army, in 2005. My military biography is attached to this affidavit as Exhibit A.
3. In 2007, following completion of an Army aviation flight training course and before my next active-duty assignment, I purchased the house involved in this case.
4. As part of my service in the National Guard, I have been called twice to serve in Afghanistan. When I was called to serve in Afghanistan most recently, my active duty service began in October of 2012 and ended in November of 2013. During that time, I served as a helicopter pilot. A copy of my orders for that service are attached as Exhibit B to this affidavit.

5. The Oak Pointe Homeowners' Association, Inc. is not a government body. It is a private corporation that acts as a homeowners association for the subdivision involved in this case.
6. In 2010, the Plaintiff sent something saying that I was being fined for having a for-rent sign in the yard at the house involved in this case. I asked that this fine be dropped, and Steffhanie Laurel, the association's president, advised me that it would be dropped. On March 14, 2011, I paid the Plaintiff \$490.00, enough to pay all money owed and claimed to be owed at that time by the association, and then some. I expected a credit toward the next year's dues, and Ms. Laurel told me in an email that I would be reimbursed. This is shown by the excerpts from one of my bank statements and the emails attached as Exhibits C and D, respectively, to this affidavit.
7. I was never reimbursed. Ms. Laurel never told me that she had made any mistake in saying that I would be reimbursed, and she never told me that the \$490.00 payment had not fully satisfied my obligations to the Plaintiff.
8. Until 2013, I never knew anything about an attorney being hired to record a lien or to take any other collection action with regard to money the association claimed I owed it.
9. In mid-2013, I became aware of the Plaintiff's law firm sending me collection materials. I had been paying my dues to the association and had received nothing further about owing them any money, so I believed, consistently with Ms. Laurel's communications with me, that I had fully satisfied all my payment obligations to the association. Accordingly, I did not inquire into whether the association claimed that I owed it any more money.

10. I was surprised about the communication from the Plaintiff's law firm and asked for documentation from that law firm. Attached to this affidavit as Exhibit E is a copy of a document received from the Plaintiff's law firm.

11. That document states charges labeled as "Other charge" and a charge for "Attorney's Fee for Lien" were assessed to my account with the Plaintiff in 2011. I had no idea these charges were assessed.

12. As shown by my email to Stephanie Trotter of the Plaintiff's law firm on August 23, 2013, I advised her that I was invoking the Servicemembers Civil Relief Act in this

matter. A copy of that email is attached to this affidavit as Exhibit F.
13. My attorney emailed Ms. Trotter a copy of my orders for my 2012-13 active duty period on November 21, 2013, as shown by Exhibit G to this affidavit.

14. On page 23 of the declaration of covenants attached to Mary Kadar's affidavit in this case, it states that unpaid assessments owed to the Plaintiff bear interest at the rate of 16 percent.

15. My counsel and I have attempted to calculate the interest rate used for the interest charges shown on Exhibit E. Because the amount on which interest is being charged is not clear from that document, it is difficult to tell what interest rate is being charged; however, it is plain that the rate is more than 6 percent. At a minimum, giving the Plaintiff the benefit of all doubts and including the fine charges as assessments on which interest is charged, the rate is 7.43 percent. A more reasonable interpretation puts it at at least 13.659 percent.

16. It is clear from that document that the Plaintiff has charged an interest rate over 6 percent on what it claims to be owed and has done so during the time I was on active-duty status with the National Guard.

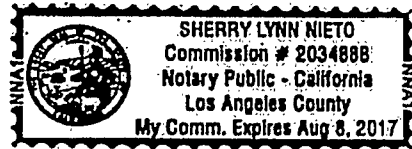
FURTHER AFFLIANT SAYETH NOT.

State of CALIFORNIA
County of Los Angeles
SWORN to before me this

4th day of September, 2014.

Sherry Lynn Nieto (L.S.)
Notary Public for ~~South Carolina~~ CALIFORNIA
My Commission Expires: August 08, 2017

Mackenzie Peffley 4 SEP 2014
Mackenzie Peffley



CPT Mackenzie E. Peffley

Military Biography

Captain Mackenzie E. Peffley, a native of Defiance, OH, enlisted in the Army in 2004 as a SMP cadet with the 213th Ordnance Company, Camp Perry, Ohio. After graduating in 2005 from the University of Toledo ROTC program, she was commissioned in the Army National Guard in July 2005.

CIVILIAN EDUCATION:

1999 - Associates of Science Degree Mechanical Engineering Technology - Northwest State Community College in Archbold, OH,

2003 - Bachelor's in Science Degree in Computer Aided Drafting and Design - Tri-State University, Angola, IN

2005 - Master's in Business Administration in Operations Management from The University of Toledo

MILITARY EDUCATION:

2007 - Army Officer Basic Course, Fort Rucker, Alabama

2012 - Aviation Maintenance Officer Course

ASSIGNMENTS:

2004-2005 213th Ordnance Company, Camp Perry, OH

2005-2006 Platoon Leader HHC 1st BN 151 AVN, South Carolina Army National Guard

2006-2007 Student, Initial Entry Rotary Wing, Fort Rucker, Alabama

2007-2008 Detachment Commander, 2-238th GSAB, South Carolina Army National Guard

2008-2009 Platoon Leader/ Assistant S-3, 2-238th GSAB, Bagram, Afghanistan

2009-2010 Platoon Leader, 2-238th GSAB, South Carolina Army National Guard

2011-2012 Platoon Leader, D Co. 2-104th GSAB, Pennsylvania Army National Guard

2012-2013 Detachment Commander, D Co. 2-104th FWD, FOB Salerno, Afghanistan

2013-2014 Assistant S-3, 28th CAB Pennsylvania Army National Guard

2014-Pres 40th Infantry Division Aviation Maintenance Officer, California Army National Guard

FLIGHT INFORMATION:

Rating: Basic Army Aviator

Flight Hours: 950

Aircraft Flown: TH-67, CH-47D, CH-47F

Pilot wings from: Fort Rucker, Alabama

AWARDS AND DECORATIONS:

Air Medal (with numeral 2)

Army Commendation Medal

Army Reserve Component Achievement Medal

National Defense Service Medal

ISAF NATO Medal

Meritorious Unit Citation

Army Service Ribbon

Overseas Service Ribbon

Army Reserves Overseas Training Ribbon

Basic Aviator Badge

Armed Forces Reserve Medal (with M Device)

Global War on Terrorism Service Medal

Combat Action Badge

Afghanistan Campaign Medal (with 2 Bronze Stars)

EFFECTIVE DATES OF PROMOTION:

Second Lieutenant 01 Sept 2005

First Lieutenant 19 July 2007

Captain 21 March 2012



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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF MILITARY AND VETERANS AFFAIRS
THE ADJUTANT GENERAL
ANNVILLE, PENNSYLVANIA 17003-5002

ORDERS 215-461

02 August 2012

PEFFLEY MACKENZIE E 279-74-0666 CPT CO D(-) 2/104TH AVN FWD
(UASDB-425) 790 NORTH HIGHLAND APT H HARRISBURG PA17111
Home Station: BLDG 19-119 FTIG ANNVILLE PA 17003

You are ordered to active duty as a member of your Reserve Component Unit for the period indicated unless sooner released or unless extended. Proceed from your current location in sufficient time to report by the date specified. You enter active duty upon reporting to unit home station.

REPORT TO HOME STATION: 12 October 2012 , FT INDIANTOWN GAP

REPORT TO MOB STATION: 15 October 2012 , Ft Hood

Period of active duty: Not to exceed 400 days

Purpose: In Support of: Operation Enduring Freedom (OEF)

Mobilization Category Code: G

Additional instructions:

- (a) Funds are available upon the U.S. Congress Enacting FY13 Defense Appropriation.
- (b) Army One Source is available to assist soldiers and family members to seek solutions in dealing with life's issues and questions during deployment. Contact by phone at (US 1-800-454-8107) or outside the US at (1-484-530-5889)
- (c) This is an unaccompanied tour. Storage of HHG and/or one POV is authorized for single soldiers; soldiers married to another service member when both are deployed; soldier married to another service member residing at different permanent duty stations; and soldiers who are single parents with a childcare plan that requires the dependent to leave the residence. When RC Soldiers execute storage option for HHG, BAH is not authorized.
- (d) If authorized, RC Soldiers will coordinate with the installation transportation officer (ITO) to ascertain the requirements/availability to store a vehicle on the installation. RC Soldiers will first ascertain the availability of vehicle storage at the unit prior to contacting the ITO.
- (e) Direct Deposit is mandatory. Bring the appropriate documentation to authorize deposit to the bank (SF 1199). Bring copies of marriage certificate, divorce decree, birth certificate of natural children or documentation of dependency/child support, family care plan, wills, powers of attorney and other documents affecting pay status. Pay status reported in DJMS-RC A24. Transaction must be (Alpha) O. Per Diem authorized IAW JFTR.
- (f) ID Card and Tags required on person while on Government orders. Panographic Dental X-Rays or SF 603 and HIV Screen required if not current. You and your dependents, as your agents, authorized PX/COM/THEATER and medical care during the period covered by this order; The National Defense Authorization Act 2004 sec 703 authorizes early eligibility for health care benefits.
- (g) Individual ordered to ADT with consent of the Governor and the State Adjutant General

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ORDERS 215-461 HQ PA NG, OTAG, 02 August 2012

Additional instructions (cont):

- (h) Demobilization of units is prohibited without prior approval of HQ DA. Individual members of the unit will demobilize with the unit unless provisions of AR 635-100 or AR 635-200 apply; Send DD Form 214 to unit of assignment. You will return to the place of initial entry on Active Duty for out processing/refrad.
- (i) Dependents of RC Soldiers ordered to active duty for more than 30 days are eligible for the same benefits (e.g., medical care, TRICARE, commissary/PX benefits, legal assistance, use of MWR facilities, etc) as dependents of regular Army Soldiers (but excluding dental, which requires orders to AD for over 180 days) For TRICARE details call 1-888-874-2273 or go to www.tricare.osd.mil/reserve/ or email TRICARE help@ammedd.army.mil
- (j) The Soldier is responsible to ensure dependents are issued DD Form 1172, Active Duty dependent ID cards. To locate the nearest ID card facility visit web site www.dmdc.osd/rsl (RAPIDS site locator by state, city, zip code)
- (k) The soldier will be excluded from the active army end-strength per 10 USC 115 and will not be placed on the active-duty list (10 USC 620 and 10 USC 641)
- (l) Pursuant to Presidential Executive Order 13223 (14 Sep 2001), you are relieved from your present Reserve Component status and are ordered to report for a period of active duty not to exceed 25 days for mobilization processing. Proceed from your present location in sufficient time to report by the date specified.
- (m) If upon reporting for Active Duty you fail to meet deployment medical standards (whether because of a temporary or permanent medical condition), then you may be released from Active Duty, returned to your prior reserve status and returned to your home address, subject to a subsequent order to active duty upon resolution of the disqualifying medical condition.
- (n) If upon reporting for Active Duty, you are found to satisfy medical deployment standards, then you are further ordered to Active Duty for a period not to exceed 400 days, such period to include the period (not to exceed 25 days) required for mobilization processing.
- (o) Call 1-800-336-4590 (National Committee for Employer Support of the Guard and Reserve) or check on-line at www.ESGR.org if you have questions regarding your employment or re-employment rights
- (p) Excess baggage is authorized.
- (q) Meals and lodging will be provided at no cost to the Soldier. Claims for reimbursement require a statement of non-availability control number.
- (r) FOR UNRESOLVED PAY ISSUES, CONTACT THE ARNG Pay Ombudsman at toll-free 1-877-ARNGPAY or by email at ARNG-MILPAY@ARNG-FSC.NGB.ARMY.MIL

FOR ARMY USE

Auth: Title 10 USC Section 12302

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ORDERS 215-461 HQ PA NG, OTAG, 02 August 2012

Acct clas:

Off pay/alw: 212/3/4 2010.0000 01-1100 P2A200 11**/12** VFRE F1201 5570 01ENGU
S12120

Off tvl/pd: 2122020.0000 B1 B1TC 12101220F1M 21T1/21T2 VFRE F4209 AZVC2E 12161

Off pay/alw: 213/3/4 2010.0000 01-1100 P2A200 11**/12** VFRE F1201 5570 01ENGU

S12

Off tvl/pd: 2132020.0000 B1 B1TC 12101220F1M 21T1/21T2 VFRE F4209 AZVC2E 12161

SDN: PEF0666T215461

Sex: F

MDC: PM

PMOS/AOS/ASI/LIC: 15A , YY , YY

HOR: 790 NORTH HIGHLAND APT H , HARRISBURG PA17111

DOR: 21-MAR-12

PEBD: 30-AUG-04

Security Clearance: S

Comp: ARNGUS

Format: 165

FOR THE ADJUTANT GENERAL:

////////////////////////////////////
// HQ, PAARNG //
// OFFICIAL //
////////////////////////////////////

DISTRIBUTION:
DCSOPS-T

MARC FERRARO
COL, GS, PAARNG
Chief of Staff

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MACKENZIE E. PEFFLEY
 128 ROBIN LN APT M6
 HUMMELSTOWN PA 17036-8235

ACCOUNT NUMBER
00283-9140-3
STATEMENT DATE
04/15/11

PAGE: 1

BALANCE LAST STATEMENT	NO. OF DEBITS PAID	TOTAL AMOUNT OF DEBITS PAID	NO. OF DEP.	TOTAL AMOUNT OF DEPOSITS MADE	SERVICE CHARGES	BALANCE THIS STATEMENT
640.56	111	7,943.07	15	7,881.85	.00	579.34

Please examine immediately and report if incorrect. If no report is received within 60 days, the account will be considered correct.

	TOTAL NONSUFFICIENT FUNDS (NSF) FEES	TOTAL OVERDRAFT (OD) FEES
This Statement	0.00	0.00
This Year's Statements	87.00	0.00

Note: Fee reversals/refunds made by USAA will not reduce the totals on this chart.

ARE YOU SAVING FOR AN EMERGENCY OR RETIREMENT? USAA CERTIFICATES OF DEPOSIT MAY BE RIGHT FOR YOU. GO TO USAA.COM OR GIVE US A CALL AT 1-800-531-8722(USAA) TO LEARN MORE.

DEPOSITS AND OTHER CREDITS

DATE	AMOUNT	TRANSACTION DESCRIPTION
03/23	230.33	OD ADVANCE TSFR IN
		OVERDRAFT PROTECTION FROM 0028391381
03/16	2,000.00	USAA FUNDS TRANSFER CR
03/17	96.30	DEBIT CARD REFUND 031711
		JONO HARDWARE JONESTOWN PA
03/22	490.00	USAA FUNDS TRANSFER CR
03/24	1,412.85	ACH CREDIT 032511
		FEDERAL SECTOR N PAYROLL *****
03/28	630.50	ACH CREDIT 032811
		SCOTT PROPERTIES PAYMENT *****cken
03/30	500.00	USAA FUNDS TRANSFER CR
04/01	100.00	USAA FUNDS TRANSFER CR
04/01	200.00	USAA FUNDS TRANSFER CR
04/01	300.00	USAA FUNDS TRANSFER CR
04/04	4.00	DEBIT CARD REFUND 040411
		TAG-DSO-BF-BILLETIN EASTOVER SC
04/07	1,412.84	ACH CREDIT 040811
		FEDERAL SECTOR N PAYROLL *****
04/14	500.00	USAA FUNDS TRANSFER CR
04/15	5.00	ATM SURCHARGE REBATE
04/15	0.03	INTEREST PAID

CHECKS

DATE	CHECK NO.	AMOUNT	DATE	CHECK NO.	AMOUNT
03/17	1167	415.00	03/30	1169	29.50
03/23	1168	490.00	04/01	1170	10.00



FDIC INSURED

MACKENZIE E. PEFFLEY
133 TERRAVIVA DR.
DUNNAGE, OH 43029

Date: 3/14/11

1167

Pay to the Order of: Justin Cassin Jones \$ 415.00

Four Hundred Fifteen and 00/100 Dollars

USAA

For: [Signature]

⑆314074269⑆ ⑆283⑆9140⑆3⑆ 1167 ⑆0000061500⑆

Check: 1167 Amount:415.00

MACKENZIE E. PEFFLEY
133 TERRAVIVA DR.
DUNNAGE, OH 43029

Date: 3/13/11

1168

Pay to the Order of: Oak Pointe MOA \$ 490.00

Four Hundred Ninety and 00/100 Dollars

USAA

For: [Signature]

⑆314074269⑆ ⑆283⑆9140⑆3⑆ 1168 ⑆0000064900⑆

Check: 1168 Amount:490.00

MACKENZIE E. PEFFLEY
133 TERRAVIVA DR.
DUNNAGE, OH 43029

Date: 3/25/11

1169

Pay to the Order of: Penn DOT \$ 29.88

Twenty Nine and 88/100 Dollars

USAA

For: [Signature]

⑆314074269⑆ ⑆283⑆9140⑆3⑆ 1169 ⑆0000062988⑆

Check: 1169 Amount:29.50

MACKENZIE E. PEFFLEY
133 TERRAVIVA DR.
DUNNAGE, OH 43029

Date: 3/27/11

1170

Pay to the Order of: Penn DOT \$ 10.00

Ten and 00/100 Dollars

USAA

For: [Signature]

⑆314074269⑆ ⑆283⑆9140⑆3⑆ 1170 ⑆0000061000⑆

Check: 1170 Amount:10.00

Sent: Tuesday, August 9, 2011 7:51 PM
Subject: Re: Sign in Yard

Good Morning,

I have talked to my rental company yesterday and he is going to get a handy man to fix the problems at my residence. Thank you for all you help. I should have this resolved by next week.

Mackenzie

From: Steffhanie Laurel <slaurel@sc.rr.com>
To: 'Mackenzie Peffley' <mepeffley@yahoo.com>
Cc: 'Steffhanie Laurel' <slaurel@sc.rr.com>
Sent: Monday, August 1, 2011 7:29 PM
Subject: RE: Sign in Yard

It was a letter that went out to everyone in the community as a notice to remedy those specific issues per lot. As of June 1st – violations started going out. I just replied to your request for an extension, should you receive a notice of violation contact me so I can resolve that for you as well since you are just now seeing the notice. Thanks.

From: Mackenzie Peffley [<mailto:mepeffley@yahoo.com>]
Sent: Monday, August 01, 2011 3:32 PM
To: Steffhanie Laurel
Subject: Re: Sign in Yard

I recently received a letter concerning a sidewalk, mailbox, washing of the house, and shutters. Was this violation letter directed at me or an overview of problems that need to be directed throughout the neighborhood.

Thanks for your time,
Mackenzie

From: Steffhanie Laurel <slaurel@sc.rr.com>
To: mepeffley@yahoo.com
Sent: Mon, March 14, 2011 10:07:49 PM
Subject: RE: Sign in Yard

You will be reimbursed. Thanks.

From: george [<mailto:mepeffley@yahoo.com>]
Sent: Monday, March 14, 2011 9:58 PM
To: Steffhanie Laurel
Subject: Re: Sign in Yard

I paid my debt to the HOA in full today so I should have a credit for next years fees



Sent from my Verizon Wireless BlackBerry
From: "Steffhanie Laurel" <slaurel@sc.rr.com>
Date: Mon, 14 Mar 2011 21:56:50 -0400
To: 'Mackenzie Peffley' <mepeffley@yahoo.com>
Cc: Steffhanie L Laurel <slaurel@sc.rr.com>
Subject: RE: Sign in Yard

I had asked that the fine be removed. I will double check and get back in touch with you.

From: Mackenzie Peffley [<mailto:mepeffley@yahoo.com>]
Sent: Sunday, March 13, 2011 9:14 PM
To: slaurel@sc.rr.com
Subject: Re: Sign in Yard

Dear Steffanie,

I wrote to you two months ago about a non-compliance fine I received for my rental sign in the yard. I was wondering if you got any where with the HOA?

Mackenzie Peffley

From: "slaurel@sc.rr.com" <slaurel@sc.rr.com>
To: Mackenzie Peffley <mepeffley@yahoo.com>
Cc: slaurel@sc.rr.com
Sent: Tue, December 14, 2010 5:12:06 PM
Subject: Re: Sign in Yard

Sure, can you tell me when you sent your appeal in and the date of the violation letter you received?

1— Mackenzie Peffley <mepeffley@yahoo.com> wrote:

- > Dear Steffanie,
- > Around the April time frame you knocked on my door (313 Oak Pointe Lane) to ask
- > if I could remove a rental sign in my yard. You told me that you had called the
- > rental company to tell them that signs we not approved and I could be fined. I
- > did remove the sign from the yard like you asked and for some reason I was still
- > fined. I have written an appeal for this fine stating that you warned me and the
- > sign was removed but with no avail. Can you help by approving my appeal for this
- > fine? Thanks
- >
- > Mackenzie Peffley
- >
- >
- >

No virus found in this incoming message.

McCabe, Trotter, & Beverly, PC
 140 Stoneridge Drive Suite 650
 Columbia, SC 29210
 (803) 724-5000
 mccabetrotter.com

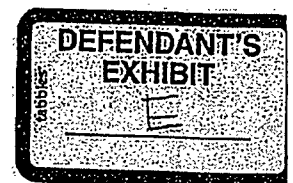
Account Activity Report

For Claim: 3210.001
 Reference No.: 013789/00024

Mackenzie E. Peffley
 1552 Terrawenda Drive
 Defiance, OH 43512

Client: 013789 - Oak Pointe Homeowners' Association, Inc.

Effective	Type	Entry	Note	Amount	Balance
14/25/2010	OTHER	Burning Trash Violation		150.00	150.00
11/01/2011	PRIN	Principal Charge		175.00	325.00
13/18/2011	INT	Interest: 01/01/2011 Thru 03/18/2011		6.06	331.06
13/18/2011	FEE	Attorney's Fee for Lien		375.00	706.06
13/21/2011	PMT	Local Check: #1168		-490.00	216.06
17/13/2011	OTHER	Other Charge		65.00	281.06
17/26/2011	OTHER	Other Charge		115.00	396.06
18/15/2011	OTHER	Other Charge		215.00	611.06
11/01/2012	PRIN	Principal Charge		150.00	761.06
11/05/2012	PMT	Direct to Client		-150.00	611.06
11/01/2013	PRIN	Principal Charge		150.00	761.06
15/23/2013	INT	Interest: 03/18/2011 Thru 05/23/2013		165.33	926.39
15/23/2013	FEE	Attorney's Fee for Intent Letter		150.00	1,076.39
16/20/2013	COST	DOCK:Abstract/Docket		95.00	1,171.39
17/11/2013	INT	Interest: 05/23/2013 Thru 07/11/2013		6.98	1,178.37
17/11/2013	COST	SC:Summons & Complaint		150.00	1,328.37
17/11/2013	FEE	Attorney's Fee for Foreclosure		1,500.00	2,828.37
17/23/2013	COST	NS:NON Service		50.00	2,878.37
18/01/2013	COST	NS:NON Service		105.00	2,983.37
10/07/2013	COST	ADV:Advertising		66.50	3,049.87
10/10/2013	INT	Current Interest To Date		12.96	3,062.83



Fwd: Invoking of the Service Members Civil Relief Act For Mackenzie E Peffley

Mackenzie <mepeffley@yahoo.com>

Fri 10/4/2013 11:31 AM

To: Taylor Smith <Taylor@harrisonfirm.com>;

Sent from my iPad

Begin forwarded message:

From: Mackenzie Peffley <mepeffley@yahoo.com>
Date: August 23, 2013 at 6:38:24 PM EDT
To: "stephanie.trotter@mccabetrotter.com" <stephanie.trotter@mccabetrotter.com>
Cc: Jean Peffley <jean.peffley@promedica.org>, Mack Peffley <mackenzie.peffley@usarmy.mil>, Parents <map8395@roadrunner.com>, amy gray <amy.e.gray2.mil@mail.mil>
Subject: Invoking of the Service Members Civil Relief Act For Mackenzie E Peffley
Reply-To: Mackenzie Peffley <mepeffley@yahoo.com>

Ms. Trotter,

Per my JAG Lawyer at Fort Jackson, SC, I am invoking the Service Members Civil Relief Act for the legal matter associated with my HOA for my property located at 313 Oak Point Lane, Lexington, SC. I will contact my JAG lawyer upon my return from my overseas deployment. Thank You

CPT Mackenzie E Peffley



<https://outlook.office365.com/owa/#viewmodel=ReadMessageItem&ItemID=AAMkADc1MGQ2ZDZlTE3YjEiNDIiY1IhZWl2LTVmNTJjYmY2NTVIZQBGA AAAA...> 1/1

Drew Radeker

From: Drew Radeker
Sent: Thursday, November 21, 2013 9:22 AM
To: Stephanie Trotter
Subject: RE: Oak Pointe Homeowners' Association, Inc. - Mackenzie E. Peffley - - 313 Oak Pointe Lane
Attachments: MOB Orders.pdf

Stephanie:

Nowhere now. She was in Afghanistan. A copy of her orders is attached.

Thank you.

Drew Radeker

HARRISON & RADEKER, P.A.

ATTORNEYS AT LAW

*Real Estate / Property Disputes • Foreclosure • Media Law • Zoning • Criminal Defense • Appeals
Personal Injury • Consumer Law • Mediation/Arbitration • False Arrest • Commercial Litigation*

923 Calhoun Street, Columbia, South Carolina 29201
Post Office Box 50143, Columbia, South Carolina 29250
Telephone: (803) 779-2211
Facsimile: (803) 779-6700

This e-mail message contains confidential, privileged information intended solely for the addressee. Please do not read, copy or disseminate it unless you are the addressee. If you have received it in error, please call us (collect) at (803) 779-2211 and ask to speak with the message sender. Also, we would appreciate your forwarding the message back to us and deleting it from your system. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.) Thank you.

From: Stephanie Trotter <Stephanie.Trotter@mccabetrotter.com>
Sent: Thursday, November 21, 2013 9:15 AM
To: Drew Radeker
Subject: Oak Pointe Homeowners' Association, Inc. - Mackenzie E. Peffley - - 313 Oak Pointe Lane

Reference Acct No. : 013789/00024.

Drew,

Can you tell me where Ms. Peffley is deployed?



McCabe, Trotter & Beverly, PC
COMMUNITY ASSOCIATION AND CONSTRUCTION LAW

Stephanie C. Trotter
Shareholder
140 Stoneridge Drive Suite 650



Columbia, SC 29210
PO Box 212069
Columbia, SC 29221
Direct: (803) 724-5008
Fax: (803) 724-5001
Email: Stephanie.trotter@mccabetrotter.com
Licensed in South Carolina and North Carolina

NOTICES

PRIVILEGED AND CONFIDENTIAL: *This electronic message (including any attachments) is intended only for the use of the individual or entity to which it is addressed and may contain information that is attorney-client privileged, may be confidential work product, or may be exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is wrongful, is strictly prohibited, and may subject you to civil liability. If you have received this communication in error, please immediately notify us by telephone at 803-724-5000 or by return e-mail, and destroy any copies (electronic, paper, or otherwise) that you may have of this communication.*

DEBT COLLECTOR: *This firm collects debts for mortgage lenders and other creditors. Any information obtained will be used for that purpose. However, if you have previously received a discharge in bankruptcy, this message is not and should not be construed as an attempt to collect a debt, but only as an attempt to enforce a lien.*

IRS CIRCULAR 230 DISCLOSURE: *To ensure compliance with certain U.S. Treasury regulations, we inform you that, unless expressly stated otherwise, any tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of avoiding tax-related penalties that may be imposed by the IRS or to promote, market or recommend to any party any tax-related matter addressed herein. In addition, if any such tax advice is used or referred to by other parties in promoting, marketing or recommending any partnership or other entity, investment plan or arrangement, then (i) the advice should be construed as written in connection with the promotion or marketing by others of the transaction(s) or matter(s) addresses in this communication and (ii) the taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor.*

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

2014 SEP -5 AM 11:34 Case No. 2013-CP-32-2386

Oak Pointe Homeowners' Association, Inc.,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC

CERTIFICATE OF SERVICE

Plaintiff,

vs.

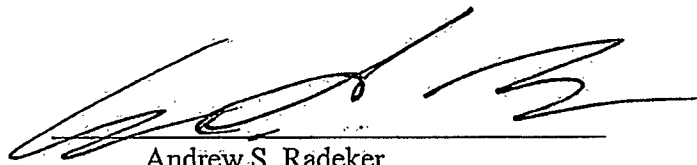
Mackenzie E. Peffley,

Defendant.

I, Andrew S. Radeker, an attorney with the law firm of Harrison & Radeker, P.A., attorneys for the Defendant, do hereby certify that I have, on this the 4th day of September, 2014, served the foregoing document in the above-captioned action by depositing the same in the United States Mail, first class, postage prepaid, with the return address clearly noted, addressed as follows, to wit:

Stephanie C. Trotter, Esq.
Joel M. Deason, Esq.
McCabe Trotter & Beverly, PC
P.O. Box 212069
Columbia, SC 29221

I have also sent this document by email to the above-noted counsel this day.



Andrew S. Radeker

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

Oak Pointe Homeowners' Association, Inc.,

Plaintiff,

NOTICE OF LIEN

v.

Mackenzie E. Peffley

Defendant(s).

013789/00024

YOU WILL PLEASE TAKE NOTICE that Oak Pointe Homeowners' Association, Inc. does hereby file the within Notice of Lien in connection with the unpaid assessments, fines, interest, costs and attorney's fees in the sum of \$870.83 on charges, accrued as of March 18, 2011 which amount is justly due and owed to Oak Pointe Homeowners' Association, Inc. and is carried on the records of the undersigned in the name of Oak Pointe Homeowners' Association, Inc..

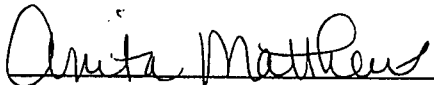
The premises affected by the lien is described as follows:


313 Oakpointe Lane

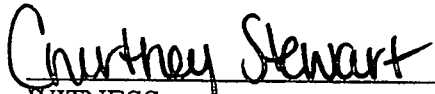
Located in Lexington County, South Carolina.

TMS NUMBER: 004118-01-098

IN WITNESS WHEREOF, Oak Pointe Homeowners' Association, Inc. has hereunto set its hand and seal this 21 day of March, 2011


WITNESS


Oak Pointe Homeowners' Association, Inc.
By: D. Ryan McCabe or Stephanie C. Trotter
Its: Counsel


WITNESS

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)

PERSONALLY appeared before me the undersigned, who states that (s)he saw the within Oak Pointe Homeowners' Association, Inc. by its Counsel, D. Ryan McCabe or Stephanie C. Trotter, sign seal and deliver the within Notice of Lien and that (s)he with the other witness witnessed the execution thereof.

Courtney Stewart
WITNESS

SWORN to before me this 21
day of March, 2011
Christa Matthews
Notary Public of the State of South Carolina
My Commission Expires: 7-12-15

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Oak Pointe Homeowners' Association, Inc.;

Plaintiff,

v.

Mackenzie E. Peffley,

Defendant(s).

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-32-02386

AFFIDAVIT OF STEFFHANIE LAUREL

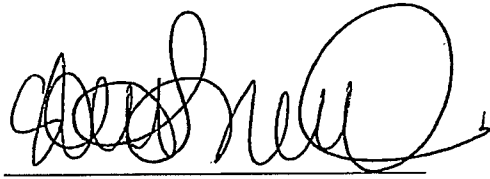
013789/00024

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

1. My name is Steffhanie Laurel. I was a member of the Plaintiff's board of directors from 2006 to 2012.
2. On June 7, 2010 the Association assessed the Defendant \$165.00 for posting unapproved signage on her property.
3. The Defendant subsequently contacted me via email about the \$165.00 assessment stating that she removed the sign and asked that I approve her appeal to waive the \$165.00 assessment for non-compliance.
4. I shared the Defendant's appeal with other board members of the Plaintiff and we approved waiving the \$165.00 assessment. I instructed MJS to remove the \$165.00 non-compliance assessment and it was removed by May 2011.
5. The Defendant has incurred other assessments for non-compliance related to burning trash in her yard and for the condition of her mailbox. As of August 1, 2014 I am unaware of any appeals or requests to waive those assessments made by the Defendant or anyone acting on her behalf.

<Signature Block on the Following Page>

FURTHER AFFIANT SAYETH NOT.



Steffhanie Laurel

SWORN TO AND SUBSCRIBED before me
This 29 day of August, 2014.

Monique Ehrig
NOTARY PUBLIC FOR Ill.

MY COMMISSION EXPIRES: 4, 27, 2022

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Oak Pointe Homeowners' Association, Inc.

Plaintiff,

v.

Mackenzie E. Peffley

Defendant(s)

IN THE COURT OF COMMON PLEAS

FILED

C/A No.: 2013-CP-32-02386

2014 SEP -3 P 3:54

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

CERTIFICATE OF SERVICE

013789/00024

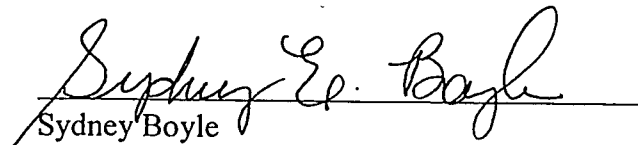
I, Sydney Boyle, an employee with the law firm of McCabe, Trotter and Beverly, P.C., attorneys for Plaintiff, hereby certify that I have served or caused to be served a copy of the foregoing document upon the below named individuals and/or counsel this the 3 day of September, 2014 via Hand Delivery, and addressed as follows:

DOCUMENT SERVED

Affidavit of Steffhanie Laurel and Affidavit of Mary Kadar in support of the Plaintiff's Motion for Summary Judgment

PARTIES SERVED

Andrew S. Radeker
Harrison & Radeker, P.A.
923 Calhoun Street
Columbia, SC 29201
Attorney for Defendant


Sydney Boyle

Columbia, South Carolina

THIS COMMUNICATION IS FOR THE PURPOSE TO COLLECT A DEBT. ANY INFORMATION OBTAINED MAY BE USED FOR THAT PURPOSE.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

Oak Pointe Homeowners' Association, Inc.

C/A No.: 2013-CP-32-02386

Plaintiff,

**AMENDED CERTIFICATE
OF SERVICE**

v.

Mackenzie E. Peffley

Defendant(s)

013789/00024

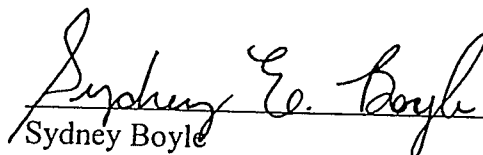
I, Sydney Boyle, an employee with the law firm of McCabe, Trotter and Beverly, P.C., attorneys for Plaintiff, hereby certify that I have served or caused to be served a copy of the foregoing document upon the below named individuals and/or counsel this the 4 day of September, 2014 via Hand Delivery, and addressed as follows:

DOCUMENT SERVED

Affidavit of Steffhanie Laurel and Affidavit of Mary Kadar in support of the Plaintiff's Motion for Summary Judgment

PARTIES SERVED

Andrew S. Radeker
Harrison & Radeker, P.A.
923 Calhoun Street
Columbia, SC 29201
Attorney for Defendant


Sydney Boyle

Columbia, South Carolina

COPY
FILED

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Oak Pointe Homeowners' Association, Inc.,

Plaintiff,

v.

Mackenzie E. Peffley,

Defendant(s).

IN THE COURT OF COMMON PLEAS

2014 SEP -3 P 3:54

C/A No.: 2013-CP-32-02386

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON SC

AFFIDAVIT OF MARY KADAR

013789/00024

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


1. My name is Mary Kadar. I am an employee of MJS, Inc. MJS, Inc. is the management company for Plaintiff.
2. My job duties include collection of assessments from homeowners, coordinating legal action between the Board and the Plaintiff's attorneys and record keeping.
3. Defendant owns the property located at 313 Oakpointe Lane, which is subject to the Declaration of Covenants that is attached hereto as Exhibit A.
4. Plaintiff's transactions and activities, specifically covenant enforcement and assessment collection, are limited to the Oak Pointe subdivision in Lexington County, South Carolina. Plaintiff does not conduct any business with the public at large.
5. On or about April 26, 2010 Plaintiff assessed the Defendant \$150.00 for burning trash in her back yard. Plaintiff was advised of this assessment via mail.
6. On or about June 7, 2010 Plaintiff assessed the Defendant \$165.00 for posting unapproved signage on her property. Plaintiff was advised of this assessment via mail.
7. In December 2010 MJS, Inc. mailed Defendant the annual budget and billing package advising that the 2011 annual assessment of \$175.00 was due January 15, 2011.
8. On January 31, 2011 MJS, Inc. sent the Defendant a past due notice for her outstanding balance of \$490.00.

9. On February 25, 2011 MJS, Inc. sent the Defendant a letter warning that her account would be turned over to the Plaintiff's attorney for collection if the account was not paid in full within ten (10) days.
10. After nineteen days passed, the Defendant did not remit payment or otherwise respond so on March 16, 2011 I forwarded his account to the Plaintiff's attorneys Rogers, Townsend & Thomas (RTT) to file a lien to secure the outstanding debt. The Plaintiff incurred \$375.00 in attorney's fees for this service.
11. At the time Plaintiff's lien was filed the Defendant owed regular assessments, non-compliance assessments, interest, and attorney's fees.
12. On March 17, 2011 MJS, Inc. received a check from the Defendant in the amount of \$490.00. This check was forwarded to RTT since the account had already been referred for collections.
13. On or about March 20, 2011 Steffhanie Laurel, Association President, directed MJS to waive the \$165.00 non-compliance assessment related to the rental sign in Defendant's yard.
14. On or about May 6, 2011 MJS, Inc. issued Defendant a written notice advising the \$165.00 non-compliance assessment had been waived. A copy of that notice is attached as Exhibit B.
15. On or about July 13, 2011 Plaintiff assessed the Defendant \$65.00 for the condition of her mailbox.
16. On or about July 26, 2011 Plaintiff assessed the Defendant \$115.00 for the condition of her mailbox.
17. On or about August 15, 2011 Plaintiff assessed the Defendant \$215.00 for the condition of her mailbox.
18. On January 1, 2012 the annual neighborhood assessment of \$150.00 came due.
19. On January 5, 2012 MJS, Inc. received a check from the Defendant in the amount of \$150.00.
20. On January 15, 2013 the annual assessment of \$150.00 came due.
21. In May 23, 2013 Plaintiff's Board decided to foreclose its lien against Defendant's property. At that time Plaintiff's attorney was instructed to send Defendant a letter

giving her ten (10) days to make payment arrangements to avoid foreclosure. The legal fees for this service were \$150.00.

22. Defendant failed to contact Plaintiff's attorney within the prescribed time frame and suit was initiated on or about July 16, 2013. The legal fees for this service were \$1500.00. At the time suit was filed Plaintiff owed regular annual assessments, non-compliance assessments, interest, attorney's fees and costs.
23. On January 15, 2014 the annual assessment of \$150.00 came due.
24. Since April 25, 2010 the Defendant has only made the following two payments to the Plaintiff: \$490.00 on 03/21/2011 and \$150.00 on 01/05/2012.
25. I am informed to believe that as of August 1, 2014 neither the Plaintiff nor MJS, Inc. has received notification of any appeals or requests to waive the assessments for non-compliance related to burning trash in her yard or for the condition of her mailbox by the Defendant or anyone acting on her behalf.

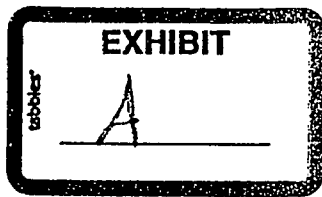
FURTHER AFFIANT SAYETH NOT.


Mary Kadar

SWORN TO AND SUBSCRIBED before me
This 26th day of August, 2014.


NOTARY PUBLIC FOR South Carolina

MY COMMISSION EXPIRES: 12/4/2022



Rec Fee:\$39.00 St Fee:\$0.00
Co Fee:\$0.00 Pages:33
Lexington County ROD Debra H. Gunter
RESTRICTIONS BR:Pg 7740:294

**THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION PURSUANT
TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT
(S.C. CODE ANN. § 15-48-10 ET SEQ., AS AMENDED**

STATE OF SOUTH CAROLINA) DECLARATION OF COVENANTS, CONDITIONS,
) RESTRICTIONS, EASEMENTS, CHARGES AND
COUNTY OF LEXINGTON) LIENS FOR OAK POINTE

THIS Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for the OAK POINTE is made this 12 day of December, 2002, by The Mungo Company, Inc., a corporation organized and existing under the laws of the State of South Carolina (the "Developer"). Any defined terms used herein shall have the meaning set out in Article I hereafter:

RECITALS

1. The Developer, is the owner of the real property described in Exhibit A of this Declaration, and desires to develop thereon a Community made up of Neighborhoods together which may include common lands and facilities, for the sole use and benefit of the Owner of each Lot to be located in such Community.
2. The Developer has or may from time to time acquire additional real property that it may desire to develop as additional phases of such Community which the Developer may incorporate as additional phases of this Community and bring same under this Declaration.
3. The Developer is desirous of maintaining control of design criteria, Structure location, Plans and construction specifications, and other controls to assure the integrity of the Community or each Neighborhood within the Community. Each purchaser of a Lot or Dwelling in the Community will be required to maintain, modify, change, and construct the Dwelling and any Structure in accordance with the design criteria contained herein and established by the Developer or Architectural Control Authority, When Empowered, as hereinafter provided.
4. The Developer desires to provide for the preservation of the value and amenities in such Community and for the maintenance of such common lands and facilities.
5. The Developer desires to subject the real property described in Exhibit A to the covenants, conditions, restrictions, easements, charges, and liens, hereinafter set forth and to the guidelines, policies, procedures, rules and regulations adopted by the Developer or the Association, When Empowered, for each Neighborhood of the Community as a whole. Each and all of which is and are binding upon and for the benefit of the Developer, the Community and each Owner and shall run with the title to the land.

6. The Developer has deemed it desirable, for the efficient preservation of the values and the amenities in the Community, to create the Association to which will be delegated and assigned as further described herein, the powers of maintaining and administering any Common Area, of administering and enforcing the Declaration; of establishing and amending the reasonable rules, regulations and policies for the proper management of the Association and for the promotion of the health, safety and welfare of the residents of the Community; and of levying, collecting and disbursing the Assessments and charges hereinafter created.

7. The Developer has caused or will cause the Association to be incorporated under the laws of the State of South Carolina, as a nonprofit corporation, for the purpose of exercising the aforesaid functions, among others.

NOW, THEREFORE, The Developer declares that the real property described in Exhibit A, annexed hereto and forming a part hereof, and any additions thereto which the Developer may incorporate from time to time in the Community is and shall be held, transferred, sold, conveyed, and occupied subject to the covenants, restrictions, easements, charges, and liens hereinafter set forth which shall run with the title to The Property and all Lots therein and which shall be binding on all Owners.

ARTICLE I DEFINITIONS

Section 1. DEFINITIONS. The following capitalized words when used in this Declaration, any Supplement, or any Supplemental Declaration (unless the context shall prohibit) shall have the following meaning:

(A) "ADDITIONAL ASSOCIATIONS" when and if created, shall mean and refer to any other separate association owning land within The Property, or being given authority to control, manage or maintain portions of The Property owned or maintained by the Association.

(B) "ARCHITECTURAL CONTROL AUTHORITY(IES)" shall mean and refer to any appointees of the Developer, or boards appointed by the Developer, while the Developer retains all or part of the rights and authority for architectural control in the Community, and the Board of Directors of the Association, When Empowered or architectural control boards appointed by the Board of Directors of the Association, When Empowered.

(C) "ARCHITECTURAL GUIDELINES" shall mean and refer to the set of policies, rules and procedures promulgated and/or amended by the Developer or the Architectural Control Authority, When Empowered, which shall act as a guide for the architectural control and review process and for the maintenance, construction or renovation of Structures in each Neighborhood and within the Community.

(D) "ASSESSMENTS" shall have the meaning specified in Article VI.

(E) "ASSOCIATION" shall mean and refer to the OAK POINTE HOMEOWNERS' ASSOCIATION, INC. its successors and assigns.

(F) "BOARD OF DIRECTORS" shall mean and refer to the Neighborhood and At-Large members of the board of directors of the Association whether elected or appointed.

(G) "BY-LAWS" shall mean and refer to the by-laws of the Association.

(H) "COMMON AREA" shall mean and refer to those areas of land shown as "Common Area", on any recorded subdivision map of The Property or so designated in any conveyance to the Association by the Developer including, but not limited to, any and all entrance signs, lights, sprinklers, shrubs, landscaping, parking places, drainage or other easements used, owned or maintained by the Association or the Developer for the benefit of the Community, whether or not located within the street right-of-ways which have been dedicated to a governmental agency or a Lot. Such areas are intended to be devoted to the common use and enjoyment of Members of the Association, subject to the Regulations established and amended from time to time by the Developer or the Board of Directors of the Association, When Empowered, and are not dedicated for use by the general public. NO REPRESENTATION FROM ANY PARTY OR SALES AGENT, INCLUDING THOSE OF THE DEVELOPER, OR OTHER ENTITY AS TO THE EXISTENCE OF A COMMON AREA, SIZE, SHAPE, OR COMPOSITION OF THE COMMON AREA, OTHER THAN THOSE PROVIDED HEREIN OR PROVIDED IN WRITING BY THE DEVELOPER, SHALL BE RELIED UPON, NOR SHALL IT IN ANY WAY REQUIRE THE DEVELOPER TO COMPLY WITH THAT REPRESENTATION. The Community may not contain Common Area, and the fact that there are provisions in this Declaration referencing Common Area does not mean there is or will be Common Area in the Community.

(I) "COMMUNITY" shall mean and refer to the subdivision of The Property.

(J) "DECLARATION" shall mean and refer to this Declaration of Covenants, Conditions, Restrictions, Easements, Charges, and Liens, any amendment or modification thereof, and supplements that annex additional land.

(K) "DIRECTOR" shall mean and refer to an appointed or elected Neighborhood or At-Large member of the Board of Directors.

(L) "DEVELOPER" shall mean and refer to The Mungo Company, Inc., a corporation organized and existing under and pursuant to the laws of the State of South Carolina, its successors and assigns.

(M) "DWELLING" shall mean and refer to a dwelling unit including, but not limited to, a single family home, a patio home, a townhouse, or an apartment, if constructed in the Community.

(N) "LOT" shall mean and refer to any plot of land with such improvements, Structures and Dwellings as may be erected thereon, shown on any recorded subdivision map of The Property, but shall not include the Common Area or the streets in the Community.

(O) "MASTER ASSOCIATION" when and if created, shall mean and refer to any incorporated or unincorporated association to which or from which is delegated specific authority, the Members of which are common to the Association, Additional Associations or Sub-Associations to which or from which the authority is granted. The establishment of Neighborhoods or Neighborhood committees, including, but not limited to, Neighborhood Architectural Control Authorities, shall not be construed as creating a Master Association or Sub-Associations, unless expressly created and recognized as such by the Developer or the Association, When Empowered.

(P) "MASTER PLAN" shall mean and refer to the drawing, sketch or map that represents the conceptual land plan for the future development of the Community. Since the concept of the future development of the undeveloped portions of the Community, including, but not limited to the Lots, streets and the Common Area are subject to continuing revision and change at the discretion of the Developer, present and future references to the "Master Plan" shall be references to the latest revision thereof. In addition, no implied reciprocal covenants or obligation to develop shall arise with respect to lands that have been retained by the Developer for future development. **THE DEVELOPER SHALL NOT BE BOUND BY ANY MASTER PLAN, USE OR RESTRICTION OF USE SHOWN ON ANY MASTER PLAN, AND MAY IN ITS SOLE DISCRETION AT ANY TIME CHANGE OR REVISE SAID MASTER PLAN, DEVELOP OR NOT DEVELOP THE REMAINING UNDEVELOPED PROPERTY OR COMMON AREA OR AMENITIES SHOWN ON ANY MASTER PLAN.**

(Q) "MEMBER" shall mean and refer to any Owner, as provided in Article III hereof.

(R) "NEIGHBORHOODS" when and if created, shall mean and refer to any specific group of Lots and/or Common Area and/or streets located within The Property identified as a distinct neighborhood by the Developer or the Association, When Empowered. The Members of any and all Neighborhoods are Members of the Association or the Master Association, if created, and the Neighborhood exists under authority granted by the Developer or the Association.

(S) "OWNER" shall mean and refer to the record owner or owners, whether one (1) or more persons or entities, of the fee simple title of any of the Lots, but shall not mean or refer to any mortgagee or subsequent holder of a mortgage unless and until such mortgagee or holder has acquired title to the Lot pursuant to foreclosure or any proceedings in lieu of the foreclosure. Said term "Owner" shall also refer to the heirs, successors, and assigns of any Owner.

(T) "PLANS" shall mean and refer to and encompass the plans, specifications, elevations and exterior designs of any Structure built or to be built on any Lot, or Common Area, as well as a site plan showing building set backs and locations of all Structures within the Lot or Common Area.

(U) "REGULATIONS" shall mean and refer to the guidelines, rules, policies, and procedures, including, but not limited to, the Architectural Guidelines, adopted by the Developer, the Board of Directors, When Empowered, or the Architectural Control Authority, When Empowered, for the Community or for each Neighborhood.

(V) "STRUCTURE" shall mean and refer to any thing, object, tree or landscaping, the placement, size, shape, color, height and quality of which upon any Lot or Common Area may affect such Lot or Common Area, including by way of illustration and not limitation, any home, building or part thereof, garage, porch, shed, greenhouse, or bathhouse, coop or cage, covered or uncovered patio, playgrounds, playground equipment, tree houses and yard art, statuary, basketball goals (permanent or temporary), or other temporary or permanent sports equipment, swimming pool, fence, curbing, paving, driveways, wall or hedge, radio, television, wireless cable, or video antenna, satellite dishes, landscaping, well, septic system, sign, appurtenance, or signboard, whether temporary or permanent; any excavation, fill, ditch, diversion dam or other thing or device which affects or alters the natural flow of waters from, through, under or across any Lot or Common Area, or which affects or alters the flow of any waters in any natural or artificial stream, wash or drainage channel from, upon or across any Lot or Common Area; and any change in the grade of any Lot or Common Area of more than six (6) inches.

(W) "SUB-ASSOCIATIONS" when and if created, shall mean and refer to any other Additional Associations within The Property, all of the members of which are Members of the Association or the Master Association and which operates under authority granted by the Developer or the Association. The establishment of Neighborhoods or Neighborhood committees, including, but not limited to, Neighborhood Architectural Control Authorities, shall not be construed as creating Sub-Associations or a Master Association, unless expressly created and recognized as such by the Developer or the Association, When Empowered.

(X) "THE PROPERTY" shall mean and refer to all property, including but not limited to, the Lots, streets and Common Area, subjected to this Declaration, which are described in Exhibit A, together with any additional land that may be developed pursuant hereto and annexed or incorporated in The Property by amendments or supplemental Declarations.

(Y) "WHEN EMPOWERED" shall mean when the Developer has transferred the right of performing some function to the Association's Board of Directors or another entity by the recordation of a document in the office of The Register of Deeds for the county in which The Property is located, or by giving written notice to the Association at the Association's address of record, or to all Owners attending a duly called meeting for that purpose. The transfer of all functions to the Association and the rights and authority of the Developer for architectural control in the Community shall automatically occur when one hundred (100%) percent of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale or when the Class B Membership terminates, whichever occurs first.

ARTICLE II USES OF PROPERTY AND EASEMENTS

Section 1. RESIDENTIAL USE OF PROPERTY. Unless otherwise designated in a supplemental Declaration filed by the Developer for additional land annexed to the Community, all Lots shall be used for single-family residential purposes only, and no commercial, business or

business activity shall be carried on or upon any Lot at any time, except with the written approval of the Developer, its designee(s), or the Association, When Empowered; provided, however, that nothing herein shall prevent the Developer, its agents, representatives, employees, or any builder of homes in the Community, approved by the Developer, from using any Lot owned by the Developer or such builder of homes for the purpose of carrying on business related to the Community or related to the improvement and sale of Lots or Dwellings in the Community; operating a construction office, business office, or model home, and displaying sign, and from using any Lot for such other facilities as in the sole opinion of the Developer may be required, convenient, or incidental to the completion, improvement, and sale of the Lots, Dwellings, or the Community; and provided, further that, to the extent allowed by applicable zoning laws, "home occupation", as defined in the Architectural Guidelines or in the zoning ordinances of the governmental authority having jurisdiction over the Lot, may be maintained in a Dwelling located on any of the Lots as approved in writing by the Developer or the Architectural Control Authority, When Empowered and the governmental authority having jurisdiction over the Lot, so long as the "home occupation" complies with any and all conditions of such approvals.

Section 2. CONSTRUCTION IN ACCORDANCE WITH PLANS. EXCEPT AS PROHIBITED BY LAW, INCLUDING 47 U.S.C. § 303 NT, AND RELATED FCC RULES, 47 CFR § 1.4000 (WHICH LIMITS, BUT DOES NOT ENTIRELY PROHIBIT, CONTROL BY THE ASSOCIATION OF THE SIZE AND LOCATION OF ANTENNAS AND SATELLITE DISHES), NO STRUCTURE SHALL BE CONSTRUCTED, ERECTED, MAINTAINED, STORED, PLACED, REPLACED, CHANGED, MODIFIED, ALTERED OR IMPROVED ON ANY LOT UNLESS APPROVED BY THE DEVELOPER OR ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED AND OTHER APPROPRIATE OR APPLICABLE GOVERNMENTAL ENTITY AND USE OF APPROVED STRUCTURES SHALL COMPLY WITH THE REGULATIONS ISSUED BY THE DEVELOPER OR ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED, FROM TIME TO TIME. NO CONSTRUCTION, RECONSTRUCTION, ERECTION, REPAIR, CHANGE, MODIFICATION SHALL VARY FROM THE APPROVED PLANS. The Developer and the Architectural Control Authority, When Empowered, shall have complete discretion to approve or disapprove any Structure. The Developer and the Architectural Control Authority, When Empowered, may issue from time to time Architectural Guidelines and Regulations to assist it in the approving of Structures and may change such Architectural Guidelines and Regulations at any time and from time to time without notice to the Owners. (For definition of Structure, see Article I, Section 1(V).) Notwithstanding anything herein to the contrary, until one hundred (100%) percent of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale, the Developer may, at its sole option, approve or disapprove any Plans approved or rejected by the Architectural Control Authority appointed by the Developer or overturn any other action of such Architectural Control Authority. Such action by the Developer shall supersede and nullify the action taken by such Architectural Control Authority.

Section 3. SUBDIVISION OF LOTS OR COMBINATION OF LOTS. One or more Lots or parts thereof may be subdivided or combined only if approved by the Developer, and the Architectural Control Authority, When Empowered.

Section 4. LIVESTOCK AND PETS. No animals, livestock or poultry of any kind shall be raised, bred or kept on any Lot, except that dogs, cats or other small household pets may be kept, subject to applicable leash laws or Regulations established and amended by the Developer or by the Board of Directors of the Association, When Empowered, from time to time, provided that they are not kept, bred or maintained for any commercial purpose. Such household pets must not constitute a nuisance as determined by the Board of Directors in its sole discretion within the Community or cause unsanitary conditions within the Community, and no animal kept outside the Dwelling shall be kept in a manner which disturbs the quiet enjoyment of the Community or any other Owner. While not in a fully confined area, all pets shall be restrained by leashes and no pet shall enter upon any Lot without the express permission of that Owner or on the Common Area without express permission of the Developer, or the Association, When Empowered. The pet owner will be responsible for clean up and removal of fecal matter deposited by such pet and shall be liable for, indemnify and hold harmless any other Owner, the Developer and the Association from any loss, cost, damage or expense incurred by such Owner, the Developer, the Association as a result of any violation of this provision. (See Article IX for the Association's Remedies for Violation.)

Section 5. OFFENSIVE ACTIVITIES. No noxious, offensive or illegal activities as determined by the Developer or the Board of Directors, When Empowered, shall be carried on upon any Lot, Common Area, street nor shall anything be done thereon which is or may become an annoyance or nuisance to any Owner in the Community. (See Article IX for the Association's Remedies for Violation.)

Section 6. TRAILERS, TRUCKS, BUSES, BOATS, PARKING, ETC. No buses, trailers or mobile homes, motorcycles, boats, boat trailers, all terrain vehicles, go-carts, campers, vans or vehicles on blocks, unlicensed vehicles, or like vehicles shall be kept, stored, used, or parked overnight either on any street within the Community, in the Common Area or on any Lot, without the approval of the Developer or the Association, When Empowered. No unsafe parking shall be allowed on any streets in the Community. The Developer or the Association, When Empowered, may in its sole discretion determine what is unsafe and issue regulations to control on and off street parking. (See Article IX for the Association's Remedies for Violation.)

Section 7. EXCAVATIONS OR CHANGING ELEVATIONS. No Owner shall excavate or extract earth for any business or commercial purpose.

Section 8. SEWAGE SYSTEM. Sewage disposal shall be through the public or private system or by septic tank approved by appropriate State and local agencies. If there is a public or private system serving the Community, the Owner shall be obligated to use the system unless authorized otherwise by the Developer.

Section 9. WATER SYSTEM. Water shall be supplied through a public or private system or any other system or well approved by appropriate State and local agencies. If there is a public or private system serving the Community, the Owner shall be obligated to use the system unless authorized otherwise by the Developer.

Section 10. UTILITY FACILITIES. The Developer reserves the right to approve the necessary construction, installation and maintenance of utility facilities, including but not limited to telephone, cable T.V., electricity, gas, water and sewage systems, which may be in variance with these restrictions.

Section 11. WAIVER OF SETBACKS, BUILDING LINES AND BUILDING REQUIREMENTS. The Developer, and Architectural Control Authority, When Empowered may waive violations of the setbacks and building lines shown on any plat of the Community or set out in Article II, Section 20 of this Declaration. Such waiver shall be in writing and recorded by the Owner in the County Register of Deeds. A document executed by the Developer or the Architectural Control Authority, When Empowered shall be, when recorded, conclusive evidence that the requirements hereof have been complied with. The Developer and Architectural Control Authority, When Empowered may also, from time to time as they see fit, eliminate violations of setbacks and boundary lines by amending the Plat. Nothing contained herein shall be deemed to allow the Developer or the Architectural Control Authority, When Empowered, to waive violations which must be waived by an appropriate governmental authority without the Owner obtaining a waiver from such authority.

Section 12. EASEMENT FOR UTILITIES AND COMMON FACILITIES. The Developer reserves unto itself, its permittees, its successors and assigns, a perpetual, alienable, easement and right of ingress and egress, over, upon, across and under each Lot and all Common Area, if any, as are necessary or convenient for the erection, maintenance, installation, and use of electrical systems, irrigation systems, landscaping, telephone wires, cables, conduits, sewers, water mains, and other suitable equipment for the conveyance and use of electricity, telephone equipment, gas, sewer, water or other public convenience or utilities including easements for privately owned televisions and other communications cable and equipment, and the Developer may further cut drainways for surface water when such action may appear by the Developer to be necessary in order to maintain reasonable standards of health, safety, and appearance, or to correct deviations from approved development drainage Plans provided such easement shall not encroach on or cross under existing buildings or Dwellings on the Lot or Common Area. The Developer further reserves an easement on behalf of itself, its permittees, its successors and assigns, over six (6') feet along each side Lot line of each Lot for the purpose of construction or maintenance of utilities, as well as drainage installation or maintenance, and over the rear twelve feet (12') of each Lot line of each Lot for the purpose of construction or maintenance of utilities, as well as drainage installation or maintenance, and over the front ten feet (10) of each Lot and over such other area of each Lot as is shown on recorded plats of the Community for utility installations, utility rights of way and maintenance thereof, as well as drainage installations, drainage rights of ways, and maintenance thereof. These easements and rights expressly include the right to cut any trees, bushes, or shrubbery, make any grading of soil, or to take any other similar action reasonably necessary to provide economical and safe utility or other installation and to maintain reasonable standards of health, safety and appearance. It further reserves the right to locate signs, entrances, landscaping, sprinklers and other improvements related to the Common Area or common facilities of the Community including, but not limited to, entrances, wells, pumping stations, and tanks, within residential areas on any walkway or any residential Lot in the area designated for such use on any applicable plat of the residential subdivision, or locate same on the adjacent Lot with the permission of the Owner of such adjacent Lot. Such right may

be exercised by the licensee of the Developer, but this reservation shall not be considered an obligation of the Developer to provide or maintain any such utility service. No Structures, including, but not limited to, walls, fences, paving or planting shall be erected upon any part of The Property which will interfere with the rights of ingress and egress provided for in this paragraph and no Owner shall take any action to prevent the Association, the Developer, or any public or private utility, or any of their agents, contractors or employees from utilizing the easements reserved herein. **THE DEVELOPER, THE ASSOCIATION, THE ARCHITECTURAL CONTROL AUTHORITY, THEIR AGENTS, EMPLOYEES AND OFFICERS SHALL NOT BEAR RESPONSIBILITY FOR THE REPAIR OR REPLACEMENT OF ANY LANDSCAPING PLANTED, SPECIAL GRADING ESTABLISHED, OR STRUCTURE CONSTRUCTED WITHIN AN EASEMENT, WHETHER PLANTED ESTABLISHED OR CONSTRUCTED INTENTIONALLY OR INADVERTENTLY AND WHETHER APPROVED OR NOT BY THE DEVELOPER OR THE ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED.** All such easements and rights shall be shown and designated on the recorded plats of the Community. The Developer, its successors and assigns, expressly reserves the right to alter any easement described in this paragraph. Such right to alter shall be limited to such extent as will allow the Owner of the Lot and Structure to convey marketable title. The rights and easements conferred and reserved herein shall be appurtenant to any property whether or not subject to this Declaration and shall be an easement in gross of a commercial nature for the benefit of the Developer, its permittees, successors and assigns to serve any property whether or not subject to this Declaration.

Section 13. YARD AND LANDSCAPING MAINTENANCE.

(a) In the event that the Owner of any residential Lot fails to maintain their yard and overall landscaping in a manner in keeping with the Declaration, as determined by the Developer or an Architectural Control Authority, When Empowered, from time to time as they see fit, the Developer or the Architectural Control Authority, When Empowered, may issue a compliance demand requiring the Owner of the residential Lot to bring the Lot into keeping with the Declaration, as determined by the Developer or the Architectural Control Authority, When Empowered. If the Owner of the residential Lot fails to comply within the time required by the notice, the Developer or the Association may enter upon the Lot, bring the Lot into keeping with the Community, as provided above, and levy against the Owner of the Lot an Assessment for Non-Compliance and such Assessment shall be a lien upon the Lot.

(b) The responsibility of an Owner of a residential Lot to properly maintain their yard and overall landscaping includes, but is not limited to, the following:

- (i) prevent any underbrush, weeds, or other unsightly plants to grow upon the Lot;
- (ii) promptly remove all trees or vegetation that may die on the lot or right-of-way in front of the lot;
- (iii) provide permanent vegetation, including but not limited to grass, fully and uniformly distributed over the Lot;

- (iv) unless approved otherwise by the Developer or the Review Authority, When Empowered, maintain and (if they die) replace, any tree(s) and/or other vegetation upon the lot or located within the road right-of-way, to include street trees, that were planted by the Developer; that are specifically required to be removed or replaced by the Developer or Review Authority, When Empowered; that were required by the Developer or Review Authority, When Empowered, to have been protected during construction; or that were placed in this area in accordance with an approved landscape plan;
- (v) provide proper grading and drainage on the Lot, in accordance with Article X, Section 15 of this Declaration;
- (vi) prevent and repair any erosion on the Owner's Lot, any other Lot, or any street in the Community caused by surface run-off from the Owner's Lot, in accordance with Article X, Section 15 of this Declaration; and
- (vii) providing at their own expense general maintenance, including but not limited to proper watering, insect and weed control, fertilization, pruning, regular replacement of straws and mulch, proper drainage control, etc. and other types of normal maintenance not provided by the Association, of the overall landscaping and grass in compliance with the regulations and guidelines established by the Developer, the Board of Directors or the Architectural Control Authority, When Empowered.

(c) Any entry by the Association or the Developer or their agents, employees, officers or contractors under the terms of this Section shall not be deemed a trespass, and an easement in gross of a commercial nature is reserved to the Developer and to the Association for the purpose of entry onto any residential Lot for the purpose of enforcing this paragraph. This provision shall not be construed as an obligation on the part of the Developer, the Association or their assigns to provide garbage or trash removal services. As provided herein, these rights may be assigned by the Developer to the Association, or other appropriate entities. The Owner shall hold harmless the Developer, its agents and employees, officers and contractors and the Board of Directors or the Architectural Control Authority, When Empowered, from any liability incurred arising out of correcting the Owner's breach of this Section.

Section 14. ACCESS BY DEVELOPER OR ASSOCIATION, WHEN EMPOWERED. For the purpose of performing its function under this or any other Article of the Declaration, to correct any violation of this Declaration, the Architectural Guidelines or the Regulations, and to make necessary surveys in connection therewith, the Association, its duly authorized agent and employees, or the Developer shall have the right to enter upon any Lot.

Section 15 EMERGENCY ACCESS. There is hereby reserved and granted to the Developer, the Association, When Empowered, their directors, officers, agents, employees, and managers and to all policemen, firemen, ambulance personnel and all similar emergency personnel an easement to enter upon The Property, any part thereof or Lot in the proper performance of their respective duties. Except in the event of emergencies, the rights under this Section shall be exercised only during reasonable daylight hours, and then, whenever practicable, only after advance notice to the Owner affected thereby. The rights granted herein to the Association includes reasonable right

of entry upon any Lot or Dwelling to make emergency repairs and to do other work reasonably necessary for the proper maintenance and operation of the Community.

Section 16 CONSTRUCTION EASEMENT FOR THE DEVELOPER During the period that Developer owns any Lot primarily for the purpose of sale or owns any interest in any portion of The Property, Developer and its duly authorized representative, agents, and employees shall have a transferable right and easement on, over, through, under and across The Property for the purpose of constructing Dwellings on the Lots and making such other improvements to The Property as are contemplated by this Declaration and to The Property as Developer, in its sole discretion, desires, and for the purposes of installing, replacing, and maintaining all Dwellings and other improvements within the Community, as well as utilities servicing The Property or any portion thereof, and for the purpose of doing all things reasonably necessary and proper in connection therewith, provided in no event shall Developer have the obligation to do any of the foregoing.

Section 17 LEASES OF LOTS. Any lease agreement between an Owner and a tenant for the lease of such Owner's Dwelling on the Lot shall provide that the terms of the lease shall be subject in all respects to the provisions of the Declaration, the Articles of Incorporation and By-Laws of the Association, and any Regulations promulgated by the Association. The Owner shall incorporate in any lease of any Lot or Dwelling a provision stating that failure to comply with the terms of such documents shall be default under the terms of the lease. All leases of Lots shall be in writing and a copy of the executed lease upon, written demand, must be provided to the Developer or the Board of Directors, When Empowered.

Section 18. STREET LIGHTING CHARGE. Each Owner shall pay a proportional share of the monthly charge for street lighting service as prescribed by the South Carolina Public Service Commission. The electric utility company shall bill the Owner for this charge as part of the monthly electric utility bill.

Section 19. MINIMUM SQUARE FOOTAGE REQUIREMENT. Unless otherwise stated in a document recorded in the County Register of Deeds Office, the Developer hereby establishes the following minimum square footage requirements, which may differ for each Neighborhood and for additional phases of the Community:

- (a) Minimum square footage of air-conditioned/heated space for a one-story home shall be:1000 sq.ft.;
- (b) Developer or Architectural Control Authority, When Empowered shall have the right to approve or disapprove any multi-level plan based solely on the amount of heated square footage contained within any level or floor and/or relationship of that level's or floor's footage to the total heated footage contained within the other levels of the Structure or the Structure in its entirety.

Section 20. BUILDING SETBACK REQUIREMENTS. Unless the Developer or the Architectural Control Authority, When Empowered, waives the requirement or unless a setback is shown otherwise on any plat of the Community or unless otherwise

stated in a document recorded in the County Register of Deeds Office, the exterior finished face, steps, eaves and overhangs of all Structures, including but not limited to, buildings, homes, garages, porches, sheds, greenhouses, bathhouses, terraces, patios, decks, stoops, wing-walls, swimming pools (whether above or below the ground) and storage buildings for related equipment (including but not limited to filters and water pumps) shall be placed on the Lot so as to be the following criteria, which may differ for each Neighborhood and for additional phases of the Community :

Front Setback: 18 ft.

Side Setback: 5 ft. minimum between houses/ 4ft. minimum
between house and side lot line

Side Street Setback: 12.5 ft.

ARTICLE III MEMBERSHIP AND VOTING RIGHTS IN THE ASSOCIATION

Section 1. MEMBERSHIP. It is mandatory that every person or entity who is an Owner of any Lot shall be a Member of the Association. Membership shall be mandatory to and may not be separated from ownership of any Lot.

Section 2. VOTING RIGHTS. The Association shall have two (2) classes of voting Membership.

(a) CLASS "A". Class "A" Members shall be all Owners excepting the Developer. Class "A" Members shall be entitled to one (1) vote for each Lot they own. When more than one (1) person holds such interest or interests in any Lot, the entire vote attributable to such Lot shall be exercised by one (1) individual who is duly authorized in writing by all of the Owners of that Lot. In no event shall more than one (1) vote or a partial vote be cast with respect to any such Lot. When more than one person holds such an interest or interests in a Lot, it shall be the responsibility of those Owners to provide the Developer or the Association with written notification, with the signatures of all of those persons owning an interest in the Lot affixed, of the name and mailing address of that person authorized to receive notification from the Association and to cast said vote.

(b) CLASS "B". The sole Class "B" Member shall be the Developer. The Class "B" Member shall be entitled to cast the greater of four (4) votes for each Lot for which it holds title or one more vote than the total votes of the Class "A" Members. Class "B" Membership shall end when one hundred (100%) percent of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale, or at such times as the Developer voluntarily relinquishes these voting rights, provided, however, that the one hundred (100%) percent may be reduced at the option of the Developer.

**ARTICLE IV
PROPERTY RIGHTS IN THE COMMON AREA**

Section 1. MEMBER'S EASEMENTS OF ENJOYMENT. Subject to the provisions of Section 3 of this Article IV, the right of the Association to suspend the use of the Common Area as set out in Article IX, and the Regulations established and amended from time to time, every Member shall have a right and easement of enjoyment in and to the Common Area, and such easement shall be appurtenant to and shall pass with the title to every Lot. (See Article IX for the Association's Remedies for Violations.)

Section 2. TITLE TO COMMON AREA. On or before the conveyance of the last Lot owned by the Developer, the Developer or its successors and assigns will convey to the Association, by limited warranty deed, fee simple title to the Common Area, free and clear of all encumbrances and liens, except those created by or pursuant to this Declaration, and further except for easements and restrictions existing of record prior to the purchase of The Property by the Developer, none of which will make the title unmarketable.

This section shall not be amended, as provided for in Article X, Section 5, to eliminate or substantially impair the obligation for the maintenance and repair of the Common Area.

Section 3. EXTENT OF MEMBER'S EASEMENTS. The rights and easements created hereby shall be subject to the following rights which are hereby reserved to the Developer or the Association's Board of Directors, When Empowered:

(a) The right of the Developer, and of the Association, When Empowered, to dedicate, transfer, or convey all or any part of the Common Area, with or without consideration, to any governmental body, district, agency, or authority, or to any utility company, and the right of the Developer and of the Association, When Empowered, to convey with consideration all or any part of the Common Area upon affirmative vote of more than fifty (50%) percent of the total votes of the Members, cast at a duly called meeting of the Members or a recorded resolution signed by the Members holding more than fifty (50%) percent of the vote of the Members.

(b) The right of the Developer, and of the Association, When Empowered, to grant and reserve easements and rights of way through, under, over, and across Common Area, for the installation, maintenance, and inspection of lines and appurtenances for public and private water, sewer, drainage, and other utility services, including a cable or community antenna television system and irrigation or lawn sprinkler systems, and the right of the Developer to grant and reserve easements and rights of way through, over and upon and across the Common Area for the operation and maintenance of the Common Area.

(c) The right of visitors, invitees, and guests to ingress and egress in and over those portions of Common Area that lie within any private roadways, parking lots and/or driveways (and over any other necessary portion of the Common Area in the case of landlocked adjacent Owners) to the nearest public highway.

(d) The right of the Association, in accordance with the law, its Articles of Incorporation and By-Laws, to borrow money for the purpose of improving the Common Area and, in pursuance thereof, to mortgage or encumber the Common Area.

Section 4. DELEGATION OF RIGHTS OF ENJOYMENT. Any Owner may delegate, in accordance with the By-Laws of the Association, his right of enjoyment to the Common Area and facilities to his employees, tenants, invitees, or licensee, subject to the Regulations established and amended from time to time. Any Owner shall at all times be responsible for and liable for the actions of that Owner's family, tenants, invitees, guests or licensees, employees, pets, and animals, and shall further be responsible for the paying of any Assessments for non-compliance levied for their non-compliance with this Declaration, the By-Laws of the Association or the Regulations established and amended from time to time, which Assessment shall become a continuing lien on the Lot of such Owner.

Section 5. ADDITIONAL STRUCTURES. Neither the Association nor any Owner shall, without the prior written approval of the Developer, so long as the Developer owns one (1) Lot permitted by the Master Plan of the Community, or without written approval of the Board of Directors, When Empowered, erect, construct, or otherwise locate any Structure or other improvement in the Common Area. The Developer, so long as the Developer owns one (1) Lot permitted by the Master Plan of the Community, reserves the right to erect, construct, or otherwise locate any additional Structure or other improvement in the Common Area.

ARTICLE V COMPLETION, MAINTENANCE, AND OPERATION OF COMMON AREA AND FACILITIES

Section 1. COMPLETION OF COMMON AREA BY THE DEVELOPER. The Developer will complete the construction of the Common Area, streets and roadways for the Community as shown on the recorded plats of the Community.

Section 2. MAINTENANCE AND OPERATION OF COMMON AREA. The Association at its sole cost and expense, shall operate and maintain the Common Area and provide the requisite services in connection therewith. It shall further be the responsibility of the Association to maintain all entrances including entrance signs, lights, sprinklers, shrubs, and to pay the cost of utility bills and other such requisite services in connection with the maintenance of such entranceways. Until one hundred (100%) percent of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale, if the Association fails to operate, maintain or repair the Common Area to the satisfaction of the Developer or fails to employ contractors which the Developer, in its sole discretion, determines to be able to properly operate or maintain the Common Area, the Developer may, but is not required to, notify the Association to correct the maintenance problem or remove the contractor. If the Association fails to do so within the time set forth in the notice, the Developer may, but is not required to, correct said maintenance problem or remove and replace such

contractor. The Association shall reimburse the Developer for any and all costs incurred by the Developer and the cost including collection costs incurred by the Developer shall be a lien on the Common Area. This Section shall not be amended or removed without the written consent of the Developer. Any entry by the Developer under the terms of this Section shall not be deemed a trespass, and an easement in gross of a commercial nature is reserved to the Developer for the purpose of entry onto the Common Area for the purpose of enforcing this paragraph. This provision shall not be construed as an obligation on the part of the Developer or its assigns to provide garbage or trash removal services. As provided herein, these rights may be assigned by the Developer. The Association shall hold harmless the Developer, its agents, officers, directors, and employees from any liability arising out of correcting the Association's breach of this Section. The maintenance, operation, and repair of the Common Area shall include, but not be limited to, repair of damage to pavements, roadways, walkways, outdoor lighting, buildings, if any, recreational equipment, if any, fences, storm drains, and sewer and water lines, connections, and appurtenances, except when such responsibilities are accepted by responsible parties, including public bodies, governmental bodies, districts, agencies or authorities and only for so long as they properly perform.

ARTICLE VI ASSESSMENTS

Section 1. ASSESSMENTS

(a) Each and every Owner of any Lot or Lots within The Property, by acceptance of a deed therefore, whether or not it shall be so expressed in any such deed or other conveyance, shall be personally obligated to pay to the Association, the Assessments, and the Association's collection fees, attorneys fees and court cost incurred in collecting the Assessments, or in enforcing or attempting to enforce the Declaration, By-Laws and the Architectural Guidelines and Regulations established or amended by the Developer or the Board of Directors, When Empowered.

(b) Assessments, together with such interest thereon, and other costs of collection; including the Association collection fees, attorney fees and court costs shall be a charge on the land and shall be a continuing lien upon the Lot or Lots against which such Assessments are levied. Owners of any Lot shall share in the obligation of any other Owner of that Lot and shall be jointly and severally liable for any Assessments, the cost of collection, attorney fees and court costs that are attributable to that Lot.

(c) The Association shall, upon demand at any time, furnish to any Owner or attorney representing the prospective purchaser of a Lot, a certificate in writing signed by an officer of the Association, setting forth whether said Assessments have been paid. Such certificate shall be conclusive evidence of payment of any Assessments therein stated to have been paid. At all times the Association's records with respect to payments made or due shall be deemed correct unless proper documentation to the contrary can be produced.

(d) This Article shall not be amended as provided in Article X, Section 5, to eliminate or

substantially impair the obligation to fix the Assessments at an amount sufficient to properly operate the Association, maintain and operate the Common Area and perform the maintenance required to be performed by the Association under this Declaration without the written consent of the Developer.

(e) The Assessment shall be six (6) types: (1) Regular Assessments; (2) Assessments for non-compliance with this Declaration, the By-Laws of the Association, and the Regulations established and amended from time to time; (3) Assessments for Capital Improvements as described in Section 4 below; (4) Assessments for Working Capital Fund as described in Section 5 below; (5) Assessments for Budgetary Shortfall as described in Section 6 below; and (6) Neighborhood Assessments as described in Section 7 below. Such Assessments to be fixed, established, and collected from time to time as herein after provided. (See Section IX for Remedies of the Association for Violation.)

Section 2. REGULAR ASSESSMENTS.

(a) The Regular Assessments levied by the Association shall be used exclusively for the purposes of the general operation of the Association, reserves and the promotion of the health, safety, and welfare of the residents of the Community, and in particular for the improvement and maintenance of the Common Area, including but not limited to, the payment of mortgages, taxes and insurance thereon, and repair, replacement, and additions thereof, the cost of labor, equipment, materials, management, Treasurer fees, and supervision thereof, and the cost of lawn and landscaping maintenance, and refuse collection; reserves for the replacement of the Association property and improvements to the Common Area; and all other obligations or debts incurred by the Association.

(b) The Developer or the Board of Directors of the Association, When Empowered, shall at all times fix the Regular Assessment based on the Association's budget for the period of the Regular Assessment. The amount of the Regular Assessment shall be uniform for each Lot except as set forth herein and shall be assessed against all Lots at the time of the Assessment. The Developer or Board of Directors, When Empowered, shall once each year create a budget and fix the date of commencement, the size and number of installments, the method of determining the amount of all Regular Assessments against each Owner of a Lot, and shall, at that time, prepare a roster of the Owners and the Assessments applicable thereto. The roster shall be kept in the office of the Association and shall be opened to inspection by any Owner. If the Developer or the Board of Directors, When Empowered, fails to set a Regular Assessment, then the previous Assessment or the previous installment schedule shall continue until the Regular Assessment is set. A copy of the budget or any amended budget and written notice of the Regular Assessment and adjustment thereof, shall be sent to every Owner subject thereto, identifying the amount(s), due date(s), and the address to which payments are to be sent, at least thirty (30) days in advance of the due date of the first (or only) installment of each Regular Assessment. Until one hundred (100%) percent of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale, the Developer shall have the option of approval of any portion of the budget.

(c) The Developer or the Board of Directors, When Empowered, shall have the right to adjust the amount and installment schedule of the Regular Assessment without Membership approval for the purpose of meeting the budgetary obligations of the Association and in times of an unexpected cashflow shortfall. The Developer or the Board of Directors, When Empowered, may, at its sole discretion, set estimated Regular Assessments until the Regular Assessment is set and the budget completed, or may delay the billing of Regular Assessments until the budget is complete and then bill the Owners for the Regular Assessment for the entire budget period.

(d) Until one hundred (100%) percent of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale, the Developer may also choose the option of either (1) paying the Regular Assessments attributable to the Lots owned by the Developer at the time that the Regular Assessments are due and paying a prorated Regular Assessment for the incorporation of additional Lots in the Community during the budget period or (2) paying the deficits in the expenses and capital reserves (but not contingencies) of the Association not paid by the Regular Assessments, so long as the responsibilities of the Association within the approved budget are properly met. Any expenses of the Association paid by and any advances paid to the Association by the Developer which are in excess of the amount due from the Developer for Regular Assessments for Lots owned by the Developer, or if the Developer chooses to pay deficit expense, the amount paid by the Developer to or for the Association which exceeds the actual deficit, at the option of the Developer, shall be considered a loan to the Association, repayable under terms established by the Developer, and which are reasonably acceptable to the Board of Directors of the Association.

(e) Any Regular Assessment against Lots owned by the Developer (including those Lots added to the Community after the date of the Assessment) shall not be due until the end of the period for which the Regular Assessment is established, provided, however, if the Developer has elected not to pay Regular Assessments and instead to pay the deficits in the expenses and capital reserves of the Association and fails to pay such deficits within thirty (30) days after the end of the budget period, the Regular Assessment for Lots owned by the Developer shall be due in thirty (30) days after the Association notifies the Developer of its failure to pay the deficits at the end of the budget period.

(f) At the time of the closing of a Lot owned by the Developer, if the Regular Assessment for that period has been paid by the Developer, that portion of the Regular Assessment that is attributable to the balance of the period shall be collected and paid to the Developer by the purchaser of the Lot. Any sums not reimbursed to the Developer, shall also be a lien on the Lot. All other Assessments, when levied, shall be the responsibility of the Owner of record on the date that the Assessment is authorized by the Developer or by the Board of Directors of the Association, When Empowered.

Section 3. ASSESSMENTS FOR NON-COMPLIANCE. In the event that any Owner, their guests or invitees fail to comply with any of the provisions of the Declaration, the By-Laws of the Association, the Architectural Guidelines and Regulations established and amended by the Developer or the Board of Directors, When Empowered, from time to time, the Developer, or the

Board of Directors, When Empowered, may issue Assessments in amounts as it determines in its sole discretion, which shall be an Assessment for Non-Compliance and which are a lien on the Lot or Lots of that Owner. (See Section IX for Remedies of the Association.)

Section 4. ASSESSMENTS FOR CAPITAL REPAIR OR IMPROVEMENTS. In addition to the Regular Assessments, the Association may levy, in any period, an Assessment (which must be fixed at a uniform rate for all Lots) for the purpose of defraying, in whole or in part, the cost of any construction or any reconstruction, unexpected repair or replacement of a capital improvement upon the Common Area, including the necessary fixtures, equipment and personal property relating thereto, provided that such Assessment shall have the assent of more than fifty (50%) percent of the votes of the Members who are voting in person, or by proxy at a meeting duly called for this purpose, written notice of which shall be sent to all Members not less than thirty (30) days and no more than sixty (60) days in advance of the meeting provided, however, these periods for notice may be shorter as necessary to obtain funds for emergency repairs to the Structures on the Common Area. Subject to the provisions of Section 2, the due date or due dates of any installment of any such Assessment shall be fixed in the resolution authorizing such Assessment.

Section 5. ASSESSMENT FOR WORKING CAPITAL FUND. At the time of acquiring title to a Lot from the Developer or from a contractor who purchased the Lot from the Developer and completed the Dwelling and Structures on the Lot, the Owner acquiring title to the Lot shall, at the option of the Developer or the Board of Directors, When Empowered, deposit with the Association a reserve fund payment in a sum to be determined from time to time by the Developer or Board of Directors, When Empowered, to provide for a working capital fund for the obligations of the Association. Such working capital fund payment shall in no way be considered a prepayment of the Regular Assessment. Such working capital fund payments shall be used for the purposes as determined from time to time by the Developer or the Board of Directors of the Association, When Empowered.

Section 6. ASSESSMENTS FOR BUDGETARY SHORTFALL. In addition to the Regular Assessment, the Developer or the Board of Directors, When Empowered, may, at its option, draw from the appropriate reserve funding or working capital funds or may levy, in any period, an Assessment (which must be fixed at a uniform rate for all Lots), subject to the provisions of Section 2, applicable to that period only, to cover any unexpected shortfall in the cashflow of the Association. Said Assessment shall not require the approval of the Membership.

Section 7. NEIGHBORHOOD ASSESSMENTS.

(a) In addition to the Regular Assessment charged each Owner of a Lot, should additional services be provided by the Association for Owners of specific Lots in a designated Neighborhood within the Community, the Board of Directors of the Association, When Empowered, shall have the authority to levy an Assessment applicable only to such Lots in the Neighborhood ("Neighborhood Assessment"), based upon a budget approved by the Board of Directors, to fund these special services and the Association's cost of implementing and administering these services, as well as to fund reserves and contingencies needed to assure that these services can be provided.

(b) The Developer or the Board of Directors of the Association, When Empowered, shall at all times fix the Neighborhood Assessment based on the budget prepared by the Board or its designee in accordance with the By-Laws for the period of the Neighborhood Assessment. The amount of the Neighborhood Assessment shall be uniform for each Lot in the Neighborhood, except as set forth herein, and shall be assessed against all Lots in the Neighborhood at the time of Assessment. The Board or its designee shall, in accordance with the By-Laws, once each year create a budget, fix the date of commencement, the size and number of installments, the method of determining the amount of all Neighborhood Assessments against each Owner of a Lot, and shall, at that time, prepare a roster of the Owners and the Neighborhood Assessments applicable thereto, all of which shall be submitted to the Board of Directors for approval as required by the By-Laws. The roster shall be kept in the office of the Association and shall be opened to inspection by any Owner. A copy of the budget, or any amended budget and written notice of the Neighborhood Assessment and adjustment thereof, shall be sent to every Owner subject thereto, identifying the amount(s), due date(s), and the address to which payments are to be sent, at least thirty (30) days in advance of the due date of the first (or only) installment of each Neighborhood Assessment. Until one hundred percent (100%) of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale, the Developer shall have the option of approval of any portion of the budget.

(c) The Developer or four-fifths (4/5) of the Board of Directors, When Empowered, shall have the right to adjust the amount and installment schedule of the Neighborhood Assessment without Membership approval for the purpose of meeting the budgetary obligations of the Neighborhood and in times of an unexpected cashflow shortfall. The Developer or four-fifths (4/5) of the Board of Directors, When Empowered, may, at its sole discretion, set estimated Neighborhood Assessments until the Neighborhood Assessment is set and the budget completed, or may delay the billing of Neighborhood Assessments until the budget is complete and then bill the Owners for the Neighborhood Assessment for the entire budget period.

(d) Until one hundred percent (100%) of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale, the Developer may also choose the option of either: (1) paying the Neighborhood Assessments attributable to the Lots owned by the Developer at the time that the Neighborhood Assessments are due and paying a prorated Neighborhood Assessment for the incorporation of additional Lots during the budget period; or (2) paying the deficits in the expenses and capital reserves (but not contingencies) of the Association not paid by the Neighborhood Assessments, so long as the responsibilities of the Association within the approved budget are properly met. Any expenses of the Association paid by and any advances paid to the Association by the Developer which are in excess of the amount due from the Developer for Neighborhood Assessments for Lots owned by the Developer, or if the Developer chooses to pay deficit expenses, the amount paid by the Developer to or for the Association which exceeds the actual deficit, at the option of the Developer shall be considered a loan to the Association, repayable under terms established by the Developer and which are reasonably acceptable to the Board of Directors of the Association.

(e) Any Neighborhood Assessment against Lots owned by the Developer (including those added to the Community after the date of the Assessment) shall not be due until the end of the period for which the Neighborhood Assessment is established, provided, however, if the Developer has elected not to pay the Neighborhood Assessments and instead pay the deficits in the expenses and capital reserves of the Association, and fails to pay such deficits within thirty (30) days after the end of the budget period, the Neighborhood Assessment for such Lots owned by the Developer shall be due in thirty (30) days after the Association notifies the Developer of its failure to pay the deficits at the end of the budget period.

(f) At the time of the closing of a Lot owned by the Developer, if the Neighborhood Assessment for that period has been paid by the Developer, that portion of the Neighborhood Assessment that is attributable to the balance of the period shall be collected and paid to the Developer by the purchaser of the Lot. Any sums not reimbursed to the Developer shall also be a lien on the Lot. All other Assessments, when levied, shall be the responsibility of the Owner of record on the date that the Assessment is authorized by the Developer or by the Board of Directors of the Association, When Empowered.

Section 8. SUBORDINATION OF THE LIEN TO MORTGAGES. The liens provided for herein shall be subordinate to the lien of any first lien, mortgage or deed of trust recorded prior to the recording of the Notice of Lien by the Association or the Developer in the Office of the Register of Deeds for the County in which the Lot is located. Sale or transfer of any Lot shall not affect the liens provided for in the preceding section. However, the sale or transfer of any Lot which is subject to any such first lien, mortgage or deed of trust, pursuant to a foreclosure thereof or any proceeding in lieu of foreclosure thereof, shall extinguish the lien of Assessments under the Notice of Lien when recorded prior to such mortgage as to the payment thereof which becomes due prior to such sale or transfer but shall not relieve any Owner in possession of a Lot prior to such foreclosure sale or deed of trust from any personal obligation defined herein for the payment of Assessments. No such sale or transfer shall relieve such Owner from liability for any Assessments thereafter becoming due or from the lien thereof, but the liens provided for herein shall continue to be subordinate to the lien of any subsequent first lien, mortgage or deed of trust, except for liens for Assessment due from subsequent Owners of the Lot if the Notice of Lien is recorded prior to the subsequent first lien mortgage.

Section 9. EXEMPT PROPERTY. The following properties subject to this Declaration shall be exempt from the dues, Assessments, charges, and liens created herein: (a) All Common Area, as defined in Article I, Section 1 hereof and (b) Streets. Notwithstanding any provision herein, no Lots shall be exempt from said liens.

ARTICLE VII ARCHITECTURAL CONTROL

Section 1. ARCHITECTURAL CONTROL AUTHORITIES. The Architectural Control Authorities when established by the Developer or the Board of Directors of the Association, When Empowered, shall be composed of at least three (3) representatives. Each Neighborhood may have its own Architectural Control Authority established by the Developer or the Board of Directors of the Association.

the Association, When Empowered. The representatives of each Neighborhood Architectural Control Authority need not own Lots in the same Neighborhood as the Neighborhood Architectural Control Authority they are serving on.

Section 2. PROCEDURES.

(a) Any person desiring to construct, maintain, place, replace, reconstruct any Structure on any Lot or Common Area or to make any improvements, alteration or changes to any Structure shall submit Plans and any other required documentation required by the Architectural Guidelines to the Developer or the appropriate Neighborhood Architectural Control Authority, When Empowered, which shall evaluate, approve or disapprove in writing such Plans in light of the purpose of the Declaration. Any person using any Structure shall comply with the Regulations established and amended from time to time. An aggrieved Owner may appeal the final decision of the Architectural Control Authority to the Developer or the Board of Directors, When Empowered, through the processes set forth in the Architectural Guidelines or the Regulations.

(b) The Developer, or the Architectural Control Authority, When Empowered, may charge a reasonable review fee for its initial review, the amount of which shall be established by the Developer or the Architectural Control Authority in the Architectural Guidelines, from time to time. The Developer or the Architectural Control Authority, When Empowered, may, at its option, employ outside professional services for initial review and may pay them accordingly for this service. The charging of fees and the hiring of professionals for this purpose by the Architectural Control Authority must be approved by the Developer or the Board of Directors of the Association, When Empowered. Subsequent reviews may require additional fees.

(c) APPROVAL BY THE DEVELOPER, BOARD OF DIRECTORS OR THE ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED, OF ANY PLANS AND SPECIFICATIONS OR THE GRANTING OF A VARIANCE WITH RESPECT TO ANY OF THE ARCHITECTURAL GUIDELINES AND REGULATIONS, WHEN ESTABLISHED, SHALL NOT IN ANY WAY BE CONSTRUED TO SET A PRECEDENT FOR APPROVAL, ALTER IN ANY WAY THE PUBLISHED ARCHITECTURAL GUIDELINES, WHEN ESTABLISHED, OR BE DEEMED A WAIVER OF THE DEVELOPER'S OR OF THE ARCHITECTURAL CONTROL AUTHORITY'S, WHEN EMPOWERED, RIGHT IN ITS DISCRETION, TO DISAPPROVE SIMILAR PLANS AND SPECIFICATIONS, USE OF ANY STRUCTURE OR ANY OF THE FEATURES OR ELEMENTS WHICH ARE SUBSEQUENTLY SUBMITTED FOR USE IN CONNECTION WITH ANY OTHER LOT. Except for the right of the Developer or Board Of Directors to approve or disapprove the Plans on appeal, approval of the Plans relating to any Lot shall be final as to that Lot and such approval may not be reviewed or rescinded thereafter by the Architectural Control Authority, provided that there has been adherence to, and compliance with the Plans as approved in writing, and any conditions attached to any such approval and the Regulations.

(d) The Developer or Architectural Control Authority, When Empowered, may, at it's option, require the Owner to make a deposit to insure compliance with the approval or the Regulations in an amount and upon conditions to be determined by the Developer or Architectural

Control Authority, When Empowered. The setting of an amount as a compliance deposit or of conditions for compliance for any one Lot, shall not in any way act to set a precedent or effect in any way the setting of an amount or conditions of compliance for any other Lot or for any other set of Plans which are to be or have been approved within the Architectural Control Authority. The terms for waiver of any deposit and for the determination of the deposit amount, conditions of payment and the release to an Owner of any remaining portion of said compliance deposit, shall be defined in the Architectural Guidelines and Regulations. Nothing herein shall be deemed to waive or limit in any way any other remedies of the Developer, including those to insure compliance with the Architectural Guidelines and Regulations, or any Owner under this Declaration or at law.

(e) NEITHER THE DEVELOPER, ITS AGENTS, EMPLOYEES, DIRECTORS, OFFICERS NOR ANY OTHER MEMBER OF AN ARCHITECTURAL CONTROL AUTHORITY, SHALL BE RESPONSIBLE OR LIABLE IN ANY WAY FOR THE DEFECTS, STRUCTURAL OR OTHERWISE, IN ANY PLANS OR SPECIFICATIONS APPROVED BY THE DEVELOPER OR THE ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED, NOR FOR ANY DEFECTS IN ANY WORK DONE ACCORDING TO THE PLANS AND SPECIFICATIONS APPROVED BY THE DEVELOPER, THE BOARD OF DIRECTORS OR ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED. FURTHER, NEITHER THE DEVELOPER, THE ASSOCIATION, ARCHITECTURAL CONTROL AUTHORITY, OR THEIR RESPECTIVE SHAREHOLDERS, DIRECTORS, OFFICERS, EMPLOYEES, AGENTS, OR ATTORNEYS SHALL BE LIABLE TO ANYONE BY REASON OF MISTAKE IN JUDGMENT, NEGLIGENCE, MISFEASANCE, MALFEASANCE OR NONFEASANCE ARISING OUT OF OR IN CONNECTION WITH THE APPROVAL OR DISAPPROVAL OR FAILURE TO APPROVE OR DISAPPROVE ANY SUCH PLANS OR SPECIFICATIONS OR THE EXERCISE OF ANY OTHER POWER OR RIGHT OF THE DEVELOPER OR THE ARCHITECTURAL CONTROL AUTHORITY PROVIDED FOR IN THIS DECLARATION. EVERY PERSON WHO SUBMITS PLANS AND SPECIFICATIONS TO THE DEVELOPER OR THE ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED, FOR APPROVAL AGREES, BY SUBMISSION OF SUCH PLAN AND SPECIFICATIONS, AND EVERY OWNER OF ANY LOT AGREES, THAT HE WILL NOT BRING ANY ACTION OR SUIT AGAINST THE DEVELOPER, THE ASSOCIATION, THE MEMBERS OF ITS BOARD OF DIRECTORS OR THEIR AGENTS, EMPLOYEES AND OFFICERS, OR ANY MEMBER OR AGENTS OF THE ARCHITECTURAL CONTROL AUTHORITY, TO RECOVER ANY DAMAGES ARISING OUT OF SUCH APPROVAL OR DISAPPROVAL, AND, EACH OWNER BY ACCEPTANCE OF THE DEED TO THE LOT, RELEASES, REMISES, QUIT CLAIMS, AND COVENANTS NOT TO SUE FOR, ALL CLAIMS, DEMANDS, AND CAUSES OF ACTION ARISING OUT OF OR IN CONNECTION WITH SUCH APPROVAL OR DISAPPROVAL, NOTWITHSTANDING, ANY LAW WHICH PROVIDES THAT A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS, DEMANDS AND CAUSES OF ACTION NOT KNOWN AT THE TIME THE RELEASE IS GIVEN.

ARTICLE VIII OWNER'S MAINTENANCE RESPONSIBILITIES

Section 1. OWNER'S MAINTENANCE RESPONSIBILITIES. Unless specifically identified herein or specifically elected by the Developer or the Board of Directors, When Empowered, as being the responsibility of the Association, all maintenance and repair of a Lot, together with all portions of the Dwelling, and other Structures or the Lot shall be the responsibility of the Owner of Such Lot. The responsibility of each Owner shall include, but not limited to, the painting, maintenance, repair, and replacement of walls or fences, and all siding, exterior doors, fixtures, equipment, and appliances (including, without limitation, the heating and air-conditioning system for the Dwelling) and all chutes, flues, ducts, conduits, wires, pipes, plumbing or other apparatus which are deemed to be a part of the Dwelling or Lot, and the lawns, trees, shrubs, fences, grass, driveways and walkways, on the Lot. The responsibility of the Owner shall also include, but not limited to, the maintenance, repair, and replacement of all glass, lights and light fixtures (exterior and interior), awnings, window boxes, window screens, and all screens or glass-enclosed porches, balconies, or decks which are a part of the Dwelling. Each owner shall also maintain roof, gutters and downspouts in a good state of repair.

Section 2. OWNER MUST PROVIDE INSURANCE OF DWELLING. Each Owner shall, at its own expense, insure the Dwelling and all other insurable improvements on the Lot in an amount not less than the then current maximum insurable replacement value thereof. Such coverage shall afford protection against loss or damage by fire and other hazards covered by the standard extended coverage endorsements and such other risks as from time to time customarily shall be covered with respect to buildings similar in construction, location and use, including, but not limited to, vandalism, malicious mischief, windstorm and water damage.

Section 3. RECONSTRUCTION OR REPAIR OF DAMAGED DWELLING. If any Dwelling shall be damaged by casualty, the Owner of such Dwelling shall promptly reconstruct or repair it so as to restore such Dwelling nearly as possible to its condition prior to suffering the damage. All such reconstruction and repair work shall be done in accordance with plans and specifications therefor, approved by the Developer, or Board of Directors, When Empowered. Encroachments upon or in favor of Dwelling or Lots, which may be necessary for or created as a result of such reconstruction or repair, shall not constitute a claim or basis of a proceeding or action by the Owner on whose Dwelling or Lot such encroachment exists, provided that such reconstruction or repair is done substantially in accordance with the plans and specifications approved by the Developer, or Architectural Control Authority, When Empowered, or as the building was originally constructed.

ARTICLE IX REMEDIES

Section 1. REMEDIES FOR NONPAYMENT OF ASSESSMENTS. Any Assessments not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of sixteen percent (16%) per annum or the highest rate allowed by law, whichever is higher. Said interest shall be charged at the discretion of the Developer or the Association's Board of Directors, When Empowered. In addition, the Developer or the Board of Directors of the Association, When Empowered, shall have the right to charge an Association collection fee or late charge on any

Assessment or installment thereof which shall not have been paid by its due date. In the event that the Developer or the Board of Directors of the Association, When Empowered, chooses an installment schedule for the method of payment for an Assessment or as a method of allowing an Owner to pay past due Assessments, and in the event that any installment is delinquent, the Developer or the Board of Directors of the Association, When Empowered, shall have the right to accelerate and immediately make due all or part of the Assessment due from that Owner of that Lot for that budgeted period. The Developer or the Board of Directors of the Association, When Empowered, may bring an action at law against the Owner personally obligated to pay the same or foreclose the lien created herein against the Lot in the same manner as prescribed by the laws of the State of South Carolina for the foreclosure of mortgages on Time Shares or for the foreclosure of mortgages by judicial proceedings, and may seek a deficiency judgment, and interest, court costs, all costs of collection, including reasonable attorney's fees. No Owner may waive or otherwise escape liability for the Assessments provided for herein by non-use of the Common Area or abandonment of his Lot nor shall damage to or destruction of any improvements on any Lot by fire or other casualty result in any abatement or diminution of the Assessments provided for herein. No disagreement on the part of any Owner with respect to the budget; the amount or installment schedule for any Assessment; any change to the amount or installment schedule for the Assessment; the Regulations established or amended by the Developer or the Board of Directors of the Association, When Empowered; the actions or lack of action on the part of the Developer or the Association; the purpose for any Assessment for Capital Repair or Improvements; or the amount or purpose of any Assessment for Budgetary Shortfall shall be reason for any Owner to fail to pay any Assessment at the time that it is due. Also, the Developer or Board of the Association, When Empowered, may at any time notify the holders of mortgages of the Lot of the failure of the Owner to pay Assessments or any other violation of the Declaration.

Section 2. REMEDIES FOR NONPAYMENT OF AD VALOREM TAXES OR LEVIES FOR PUBLIC IMPROVEMENTS BY THE ASSOCIATION. Upon default by the Association in the payment to the governmental authority entitled thereto of any ad valorem taxes levied against the Common Area or Assessments levied for public improvements to the Common Area, which default shall continue for a period of six (6) months, each Owner of a Lot shall become personally obligated to pay to the taxing or assessing governmental authority a portion of such unpaid taxes or Assessments in an amount determined by dividing the total taxes and/or Assessments due the governmental authority by the total number of Lots in the Community. If such sum is not paid by the Owner within thirty (30) days following receipt of notice of the amount due, then such sum shall become a continuing lien, subordinate to all other mortgages, on the Lot of the then Owner, his or their heirs, devisees, personal representatives and assigns, and the taxing or assessing governmental authority may either bring an action at law or may elect to foreclose the lien against the Lot of the Owner.

Section 3. REMEDIES FOR FAILURE TO MAINTAIN EXTERIOR OF DWELLING AND LOT. In the event that the Owner neglects or fails to maintain his Lot and/or the exterior of his or her Dwelling in the Community, the Developer or the Association, When Empowered, may in addition to any other remedy, provide such exterior maintenance. The Developer or the Association, When Empowered, shall first give written notice to the Owner of the specific items of the exterior maintenance or repair that the Association intends to perform and the Owner shall have

the time set forth in said notice within which to perform such exterior maintenance himself or to satisfy the Association that the required maintenance or repair will be completed in a timely manner.

The determination as to whether an Owner has neglected or failed to maintain his Lot and/or Dwelling in a manner consistent with other Lots and Dwellings in the Community shall be made by the Developer or the Board of Directors of the Association, When Empowered, in its sole discretion, or an entity authorized to do so by the Developer or the Board of Directors of the Association, When Empowered.

In the event the Association performs such exterior maintenance, repair or replacements repair, the costs of such maintenance, repairs or replacement together with all costs of collecting from the Owner the cost of such maintenance, repairs or replacement established herein shall be added to and become a part of the Assessment to which that Lot is subject.

In the event that the Association determines that the need for maintenance, repair or replacement, which is the responsibility of the Association hereunder, is caused through the willful or negligent act of an Owner, or the family, guests, employees, lessees, or invitee(s) of any Owner, then the Association may perform such maintenance, repair or replacement at such Owner's sole cost and expense, and all costs thereof, together with any Assessments for Non-Compliance levied by the Association for non-compliance and all costs of the collection shall be added to and become a part of the Assessment to which such Owner is subject and shall become a lien against the Lot of such Owner. Each Owner is responsible for the actions of and the compliance with these documents and the Regulations by the family, guests, lessees, employees or invitee(s) of that Owner and shall further be responsible for the payment of any Assessments levied for that non-compliance.

Section 4. ADDITIONAL REMEDIES.

(a) Enforcement of the Declaration, By-Laws of the Association, and the Regulations in addition to any other remedy set out herein, may be carried out by the Developer, the Association, When Empowered, or the Owner through any proceeding at law or in equity against any person or persons violating or attempting to violate any covenant or restriction in the Declaration, By-Laws, and Regulations established by the Developer or the Association, When Empowered, either to prevent or restrain violations, to recover damages or to compel a compliance to the terms thereof. Any failure by the Developer, the Association, When Empowered, or any Owner to enforce any covenant or restriction herein contained or contained in the Declaration or By-Laws or to enforce any of the Regulations shall in no event be deemed a waiver of a right to do so thereafter. In addition to the foregoing, the Developer or the Board of Directors of the Association, When Empowered, shall have the right wherever there shall have been built on any Lot any Structure which is in violation of the Declaration, Architectural Guidelines or Regulations to enter upon the Lot where such violation exists and summarily abate or remove the same at the expense of the Owner, if after written notice of such violation, it shall not have been corrected by the Owner within the time required by the notice of violation. Any such entry and abatement or removal shall not be deemed a trespass.

(b) The Developer or the Association, When Empowered, may, in addition to any other remedy, may suspend the Common Area enjoyment rights of any Owner, family member, lessee,

licensee, employee or guest, pet or animal of an Owner for an appropriate period of time to be determined on a case by case basis by the Developer or the Board of Directors, When Empowered, for any non-compliance with the provisions of the Declaration, the By-Laws or of the Regulations, including, but not limited to, violations of Article II, Section 2, CONSTRUCTION IN ACCORDANCE WITH PLANS, Article II, Section 5, OFFENSIVE ACTIVITIES, Article II, Section 13, UNDERBRUSH, FINISHED YARDS, LANDSCAPING and Article VIII, OWNER'S MAINTENANCE RESPONSIBILITIES. The right, however, of a Member to ingress and egress over the roads and/or parking areas shall not be suspended.

(c) The Owner grants to the Developer and the Association the right and permission to enter the Lot to remove or correct any violation of the Declaration, By-Laws or Regulations, including but not limited to, the maintenance of Lots or any Structure (as defined in Article I, Section 1) thereon, and the removal of abandoned automobiles considered by the Board to be in violation with the Regulations, Declaration, By-Laws or to be a nuisance.

(d) In addition to the remedies outlined in this Article, the Developer or the Association, When Empowered, may, but shall not be required to, enter upon any Lot(s) or Common Area, seize and either deliver to the animal control authority at the Owner's cost, any pet or other animal that is not in compliance with the Declaration, By-Laws, or the Regulations or to be a nuisance. Notice of non-compliance shall be given to any Owner whose pets or animals are not in compliance, except when said non-compliance creates an emergency as determined by the Developer or the Board of the Association, When Empowered. The departure, while not under the restraint of a leash, of any pet or other animal from the Lot of its Owner, shall immediately constitute an emergency and there shall be no requirement for notice to be given.

(e) In addition to the remedies outlined above in this Article, the Developer, or the Association, When Empowered, shall have the right to arrange for the removal, at the Owners expense, of any vehicle that is parked in violation of the Declaration or the Regulations after notice to the Owner of the Lot on or beside which the vehicle is parked. Notice of non-compliance shall be given to any Owner where the parking of a vehicle or vehicles, except when said non-compliance creates an emergency as determined by the Developer or the Board of the Association, When Empowered. The parking of a vehicle, which impedes the passage of any emergency vehicle or school bus, shall immediately constitute an emergency and there shall be no requirement for notice to be given.

ARTICLE X GENERAL PROVISIONS

Section 1. DURATION. The covenants and restrictions of this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by the Developer, the Association, or the Owner(s) of any land subject to this Declaration, and the irrespective legal representatives, heirs, successors, and assigns. All covenants, conditions, limitations, restrictions, and affirmative obligations set forth in this Declaration, and amended as provided in Article X section 5 and 6 of this Declaration from time to time, shall be binding and run with the land and continue until twenty one (21) years from the date of execution hereof, after which time said

covenants shall be automatically extended for successive periods of ten (10) years unless an instrument signed by two-thirds (2/3) of the then Owners affected by the same has been recorded, agreeing to change the same in whole or in part; provided, however, that all property rights and other rights reserved to the Developer shall continue forever to the Developer, its successors and assigns, except as otherwise herein provided.

Section 2. NOTICE. Any notice required to be sent to any Member or Owner under the provision of this Declaration and service of any legal proceedings shall be deemed to have been properly sent and received when personally delivered or mailed, post paid, to the last known address of the person who appears as that person authorized to receive notice or to vote as shown on the records of the Association at the time of such mailing. It shall at all times be the responsibility of any Owner to file written notice with the Association of the name and address of the person authorized to receive notification from the Association or the Developer as to Assessments, or infractions of the Regulations. Proof of the authority to receive notice and to vote shall be presented to the Association in the form of a certificate signed by the Owner of a Lot or HUD Settlement. Such certificate shall be deemed valid until revoked by a subsequent certificate. The Association does not have to send notice or service to any other address. If the Owner does not file such certificate, the notice or service shall be sufficient if delivered, posted or mail post paid to the Lot

Section 3. SETTLEMENT STATEMENT AUTHORIZATION. The Owner by acceptance of the deed authorizes and directs the closing attorney to provide the Association with a copy of the Settlement Statement from the closing transferring the Lot and/or Dwelling to the Owner.

Section 4. SEVERABILITY. In the event that any one or more of the foregoing conditions, covenants, restrictions, or reservations shall be declared for any reason by a court of competent jurisdiction to be null and void, such judgment or decree shall not in any manner whatsoever effect, modify, change, aberrant, or nullify any of these covenants, conditions, and restrictions not so declared to be void but all remaining covenants, conditions, reservations and restrictions not so expressly held to be void shall continue unimpaired and in full force and effect.

Section 5. AMENDMENT. With respect to the minimum square footage requirements in the Community, the Developer reserves the right to alter, from time to time, the minimum square footage requirements as established by the Developer or as set out the Architectural Guidelines and Regulations, when established. In addition to any other manner herein provided for the amendment of this Declaration, the covenants, restrictions, easements, charges, and liens for this Agreement may be amended, changed, added to, derogated or deleted at any time and from time to time upon the execution and recordation of any instrument executed by Owners holding not less than a majority of votes of the Owners of the Membership of the Association, provided that so long as the Developer is the Owner of any Lot affected by this Declaration, the Developer's consent must be obtained. Provided, further, that the provisions for voting of Class A and Class B Members as herein contained in this Declaration shall also be effective in voting changes in this Declaration. Without limiting the foregoing, the Association, and so long as the Developer owns at least one (1) Lot in the Community, the Developer or the Board of Directors, When Empowered, shall, at any time and from time to time as the Developer or Board of Directors, When Empowered, see fit, have the right to cause this document to be amended to correct any clerical or scrivener's error(s) or to conform to the

requirements of the Federal Housing Administration or the Veterans Administration or the Federal National Mortgage Corporation, FNMA or any other insurer or purchaser of mortgage secured by the Lots as the same may be amended from time to time.

Section 6. AMENDMENT PRIOR TO SALE BY THE DEVELOPER. At any time prior to the closing of the first sale of Lots by the Developer, the Developer, and any mortgage holder, if any, may amend this Declaration by their mutual consent. The closing of the first sale shall mean transfer of title and delivery of a deed and not execution of contract of sale or like document.

Section 7. EFFECTIVE DATE. This Declaration shall become effective upon its recordation in the office of The Register of Deeds for the county in which The Property is located.

Section 8. PAID PROFESSIONAL MANAGER. The Developer or the Board of Directors, When Empowered, may employ a professional manager or managerial firm to supervise all work, labor, services, and material required in the operation and maintenance of the Common Area and in the discharge of the Association's duties throughout the Community.

Section 9. BINDING EFFECT. This Declaration shall inure to the benefit of and be binding upon the parties hereto, and the purchasers of Lots, their heirs, personal representatives, successors and assigns.

Section 10. WAIVER. The failure to enforce any rights, reservations, restrictions, or conditions contained in this Declaration, however long continued, shall not be construed to constitute a precedent or be deemed a waiver of the right to do so hereafter as to the same breach or as to a breach occurring prior or subsequent thereto and shall not bar or affect its enforcement.

Section 11. ATTORNEY'S FEES AND COST. Should the Developer or the Association employ counsel to enforce the Declaration, or the reasonable rules, regulations and policies established or amended by the Developer or the Board of Directors from time to time because of a breach of the same, all costs incurred in such enforcement, including a reasonable fee for the Developer's or the Association's counsel and other reasonable costs of collection, shall be paid by the Owner of such Lot or Lots in breach thereof.

Section 12. DEVELOPER LIABILITY AND HOLD HARMLESS. The Developer herein shall not in any way or manner be liable or responsible for any violation of the Declaration by any person other than itself. The Owners and the Association shall hold harmless the Developer from any liability, loss or cost arising out of their or their agents, guests or invitees violation of the Declaration.

Section 13. TIME REDUCTION. In the event that any of the provisions hereunder are declared void by a court of competent jurisdiction by reason of the period of time herein stated for which same shall be effective, then and in that event such terms shall be reduced to a period of time which shall not violate the rule against perpetuities or any other law of the State of South Carolina and such provisions shall be fully effective for such period of time.

Section 14. BINDING ARBITRATION. The Owner and the Association by acceptance of a deed agree that any dispute arising out of use, occupancy, ownership of a Lot or on the Common Area or the enforcement of any Covenant, condition, rule or restriction or regulation and any complaint to the Developer shall be settled by binding arbitration pursuant to the South Carolina Arbitration Act.

Section 15. GRADING, DRAINAGE, AND EROSION CONTROL. THE TOTAL RESPONSIBILITY FOR AND COST OF COMPLIANCE WITH THIS SECTION OF THE DECLARATION SHALL BE THAT OF THE OWNER OF THE LOT, EXCEPT WHERE BY CONTRACTUAL RELATIONSHIP, THAT RESPONSIBILITY SHALL BE ASSUMED BY AN INDIVIDUAL OR ENTITY, SUCH AS A BUILDER, WHO HAS EXECUTED AN AGREEMENT FOR THE PURCHASE OF THE LOT. THE DEVELOPER, OR THE ASSOCIATION, WHEN EMPOWERED, SHALL HAVE AS REMEDIES FOR NON-COMPLIANCE, THE LEVYING OF ASSESSMENTS FOR NON-COMPLIANCE AGAINST THAT LOT, THE AUTHORITY TO ENTER THE LOT AND TAKE APPROPRIATE ACTION TO REMEDY THE VIOLATION OR THE AUTHORITY TO BRING LEGAL ACTION TO FORCE THE OWNER OF THE LOT TO COMPLY WITH THE TERMS SET OUT HEREIN. IN THE EVENT THAT THE DEVELOPER OR THE ASSOCIATION TAKES SUCH ACTION TO ASSURE COMPLIANCE, AS WITH OTHER VIOLATIONS OF THE DECLARATION, ALL COSTS INCURRED BY THE DEVELOPER OR THE ASSOCIATION RELATED TO BRINGING THE LOT INTO COMPLIANCE SHALL BE THAT OF THE LOT OWNER AND COLLECTABLE BY THE DEVELOPER FROM THE LOT OWNER OR, IF BY THE ASSOCIATION, SHALL BE MADE A PART OF THE ASSOCIATION'S CONTINUING LIEN ON THE LOT.

ALL GRADING, DURING AND AFTER CONSTRUCTION, SHALL AT ALL TIMES BE PERFORMED IN ACCORDANCE WITH (A) ANY APPLICABLE PORTIONS OF THE STORM WATER MANAGEMENT PLAN, OR ANY SEDIMENT AND EROSION CONTROL PLAN, GRADING AND DRAINAGE PLAN, POLLUTION PREVENTION PLAN OR ANY OTHER APPLICABLE PLAN ON FILE WITH THE DEVELOPER OR FILED WITH ANY APPLICABLE GOVERNMENTAL AGENCY OR AUTHORITY FOR THE COMMUNITY AND BUILDINGS TO BE CONSTRUCTED WITHIN THE COMMUNITY, WHICH CONFORMS TO REGULATIONS PROMULGATED BY THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND/OR (B) ANY OTHER APPLICABLE LEGISLATION, LAW, STATUTE OR ORDINANCE GOVERNING THE CONTROL OF DRAINAGE. IT SHALL AT ALL TIMES BE THE RESPONSIBILITY OF THE OWNER OR CO-OWNER OF THE LOT OR, IN THE CASE OF THE CONTRACTUAL TRANSFER OF THE RESPONSIBILITY FOR COMPLIANCE BY AN INDIVIDUAL OR ENTITY, THAT INDIVIDUAL OR ENTITY, TO REQUEST AND REVIEW ALL SUCH APPLICABLE PLANS. UNLESS SUCH A REQUEST IS MADE BY SAID LOT OWNER, CO-OWNER, INDIVIDUAL OR ENTITY, FAILURE ON THE PART OF THE DEVELOPER TO SUPPLY THAT LOT OWNER, CO-OWNER, INDIVIDUAL OR ENTITY WITH COPIES OF THE APPLICABLE PLANS SHALL NOT BE A DEFENSE FOR NON-COMPLIANCE OR RELEASE OF RESPONSIBILITY ON THE PART OF THAT LOT OWNER, CO-OWNER, BUILDER, INDIVIDUAL OR ENTITY. ANY LOT OWNER, CO-OWNER, INCLUDING BUILDERS, OR BUILDER, BY ACCEPTANCE OF THE DEED TO A LOT, AND AT ALL TIMES

THEREAFTER, SHALL HAVE BEEN DEEMED TO HAVE AGREED TO AND ACCEPTED THE RESPONSIBILITY ESTABLISHED BY A CO-PERMITTEE AGREEMENT AND TO HAVE ASSUMED THE RESPONSIBILITIES OF A CO-PERMITTEE AND BE BOUND TO THE ABOVE MENTIONED PLANS AND INDEMNIFY AND HOLD THE DEVELOPER, THE ASSOCIATION AND THE AUTHORITY HARMLESS FROM ANY AND ALL DEVIATIONS BY THE LOT OWNER, CO-OWNER, OR THEIR BUILDER FROM THAT PLAN OR FROM THE LOT OWNER'S, CO-OWNER'S OR BUILDER'S FAILURE TO COMPLY WITH ANY APPLICABLE LEGISLATION, LAWS, STATUTES OR ORDINANCES, WHETHER SUCH LANGUAGE IS INCLUDED IN THAT DEED OR WHETHER THEY HAVE EXECUTED A "CO-PERMITTEE AGREEMENT" OR NOT.

ALL GRADING, TEMPORARY AND PERMANENT, SHALL BE PERFORMED IN A MANNER TO ALLOW FOR PROPER DRAINAGE, TO PROPERLY MANAGE THE FLOW OF STORM WATER RUN-OFF AND TO CONTROL EROSION. DURING AND AFTER CONSTRUCTION, OWNER (AND DURING CONSTRUCTION, OWNER'S BUILDING CONTRACTOR) SHALL BE RESPONSIBLE FOR MAINTAINING ALL GRADING AND SURFACE DRAINAGE SO THAT SURFACE RUN-OFF GRADING WILL NEITHER CAUSE THE DAMMING OF WATER OR EXCESSIVE RUN-OFF TO OCCUR OR SEDIMENT LOSS TO WASH ONTO OR ACCUMULATE ON ADJACENT LOTS, OR OTHER ADJACENT PROPERTIES, INTO BODIES OF WATER, OR ONTO THE STREETS OF THE COMMUNITY OR INTO THE STORM DRAINAGE SYSTEM, NOR SHALL IT ADVERSELY AFFECT ANY ADJOINING LOT OR PROPERTIES, ANY STRUCTURE(S) ON THAT OWNER'S LOT OR ON OTHER PROPERTIES OR ANY PORTION OF ANY ADJOINING LOT OR OTHER PROPERTIES, THE STREETS OF THE COMMUNITY, THE STORM DRAINAGE SYSTEM OR ANY BODY OF WATER. OWNER AND OWNER'S BUILDING CONTRACTOR SHALL PROVIDE RIP-RAP, GRAVEL EXITS, WATER BARS, BERMS, SEDIMENT FENCES, HYDROSEEDING AND SOD, OR OTHER FORMS OF EROSION CONTROL AS MAY BE REQUIRED BY THE DEVELOPER OR AUTHORITY OR ANY GOVERNMENTAL AGENCY.

OWNER (AN OWNER'S BUILDING CONTRACTOR UPON COMPLETION OF CONSTRUCTION) SHALL INSURE THAT THE GRADE OF THE LOT, AND ANY ADJUSTMENT TO THAT GRADE THEREAFTER, DOES NOT CAUSE THE DEPTH OF ANY UTILITIES INSTALLED UPON THE LOT TO BE REDUCED TO LESS THAN THE STANDARD SET FORTH BY THE UTILITY PROVIDER OR ANY APPLICABLE CODE, STATUTE OR LAW, WHICHEVER MAY BE DEEPER.

ARTICLE XI ADDITIONAL MATTERS DEALING WITH PHASED COMMUNITY

Section 1. ANNEXATION OF ADDITIONAL PHASES AND CREATION OF A MASTER ASSOCIATION. The Developer shall have the right to annex additional Phases and Common Area into The Property by the filing of an Amendment or Addendum to this Declaration which describes The Property annexed, and imposes this Declaration upon such property annexed. All property annexed in this manner shall be a part of the Association as fully as if it had been a part thereof from the filing of this Declaration. The Developer or the Board of Directors, When

Section 14. BINDING ARBITRATION. The Owner and the Association by acceptance of deed agree that any dispute arising out of use, occupancy, ownership of a Lot or on the Common area or the enforcement of any Covenant, condition, rule or restriction or regulation and any complaint to the Developer shall be settled by binding arbitration pursuant to the South Carolina Arbitration Act.

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Empowered, may create an incorporated or unincorporated Master Association for the purpose of owning property and/or for the purpose of maintaining and operating some or all of the Common Area within the Community and upon its creation may delegate part or all of the responsibilities and authority of this Association to that Master Association or make this Association a Sub-Association of that Master Association or create additional Neighborhoods within the Community.

Section 2. VOTING RIGHTS. As each phase, if any, is added to the Community, the Lots comprising such additional phase shall be counted for the purpose of voting rights.

IN WITNESS WHEREOF, the Developer has caused this instrument to be executed by its proper officers and its corporate seal to be affixed thereto on the day and year first above written.

[Signature]
[Signature]

DEVELOPER:

THE MUNGO COMPANY, INC.

By [Signature]
Its VP.

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF RICHLAND)

PERSONALLY APPEARED before me the undersigned witness who on oath says that (s)he saw the within named Developer by its duly authorized officer as indicated above, sign, seal and as its act and deed, deliver the within written instrument and that (s)he with the other witness whose name appears above, witnessed the execution thereof.

[Signature]
Witness

Sworn to before me this
12 day of December, 2002.

[Signature]
Notary Public for South Carolina
My Commission Expires: 12/18/05

EXHIBIT "A"

OAK POINTE PHASE ONE

All those certain pieces, parcels or lots of land, with the improvements thereon, if any, situate, lying and being in the County of Lexington, State of South Carolina, being shown and delineated as Lots 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, and 32 on a plat of OAK POINTE PHASE ONE prepared by BELTER & ASSOCIATES, INC. dated July 28, 2002, last revised October 13, 2002, and recorded in the Office of the R.O.D. for Lexington County in Plat Slide 7647, at Page 84; reference being made to the said plat which is incorporated herein by reference for a more complete and accurate description; all measurements being a little more or less.

AND ALSO

OAK POINTE PHASE TWO

All those certain pieces, parcels or lots of land, with the improvements thereon, if any, situate, lying and being in the County of Lexington, State of South Carolina, being shown and delineated as Lots 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, and 67 on a plat of OAK POINTE PHASE TWO prepared by BELTER & ASSOCIATES, INC. dated August 1, 2002, last revised October 30, 2002, and recorded in the Office of the R.O.D. for Lexington County in Plat Slide 7647, at Page 85; reference being made to the said plat which is incorporated herein by reference for a more complete and accurate description; all measurements being a little more or less.

DERIVATIONS:

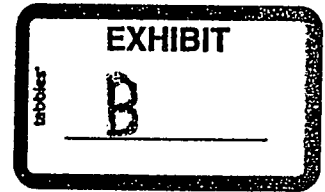
This is a portion of the property heretofore conveyed to THE MUNGO COMPANY, INC. by deed of MARION LEE HENDRIX dated January 5, 2000, and recorded January 31, 2000 in Lexington County Record Book 5627, at Page 202.

This is a portion of the property heretofore conveyed to THE MUNGO COMPANY, INC. by deed of BARBARA F. PARKS dated January 25, 2000, and recorded January 31, 2000 in Lexington County Record Book 5627, at Page 221.

This is a portion of the property heretofore conveyed to THE MUNGO COMPANY, INC. by deed of FAYE S. KIRBY and PATRICIA A. WATTS dated December 3, 1999, and recorded December 6, 1999 in Lexington County Record Book 5556, at Page 93.

Alice Chandler

From: Alice Chandler [alice@mjsmgt.com]
Sent: Friday, May 06, 2011 3:24 PM
To: 'mepeffley@yahoo.com'
Subject: Oak Pointe Appeal Determination



Mackenzie E. Peffley
313 Oakpointe Lane
Lexington, SC 29072

Re: 313 Oakpointe Lane, Lot 99

Dear Homeowner,

The Association is in receipt of your appeal concerning the Assessment for Non-Compliance on the Lot indicated above. The Association would like to inform you that the \$165.00 lien that was added to your lot for an unapproved structure (rental sign) has been removed at this time.

Please respond to all correspondence in writing. If you have any questions or concerns regarding this notice, you may contact MJS Inc. at (803) 743-0600. Correspondence can be sent to Oak Pointe HOA at 4910 Trenholm Road, Suite C, Columbia, SC 29206 or via email to violations@mjsmgt.com.

Sincerely,
Oak Pointe Homeowners' Association, Inc.

Alice Chandler
Violations Processor
MJS INC
4910 Trenholm Road, St. C
Columbia, SC 29206
*803-743-0600 *104*
803-790-0340 fax

COPY

JM

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
Case No. 2013-CP-32-2386

Oak Pointe Homeowners' Association,
Inc.,

Plaintiff,

vs.

Mackenzie E. Peffley,

Defendant.

DEFENDANT'S MEMORANDUM IN
OPPOSITION TO
SUMMARY JUDGMENT

FILED
OCT - 7 A 10 45
ETHA CASANOVA
CLERK OF COURT
LEXINGTON COUNTY

The Defendant (hereinafter "Captain Peffley") submits this memorandum in opposition to the Plaintiff's motion for summary judgment in the above-referenced case. For a number of reasons, summary judgment in favor of the Plaintiff is not appropriate. This memorandum does not speak to every issue in this case¹; just the more unusual ones.

CASE SUMMARY

The Plaintiff is seeking foreclosure as to Captain Peffley's property involved in this case for a claimed lien of \$933.37, plus attorney's fees and costs. Captain Peffley, a member of the Army National Guard, purchased the subject property in 2007, following the completion of an Army aviation flight training course and before her next active duty assignment. The Plaintiff is a corporation that acts as a homeowners' association for the subdivision where the property is located. It is not a part of any state, federal, county, or municipal government.

In 2010, the Plaintiff purported to *fine* Captain Peffley for placing a sign in her yard without the Plaintiff's prior authorization. Captain Peffley requested that the fine be rescinded, but she paid the bill the Plaintiff claimed to be owed (including the fine) in full on March 14,

¹ In fact, given the bare-bones content of the Plaintiff's summary judgment motion, which violates the requirement of Rule 7(b)(1), SCRPC, that a motion "shall state with particularity the grounds therefor," the undersigned can only guess at what the Plaintiff's arguments at summary judgment will be.

2011. The Plaintiff "removed" the fine, and the Plaintiff's president emailed Captain Peffley to tell her that she would be reimbursed for her overpayment.

She was never reimbursed. Instead, unbeknownst to Captain Peffley, the Plaintiff hired a law firm to record a notice of lien, which it did, on the subject property, in which the Plaintiff claimed to be owed the fine and associated fees. This notice of lien was recorded after Captain Peffley had already paid the Plaintiff all the money the Plaintiff had billed her for at that time. It was also recorded after Captain Peffley had emailed the Plaintiff's president and told her that she had overpaid the Plaintiff because of the removal of the fine, and it was recorded after the Plaintiff's president told Captain Peffley she would be reimbursed for her overpayment. The Plaintiff charged Captain Peffley \$375.00 for attorney's fees for recording the notice of lien, though it did not send Captain Peffley notice of that. Indeed, the Plaintiff never made any statement to change its president's statement that Captain Peffley would be reimbursed the money she had overpaid. The Plaintiff only confirmed to Captain Peffley that the fine had been rescinded. The Plaintiff never notified Captain Peffley of the recording of the notice of lien.

In the summer of 2011, the Plaintiff purported to assess three more fines against Captain Peffley, totaling \$395.00, "for the condition of her mailbox." Captain Peffley was given no notice of these purported fines. She timely paid her annual assessment to the Plaintiff for 2012.

In October of 2012, Captain Peffley was called up for active duty service with the Army National Guard. For part of that time, she served in Afghanistan as a helicopter pilot. That period of active duty service ended in November of 2013.

The Plaintiff's covenant document states that it may charge interest on unpaid assessments in the amount of sixteen percent, and the Plaintiff did charge Captain Peffley interest during the time of her active duty military service. At a minimum, giving the Plaintiff the benefit of all doubts and including the fine charges as assessments on which interest is charged, the rate

at which the interest was charged is 7.43 percent. A more reasonable interpretation puts the interest rate at least at 13.659 percent. Also during the time of Captain Peffley's active duty service, the Plaintiff decided to bring suit to foreclose its claimed lien on her property.

Consistently with what the Plaintiff's president told her and in light of the overpayment, Captain Peffley believed that she had fully satisfied her payment obligations to the Plaintiff. Captain Peffley was correct to believe that.

When Captain Peffley discovered the Plaintiff had hired a law firm to collect this claimed debt from her, on August 23, 2013, she notified the Plaintiff, through its counsel, that she was invoking the provisions of the Servicemembers Civil Relief Act, 50 U.S.C. Appx. § 501, *et seq.* (the updated version of the Soldiers' and Sailors' Civil Relief Act enacted in 1940). On November 21, 2013, Captain Peffley's counsel provided the Plaintiff's counsel with a copy of Captain Peffley's orders for her 2012-13 military service.

THE PLAINTIFF IS NOT A GOVERNMENT AND CANNOT FINE PEOPLE

One of the issues in this case is whether, in the absence of any statute that so provides, a private entity may impose a punishment on another private entity (a natural person) that historically has been and normally is meted out only by the sovereign as a sentence for a criminal infraction.

Consistently with common understanding and what appears to be universal agreement in our nation's jurisprudence, Black's Law Dictionary defines "fine" as "[a] pecuniary criminal punishment or civil penalty payable to the public treasury." Black's Law Dictionary 284 (2d pocket ed 2001). In a 2012 case involving a fine, the Supreme Court of the United States discussed other cases involving "imprisonment or a death sentence" and noted that the distinction between those forms of punishment and fines was immaterial to the issue at hand, stating that "fines, like these other forms of punishments, are penalties inflicted by the sovereign

for the commission of offenses.” So. Union Co. v. U.S., ___ U.S. ___, 132 S.Ct. 2344, 2350 (2012). “Bail, fines, and punishment traditionally have been associated with the criminal process,” as our nation’s Supreme Court stated on another occasion. Ingraham v. Wright, 430 U.S. 651, 664 (1977). “Fines were by far the most common form of noncapital punishment in colonial America.” So. Union, 132 S.Ct. at 2350. At the time of the drafting and adoption of the Constitution of the United States, “the word ‘fine’ was understood to mean a payment to a sovereign as punishment for some offense. Then, as now, fines were assessed in criminal, rather than private civil, actions.” Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, 492 U.S. 257, 265 (1989).

South Carolina law is consistent with this. In State v. Stevens, our state Supreme Court appeared to reject rather roundly the idea of a fine being paid to the prosecutor of a criminal case rather than to the government. 116 S.C. 210, 211, 107 S.E. 906 (1921). Our Supreme Court also has also noted that “[a] fine is usually a sum of money exacted from a person guilty of a crime as pecuniary punishment[.]” S.C. State Hwy. Dept. v. So. Ry. Co., 239 S.C. 227, 230, 122 S.E.2d 422, 424 (1961).

As noted by the Supreme Court of Virginia, “[t]he imposition of a fine is a governmental power. The sovereign cannot be preempted of this power, and the power cannot be delegated or exercised other than in accordance with the provisions of the Constitution of the United States and of [the state (there, Virginia)].” Unit Owners Assn. of BuildAmerica-1 v. Gillman, 223 Va. 752, 764, 292 S.E.2d 378, 384 (1982).

The South Carolina General Assembly has not delegated to property owners’ associations any power to impose fines. South Carolina has enacted the Horizontal Property Act, S.C. Code Ann. §§ 27-31-10 - -440, but this Act does not empower any such association to levy fines for anything. A writer on South Carolina law on this subject has noted that “[c]ommentaries have

expressed doubt about the legality of levying fines in the absence of statutory authority, of which there is none in the SCHPA [the Horizontal Property Act]. The courts generally agree that absent statutory authorization a council of co-owners may not levy fines.” Douglas Scott MacGregor, Condominium Law in South Carolina 49 (3d ed. 2013).

As the above-quoted South Carolina writer notes, there is indeed wide agreement by courts that have addressed the issue of whether a homeowners’ association can fine its members in the absence of statutory authorization to do so. Wise v. Harrington Grove Community Assn., 357 N.C. 396, 584 S.E.2d 731 (2003) (until enactment of statute that delegated power to fine to homeowners’ associations, those associations had no such power); Holbert v. Great Gorge Village South Condominium Council, Inc., 281 N.J.Super. 22, 656 A.2d 1315 (1994)(absent statutory authorization, association could not levy fines, impose penalties, or charge late fees for failure to pay common expenses); Elbadramany v. Oceans Seven Condominium Assn., 461 So.2d 1001 (Fla. 5th DCA 1984); Gillman, 223 Va. At 764; Vernon Manor Co-op Apts., Section I v. Salatino, 178 N.Y.S.2d 895 (1958); see Stewart v. Kopp, 454 S.E.2d 672 (N.C. App. 1994) (where North Carolina’s condominium statute *did* authorize fines and declaration of covenants incorporated the statute, association could levy fines for rule violation). In short, courts across the country generally agree that the power to impose fines, as a governmental function, cannot be exercised by a private actor unless the sovereign has expressly delegated the exercise of that power. See id.

In the absence of a statutory delegation of the fining power to a private entity, the private entity has no power to assess a fine. At common law, the power to fine is vested solely in the sovereign. So. Union, 132 S.Ct. at 2350; Browning-Ferris Indus., 492 U.S. at 265; Ingraham, 430 U.S. at 664; S.C. State Hwy. Dept., 239 S.C. at 230; Stevens, 116 S.C. at 211. Replacing the word “fine” with the word “imprison” in any example illustrates the fallacy of the Plaintiff – a

private corporation – contending that it is empowered under the law to assess fines. While imprisonment is often more harsh than the imposition of a fine, there is no difference between these punishments that is material to the outcome of this case. They are both punishments that the sovereign is exclusively empowered to impose. So. Union, 132 S.Ct. at 2350; Ingraham, 430 U.S. at 664.

Any reliance by the Plaintiff on the powers of nonprofit corporations set out in S.C. Code Ann. §§ 33-31-206 and -302 is unavailing. Our General Assembly provided in S.C. Code Ann. § 33-31-206 that a nonprofit corporation’s “bylaws may contain any provision for regulating and managing the affairs of the corporation that is *not inconsistent with law* or the articles of incorporation.” (Emphasis added). As a matter of law, the power to fine is vested solely in the government, absent a delegation of that power (which has not been made in this state). See, e.g., So. Union, 132 S.Ct. at 2350; S.C. State Hwy. Dept., 239 S.C. at 230; Gillman, 223 Va. at 764. Enshrining a purported power to fine in association bylaws *is inconsistent with law*.

The plain language of S.C. Code Ann. § 33-31-302 makes any reliance on it fruitless for the Plaintiff, since it provides that a nonprofit corporation “has the same powers as an *individual*” – not a governmental entity – “to do all things necessary or convenient to carry out its affairs[.]” (Emphasis added). Individuals are not governments; they do not have the power to levy fines. Since individuals have no power to fine people, neither does the Plaintiff homeowners’ association have such a power.

Further, one who purports to place a lien on someone’s property on the basis of a claimed fine for violation of homeowners’ association rules or covenants may well be himself in violation of our state’s criminal law. The language of S.C. Code Ann. § 16-17-735 bears this interpretation out:

It is unlawful for a person falsely to assert authority of state law [– such as the authority to fine –] in connection with a sham legal

process. A person violating the provisions of this subsection is guilty of a misdemeanor and, upon conviction, must be fined not more than two thousand five hundred dollars or imprisoned not more than one year, or both.

S.C. Code Ann. § 16-17-735(B).

For purposes of this section:

(3) "Sham legal process" means the issuance, display, delivery, distribution, reliance on as lawful authority, or other use of an instrument that is not lawfully issued, whether or not the instrument is produced for inspection or actually exists, which purports to:

(a) be a summons, subpoena, judgment, *lien*, arrest warrant . . .

...

(4) "Lawfully issued" means adopted, issued, or rendered in accordance with the applicable statutes, rules, regulations, and ordinances of the United States, a state, an agency, or a political subdivision of a state.

S.C. Code Ann. § 16-17-735(E).

At the very least, the existence of this statute demonstrates that the recording of lien notices for fines claimed to be owed to private entities violates the public policy of this state.

The power to contract is not unlimited. The contractual arrangement between the parties here can no more provide, lawfully, for the Plaintiff to fine Captain Peffley not complying with the covenants or other rules than it can for the Plaintiff to imprison or kill Captain Peffley for violating those rules – because imprisoning, killing, and fining are all powers vested only in the government.

"[A] corporation cannot impose an assessment or fine for a violation of its by-laws unless it is expressly authorized by statute." Vernon Manor Co-op. Apts., 178 N.Y.S.2d at 902 (internal citations omitted). A number of states have enacted statutes that delegate the power to fine to associations of property owners. E.g., N.C.G.S. § 47F-1-102, Nev. Rev. Statutes § 116.310305,

Fla. Code § 718.303(3), Ga. Code Ann. § 85-1613e. South Carolina is not among them. In South Carolina, unless and until our legislature changes the law, homeowners' associations lack any power or authority to impose fines on their members.² There is no reason for South Carolina to depart from the general – and apparently universal – rule, recognized in other jurisdictions, that a homeowners' association cannot fine its members unless a statute has been enacted that authorizes it to do so. The reason that other jurisdictions recognize this principle is not because of quirky differences in those states' law and South Carolina law. The reason for the recognition of this principle in other jurisdictions is because it is correct and is founded in the basic, fundamental conception of what a fine is: a punishment that a government, and only a government, may impose.

IF THE FINE IS REALLY A PENALTY, IT IS STILL AN UNENFORCEABLE ONE

Perhaps the Plaintiff will argue that the fines at issue are permissible contractual penalties. While *fines* (government-imposed sentences of monetary payment) are not exactly the same thing as contractual penalties, S.C. State Hwy. Dept., 239 S.C. at 230, the Plaintiff's claimed power to levy "assessments for non-compliance" fails to meet the requirements of what makes an enforceable liquidated damages provision different from an unenforceable penalty.

If a contract's purported stipulation of liquidated damages owed in the event of breach of the contract actually constitutes a penalty, it will not be enforced. Foreign Academic & Cultural Exch. Servs., Inc. v. Tripon, 394 S.C. 197, 204, 715 S.E.2d 331, 334 (2011); Tate v. Le Master, 231 S.C. 429, 442, 99 S.E.2d 39, 46 (1957). Courts look principally to the intent of the parties to the contract in determining whether a provision constitutes a penalty, usually by looking to the language used in the document. Tate, 231 S.C. at 429; Erie Ins. Co. v. Winter Const. Co., 393

² Only two South Carolina cases, Rawlinson Road Homeowners Assn., Inc. v. Jackson, 395 S.C. 25, 31, 716 S.E.2d 337, 340 (Ct. App. 2011), and Seabrook Island Property Owners Assn. v. Berger, 365 S.C. 234, 239, 616 S.E.2d 431, 434 (Ct. App. 2005), even mention fines by property owners' associations. In neither one of those cases was the issue of the power of such an association to levy fines addressed.

S.C. 455, 461, 713 S.E.2d 318, 321 (Ct. App. 2011). Where the stipulation “is reasonably intended by the parties as the predetermined measure of compensation for actual damages that might be sustained by reason of nonperformance, the stipulation is for liquidated damages.” Tate, 231 S.C. at 440. “However, where the stipulation is not based upon contemplated actual damages but *is intended to provide punishment for breach of the contract*, it is a penalty.” Moser v. Gosnell, 334 S.C. 425, 432, 513 S.E.2d 123, 126 (Ct. App. 1999) (emphasis added).

Here, the restrictions document at issue plainly refers to “assessments for non-compliance.” The nature of these “assessments” is that they are punitive measures, not an attempt to compensate for actual losses. No formula or method for determining how to link the violation at issue with the appropriate amount of the “assessment” is given. Such “assessments” are “intended to provide punishment for breach of the contract” and are, thus, unenforceable. Id.

THE PLAINTIFF’S FAILURE TO COMPLY WITH THE SCRA

Captain Peffley has counterclaimed against the Plaintiff for the Plaintiff’s violation of the Servicemembers Civil Relief Act, 50 U.S.C. Appx. § 501, *et seq.* (hereinafter “the SCRA”). The Plaintiff has violated the SCRA here.

The SCRA provides as follows:

(1) An obligation or liability bearing interest at a rate in excess of 6 percent per year that is incurred by a servicemember, or the servicemember and the servicemember’s spouse jointly, before the servicemember enters military service shall not bear interest at a rate in excess of 6 percent—

(A) during the period of military service and one year thereafter, in the case of an obligation or liability consisting of a mortgage, trust deed, or other security in the nature of a mortgage; or

(B) during the period of military service, in the case of any other obligation or liability.

(2) Interest at a rate in excess of 6 percent per year that would otherwise be incurred but for the prohibition in paragraph (1) is forgiven.

50 App. U.S.C. § 527(a). "The term 'interest' includes service charges, renewal charges, fees, or any other charges (except bona fide insurance) with respect to an obligation or liability." 50 App. U.S.C. § 527(d)(1).

The term "military service" means —

...

(ii) in the case of a member of the National Guard, includes service under a call to active service authorized by the President or the Secretary of Defense for a period of more than 30 consecutive days[.]

50 App. U.S.C. § 511(2)(A)(ii).

The SCRA also specifically provides that it applies to activated members of reserve components of the armed forces. 50 App. U.S.C. § 516(a).

(1) In order for an obligation or liability of a servicemember to be subject to the interest rate limitation in subsection (a) [the six percent interest limitation of 50 App. U.S.C. § 527(a), quoted above], the servicemember shall provide to the creditor written notice and a copy of the military orders calling the servicemember to military service and any orders further extending military service, not later than 180 days after the date of the servicemember's termination or release from military service.

(2) Upon receipt of written notice and a copy of orders calling a servicemember to military service, the creditor shall treat the debt in accordance with subsection (a), effective as of the date on which the servicemember is called to military service.

50 App. U.S.C. § 527(b).

There is civil liability for violating these provisions. The SCRA provides a wide range of available relief for its violation:

(a) Any person aggrieved by a violation of this Act [sections 501 to 515 and 516 to 597b of this Appendix] may in a civil action—

(1) obtain any appropriate equitable or declaratory relief with respect to the violation; and

(2) recover all other appropriate relief, including monetary damages.

(b) The court may award to a person aggrieved by a violation of this Act [sections 501 to 515 and 516 to 597b of this Appendix] who prevails in an action brought under subsection (a) the costs of the action, including a reasonable attorney fee.

The SCRA “must be read with an eye friendly to those who dropped their affairs to answer their country’s call.” Le Maistre v. Leffers, 333 U.S. 1, 6, 68 S. Ct. 371, 373, 92 L. Ed. 429 (1948); accord Boone v. Lightner, 319 U.S. 561, 575, 63 S. Ct. 1223, 1231, 87 L. Ed. 1587 (1943)(“The Soldiers’ and Sailors’ Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.”) Not long ago, the Fourth Circuit reaffirmed that “[t]he Servicemembers Civil Relief Act is part of a long record of congressional concern for the domestic affairs of those in military service.” Gordon v. Pete’s Auto Serv. of Denbigh, Inc., 637 F.3d 454, 457 (4th Cir. 2011).

Captain Peffley is and at all material times was a member of the Army National Guard. She purchased the subject property (and thus incurred her obligation to pay assessments to the Plaintiff homeowners’ association) at a time when she was not in the military service, as defined by the SCRA. She then entered the military service as defined by the SCRA. The Plaintiff then charged her interest during that time at a rate in violation of the SCRA. She notified the Plaintiff promptly (once she found out about this) of her invocation of the SCRA and provided the Plaintiff with a copy of the orders that called her to service within a month of the end of her military service.

Everything that had to happen to trigger the Plaintiff’s liability to Captain Peffley under the SCRA happened in this case. Summary judgment in favor of the Plaintiff is not proper.

BREACH OF CONTRACT BY THE PLAINTIFF

On page 23 of the declaration of covenants attached to Mary Kadar’s affidavit in this case, it states that “[a]ny assessments not paid within thirty (30) days after *the due date* shall bear

interest *from the due date* at the rate of sixteen percent (16%) per annum or the highest rate allowed by law, whichever is higher.” (Emphasis added.) Here, the Plaintiff never gave Captain Peffley a due date by which to pay her fines. The Plaintiff never gave her any advance notice of the imposition of the fines at all. But the Plaintiff charged her interest on them.

By charging interest on the fine amounts, the Plaintiff has breached the contract between the parties itself, regardless of the merits of any of Captain Peffley’s other claims.

SLANDER OF TITLE BY THE PLAINTIFF

“Wrongfully recording an unfounded claim against the property of another generally is actionable as slander of title.” Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995). There is no reason to think it would not be actionable here.

UNFAIR TRADE PRACTICES BY THE PLAINTIFF

An action for violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*, lies where there is a violation of the Act (i.e., an unfair or deceptive act in trade or commerce that impacts the public interest) that proximately causes damages to the plaintiff. See, e.g., Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 417, 458 S.E.2d 431 (Ct. App. 1995). “‘Trade’ and ‘commerce’ shall include the . . . distribution of any services and any property, tangible or intangible, . . . and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.” S.C. Code Ann. § 39-5-10(b). Trade and commerce are interpreted broadly for purposes of the UTPA. The text of S.C. Code Ann. § 39-5-10(b) states that:

“Trade” and “commerce” shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

Our Court of Appeals has held that “[t]he statute’s use of the words ‘shall include’ clearly suggests the legislature did not intend to limit ‘trade’ and ‘commerce’ to only the listed transactions.” Baker v. Chavis, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603 (Ct. App. 1991). “[T]he UTPA ‘should be given a liberal construction.’” McTeer v. Provident Life and Accident Ins., 712 F. Supp. 512, 515 (D.S.C. 1989) (quoting Connolly v. People’s Life Ins. Co., 294 S.C. 355, 359, 364 S.E.2d 475, 477 (Ct. App. 1988)).

The Plaintiff provides the services of a homeowners’ association: maintenance of common elements, for example. That is “trade” or “commerce” for these purposes. Further, its actions at issue here impact the public interest: they are capable of repetition, as they are enshrined in the Plaintiff’s covenants as being applicable to all association members, and it is plain that the purported usurpation of the government’s power to fine impacts the public interest.

ANY “BUSINESS JUDGMENT RULE” ARGUMENT FAILS AS A MATTER OF LAW

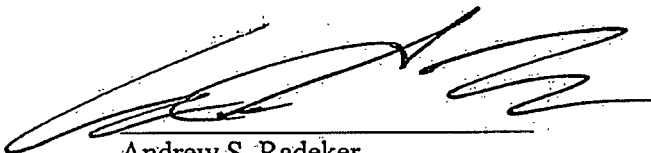
Any “business judgment rule” argument by the Plaintiff must fail. That rule usually applies, when it does, to protect individual directors who have made errors in taking entrepreneurial risks on behalf of the corporation; moreover, it does not protect a corporate party from liability for actions that are outside the law. See Kiriakides v. Atlas Food Systems & Servs., Inc. 343 S.C. 587, 606 n. 31, 541 S.E.2d 257, 268 n. 32 (2001); Baumann v. Long Cove Club Owners Assn., Inc., 380 S.C. 131, 138, 668 S.E.2d 420, 424 (Ct. App. 2008); Goddard v. Fairways Dev. Gen. P’shp., 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct. App. 1993); Dockside Assn., Inc. v. Detyens, 291 S.C. 214, 216-17, 352 S.E.2d 714, 716 (Ct. App. 1987). A corporation cannot exercise powers that are outside the scope of what the law authorizes; such acts are *ultra vires*, which makes the business judgment rule inapplicable. Baumann, 380 S.C. at 138; Goddard, 310 S.C. at 414; Dockside Assn., 291 S.C. at 216-17. As discussed above, a nonprofit corporation like the Plaintiff has statutory authorization to exercise “the same powers

as an individual” – not a governmental entity – “to do all things necessary or convenient to carry out its affairs[.]” S.C. Code Ann. § 33-31-302 (emphasis added). To fine is a power of a sovereign government, not of any individual. Purporting to usurp that power is beyond the protection of the business judgment rule. That rule is simply inapplicable.

EVEN THE PLAINTIFF DOES NOT KNOW WHAT THE TOTAL “DEBT” IS

Notice that even the affidavits offered by the Plaintiff do not contain a purported total of the debt the Plaintiff claims. Even the Plaintiff does not know what it claims to be owed by Captain Peffley.

Respectfully submitted,



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ATTORNEY FOR DEFENDANT

Columbia, South Carolina
October 6, 2014

BETH A. CARRIGAN
CLERK OF COURT
LEXINGTON, SOUTH CAROLINA

2014 OCT -7 A 0:46

FILED

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Oak Pointe Homeowners' Association, Inc.

Plaintiff,

v.

Mackenzie E. Peffley

Defendant(s)

IN THE COURT OF COMMON PLEAS

C/A No.: 2013-CP-32-02386

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF SUMMARY JUDGMENT**

013789/00024

Plaintiff, Oak Pointe Homeowners' Association, Inc., submits this Memorandum in Support of its Motion for Summary Judgment.

STATEMENT OF FACTS

Plaintiff is the homeowners' association for the subdivision known as Oak Pointe in Lexington County, South Carolina. Properties within the subdivision are burdened by the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Oak Pointe ("Declaration"). Defendant is the owner of 313 Oakpointe Lane within Oak Pointe. Defendant admits that her property is subject to the declaration to the extent that they are lawful. (Def's Resp. to Pl. Request to Admit #3).

On April 26, 2010 Plaintiff levied a non-compliance assessment against Defendant's property for \$150.00 for burning trash in her back yard. Defendant was notified of the assessment by mail. On June 7, 2010 Plaintiff levied another \$165.00 non-compliance assessment against Defendant's property for improperly displaying a rental sign. Defendant was

again notified of this assessment via mail. Defendant did not make payment on the account at that time.

On December 1, 2010 Plaintiff mailed the Defendant the annual budget and billing package for 2011. When the \$175.00 annual assessment was not paid by January 31, 2011, the Plaintiff mailed Defendant a past due notice showing an outstanding balance of \$490.00. On February 25, 2011 Plaintiff sent the Defendant a final warning letter advising that her account would be turned over to Plaintiff's attorney for collection if the account was not paid in full within ten (10) days. When the Defendant failed to make payment within the proscribed time period Plaintiff directed its attorneys to file a lien against Defendant's property to secure the entire balance due. On March 23, 2011 Plaintiff's attorney filed a lien in the amount of \$870.83. The Plaintiff incurred \$375.00 in attorney's fees for this service.

Plaintiff received a check from Defendant in the amount of \$490.00 on or about March 17, 2011. Because the account was already in collections, Plaintiff then forwarded the check to its attorney for application to Defendant's account.

Defendant was notified May 6, 2011 that Plaintiff's board waived the \$165.00 non-compliance assessment due to the Defendant's appeal.

Plaintiff issued three non-compliance assessments to Defendant for the condition of her mailbox in July and August of 2011. These three assessments totaled \$395.00.

The 2012 regular assessment of \$150.00 came due January 1, 2012. Defendant remitted \$150.00 January 5, 2012. Since that time Defendant has not remitted any payments to the Plaintiff.

In May 2013 the Plaintiff elected to foreclose its lien to collect the delinquent balance. When Defendant failed to make any additional payments Plaintiff filed the present action on July 16, 2013.

Defendant filed her Answer and Counterclaims asserting seeking a Declaratory Judgment regarding Plaintiff's ability to levy assessments for non-compliance, violations of the South Carolina Unfair Trade Practices Act, Breach of Contract, Breach of Good Faith and Fair Dealing, Breach of Contract with Fraudulent Intent, Slander of Title, Libel/Defamation, Negligence, Accounting, and violations of the Servicemembers Civil Relief Act. Plaintiff's Motion for Summary Judgment on its foreclosure and Defendant's Counterclaims is now before the Court.

STANDARD OF REVIEW

In considering a motion for summary judgment, "the Court must view the facts and inferences in the light most favorable to the nonmoving party. Summary judgment is appropriate only when the pleadings, depositions, interrogatory answers, admissions, and affidavits show that there is no genuine issue of material fact. A party opposing a properly supported motion for summary judgment, however, may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact."

Dickert v. Metropolitan Life Ins. Co., 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct. App. 1991).

DISCUSSION

1. Declaratory Judgment

Defendant alleges that Plaintiff lacks authority to levy non-compliance assessments because Plaintiff is not a government and no government has delegated the power to issue fines to Plaintiff.

Defendant provides no legal basis for her assertion that only governments can issue fines and the appellate courts of this state have not directly addressed an association's authority to fine its members. However, several South Carolina Attorney General opinions have considered this question and have consistently concluded that it is permissible provided that the association's governing documents provide authorization.

Specifically, a 2008 opinion found that "[t]he ability of a property or homeowners' association to assess and collect fines and penalties for violations occurring on private property would probably depend on the nature of the homeowners' association's agreement and whether the violator was a member of the association or in a position to contractually which would bind the violator to the terms of the agreement. Courts in other jurisdictions have addressed similar questions. In Florida, the State District Court of Appeals held that a homeowners' association had the authority to assess fines against a homeowner based on violations of covenants restricting parking . . . Similarly, the Court of Appeals of Wisconsin noted. . . that the property owners' 'association's power to fine its members depends on the contract between the association and the members embodied in the bylaws and articles.' Consistent with such, homeowner's associations are private organizations. As referenced above, these associations' authority to collect fees and assessments and enforce restrictive covenants is a private matter between the association and its members. Therefore, consideration must be given to any agreement to determine whether such collections or restrictions are authorized. Op. S.C. Atty. Gen., February 5, 2008. Subsequently, a 2010 opinion stated "[f]inding no statutory authority preventing the imposition of such fees on its members, we suggest you look to the particular association's agreement with its members or its articles of incorporation, if such is applicable, to determine the scope of the association's authority." Op. S.C. Atty. Gen., June 2, 2010.

Article VI, Section 3 of the Declaration authorizes Plaintiff to issue non-compliance assessments against owners for violations of the restrictive covenants. Defendant purchased the property with notice of the restrictions. Although restrictive covenants are strictly construed, the rule of strict construction does not preclude their enforcement. *Sea Pines Plantation Co. v. Wells*, 363 S.E. 2d 891, 894 (1987). “A restrictive covenant will be enforced if the covenant expresses the party’s intent or purpose” and the rule of strict construction “will not be used to defeat the clear express language of the covenant.” *Id.* Article VI Section 3 of the Declaration clearly states that, “[i]n the event that any Owner, guests or invitees fail to comply with any of the provisions of the Declaration, the By-Laws of the Association, the Architectural Guidelines and Regulations established and amended by the Developer (or Board of Directors), the Developer (or Board of Directors) may issue Assessments in amounts as it determines in its sole discretion, which shall be an Assessment for Non-Compliance and which are a lien on the Lot or Lots of that Owner.”

Additionally, Plaintiff’s power to issue non-compliance assessments is an inherent power of a non-profit corporation. Plaintiff is a non-profit corporation and is governed by the South Carolina Nonprofit Corporation Act, S.C. Code § 33-31-101, et seq. Pursuant to the South Carolina Nonprofit Corporation Act, the corporation shall adopt bylaws and the “bylaws may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with law or the articles of incorporation.” S.C. Code § 33-31-206. The Act further grants the following powers to a nonprofit corporation:

Unless its articles of incorporation provide otherwise, every corporation has perpetual duration and succession in its corporate name and has the same powers as an individual to do all things necessary or convenient to carry out its affairs including, without

limitation, power: (3) to make and amend bylaws not inconsistent with its articles of incorporation or with the laws of this State for regulating and managing the affairs of the corporation; (10) to conduct its activities, locate offices, and exercise the powers granted by this chapter within or without this State; (15) to impose dues, assessments, and admission and transfer fees upon its members; (18) to do all things necessary or convenient, not inconsistent with law, to further the activities of the corporation.

Accordingly, Plaintiff has the power to make rules regulating its members, impose assessments and other fees against members, and all other things necessary to further the activities of the corporation. The power to levy non-compliance fines is clearly included in these powers.

2. Unfair Trade Practices Act

The South Carolina Unfair Trade Practices Act (“SCUTPA”) prohibits “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce.” S.C. Code Ann. § 39-5-20(a). To prevail on a SCUTPA claim the claimant must show (1) that the opposing party engaged in an unlawful trade practice, (2) that the claimant suffered actual, ascertainable damages as a result of the opposing party’s use of the unlawful trade practice, and (3) that the unlawful trade practice engaged in by the opposing party had an adverse impact on the public interest. *Havird Oil Co. v. Marathon Oil Co.*, 149 F.3d 283, 291 (4th Cir. 1998). To establish an adverse impact on the public interest, a claimant must demonstrate that the complained of conduct has had the potential for repetition. *Daisy Outdoor Adver. Co. v. Abbott*, 322 S.C. 489, 473 S.E.2d 47, 50 (1996). A potential for repetition may be demonstrated by showing that “similar unfair activities occurred in the past . . . or by showing [the current] procedures create a potential for repetition.” *Beattie v. Nations Credit Finc. Svcs.*

Corp., 59 Fed.Appx 585, 589 (2003). Defendant has failed to allege any unfair or deceptive act and has failed to establish an adverse impact on the public interest.

Unfair or Deceptive Act

Defendant's Counterclaim alleges that Plaintiff acted unfairly and deceptively in levying and collecting non-compliance assessments against Defendant's property. However, the contract between the parties specifically authorizes the Plaintiff to take these actions. (Declaration, Article VI, § 3.) The restrictive covenants were recorded with the Lexington County Register of Deeds December 12, 2002, nearly five years prior to Defendant accepting title to the property. By accepting title to the property Defendant agreed to follow the rules of the community and agreed to pay non-compliance assessments if she failed to do so. Defendant has failed to allege any facts that would constitute unfair or deceptive acts by Plaintiff.

Adverse impact on the public interest

Defendant claims Plaintiff's conduct affects the public's interest and is capable of repetition due to the fact that its Declaration of Covenants empowers it to levy assessments to its members within the subdivision. However, Plaintiff's actions are limited to one neighborhood in Lexington County and therefore cannot affect the interests of the public at large.

3. Breach of Contract

To bring an action for breach of contract the claimant has the burden "to prove the contract, its breach, and the damages caused by the breach" *Fuller v. Eastern Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962). "The necessary elements of a contract are offer, acceptance and valuable consideration" *Roberts v. Gaskins*, 327 S.C. 478, 484, 486 S.E.2d 771, 773 (Ct. App. 1997). "[B]efore a party can recover for the breach of a contract, he must allege

and prove by competent, relevant testimony each one of the material elements of the contract sued on.” *Rabon v. State Finance Corp.*, 203 S.C. 183, 26 S.E.2d 501, 502 (1943).

Defendant claims that the Plaintiff breached a contract with the Defendant by promising to remove a fine and failing to honor the promise. However, Defendant fails to allege each material element of the contract. While Defendant alleges that Plaintiff promised to waive a non-compliance assessment, Defendant fails to establish which non-compliance assessment was to be waived. Without this certainty the Defendant cannot establish that the parties had the requisite meeting of the minds to establish a contract. Defendant further fails to allege or establish any consideration that she gave to Plaintiff in exchange for its promise to waive the non-compliance assessment.

Plaintiff has not breached a contract with the Defendant. All parties agree that the Defendant asked that the assessment be waived. Paragraph 6 of Defendant’s affidavit states that she asked Plaintiff to drop the non-compliance assessment related to the for rent sign that Ms. Laurel told her that she would be reimbursed. Defendant does not set forth specific facts as to when she requested the removal of the fine. Defendant submits Exhibit D to her affidavit to support her contention. Although it appears to be an incomplete chain of emails between Defendant and Steffhanie Laurel, the chain attached the Defendant’s own affidavit notes that Defendant submitted a written appeal (doesn’t say when it was written and submitted) and indicates that at 10:07 p.m. on March 14, 2011 Ms. Laurel agreed that the \$165.00 would be reimbursed. Exhibit E to Defendant’s affidavit lists an itemization of charges and there is no reference to a \$165.00 charge for the sign violation.

Both of Plaintiff’s supporting affidavits provided by Mary Kadar and Steffhanie Laurel attest that the Plaintiff waived the \$165.00 non-compliance assessment related to the unapproved

signage in Defendant's yard. This was also memorialized in the email informing Defendant that the Plaintiff had removed the assessment from (the lien upon) her lot (Kadar affidavit Exhibit B). Defendant has not set forth any specific facts in her allegations to the contrary and therefore no genuine issue of material fact exists. Further both Ms. Kadar and Laurel note that neither the Defendant nor anyone acting on her behalf made any requests to have any of the other non-compliance assessments waived or reduced.

Even if the Declaration is deemed to have been breached the Defendant still would not be entitled to any relief as she had not otherwise fully performed the contract on her part as she has been in arrears both prior to her request to waive the assessment and at this present time. "A breach of covenant of good faith and fair dealing cannot stand if the party seeking damages for breach of contract, to which he was a party, must show that the contract has been fully performed on his part" *Williams v. Riedman*, 529 S.E. 2d 28, 39 (2000).

4. Breach of Covenant of Good Faith and Fair Dealing

There is no separate cause of action for breach of the implied covenant of good faith and fair dealing because it is subsumed in a claim for breach of contract. In *Ro Tec Services, Inc. v. Encompass Services, Inc.*, 597 S.E. 2d 881, 883 (Ct. App. 2004) the court concluded that, "the implied covenant of good faith and fair dealing is not an independent cause of action separate from the claim for breach of contract" *Ro Tec Services, Inc.* at 884.

5. Breach of Contract with Fraudulent Intent

In order to prevail on a claim for breach of contract accompanied by a fraudulent act, a

claimant must prove: a) a breach of contract b) fraudulent intent relating to the contract's breach (not merely its making) c) a fraudulent act accompanying the breach. *Floyd v. Country Squire Mobile Homes, Inc.*, 336 S.E. 2d 502 (Ct. App. 1985)

A fraudulent act is broadly defined as "any act characterized by dishonesty in fact or unfair dealing" *Ro Tec Services, Inc. v. Encompass Services, Inc.*, 597 S.E. 2d 881, 883 (Ct. App. 2004).

This cause of action fails as the Defendant has not made the predicate allegations to raise issues of material fact relating as to whether a contract was actually breached. Importantly, Defendant fails to plead or establish any fraudulent intent, dishonesty or unfair dealing by Plaintiff such that she would be entitled to damages for breach of contract with fraudulent intent.

5. Slander of Title

In order to maintain an action for slander of title a party "must establish (1) the publication (2) with malice (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties" *Solley v. Navy Federal Credit Union, Inc.*, 723 S.E. 2d 597, 603 (Ct. App. 2012).

Defendant's alleges her title was slandered when the Plaintiff recorded a notice of lien containing false statements. While Defendant does not specifically allege which statements were false, we can presume that her argument is that Plaintiff's lien contained amounts due for non-compliance assessments. However, as argued more fully herein, Plaintiff was entitled to levy and collect all sums contained in its notice of lien. Additionally, Defendant has failed to establish any specific facts to show such statement(s) were made with malice. "In slander of title actions, the malice requirement may be satisfied by showing the publication was made in reckless or wanton disregard to the rights of another, or without legal justification" *Huff v.*

Jennings 459 S.E. 2d 886, 891 (Ct. App. 1995): The Plaintiff's lien recorded March 23, 2011 stated that Defendant owed \$870.83 for unpaid assessments, interest, costs and attorney's fees. This is substantiated by Ms. Kadar's affidavit which itemized these charges. On that date, the Defendant's balance included \$490.00 (for two non-compliance assessments and the 2011 regular assessment) and \$375.00 for attorney's fees leaving \$5.83 and interest. These charges are neither false nor without legal justification as they are specifically authorized in the Declaration.

Further, the Court of Appeals has clearly provided that relevant pleadings, *even if defamatory* (emphasis added) are absolutely privileged and cannot form the basis of an action for slander of title. *Pond Place Partners, Inc. v. Poole*, 567 S.E. 2d 881, 892-893 (2002). The question as to whether such statements are relevant "is for the determination of the Court and not a jury, and that in determining this issue pleadings must be liberally interpreted and all doubt resolved in favor of relevancy" *Pond Place* at 893.

6. Libel/Defamation

Libel is actionable per se if it involves "written or printed words which tend to degrade a person, that is, to reduce his character or reputation in the estimation of his friends or acquaintances, or the public, or to disgrace him, or render him odious, contemptible, or ridiculous . . . in other words, if the trial judge can presume, because of the nature of the statement, that the plaintiff's reputation was hurt as a consequence of its publication, the libel is actionable per se." *Holtzscheiter v. Thomson Newspapers, Inc.*, 506 S.E.2d 497, 501 (1998).

Paragraph 56 of the Defendant's answer avers that Plaintiff has published libelous statements to the effect that Defendant is currently delinquent in its payments "with regard to the loan subject of this action and is in default thereof." As stated earlier, this action is the

foreclosure of an unpaid assessment lien. There is absolutely no loan at issue in this matter. Even Defendant's affidavit contains no reference to a loan between Plaintiff and Defendant. Accordingly, Defendant's claim for libel must fail as a matter of law.

If the erroneous averments contained in paragraph 56 of Defendant's answer were a scrivener's error that was intended to bring a claim for libel based on the lien that was filed or any other pleadings in this lawsuit then Plaintiff would again assert the absolute privilege established in *Pond Place*.

7. Negligence

Defendant's tenth counterclaim avers that Plaintiff was negligent by falsely representing to the Defendant that it would rescind, remove or undo a fine levied against the Defendant. To establish a cause of action for negligence, a plaintiff must prove the following three elements: (1) a duty owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damages proximately resulting from the breach" *Shaw v. City of Charleston*, 567 S.E. 2d 530 (2002).

This negligence claim is essentially the same argument set forth in Defendant's claim for breach of contract and should be defeated for the same reasons articulated above. Plaintiff did not fail to remove the \$165.00 assessment from Defendant's account and therefore could not have breached its duty to communicate truthfully to Defendant. Defendant has also failed to qualify, quantify or otherwise set forth specific factual allegations to substantiate its damages or that any damages were proximately caused by the Plaintiff providing an additional basis for this claim to fail.

Additionally, Defendant cannot recover in a tort. This controversy is predicated upon the Declaration, which is deemed to be a contract by the courts. Restrictive covenants are

considered voluntary contracts between the parties *Sea Pines Plantation Co. v. Wells*, 363 S.E. 2d 891, 894 (1987) and the economic loss rule precludes recovery in tort for duties created by contract *Sapp v. Ford Motor Co.*, 687 S.E. 2d 47 (2009).

8. Servicemembers Civil Relief Act

Paragraphs 75-77 of Defendant's answer averred that "During times when the Plaintiff claims that interest, late charges penalties, and fines accrued or were assessed or levied against the Defendant, the Defendant was in active-duty military service" and that the interest, late charges, penalties, and fines assessed were in violation of the Servicemembers Civil Relief Act. Plaintiff acknowledges that Defendant is entitled to a reduction in interest during the period of her active service, but denies any violation of the act for the reasons set forth below:

Interest

Article IX of the Declaration calls for assessments that aren't paid within thirty days to bear interest at 16% per annum or the highest rate allowed by law. However, §527(a) of the Act provides that obligations incurred before the servicemember enters military service shall not bear interest in excess of 6% per year for (A) during the period of service and one year thereafter for securities in the nature of a mortgage or (B) during the period of military service only for any other obligations.

The Servicemembers right to this reduction is not automatic and is conditioned upon the Servicemembers written notice to the creditor within 180 days after her termination or release from military service §527(b)(1) and is effective as of the date of order to active duty §527(b)(2). Finally, the 6% limitation on interest is tempered by a permissive determination by the court that Defendant's ability to pay interest is "not materially affected" by their military service §527(c).

Defendant's obligation to pay assessments and other charges began August 31, 2007 when she obtained title. According to Defendant's affidavit she had transitioned from the Army to the Army National Guard in 2005. Therefore, she was not entitled to interest relief until called to active duty in October of 2012.

§511(2)(A)(ii) of the Act defines Military Service for members of the National Guard to include "service under a call to active service authorized by the President or Secretary of Defense for a period of more than 30 consecutive days". §511(3) defines "Period of Military Service" to mean beginning on the date which a servicemember enters military service and ending on the date which the servicemember is released or dies.

Paragraph 12 of Defendant's affidavit only indicates that she "invoked the Servicemembers Civil Relief act on August 23, 2013". There are a variety of protections a servicemember can invoke according to the act and the email provided to substantiate this claim (Exhibit F) uses those exact words without providing any specific reason for the invocation.

It is important to note that regardless of what protections were invoked, Defendant did not do this until after the complaint was filed. There is no genuine issue of material fact that Plaintiff has charged interest in violation of the Act and Plaintiff will gladly reduce Defendant's interest on her obligation to 6% for the entire period of delinquency (April of 2010 to present) even though she was only called to active duty for a fraction of her delinquency (approximately 13 months from October 2012 to November of 2013) in addition to the fact that Defendant has not set forth any specific facts to substantiate her claim that her service materially affected her ability to pay interest on her obligation.

Late charges, penalties, and fines

Plaintiff has not levied any late charges on Defendant's account. Although it is clear from the pleadings that Defendant considers the assessments for non-compliance to be penalties or fines, a close reading of the Act proves that there is no genuine issue of material fact as to whether Plaintiff levied these in a manner that violates the Act.

§523(a) prohibits penalties for failure to comply with the terms of a contract during the period a contract is stayed pursuant to the Act. The preceding section of the act (§523) sets forth the manner in which a court can stay proceedings sua sponte or upon application of the servicemember. There is nothing in the record to indicate that the court has done so or that the Defendant has made such an application. Even if Defendant's August 23, 2013 invocation is liberally construed so as to stay the proceedings, all of her penalties were assessed from April of 2010 to August of 2011, a full two years prior to that date and therefore could not have violated this section of the Act.

§523(b) allows a court to reduce or waive a fine or penalty incurred by a servicemember for failing to perform a contractual obligation IF (1) the servicemember was in military service at the time the penalty was incurred AND the ability of the servicemember to perform the obligation was materially affected by such military service.

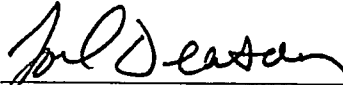
There is no genuine issue of material fact as to either of these elements as Ms. Kadar's affidavit makes clear that the assessments for non-compliance were all levied well before Defendant's active service began and Defendant has not set forth any specific facts to substantiate her claim that her military service materially affected her ability to perform the obligations.

9. Foreclosure Action

The Declaration provides the Plaintiff is authorized to levy assessments to cover the common expenses of the association and that each unit is subject to a lien in favor of the association to secure payment of all authorized assessments and charges. In the event that the owner fails to pay these charges the Declaration authorizes Plaintiff to foreclose its lien in the same manner as a mortgage. Mary Kadar's affidavit sets forth an itemized accounting of the account balance. It avers that the Defendant has failed to pay assessments and interest according to the Declaration. Defendant's affidavit offers no contradictory evidence. Accordingly, Plaintiff is entitled to summary judgment as to its foreclosure action.

CONCLUSION

For the reasons stated above Plaintiff respectfully requests the Court grant its Motion for Summary Judgment as to its foreclosure and all of the Defendant's Counterclaims.

 10-7-14
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Judge

Appellate Case No.: 2015-000263

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JUN 29 2016

SC Court of Appeals

Oak Pointe Homeowners' Association, Inc.,.....Respondent,

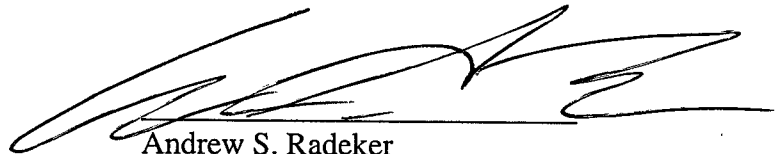
v.

Mackenzie E. Peffley,..... Appellant.

CERTIFICATE OF COUNSEL

I certify that the Record on Appeal contains all material proposed to be included
by any of the parties and not any other material.

Respectfully submitted,



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May 31, 2016