

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markley Dennis, Circuit Court Judge

Trial Case No.: 2010-CP-10-0482
Appellate Case No. 2016-000281

Anchorage Plantation
Homeowners Association,

Respondent,

v.

John B. Walpole and
Theodora W. Walpole

Appellant.

RECORD ON APPEAL
Vol. 1 of 3

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STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
ANCHORAGE PLANTATION)
HOMEOWNERS ASSOCIATION, INC.)
)
Plaintiff,)
)
v.)
)
JOHN AND THEODORA WALPOLE,)
)
Defendants.)
_____)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

C.A. No. 10-CP-10-0432⁴⁸²

ORDER AND JUDGMENT

FILED
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JULIE A. ARMSTRONG
CLERK OF COURT

This matter is before the court after trial for final disposition on the merits.

The Honorable ~~Kristi~~ Lee Harrington, Circuit Judge, oversaw the first three days of trial that were conducted on February 26, February 27, and June 21, 2013. Because Judge Harrington was unable to proceed in the matter due to various scheduling conflicts, the undersigned succeeded Judge Harrington and took over the matter.

After reviewing the transcripts of the proceedings before Judge Harrington and exhibits entered into evidence, I determined that the case could be completed before me under Rule 63, SCRCP, without prejudice to the parties,. At the commencement of the final hearing date on August 21, 2015, counsel for the parties agreed to my deciding the merits and handling the proceedings to conclusion.

Based on my review of the transcript and exhibits, as well as the testimony and exhibits admitted on the final hearing day of August 21, I determined it was unnecessary to recall any witness.

ANDY

In this action Plaintiff, Anchorage Plantation Homeowners Association, Inc. (the "Association") seeks to have the Court invalidate an easement granted by Southern Lifestyles, VIII, LLC to Defendants, John and Theodora Walpole (the "Walpoles"), in November 2001, later amended in June 2002. The Walpoles contend that the easement, as amended, is valid and enforceable, alleging several defenses to the Complaint that seeks declaratory and injunctive relief.

Having fully considered the testimony, exhibits, and arguments of counsel, and applying the applicable law, I make the following findings of facts and conclusions of law:¹

FINDINGS OF FACT

On July 31, 1980, the Walpoles acquired title to 1046.4 acres, more or less, known as Anchorāge Plantation on Wadmalaw Island. (Plaintiff's Exhibit 1).

On or about June 23, 1997, the Walpoles recorded a plat for a portion of the Anchorage, described as "the Anchorage Plantation-Phase I," that included the first section of an entry road called Anchor Watch Drive along with the subdivision of five lots (lots 1, 2, 3, 77, and 78) at the then-terminus of Anchor Watch Drive. (Plaintiff's Exhibit 2). The plat also created a spur road near the then-terminus of Anchor Watch Drive described as Drop Anchor Lane. (Plaintiff's Exhibit 2). The roadways described on the plat comprised 8.839 acres. The plat contained the following note that was accompanied by the signature of the Walpoles:

WE HEREBY DEDICATE THE ROADS AND DRAINAGE
EASEMENTS SHOWN HEREON TO THE USE OF THE

¹ The separate headings, "Findings of Fact" and "Conclusions of Law," are not meant to be conclusive as to the nature of every determination made under the respective heading. There may be some conclusions of law in the findings of fact and vice versa.

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ANCHORAGE PLANTATION HOMEOWNERS
ASSOCIATION. THE APPROVAL OF THIS PLAT IN NO
WAY OBLIGATES THE COUNTY OF CHARLESTON TO
ACCEPT FOR CONTINUED MAINTENANCE ANY OF THE
ROADS OR EASEMENTS SHOWN ON THIS PLAT.

(Plaintiff's Exhibit 2).

On June 24, 1997, the Walpoles recorded the Declaration of Covenants, Conditions, Easements, Restrictions, Charges and Liens for the Anchorage Plantation Homeowners Association (the "Original Declaration"). (Plaintiff's Exhibit 3) It was re-recorded on July 13, 1999, because the first recorded version omitted the property description that was Exhibit "A" to the original declaration. (Plaintiff's Exhibit 4). The Original Declaration defined the "Declarant" as the Walpoles.

The Original Declaration encumbered the roadways and lots described on the plat dated June 9, 1997, recorded on June 23, 1997 (Plaintiff's Exhibits 2, 3, and 4). The encumbering provision at the beginning of the original Declaration specifies as follows:

NOW, THEREFORE, the Declarant declares that the real property described as the Properties in Article II hereof is and shall be held, transferred, sold, conveyed, given, donated, leased, occupied, and used subject, among others, to the Covenants, Restrictions, Conditions, Easements, Charges, Assessments, affirmative obligations and liens (herein sometimes referred to as the "Covenants" or "Declaration of Covenants") hereinafter set forth.

(Plaintiff's Exhibits 3 and 4).

The Original Declaration specifically addressed easements. The Walpoles, as the Declarant, reserved a blanket easement over all of the Association's common areas for utilities in Section 8.02. The Original Declaration, however, did not include an easement or right of use in favor of the Walpoles over any of the common areas,

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although the Original Declaration did grant a right of use to Anchor Watch Drive to other individuals to access their lot.

Section 11.06 of the Original Declaration granted to "Kelly T. McKee and Gladys H. McKee, their heirs and assigns ("McKee")" a right to use Anchor Watch Drive from its intersection with Maybank Highway to the property owned by the McKees located at the then-terminus of Anchor Watch Drive. (Plaintiff's Exhibits 3 and 4, p. 15; Plaintiff's Exhibit 2, sheet 2 of 2). Section 11.06 required McKee to pay \$125 per annum to the Anchorage Plantation Homeowners Association "as their share of the costs of the upkeep of the road that they are entitled to use." To comply with other terms of Section 11.06, McKee signed the Original Declaration agreeing that they, their heirs and assigns shall be responsible to pay the fee and agreeing that the obligation may be enforced the same as any fee charged to any owner in Anchorage Plantation subdivision. (Plaintiff's Exhibits 3 and 4).

On January 11, 2000, the Walpoles entered a Purchase Agreement for Real Estate with Southern Lifestyles, LLC (the "First Purchase Agreement") to sell it Phase I of the Anchorage as well as an additional 278 acres described on the Preliminary Subdivision Plat for lots 1-35, 30-50, and 52-78, known as Phase II, for \$10,100,000. (Plaintiff's Exhibit 5). Phases I and II included the Walpoles' acreage fronting on Bohicket Creek intersected by Anchor Watch Drive with lots on either side of it. (Exhibit A to Plaintiff's Exhibit 5).

Pertinent to the matters at issue, Article X of the First Purchase Agreement included terms giving the Seller (the Walpoles) certain rights to use the property including the following:

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10.3 Purchaser agrees to provide Seller access to Bohicket Creek over the community boat ramp and courtesy dock located in Phase II until such time as Purchaser closes on the purchase of the Option B Property. Seller shall have the right to use any road within the Property and the Option Property for purposes of ingress and egress to properties owned or leased by Seller. . . .

(Plaintiff's Exhibit 5, p. 8)

Section 11.2 of the First Purchase Agreement provided that the agreements *made by the Seller*, i.e., the Walpoles, in the First Purchase Agreement survived the delivery of the deed and the closing. (Plaintiff's Exhibit 5, p. 8) This provision did not provide for the survival of the obligations of *the Purchaser* including those in Section 10.3.

The Walpoles wanted to sell the entirety of the property in a single transaction to Southern Lifestyles, but Southern Lifestyles was unable to acquire the entire tract at one time. Instead, Southern Lifestyles agreed to purchase the waterfront acreage of Phases I and II first. Article VIII of the First Purchase Agreement granted an option to Southern Lifestyles to purchase Phase III consisting of the remaining approximately 780 acres of the interior residual land owned by the Walpoles for \$3,500,000. (Plaintiffs' Exhibit 5).

On June 16, 2000, a conditional plat for the Anchorage Phase 2 was recorded in the RMC Office for Charleston County for lots 4 through 72 that also redesignated lot 77 and 78 of Phase 1 as lots 73 and 74, respectively. (Plaintiff's Exhibit 6). This conditional plat included the remainder of the future proposed Anchor Watch Drive, a dock between lots 46 and 47, and a dock and boat landing between lots 54 and 55. (Plaintiff's Exhibit 6, sheets 4 and 5). The Walpoles signed a certificate on this conditional plat that was identical to that in the 1997 plat for Phase I dedicating the roads and drainage

easements shown on the conditional plat to the use of the Anchorage Plantation Homeowners Association. Just as with the 1997 plat for Phase I, the 2000 conditional plat that included Phase II did not reflect an easement over the roads in favor of the Walpoles or the interior property that they would continue to own.

On June 16, 2000, the Walpoles executed and recorded the First Amendment to the Original Declaration bringing the property described in the conditional plat of Phase II under the Original Declaration. (Plaintiff's Exhibit 8). As with the Original Declaration, the Declarant declares in the First Amendment that this added property "shall be held, transferred, sold, conveyed, given, donated, leased, occupied, and used subject, to the covenants, restrictions, conditions, easements, charges, assessments, affirmative obligations and liens" of the Original Declaration. (Plaintiff's Exhibit 8).

That same day, June 16, 2000, the Walpoles conveyed legal title to Phases I and II to Southern Lifestyles VIII, LLC. (Plaintiff's Exhibit 7). The property description attached as Exhibit "A" to the deed specifically referred to "lots 4-72, a 2.289 ac. dock lot, a 2.742 ac. dock and boat landing dock lot and a .614 ac. future Anchor Line Drive, along with the property described in the 1997 final plat of Phase I." In the deed to Southern Lifestyles VIII, LLC of Phases I and II, the Walpoles did not reserve an easement or right of access across the common areas of Phases I and II. (Plaintiff's Exhibit 7).

On July 14, 2000, Anchorage Plantation Homeowners Association became a non-profit corporation. (Plaintiff's Exhibit 9).

On July 21, 2000, Southern Lifestyles VIII, LLC, recorded the Second Amendment to and Restatement of Declaration of Covenants, Conditions and

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Restrictions for the Anchorage (the "Restated Declaration"). (Plaintiff's Exhibit 10). The Restated Declaration completely replaced the Original Declaration and First Amendment. (Plaintiff's Exhibit 10, p. 1). Southern Lifestyles, VIII, LLC, as Declarant, imposed the Restated Declaration on all the property acquired by it including Anchor Watch Drive and the other common areas of the Association, by the following:

NOW, THEREFORE, Declarant hereby declares that all of the property described in Exhibit "A" and any additional property as may be added by subsequent amendment hereto, and in accordance with the terms and conditions hereof, is subjected to this Second Amendment to and Restatement of Declaration of Covenants, Conditions and Restrictions for The Anchorage ("Declaration"); that the terms and conditions of the Walpole Declaration and the Walpole Amendment are subsumed under this Declaration and shall have no further independent force and effect; and that the property described in Exhibit "A" will be held, transferred, sold, conveyed, leased, occupied, and used subject to the following easements, restrictions, covenants, charges, liens, and conditions which are for the purpose of protecting the values and desirability of, and which will touch and concern and run with title to the real properties subjected to the Declaration and **which will be binding on all parties having any right, title, or interest in the described properties or any portion thereof, and their respective heirs, successors, successors-in-title, and assigns**, and will inure to the benefit of each owner thereof.

(Plaintiff's Exhibit 10, pp. 1-2)(emphasis added).

I find the Restated Declaration encumbered all right, title, and interest of Southern Lifestyles VIII, LLC, in and to the real property known as Phases I and II of the Anchorage.

The Restated Declaration defines the "Common Areas" to include all real and personal property "hereafter deeded or leased to" the Association wherein the property is denominated as a common area. (Plaintiff's Exhibit 10, p. 2, Section 1.1(g)) As

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described in the further findings below, the private roads of Phases I and II, the community boat ramp, and courtesy dock were later deeded to the Association as common areas. I find they constituted common areas under the Declaration.

Further, according to the Restated Declaration's definition, "[a]ll common areas are to be devoted to and intended for the common use and enjoyment of the Declarant, Owners, and their respective guests, and invitees, **as well as third-parties with easements in and to such common areas, as herein provided**" (Plaintiff's Exhibit 10, p. 2) (emphasis added).

The Walpoles are third parties with respect to the Restated Declaration. The Restated Declaration does not grant an easement in and to the common areas to the Walpoles. Section 6.4.2 of the Restated Declaration, however, does grant a non-exclusive, appurtenant easement to McKee for the same section of Anchor Watch Drive on the same terms as in the Original Declaration. (Plaintiff's Exhibit 10, pp. 19-20). This provision specifically states that it does not provide McKee the right to use any common areas except over which McKee was granted the easement unless and until the McKees' property was added to the development and became a part of the Association as provided in Section 2.2 of the Restated Declaration. (Plaintiff's Exhibit 10, pp. 19-20).

Section 2.2 of the Restated Declaration specifies the terms and conditions for the addition of contiguous or nearly contiguous real property to the Restated Declaration by recording a supplemental declaration with respect to that land. (Plaintiff's Exhibit 10, p. 5). The interior residual acreage of the Walpoles was never added to the Association by supplemental declaration.

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Section 2.3 of the Restated Declaration sets forth the terms and conditions for the conveyances of the common areas by the Declarant to the Association specifying, among other things, that any such conveyance will be subject to "(b) the right of access of the Declarant, its successors and assigns, over and across such property...." (Plaintiff's Exhibit 10, p. 6). Section 2.3 also provides that "the Association hereby agrees to accept title to any property, or to any interest in property, now or hereafter conveyed to it pursuant to the terms and conditions of this Declaration." (Plaintiff's Exhibit 10, pp. 6-7).

Article 6 of the Restated Declaration addresses "PROPERTY RIGHTS." This article does not grant any rights to the Walpoles to the common areas nor does it grant the right to the Declarant to grant an easement or right of access to the Walpoles for the common areas.

Section 6.2. describes the "Declarant's Reserved Rights and Easements" as "the rights and easements specifically reserved to Declarant in this Declaration." (Plaintiff's Exhibit 10, p. 17). Section 6.2.5 titled "Declarant's Easements for Additional Property" affirms "the Declarant's right to add Property to this Declaration pursuant to Section 2.2.1 in the rights and easements reserved in Section 6.1. hereof for the benefit of the Additional Property so added to this Declaration." (Plaintiff's Exhibit 10, p. 18).

Section 6.4 titled "Easements Over Private Roadways" contains the following specific provision describing the temporary easement of the Declarant over the private roadways during the time it owns any of the lots for sale:

6.5 Easements for Declarant. During the period that Declarant owns any of the Property for sale, Declarant will have an alienable and transferable right and easement on, over, through, under, and across the common areas for

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the purpose of constructing improvements in and to the Lots and for installing, maintaining, repairing and replacing other improvements to the Property contemplated by this Declaration or as Declarant desires, in its sole discretion, including, without limitation, any improvements or changes permitted and described by Article 2, and for the purpose of doing all things reasonably necessary and proper in connection therewith, provided in no event will Declarant have the obligation to do any of the foregoing.

(Plaintiff's Exhibit 10, p. 20)(emphasis added).

Section 6.5.1 titled "Declarant's Easements for Any Additional Property" reserves for Declarant, and its successors, assigns, and successors-in-title, an easement of access to and use of the common areas in favor of any Additional Property when added to the Restated Declaration pursuant to Section 2.2.1. (Plaintiff's Exhibit 10, p. 20). The Walpoles' acreage was never added to the Restated Declaration pursuant to Section 2.2.1.

Section 6.7 titled "Easements for Utilities" reserves to the Declarant in the Association the right and easement, as well as the power to grant and accept easements, over the common areas for the purpose of providing utilities, according to the terms of this section. The easement in question in this case is not an easement for purposes of providing utilities.

Section 16.12 titled "Rights of Third Parties" provides, in pertinent part that "this Declaration will be filed Of Record for the benefit of Declarant, the Owners, and their Mortgagee as herein provided, and **by such recording, no adjoining property owner or third party will have any right, title or interest whatsoever in the Development, except as provided herein. . .**" (Plaintiff's Exhibit 10, p. 46)(emphasis added). Since the Restated Declaration does not provide for any right in favor of the Walpoles in any

R. M. 10

of its other terms, this provision excludes the Walpoles, who are adjoining owners, from any rights associated with the Development that includes its common areas.

Section 15.5 of the Restated Declaration titled "Actions" specifies that the Association may not grant an easement, license, or concession through or over the common areas (except for utilities) without the approval of at least 51% of the institutional mortgagees holding first mortgages on the lots. No approval of the easement in question in this case was sought from the institutional mortgagees,

On December 15, 2000, Southern Lifestyles VIII, and the Walpoles entered a Purchase Agreement for Unimproved Real Estate (the "Second Purchase Agreement") for the approximately 780 acres of Phase III that replaced the option to purchase Phase III in the First Purchase Agreement. (Plaintiff's Exhibit 13). The Second Purchase Agreement required the closing for Phase III to occur no later than June 15, 2002. (Plaintiff's Exhibit 13, p. 4). The Second Purchase Agreement included reference to the right of access in the First Purchase Agreement: "10.13 The provisions of the [First] Agreement between the parties dated January 11, 2000 contained in Articles VI and X shall apply to this [Second] Agreement as contemplated under the [First] Agreement of January 11, 2000." (Plaintiff's Exhibit 13, p. 8).

Southern Lifestyles, VIII, LLC, intended to close on the purchase of Phase III but ran into financial difficulties. On July 5, 2001, Southern Lifestyles, VIII, LLC, granted a mortgage to the Walpoles on 23 of the lots in Phases I and II to secure amounts owed the Walpoles under the Second Agreement, as amended. (Plaintiff's Exhibit 15). Southern Lifestyles, VIII, LLC, went so far to have its engineers to prepare a subdivision and site plan for Phase III. (Defendant's Exhibit 16). Southern Lifestyles, VIII, LLC,

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intended to submit Phase III to the Restated Declaration and make it a part of the Association if it acquired Phase III. Had that occurred, the lot purchasers in Phase III would have been subject to all the terms and conditions of the Restated Declaration, including liability for assessments and being subject to rules and regulations applicable to the common areas.

Concerned that Southern Lifestyles, VIII, LLC, might not be able to close on Phase III, the Walpoles desired to obtain an easement for the benefit of their residual parcel for the use of the community boat landing and dock as well as the roads in Phases I and II, in the event the closing did not occur. To that end, Charles S. Altman, attorney for the Walpoles, wrote a letter dated October 30, 2001, to Neil C. Robinson, Jr., attorney for Southern Lifestyles, VIII, LLC.. The letter stated that the Walpoles still desired that Southern Lifestyles, VIII, LLC, acquire Phase III but that they were unwilling to continue negotiations with it and grant it concessions unless it granted the Walpoles the easement drafted by Mr. Altman.

On November 8, 2001, Southern Lifestyles, VIII, LLC, signed the Easement Agreement prepared by Mr. Altman that is at the center of this dispute. (Plaintiff's Exhibit 17). The Easement Agreement purported to grant the Walpoles, their heirs and assigns, an easement over the roads and streets of Phases I and II described as the "Burdened Property", for purposes of ingress and egress to the Walpoles' property, described as the "Benefited Property." (Plaintiff's Exhibit 17). The Easement Agreement also granted "the right for the Grantees [the Walpoles], their heirs and assigns to use the community boat ramp and courtesy dock located on the Burdened Property for the purpose of access to Bohicket Creek." (Plaintiff's Exhibit 17, p. 1).

Rmt 8/12

The Easement Agreement also specified that if the Benefited Property was subdivided and sold to third persons, each subsequent owner of a lot would be obligated to pay an annual fee "for the right to enjoy the easements granted herein" of \$50 for the first year, increasing by \$5 per year thereafter. (Plaintiff's Exhibit 17). The fee was to be paid to the Association. (Plaintiff's Exhibit 17). The applicable zoning allowed the subdivision of the residual property into 107 residential lots whose future purchasers would receive the benefit of the Easement Agreement.

According to its attorney, Robinson, Southern Lifestyles, VIII, LLC, recognized that questions might later be raised as to the validity of the Easement Agreement and that it might be subject to later legal challenge. Because it still intended to acquire Phase III and add it to the Association and Restated Declaration by a future supplemental declaration, Southern Lifestyles, VIII, LLC, considered that, if it closed on Phase III, it could cancel the easement by recording an easement cancellation notice as provided in the Easement Agreement. (Plaintiff's Exhibit 17, p. 2).

On June 13, 2002, Southern Lifestyles, VIII, LLC and the Walpoles entered an Amended Easement Agreement that was essentially the same with only one or two changes. The Amended Easement Agreement capped at \$100 fee per lot that started at \$50. (Plaintiff's Exhibit 18).

The court takes judicial notice of the deeds of conveyance recorded in the RMC office at the time Southern Lifestyles VIII, LLC, and the Walpoles entered the Easement Agreement. A court is entitled to take judicial notice of deeds of record even though not introduced into evidence. Wiseman v. Cambria Prods. Co., 61 Ohio App. 3d 294, 300, 572 N.E.2d 759, 762, (Ohio Ct. App., Lawrence County 1989). In Wiseman the Ohio

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appellate court rejected an appeal challenging the trial court's taking judicial notice of a deed of record after the close of the evidence, reasoning as follows:

The question posed by this assignment of error, however, is whether the court erred by taking judicial notice of the Neal-Ironton deed. Appellant contends judicial notice of the Neal-Ironton deed constituted judicial notice of an "adjudicated fact." Appellant also contends the court erred by taking judicial notice after "all proceedings had stopped." Appellant further contends the Neal-Ironton deed is not part of the record.

We find the Neal-Ironton deed to be a proper subject of judicial notice.

Evid.R. 201(B) permits courts to take judicial notice of facts which are not subject to reasonable dispute and which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Appellant cites no authority which would prevent the court from taking judicial notice after a hearing or trial. Quite to the contrary, Evid.R. 201(F) permits courts to take judicial notice "at any stage of the proceeding." With regard to appellant's contention that the Neal-Ironton deed is not part of the record, we note appellant cites no authority which would require a court taking judicial notice of a deed to make that deed part of the court record.

Wiseman v. Cambria Prods. Co., 61 Ohio App. 3d 294, 300, 572 N.E.2d 759, 762, (Ohio Ct. App., Lawrence County 1989).

The same reasoning would apply under South Carolina's parallel rule of evidence, Rule 201, SCRE, "Judicial Notice of Adjudicative Facts." Other courts have reached the same result as Wiseman. See, Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 265, 129 Cal. Rptr. 3d 467, 476 (Cal. App. 1st Dist. 2011) ("[C]ourts have taken judicial notice of the existence and recordation of real property records, including deeds of trust, when the authenticity of the documents is not challenged... Taken together, the decisions discussed above establish that a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in the document, ..."); Pratt v. Kelly, 585 F.2d 692, 696 (4th Cir. 1978)(court may take judicial notice of deed).

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The deeds recorded in the RMC Office for Charleston County show that between the time it acquired Phases I and II on June 16, 2000, and its execution of the Easement Agreement on November 8, 2001, Southern Lifestyles, VIII, LLC sold and conveyed title to over 50 of the 74 lots in Phases I and II. This number is consistent with the mortgage granted by Southern Lifestyles VIII, LLC, to the Walpoles on July 5, 2001, that was secured by only 23 of the 74 original lots. (Plaintiff's Exhibit 15). Three of these deeds to third-parties who purchased before the Easement Agreement were admitted into evidence. (Plaintiff's Exhs. 11, 12, and 16). One of those persons who purchased a lot before the purported easement was executed was Steve Brostoff, current president of the Association, who testified at trial. (Plaintiff's Exhibit 16).

Attorney Elizabeth W. Settle, whom the court qualified as an expert in real estate development matters, testified the Easement Agreement would not appear in the chain of title for the lots purchased by persons before the purported easement was recorded. (Trial Tr. 02/26-27/13, pp. 51-52). She also rendered her opinion that Southern Lifestyles, VIII, LLC, did not have the authority to grant the easement based on the terms and conditions of the Declaration that encumbered the common areas as well as the other real property comprising Phases I and II of the Anchorage. (Trial Tr. 02/26-27-13, pp. 66-67 ??)

Robinson, who represented Southern Lifestyles, VIII, LLC, whose testimony was offered as a fact witness rather than an expert witness, testified he believed Southern Lifestyles, VIII, LLC had the authority to execute the easement in its capacity as owner, as opposed to its capacity as Declarant. But, as noted, his state of mind was not

Amat/15

offered as an expert opinion. The Walpoles did not present expert testimony to rebut Settle's opinion.

Robinson admitted that the typical real estate practice would have been for the Walpoles to reserve an easement in favor of the owners of Phase III in their deed of Phases I and II if they wanted to preserve a right of access or use to the land conveyed. The Walpoles did not reserve any rights to the common areas in Phases I and II in the deed of conveyance to Southern Lifestyles, VIII, LLC. (Plaintiff's Exhibit 7). Robinson acknowledged there was no express provision in the Restated Declaration authorizing the Declarant to grant an easement of this nature to a third person for use of the common areas.

On January 13, 2003, Southern Lifestyles, VIII, LLC, deeded Anchor Watch Drive and the other roads within Phases I and II of the Anchorage to the Association as common properties. (Plaintiff's Exhibit 20). On July 29, 2003 Southern Lifestyles, VIII, LLC, deeded the community boat landing dock and land for the amenity center to the Association. (Plaintiff's Exhibit 22).

In 2004 attorney Thomas L. Harper, Jr., representing the Association, wrote attorney Gerald M. Finkel, attorney for the Walpoles, concerning the Easement Agreement. Harper asserted that the easement was not authorized under the Declaration and legally invalid. Finkel asserted that the easement was valid. (See Defendants' Exhibits 1-4).

In January 2005 the Walpoles obtained approval from Charleston County to subdivide the 780 acres into six large lots. (Plaintiff's Exhibit 33 and 34). Harper sent a letter dated March 7, 2005, to the Charleston County Planning Director opposing the

R. M. O. J. 16

subdivision to the extent the Walpoles relied on the Easement Agreement for the right to use Anchor Watch Drive and any other streets within the Association. (Defendants' Exhibit 15).

On February 10, 2005, the Walpoles recorded the subdivision plat for their 780 interior acres dividing them into six large lots. Plaintiff's Exhibit 34. Although the Walpoles contend that their access to lots numbered 5 and 6 is through the cul de sac at the far end of Anchor Watch Drive, the plat indicates that the access to these two lots is through a private 50' ingress and egress across the Walpoles' property called Salt Bottom Way. Plaintiff's Exhibit 34, Sheet 9 of 9.

Further, no issue has been joined as to whether the Walpoles have an easement of necessity across Anchor Watch Drive to either of these two lots or Lot 1 on the 2005 plat (on the south side of Anchor Watch Drive). The Walpoles have not pleaded an affirmative cause of action for a determination of an easement of necessity and did not allege an easement of necessity as an affirmative defense. Answer of Walpoles filed April 27, 2010. Rule 8(c) of the South Carolina Rules of Civil Procedure requires a defendant to affirmatively set forth in addition to the listed defenses "any other matter constituting an avoidance or affirmative defense." Generally, the failure to plead an affirmative defense constitutes a waiver of that defense. Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 615, 703 S.E.2d 221, 224 (2010).

The Walpoles have not sold any of the six lots that now constitute the residual interior acreage. There was no proof of any third person relying on the purported easement, as amended.

PANDY 1/17

The Walpoles did not offer any proof as to the method or rationale, if any, for setting the initial fee for each future lot at \$50, increasing annually to no more than \$100. Billy Walpole, the Guardian ad Litem for Defendant John Walpole, testified that he had no knowledge of the basis for setting the fee at this figure. Unlike the provision in the Restated Declaration granting the McKee access, the terms of the purported easement do not grant to the Association the right to collect the fee in the same manner as an assessment due the Association from one of its members.

The current annual assessment for each of the 74 lots and Phases I and II of the Anchorage is \$1,400. (Trial Tr. 06/21/13, pp. 8, 11-12). Approximately \$343 of this assessment is budgeted to road repair and maintenance. (Trial Tr. 06/21/13, p.8).

The Association spent over \$400,000 building the outdoor picnic area and men's and women's bathrooms located at the community boat landing and dock, which the members describes as their amenity center, (Trial Tr. 02/26-27/13, pp. 139-140). There are a dozen parking spaces for cars with trailers to launch and retrieve boats. (Trial Tr. 02/26-27/13, pp. 119-120).

Brostoff testified to the Association's extensive concerns about the purported easement if the 107 lots are subdivided on the residual property owned by the Walpoles as allowed under Charleston County zoning. These concerns included the following: that the fee to be paid is far below a fair proportionate share to repair and maintain the roads, boat landing, and community dock (Trial Tr. 02/26-27/13, pp. 116-119); that there is insufficient parking for the anticipated cars and boat trailers from the owners of the 107 lots (Trial Tr. 02/26-27/13, pp. 119-120); that there is insufficient fresh water capacity at the community boat landing if the number of boats were considerably

Rmoo/18

increased (Trial Tr. 02/26-27/13, pp. 119-121); that the Association has no means to enforce collection or to deny access to a property owner who did not pay the fee (Trial Tr. 02/26-27/13, p. 145); privacy and security concerns if the Association has to provide an access code to the entrance security gate to all the lot owners in the residual property (Trial Tr. 02/26-27/13, p. 124); the high costs of maintaining the automatic access gate which would have to be funded entirely by the members of the Association, not by the outside property owners (Trial Tr. 02/26-27/13, pp. 113, 141); that the outside owners, not being members of the Association, would not be bound by the rules and regulations of the Association governing the use of an access to the community boat landing and dock (Trial Tr. 02/26-27/13, pp. 123-125); and that the large trucks associated with the construction of houses on the interior lots would cause significant wear and tear on Anchor Watch Drive accelerating its deterioration and need for repair. (Trial Tr. 02/26-27/13, p. 123).

The Board of Directors of the Association authorized the bringing of the within action against the Walpoles. The Board has provided reports on the status of this litigation to the members at their annual meeting. (Trial Tr. 02/26-27/13, pp. 125, 153-156, 157-161). 75% of the members did not formally approve the litigation by vote or referendum.

CONCLUSIONS OF LAW

The Complaint alleges separate causes of action seeking declaratory and injunctive relief. The Association does not seek damages. The primary relief sought is the invalidation of the easement, as amended.

Rm02/19

"The character of an action as legal or equitable depends on the relief sought." Cedar Cove Homeowners Association, Inc. v. Dipietro, 268 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006). "[A]n action sounding in law may be transformed to one in equity because equitable relief is sought." Insurance Financials Services, Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978). "Normally an action to quiet title to property is an action in equity. Clark v. Hargrave, 323 S.C. 84, 86, 473 S.E.2d 474, 476 (Ct. App. 1996).

The threshold question is whether or not Southern Lifestyles, VIII, LLC, had the legal authority to grant the easement to the Walpoles. At the time Southern Lifestyles, VIII, LLC, and the Walpoles executed the Easement Agreement and Amended Easement Agreement, the Restated Declaration encumbered the common areas. According to the Restated Declaration's terms, all land acquired by Southern Lifestyles, VIII, LLC, including the common areas, was subject to the terms and conditions of the Restated Declaration, as were any conveyances by Southern Lifestyles, VIII, LLC.

The easement, as amended, is a purported conveyance of an interest in real property. Even though Southern Lifestyles, VIII, LLC, had yet to convey legal title to the common areas in question to the Association at the time it purported to grant the easement and amended easement to the Walpoles, their fee title interest was subject to the terms and conditions of the Restated Declaration. It is not a question of which entity held legal title to the common areas in question at the time the easement and amended easement were executed. Rather, the controlling consideration is whether the property, including the common areas, was encumbered by the Restated Declaration, which they were.

Amended

Restrictive covenants such as those in the Restated Declaration are contractual in nature and bind the parties thereto in the same manner as would any other contract. Queens Grant, II Horizontal Property Regime vs. Greenwood Development Corporation, 368 S.C. 242, 361, 628 S.E.2d 902, 913 (Ct. App. 206). Hence, Southern Lifestyles, VIII, LLC, was bound by the terms and conditions of the Restated Declaration just as the persons taking title to lots within the Association were. Restrictive covenants, including those created by Restated Declaration, "will be enforced unless they are indefinite or contravene public policy." Ibid. A developer may generally reserve in the restrictive covenants the right to take certain actions; if those actions are taken, they must be exercised in a reasonable manner in strict compliance with the procedures set forth in the declaration of covenants. Id. (In context of specific right reserved in Declaration to developer to amend the Declaration of Covenants).

Here, the pertinent provisions of the Restated Declaration are clear and unambiguous. The Restated Declaration does not empower the Declarant to grant an easement to an outside property owner to use the common areas except as specifically stated in the Restated Declaration. Section 6 of the Restated Declaration (Plaintiff's Exhibit 10) specifically enumerates the various "PROPERTY RIGHTS" in Phases 1 and 2. As found above, none of the property rights reserved to the Declarant in the Restated Declaration includes the right to grant a perpetual easement to a third person to use the common areas. Robinson acknowledged this omission.

"The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d

2-11-08/21

578 (S.C. 2000). The failure of the Declaration to instill such a right in the Declarant legally implies that it was excluded.

If under the terms of the Restated Declaration, Southern Lifestyles, VIII, LLC, did not have the authority to grant the easement, then the easement is of no legal effect. "No person can convey an interest which the grantor does not have in the land described in the deed, even though the terms of the deed may purport to do so." Cummings v. Varn, 413 S.E.2d 829, 832 (1992).

If a declarant could validate actions and transactions that are contrary to the terms of a declaration by contending such actions and transactions were in its capacity as owner rather than declarant, a developer could entirely defeat the purpose of the declaration simply by asserting that a prohibited action was done in its capacity as owner. Such alleged authority in the capacity of the owner rather than as declarant would entitle the owner/declarant to circumvent the restrictions in the declaration that are matters of record and relied upon by the members of an association in purchasing their properties. Here, Southern Lifestyles, VIII, LLC, sold as many as 50 lots before entering and recording the Easement Agreement. Neither the Restated Declaration in this case nor the law makes this distinction. The commitments of Southern Lifestyles, VIII, LLC, as Declarant in the Declaration would become meaningless if this were the case. Moreover, Southern Lifestyles, VIII, LLC specifically stated in the recitals that it purchased Phases I and II and was proceeding with the Declaration "as the owner of the Walpole property, which is more fully described in Exhibit "A". (Plaintiff's Exhibit 10, p. 1).

RMOJ/22

In Raman Chandler Properties, L.C. vs. Caldwell's Creek Homeowners Association, Inc., 178 S.W.3d 384 (Ct. Tex. 2005), a homeowners' association brought suit against a developer seeking a determination that a declaration of restrictive covenants did not authorize the declarant-developer to grant an access easement over the plaintiff association's common areas in favor of the property owners in a new adjoining development. Just as in this case, the defendant in Raman Chandler Properties, L.C. asserted that the developer had the right to grant the easement because it still held legal title to the common areas when it granted the easement. The court rejected this argument:

Under these facts, the actual legal ownership of the common areas is irrelevant. The primary issue is whether the Developer, in 1999, retained the right to unilaterally amend the plat or create and burden the common area for the benefit of a different association by granting it an easement. The answer is "No." Restrictive covenants that run with the land such as these generally burden and govern all lots with in the subdivision to which they were intended to apply. . . Thus, **only if the Developer followed the specific procedure for amending the restrictions or the plat as set forth in the Covenants could it have had the right to create such an easement for the benefit of some entity or owner other than the Association and its lot owners.** . . Additionally, regardless of ownership, the lots comprising the common areas were and are subject to the Restrictive Covenants created by the original dedication and restrictions as well as any amendments to them. Once an Association shows that a plan or scheme exists for the benefit of all lot owners, it has shown a right to enforcement of such covenants and restrictions.

178 S.W.3d 393-394 (emphasis added).

As previously found, the Restated Declaration's definition of common areas includes those parcels within the development intended for the common use of the

RM08/23

owners even though legal title will be conveyed to the Association sometime in the future. (Plaintiff's Exhibit 10, Section 1.1.(g), p. 2).

I find and conclude that the Restated Declaration did not reserve to the Declarant the right to grant the easement in question. The easement is outside the authority reserved to the Declarant in the Declaration. Further, the members of the Association purchasing lots before the easement was granted had no notice that the Declarant might grant such an easement since the Restated Declaration did not vest the Declarant with such authority. The purchasers of the 50 or so lots would not have had record notice of the Easement Agreement since it was executed after title was conveyed for their lots. As such, the Easement Agreement falls outside the chain of title for the subsequent purchasers of those lots who would not have record notice of the purported easement.

Further, as shown by the testimony about the expenses associated with the repair and maintenance of the common areas in question, the amount of the fee is grossly out of proportion to the actual expenses. The Walpoles offered no proof explaining how the \$50 annual fee (subject to an annual adjustment and \$100 cap) was determined or that this amount was fair and reasonable. McKee, who only uses one short section of Anchor Watch Drive and has no access to any of the Association's other common areas, pays \$125 per year. The Walpoles have suggested to the Court that it could adjust the fee. Not only has no claim been asserted to reform the instrument but the threshold question is whether the easement is valid and enforceable in the first instance regardless of the reasonableness of the fee to be paid by the owners of the future lots.

RMD/24

The Walpoles rely, in part, on Section 2.3 of the Restated Declaration. This section governs conveyance of the common areas and does not authorize the Declarant to grant the easement at issue. This section specifies that conveyances of the common areas by the Declarant to the Association are subject to, among other things, the restrictive covenants of record at the time of conveyance and the "right of access of the Declarant, its successors and assigns over and across such property. . . ."

A right of access is not an easement. A right of access is in the nature of a license by which an owner allows another to come onto land for a specific purpose, unlike an easement which is a grant of an interest in real property that burdens the servient estate for the benefit of the dominant estate. 25 Am. Jur. 2d, Easements and Licenses Section 2. Additionally, the Restated Declaration specifically distinguishes between rights and easement by recognizing they are different. Section 6.2.2 refers to the "rights and easements specifically reserved to Declarant in this Declaration." (Plaintiff's Exhibit 10, p. 17). The Declarant's easement over the roadways that are common areas are specifically for the purpose of constructing and maintaining, repairing and replacing improvements to the property, as set forth in Section 6.5. (Plaintiff's Exhibit 10, p. 20).

For the same reasons, the Purchaser's right of access in the First and Second Purchase Agreements that were unrecorded and have terminated is also not an easement. Moreover, the survival provision of these two agreements provides that only the rights of the Purchaser survive termination or closing. They did not provide for the survival of any rights of the Seller.

Once Southern Lifestyles, VIII, LLC, sold the lots and transferred the common areas to the Association, it no longer had an interest in the Phases 1 and 2. A grantor who no longer has an interest in the real property subject to a restriction in its favor lacks standing to enforce the restriction. McLeod v. Baptiste, 315 S.C. 246, 247, 433 S.E.2d 834, 835 (1993); AJG Holdings, LLC v. Dunn, 410 S.C. 346, 347, 764 S.E.2d 912, 912 (S.C. 2014). Similarly, once it relinquished all interest in Phases 1 and 2, any alleged easement granted to Southern Lifestyles VIII, LLC, to the common areas could no longer be enforced. To the extent that Southern Lifestyles, LLC, conveyed its interests in the easements in its favor under the Restated Declaration, those easements expired years ago, in 2003, when it no longer had an interest in the real property comprising Phases 1 and 2 and control of the Association was turned over to the members.

The Restated Declaration sets forth the limited easements granted to the Declarant. To the extent Southern Lifestyles VIII, LLC, as Declarant held these easements, its attempted transfer of its non-exclusive easement rights to a third party whose use would increase the burden on the servient estate is also invalid under the law governing easements. In Rhett v. Gray, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2012), our Court of Appeals invalidated a purported transfer of an access easement by the owner of the dominant estate. The Court of Appeals recited numerous legal principles governing easements that are applicable to this case:

“[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden.” . . . “As a general rule, an easement appurtenant to one parcel of land may not be extended by the owner of the dominate estate to other parcels owned by him, whether adjoining or distinct tracts, to

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which the easement is not appurtenant." . . . "If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement." . . . Enlarging an easement to include adjoining tracts increases the burden... A fundamental principle is that an easement for the benefit of a particular piece of land cannot be enlarged and extended to other parcels of land, whether adjoining or distinct tracts, to which the right is not attached. In other words, an easement appurtenant to a dominant tenement can be used only for the purposes of that tenement; it is not a personal right, and cannot be used, even by the dominant owner, for any purpose unconnected with the enjoyment of his estate. **The purpose of this rule is to prevent an increase of the burden upon the servient estate, and it applies whether the easement is created by grant, reservation, prescription, or implication.**

736 S.E.2d 881-883 (Internal citations omitted)(emphasis added).

Further, any right of access or alleged easement of Southern Lifestyles, VIII, LLC, was appurtenant to Phases 1 and 2. It was not a right of Southern Lifestyles, VIII, LLC, that it could transfer to anyone. Under the fundamental legal principles governing easements, Southern Lifestyles, VIII, LLC, could not extend its purported easement to include the more than 700 interior acres owned by the Walpoles that have never been incorporated into the Association. Any easement held by Southern Lifestyles, VIII, LLC, was appurtenant to Phases 1 and 2, and was not appurtenant to the Walpoles's interior acreage. For this additional reason, the purported easement granted to the Walpoles is invalid and unenforceable.

As previously found and concluded, Southern Lifestyles VIII, LLC, did not have an easement for the general use of the common areas for an indefinite time. Its easements were limited to specific purposes incident to the development of Phases 1 and 2 for the period of that development. But, if its rights to the use of the common

2-10-07/27

areas were unrestricted and tantamount to an easement, which they were not, its purported non-exclusive grant of its easement to the Walpoles is unenforceable and invalid under the principles stated by the court in Rhett.

The Court also finds and concludes that the purported easement granted by Southern Lifestyles VIII, LLC, to the Walpoles would materially and unfairly increase the burden on the servient estate. The easement purports to grant the right to use the Association's roads, boat landing, and community dock to as many as 107 lot owners and their guests, more than doubling the burden on these common areas of the Association. As the testimony indicated, these owners would be paying only a fraction of the cost of repairing and maintaining those common areas.

In South Carolina developers have a fiduciary duty to turn over common areas in good repair or provide the association with sufficient funds to make needed repairs to bring them to good condition. Concerned Dunes West Residents v Georgia-Pacific, 349 S.C. 251, 562 S.E.2d 633 (2002). While the case at hand involves common areas that the developer turned over with legal burdens rather than physical burdens, the same principles appear to apply.

"After the developer has relinquished control of the association to the members, the association has the power to terminate without penalty . . . any contract or lease that is not bona fide, or was unconscionable to the members other than the developer at the time it was entered into, under the circumstances then prevailing." Restatement (Third) of Property (Servitudes) § 6.19 (2000). "The developer's duty to turn over control can be thwarted if the developer obligates the association to long-term arrangements that effectively deprive the owners of control of the common property." Id. at Comment d. I

RWD/28

find and conclude that the Easement Agreement, as amended, if enforced would be unconscionable to the 74 members of the Association based on the Court's previous findings concerning the burdens the Easement Agreement, as amended, places on the members of the Association and the common areas. Southern Lifestyles, VIII, LLC granted the purported easement under duress to keep alive their opportunity to acquire Phase III.

The dedications of the roads in Phases 1 and 2 to the Association at the time of recording of the plats also restricted the right of the owner to control their use thereafter. As held in Timberlake Plantation Co. v. County of Lexington, 314 S.C. 556, 560, 431 S.E.2d 573, 575 (S.C. 1993), "[t]here is no essential difference between a dedication and a grant. Grady v. City of Greenville, 129 S.C. 89, 95, 123 S.E. 494, 497 (1924). It is clear then, that while a landowner may dedicate land for a specific, limited, and defined purpose, he cannot retain discretion to alter or control future use of the property once it has been accepted by the public." 431 S.E.2d 575. Once the roads, including Anchor Watch Drive, were dedicated to the Association, the owner of them -- first the Walpoles and then Southern Lifestyles VIII, LLC -- no longer retained discretion to alter or control future use of the roads except pursuant to the terms of the Original Declaration and later Restated Declaration. The fact that Southern Lifestyles had no yet conveyed legal title to the roads to the Association at the time it purported to grant the easement to the Walpoles is of no significance since the roads had previously been dedicated to the Association.

Rm007/29

The Walpoles assert a number of defenses. The two main defenses are that the Association lacks standing or authority to bring the suit and that the Association's claims are barred by the statute of limitations.

The Walpoles base their lack of standing defense on the following provision in the Restated Declaration that refers to the necessity of a vote of the membership before certain litigation may be initiated:

14.4 Litigation. No judicial or administrative proceeding, including any mandatory procedure under Section 14.3 above, with an amount in controversy exceeding \$25,000.00, will be commenced or prosecuted by the Association unless approved by 75% or more of the of the votes of the entire Association, by Referendum or at a duly held meeting of Members called for the purpose of approving the proceeding, which percentage will also constitute the quorum required for any such meeting. This Section will not apply, however, to (a) actions brought by the Association to enforce the provisions of this Declaration (including, without limitations, the foreclosure of liens); (b) the imposition and collection of Assessments; (c) proceedings involving challenges to ad valorem taxation; (d) counterclaims brought by the Association in proceedings instituted against it; or (e) actions brought by the Association to enforce written contracts with its suppliers and service providers.

Plaintiff's Exhibit 10, Restated Declaration, pp. 38-39.

The Association established, and I find, that the board approved this litigation and that the members have been kept abreast of it. The Association did not establish that 75% of the members approved the suit by referendum or vote at a duly authorized meeting. However, that omission does not mean the Association has no standing or authority to bring this action.

As stated in the terms of Section 14.4, its 75% vote requirement does not apply to litigation where the amount in controversy does not exceed \$25,000. Here, the Association is not seeking damages of any amount. The relief sought is declaratory and injunctive. Hence, the conditions of Section 14.4 do not apply.

AMDT 30

Even if Section 14.4 were considered applicable, its terms exclude "(a) actions brought by the Association to enforce the provisions of this Declaration...." In this action the Association seeks to enforce the provisions of the Restated Declaration that, among other things, did not authorize the Declarant to grant the easement in question to the Walpoles and that reserves the common areas to "common use and enjoyment of the Declarant, Owners, and their respective guests, and invitees, as well as third parties with easements in and to such Common Areas, as herein provided." Plaintiff's Exhibit 10, Restated Declaration, p. 2. No vote of the members was required.

Section 11.2.2 (g) of the Restated Declaration specifically authorizes the Association: "To take any and all actions necessary to enforce these and all covenants and restrictions affecting the Property and to perform any of the functions or services delegated to the Association in any covenants or restrictions applicable to the Property..." Plaintiff's Exhibit 10, Restated Declaration, p. 29.

I find and conclude the Association has standing and authority to bring this action.

The Court also notes that the Walpoles are third parties for purposes of the Restated Declaration and, as such, lack standing under both the controlling statutes and case law to assert that the initiation of the suit is *ultra vires* under the provisions of the Restated Declaration.

S.C. Code Section 33-31-304 provides, in pertinent part, as follows:

(a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not

R-mo/31

acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.

S.C. Code Ann. § 33-31-304

The Walpoles do not come within the limited category of persons described in section 33-31-304(b) who may challenge the authority of the Association to bring this action.

This statute is in keeping with legal precedent that an outsider has no standing to challenge whether an adverse party was authorized to bring an action under its governance documents. DeBorde v. St. Michael & All Angels Episcopal Church, 272 S.C. 490, 501, 252 S.E.2d 876, 881 (1979) ("Petitioners contend that this grant is not broad enough to permit respondent's operation of a cemetery for the benefit of its parishioners. The simple answers to this contention are twofold: (1) this issue was not raised by the complaint; and, (2) **even had it been, petitioners, not being members of the Parish, have no standing to raise it.**" (emphasis added)). The Walpoles, not being members of the Association, have no standing to assert that the maintenance of this proceeding is not authorized under the provisions of the Restated Declaration. Indeed, the Restated Declaration expressly denies them standing. As previously found and discussed, section 16.12 of the Restated Declaration excludes the Walpoles from enforcing any provisions of the Restated Declaration: "...**no adjoining property owner or third party will have any right, title or interest whatsoever** in the Development, except as provided herein, or in the operation or continuation thereof **or in the enforcement of any of the provisions hereof, ...**" Plaintiff's Exhibit 10, Section 16.12, p. 46.

Turning to the statute of limitations, the Walpoles assert that this action is time barred because as early as March 18, 2004, a lawyer for the Association was on notice

of the easement and asserted it was ineffective for being in violation of the provisions of the Restated Declaration. (Defendant's Exhibit 3, Letter of Harper dated March 18, 2004). The Walpoles assert the Association should have brought this lawsuit within the three year statute of limitations set forth in section 15-3-530 of the South Carolina Code, applicable to "Actions *Other Than* for the Recovery of Real Property." (emphasis added). By its terms, this particular statute of limitations does not apply.

This action falls under the provisions of S. C. Code §15-67-10 entitled "Recovery of Real Property" that provides as follows:

Any person in possession of real property, by himself or his tenant, or any person having or claiming title to vacant or unoccupied real property may bring an action against any person who claims or who may or could claim an estate or interest therein or a lien thereon adverse to him for the purpose of determining such adverse claim and the rights of the parties, respectively."

S.C. Code §15-67-10.

The statute of limitations for the "recovery of real property" is ten years. Section 15-3-340 of the South Carolina Code, applicable to "Actions for Recovery of Real Property," requires simply that a party seeking to bring an action for the recovery of real property bring suit within 10 years of his possession of such property: "No action for the recovery of real property . . . may be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question *within ten years before the commencement of the action.*" (emphasis added). This action is timely since the Association is still in possession of, and holds title, to the Association's common areas.

The Court further notes that because this is an action in equity the statute of limitations does not apply. Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855

(2005); Mazloom v. Mazloom, 382 S.C. 307, 675 S.E.2d 746 (S.C. Ct. App. 2009). Instead, any question as to the timeliness of the bringing of the action must be assessed under the doctrine of laches.

As explained by our Supreme Court, "[l]aches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of [the] facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches." Robinson v. Estate of Harris, 391 S.C. 114, 118, 705 S.E.2d 41, 43, (2011). In Robinson our Supreme Court found laches where the plaintiff had waited more than sixty years to challenge a conveyance in 1946, the property had been transferred through probate, and other irreversible actions had occurred.

Here the Walpoles did not establish that failure to bring the suit before January 20, 2010, caused injury, prejudice, or disadvantage to them. The Walpoles have been on notice since 2004 that the Association asserted the purported easement was ineffective. There was no proof the Walpoles had conveyed lots to third persons nor that any third person has relied on the purported easement. I find and conclude the Walpoles did not establish the basis for the defense of laches by the preponderance of the evidence.

Moving to the other defenses, the Walpoles assert that the Association's acceptance of the conveyance of the deeds to the common areas from Southern Lifestyles VIII, LLC, subject to matters of record somehow bars their claims. The

Walpoles overlook that under the terms of the Restated Declaration the Association was required to accept the deeds to the common areas: "In consideration of the benefits accruing to the Association and to the Members under this Declaration and in consideration of the covenants and agreements of the Declarant hereunder, the Association hereby agrees to accept title to any property, or to any interest in property, now or hereafter conveyed to it pursuant to the terms and conditions of this Declaration." Plaintiff's Exhibit 10, Restated Declaration, Section 2.3, pp. 6-7. The Association's failure to object to the deed to the common areas does not constitute consent or ratification of any act of Southern Lifestyles VIII, LLC, as Declarant.

I have considered the remaining affirmative defenses alleged in the Walpoles' Answer and, without separately enumerating them, find and conclude that they are either not legal defenses to the claims asserted by the Association or that the Walpoles did not establish such defenses by the preponderance of the evidence.

"The remedy of injunction rests in the sound discretion of the trial court" and "depends upon the equities between the parties." Gibbs v. Kimbrell, 311 S.C. 261, 270, 428 S.E.2d 725, 730-31 (Ct. App. 1993). The Court finds and concludes that the remedy of injunction through a recorded cancellation of the Easement Agreement and Amended Easement Agreement further the interests of equity and is necessary to correct the matters of record and protect the Association and its members who are purchasers of the lots in Phases I and II.

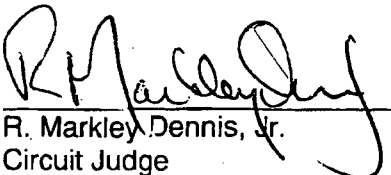
Based on the foregoing, the Court declares that the Easement Agreement recorded at Book K387, Page 751 (Plaintiff's Exhibit 17) and the Amended Easement Agreement recorded at Book K409, Page 481 (Plaintiff's Exhibit 18) are void *ab initio*

and of no legal effect. The Court further enters a permanent injunction invalidating the purported easements and ordering that this invalidation and cancellation be made a matter of public record in the RMC Office for Charleston County.

IT IS THEREFORE ORDERED AND DECREED that a declaratory judgment be entered for the Plaintiff adjudicating that the Easement Agreement recorded at Book K387, Page 751 (Plaintiff's Exhibit 17) and the Amended Easement Agreement recorded at Book K409, Page 481 (Plaintiff's Exhibit 18) are invalid, void *ab initio*, and of no legal effect.

IT IS FURTHER ORDERED that the register of deeds is ordered to record and index in the RMC office for Charleston County the Cancellation of Easement Agreement and Amended Easement Agreement appended to this Order and Judgment.

AND IT IS SO ORDERED.


R. Markley Dennis, Jr.
Circuit Judge

October 29, 2015
Charleston, South Carolina

RMD 36

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

 COURT ORDERED
 CANCELLATION OF EASEMENT
 AGREEMENT

WHEREAS, Southern Lifestyles, VIII, LLC as Grantor, entered into an Easement Agreement with John B. Walpole and Theodora W. Walpole as Grantees that is recorded in the RMC office for Charleston County at Book K 387, p. 751; and

WHEREAS, these same parties entered an Amended Easement Agreement recorded in the RMC office for Charleston County at Book K 409, p. 481; and

WHEREAS, in the Easement Agreement, as amended, the Grantor purported to grant certain rights to the Grantees over the Burdened Property described in Exhibit "A" to the Easement Agreement and Amended Easement Agreement; and,

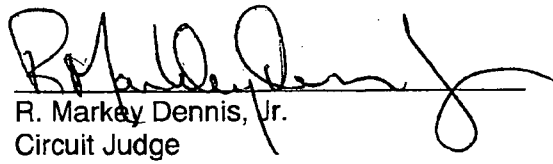
WHEREAS, the Anchorage Plantation Homeowners Association brought an action in the Court of Common Pleas for Charleston County, Civil Action No. 2010-CP-10-482 seeking, among other things, a determination that the Easement Agreement and Amended Easement Agreement are invalid; and

WHEREAS, the Circuit Court entered an order and judgment dated October 21th, 2015, copy attached hereto, declaring that the Easement Agreement and Amended Easement Agreement are invalid *ab initio* and of no effect and that this invalidation be made a matter of public record in the RMC office for Charleston County.

NOW, THEREFORE, in accordance with the Order and judgment entered by this Court on October 29th, 2015, the Easement Agreement between Southern Lifestyles VIII, LLC, as Grantor, and John B. Walpole and Theodora W. Walpole as Grantees, recorded at Book K 387, p. 781 in the RMC office for Charleston County and the Amended Agreement between these same parties recorded at Book K 409, p. 481, in

RMA/37

the RMC office for Charleston County are both declared and adjudged to be void *ab initio*, cancelled, and of no further force and effect.



R. Markey Dennis, Jr.
Circuit Judge

10/29/2015

IN THE COURT OF COMMON PLEAS
Case No. 2010-CP-10-0482

Plaintiff,

Defendants.

ORDER

FILED
2016 FEB - 8 AM 10: 01
JULIE J. ARMSTRONG
CLERK OF COURT

AND IT IS SO ORDERED!


R. MARKLEY DENNIS, JR.
Presiding Judge

February 4, 2016

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
ANCHORAGE PLANTATION)
HOMEOWNERS ASSOCIATION,)
Plaintiff,)
vs.)
JOHN B. WALPOLE and THEODORA)
W. WALPOLE,)
Defendants.)

10-CP-10-482
IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2020-00000

FILED
2020 JAN 20 PM 1:44
JULIE J. ARMSTRONG
CLERK OF COURT

COMPLAINT
(Declaratory Judgment)
(Injunction)

Plaintiff Anchorage Plantation Homeowners Association, complaining of the above-named Defendants, alleges and states as follows:

1. Plaintiff Anchorage Plantation Homeowners Association ("Plaintiff" or "Association") is a non-profit corporation organized and existing under the laws of South Carolina with its principal place of business located in Charleston County, South Carolina.
2. Upon information and belief, Defendants John B. Walpole and Theodora W. Walpole ("Defendants" or the "Walpoles") are citizens and residents of Charleston County, South Carolina.
3. Pursuant to a Declaration of Covenants, Conditions and Restrictions adopted by the Walpoles, and later amended and restated by Southern Lifestyles VIII, LLC ("Southern Lifestyles VIII"), recorded in the RMC Office for Charleston County on July 1, 2000, in Book R351 at Page 391 (hereinafter the "Declaration"), Plaintiff owns and maintains Anchor Watch Drive and other common areas (including but not limited to other roads, a landing dock, and a boat ramp) within Anchorage Plantation Community. The Declaration is attached hereto as Exhibit 1.

4. The members of Plaintiff are residential property owners within Anchorage Plantation Community whose properties are subject to the Declaration and who pay assessments to the Association.

5. Upon information and belief, the Walpoles own and intend to develop approximately 1,000 acres of real property (the "Walpole Property") adjacent to or near the Anchorage Plantation Community.

6. The Walpole Property has never been submitted to, and is not encumbered by, the Declaration.

7. Upon information and belief, the Walpoles intend to subdivide the Walpole Property in a manner that will allow the conveyance of up to 107 residential lots on the Walpole Property to individual owners; to install curb cuts on Anchor Watch Drive to serve the new residential development; and to permit the owners of the residential lots created on the Walpole Property to access and use Anchor Watch Drive and the other common areas owned and maintained by Plaintiff through the assessment of its members. The Walpoles have already obtained subdivision approval to divide the Walpole Property into six lots.

8. Because it is not subject to the Declaration, the Walpole Property does not enjoy the rights associated therewith, including but not limited to the right to use Anchor Watch Drive and the other common areas therein. For this same reason, the Walpole Property is also not subject to the burdens and obligations of property owners whose properties are subject to the Declaration, including the payment of assessments to maintain and repair Anchor Watch Drive and the other common areas of Anchorage Plantation Community.

9. During the development stage of Anchorage Plantation Community and until the

common areas were conveyed to Plaintiff for ownership and maintenance, the Declaration expressly reserves an easement in favor of the Declarant over Anchor Watch Drive and the other common areas "for the purpose of constructing improvements in and to the Lots and for installing, maintaining, repairing and replacing other improvements to the Property" Ex. 1, p.20, §6.5.

10. The Declaration expressly reserves to Declarant its successors, assigns and successors-in-title to any property *added to the Declaration* "perpetual, nonexclusive rights and easements for . . . pedestrian, vehicular, access, ingress, egress, parking over, across, within, and on all private roads, sidewalks, trails, parking facilities, and lagoons, from time to time located with the Common Areas or within easements serving the Common Areas" Ex. 1, p.20, §6.5.1.

11. The Declaration does not otherwise grant or reserve to Declarant the right to (1) use or access Anchor Watch Drive or other common areas except as a member of Plaintiff; (2) use or access Anchor Watch Drive or other common areas for the benefit of other properties not subject to the Declaration; or (3) install curb cuts on or otherwise use Anchor Watch Drive or other roads of Anchorage Plantation Community.

12. Furthermore, the Declaration does not otherwise grant or reserve to the Walpoles or Declarant the right to grant easement or other rights of use or enjoyment with respect to Anchor Watch Drive and other common areas of Anchorage Plantation Community to third parties, successors, or assigns except as a member of Plaintiff. To the contrary, the Declaration expressly provides that "no adjoining property owners or third party will have any right, title or interest whatsoever in the Development, except as provided herein" Ex. 1, p.46, §16.12.

13. The Declaration expressly requires that any conveyance of common areas from Declarant to the Plaintiff is made subject to the "right of . . . the [Plaintiff], after expiration of the Declarant Control Period, and the ARC [the Architectural Review Committee] to approve all structures, construction, repairs, changes in elevation and topography and the location of any object (including vegetation) within the Common Areas prior to commencement of such activities or location of any object therein" Ex. 1, p.6, §2.3(c). Neither Plaintiff nor the ARC has approved any improvements (including but not limited to the installation of curb cuts) or other changes to Anchor Watch Drive or the other common areas of Anchorage Plantation Community by the Walpoles.

14. After adopting and restating the Declaration as set forth above, by instruments titled (1) "Easement Agreement" dated November 8, 2001 and recorded in the RMC Office for Charleston County in Book K387 at Page 751 and (2) "Amended Easement Agreement" dated June 13, 2002 and recorded in the RMC Office for Charleston County in Book K409 at Page 481 (collectively the "Purported Easements"), Declarant purported to grant to the Walpoles, their heirs and assigns, "an[] easement over the roads and streets constructed by [Declarant within Anchorage Plantation Community] for purposes of ingress and egress to [the Walpole Property]." The Purported Easements are attached hereto as Exhibit 2.

15. In the Purported Easements, Declarant purported to grant to the Walpoles, their heirs and assigns, "the right for [the Walpoles], their heirs and assigns to use the community boat ramp and courtesy dock located [within Anchorage Plantation Community] for the purpose of access to Bohicket Creek."

16. By their terms, the Purported Easement supposedly ran with the land in favor of

future purchasers of residential building lots on the Walpole Property.

17. Defendants did not submit the Walpole Property to—nor encumber the Walpole Property with—the Declaration.

18. Defendants did not subject the Walpoles or the future purchasers of residential building lots on the Walpole Property to the same assessments payable to the Plaintiff to which the members of Plaintiff are subject.

For a First Cause of Action (Declaratory Judgment)

19. Plaintiff incorporates herein all prior allegations of this Complaint.

20. The Plaintiff and the Walpoles disagree over the scope of the rights, if any, granted to the Walpoles, their heirs and assigns, in the Purported Easements. Attached hereto as Exhibit 3 is correspondence between their attorneys disagreeing over the legal effect of the Purported Easements and the authority granted the Declarant under the Declaration.

21. Because the Purported Easements are misleading and inaccurate as to the legal rights, if any, of the Walpoles, their heirs, and assigns to and in the common areas under the Declaration, the status of the rights in dispute needs to be determined, or else irreparable harm will result.

22. At the time of the Purported Easements, the Declaration defined the scope of the rights of Southern Lifestyles VIII, as Declarant, with respect to the common areas. Any purported grant of rights by Southern Lifestyles VIII in and to the common areas of Anchorage Plantation Community were subject to this limitation in scope.

23. The Declaration does not grant Southern Lifestyles VIII, as Declarant, the authority to grant an easement benefitting a property which was never added to Anchorage

Plantation Community.

24. The Declaration limited Southern Lifestyles VIII's easement and right of access to what was necessary to develop the Anchorage Plantation Community that is subject to the Declaration. The Declarant Control Period has expired, the Declarant is no longer developing Anchorage Plantation, and the Declarant has sold or conveyed all its land subject to the Declaration. As a result, the right of access of the Declarant under the Declaration has expired.

25. The Declaration did not grant rights to Southern Lifestyles VIII, as Declarant, that would have empowered it to grant an easement of perpetual duration to a third party who was not a member of the Association for access over and use of the common areas of the Association.

26. The Declaration did not grant rights to Southern Lifestyles VIII, as Declarant, to allow persons who were not members of the Association to make curb cuts or install other encroachments on Anchor Watch Drive or the other common areas.

27. In addition, any purported grant of an easement to the Walpoles is invalid as being unconscionable and against public policy. Under such a grant, Plaintiff and its members would be forced to pay to maintain, repair and replace Anchor Watch Drive and the other common areas of Anchorage Plantation Community, while the Walpoles and their lot purchasers, on the other hand, would not be obligated to pay assessments to the Association or otherwise bear their proportionate share of these expenses.

28. The Purported Easements are further invalid because they would result in unjust enrichment to the Walpoles. Plaintiff and its members would be forced to confer a disproportionate benefit to the Walpoles, and their lot purchasers; the Walpoles and their lot purchases would realize this benefit without paying their proportionate share of the maintenance

and other costs associated with these common areas; and great inequity would result.

29. For these reasons, Plaintiff is entitled to a declaratory adjudication that the Walpoles, their heirs, and assigns do not have rights of access to or use of the common areas of the Association by virtue of the Purported Easements and that any such alleged right is invalid and not legally enforceable.

For a Second Cause of Action (Permanent Injunction)

30. Plaintiff incorporates herein all prior allegations of this Complaint.

31. Upon information and belief, the Walpoles may be in the process of selling the Walpole Property or the subdivided parcels therein to third persons who may be basing their purchase decision in part on the mistaken belief that the Purported Easements grant to them a right of access to and use of all the common areas of the Association.

32. Irreparable harm to Plaintiff may result if such sales occur. Plaintiff has an inadequate remedy at law.

33. Plaintiff is entitled to a permanent injunction enjoining the Walpoles from selling the Walpole Property upon representation that the purchaser will have access to and use of all the common areas of the Association.

34. Plaintiff is entitled to a permanent injunction invalidating the Purported Easements and requiring that this invalidation be made a matter of public record in the RMC Office for Charleston County.

WHEREFORE, Plaintiff prays that the court award it declaratory and injunctive relief described herein, its attorneys' fees, and such other relief as the court deems just and proper.

PRATT-THOMAS WALKER, P.A.

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ATTORNEYS FOR PLAINTIFF ANCHORAGE
PLANTATION HOMEOWNERS ASSOCIATION

January 20, 2010

Charleston, South Carolina

BK R 351PG391

PORTIONS OF THIS AGREEMENT ARE SUBJECT TO ARBITRATION PURSUANT TO THE
SOUTH CAROLINA UNIFORM ARBITRATION ACT, § 15-48-10, S.C. CODE OF LAWS OF
1976, AS AMENDED.

**SECOND AMENDMENT TO AND RESTATEMENT OF
DECLARATION OF COVENANTS, CONDITIONS AND RESTRICTIONS
FOR
THE ANCHORAGE**

SECOND AMENDMENT TO AND RESTATEMENT OF
DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS

FOR

THE ANCHORAGE

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SECOND AMENDMENT TO AND RESTATEMENT OF
DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS

FOR
THE ANCHORAGE

THIS SECOND AMENDMENT TO AND RESTATEMENT OF DECLARATION OF COVENANTS, CONDITIONS, AND RESTRICTIONS FOR THE ANCHORAGE is made this 20 day of July, 2000, by SOUTHERN LIFESTYLES VIII LLC, a North Carolina limited liability company (the "Declarant");

WITNESSETH

WHEREAS, John B. Walpole and Theodora W. Walpole submitted certain property in Charleston County to that certain Declaration of Covenants, Conditions, Easements, Restrictions, Charges and Liens for the Anchorage Plantation Homeowners Association dated May 7, 1997, recorded June 24, 1997 in Book A286 at Page 37 and re-recorded on July 13, 1999 in Book J330 at Page 856 (the "Walpole Declaration") in the RMC Office for Charleston County, South Carolina (the "RMC"); and

WHEREAS, John B. Walpole and Theodora W. Walpole amended the Walpole Declaration and submitted additional property to the Walpole Declaration by First Amendment to Declaration of Covenants, Conditions, Easements, Restrictions, Charges and Liens for the Anchorage Plantation Subdivision dated June 16, 2000 and recorded June 16, 2000 in Book O-349 at Page 671 of the RMC (the "Walpole Amendment"); and

WHEREAS, Declarant purchased all of the property subject to the Walpole Declaration, as amended by the Walpole Amendment, by deed of John B. Walpole and Theodora W. Walpole dated June 16, 2000 and recorded in Book N349 at Page 168 of the RMC (the "Walpole Property"); and

WHEREAS, Declarant, as the owner of the Walpole Property, which is more fully described in Exhibit "A" hereto and incorporated herein by this reference, has designated the Walpole Property as "The Anchorage"; and

WHEREAS, Declarant deems it to be in the best interest of the subdivision known as The Anchorage, as it exists today and as it will evolve in the future, to further amend the Walpole Declaration, as amended by the Walpole Amendment, and to restate the same in one instrument which establishes the covenants, conditions and restrictions which will promote efficiencies and provide a flexible mechanism for the administration and maintenance of the subdivision's facilities and services which are for the common use and benefit of the subdivision property owners.

NOW, THEREFORE, Declarant hereby declares that all of the property described in Exhibit "A" and any additional property as may be added by subsequent amendment hereto, and in accordance with the terms and conditions hereof, is subjected to this Second Amendment to and Restatement of Declaration of Covenants, Conditions and Restrictions for The Anchorage (referred to hereinafter as, the "Declaration"); that the terms and conditions of the Walpole Declaration and the Walpole Amendment are subsumed under this Declaration and shall have no further independent force or effect; and that the property described in Exhibit "A" will be held, transferred, sold, conveyed, leased, occupied, and used subject to the following easements, restrictions, covenants, charges, liens,

and conditions which are for the purpose of protecting the values and desirability of, and which will touch and concern and run with title to the real properties subjected to the Declaration and which will be binding on all parties having any right, title, or interest in the described properties or any portion thereof, and their respective heirs, successors, successors-in-title, and assigns, and will inure to the benefit of each owner thereof.

ARTICLE 1. DEFINITIONS

1.1 Definitions. When used in this Declaration, unless the context will prohibit or otherwise require, the following words will have all the following meanings, and all definitions will be applicable to the singular and plural forms of such terms:

(a) "ARC" will mean and refer to the board or committee established pursuant to this Declaration to approve exterior and structural improvements, additions, and changes within the Development.

(b) "Articles of Incorporation" will mean and refer to the Articles of Incorporation of Anchorage Plantation Homeowners Association, as amended from time to time, filed in the Office of the Secretary of State of the State of South Carolina in accordance with the Nonprofit Corporation Act.

(c) "Assessment" will mean and refer to an Owner's share of the Common Expenses or other charges from time to time assessed against an Owner by the Association in the manner herein provided.

(d) "Association" will mean and refer to Anchorage Plantation Homeowners Association, a South Carolina not-for-profit corporation, its successors and assigns. In exercising any right or easement granted or reserved to it hereunder, such right or easement shall be deemed to extend to its duly authorized directors, officers, agents, employees and contractors.

(e) "Board of Directors" or "Board" will mean and refer to the Board of Directors of the Association, which is the governing body of the Association.

(f) "By-Laws of the Association" or "By-Laws" will mean and refer to those By-Laws of Anchorage Plantation Homeowners Association attached hereto as Exhibit "B", which govern the administration and operation of the Association, and as the same may be amended from time to time.

(g) "Common Areas" will mean and refer to any and all real and personal property now or hereafter deeded or leased to, or which is the subject of a use agreement with, the Association, and wherein the property therein described is specifically denominated to be a part of the Common Areas. The Common Areas may include the Association's, private roads, streets, road and street shoulders, walkways, sidewalks, leisure trails, bike paths, gazebos, gates, fountains, entry walls, street lighting, signage, and such maintenance and drainage areas, easements, lagoons, and ponds located within the Property and which are not maintained by public authority. The designation of any land and/or improvements as a Common Area will not mean or imply that the public at large acquires any easement of use or enjoyment therein. All Common Areas are to be devoted to and intended for the common use and enjoyment of the Declarant, Owners, and their respective guests, and invitees, as well as third parties with easements in and to such Common Areas, as herein provided.

(h) "Common Expenses" will mean and refer to all expenditures lawfully made or incurred by or on behalf of the Association, together with all funds lawfully assessed for the creation or maintenance of reserves, pursuant to the provisions of this Declaration for the maintenance, repair and management of the Common Areas, and for the maintenance, repair and management of other property, whether owned by the Association or not and set forth in this Declaration or incorporated herein by a Supplemental Declaration, for which the Association has

responsibility, such as providing, conducting, or maintaining water pollution and shoreline erosion abatement measures including, without limitation, the installation, maintenance and repair of shore revetments pursuant to Article 11 hereof.

(i) "Declarant" will mean and refer to Southern Lifestyles VIII LLC, or any successor-in-title to the entire interest of such person with respect to the Property at the time of such transfer to said successor-in-title, or any party designated Of Record to succeed to the rights of Declarant hereunder as to the matters set forth in such writing. In exercising any right or easement granted or reserved to it hereunder, such right or easement shall be deemed to extend to its duly authorized directors, officers, agents, employees and contractors.

(j) "Declarant Control Period" means the time period commencing on the date this Declaration is filed Of Record and ending on the earlier of:

(i) December 31, 2015; or

(ii) Three (3) months after the conveyance by the Declarant, in the ordinary course of business to persons other than a successor Declarant, property representing ninety-five percent (95%) of the total number of Lots intended for development on all of the Property as set forth in a Supplemental Declaration executed and filed Of Record by the Declarant on or before December 31, 2015, making specific reference to this Section; or

(iii) Three (3) months following the date the Declarant surrenders its authority to appoint directors of the Association by an express amendment to this Declaration executed and filed Of Record by the Declarant.

(k) "Declaration" will mean and refer to this Declaration of Covenants, Conditions, and Restrictions for The Anchorage, as amended, from time to time, by any Supplemental Declaration filed Of Record.

(l) "Development" will mean and refer to the Property and all improvements located or constructed thereon, and being a part of the overall plan, from time to time existing hereunder, for the real estate development known as "The Anchorage."

(m) "Dwelling" will mean and refer to any improved Lot used as a single-family detached residence.

(n) "Institutional Mortgage" will mean and refer to a Mortgage held by a bank, trust company, insurance company, or other recognized lending institution, or by an institutional or governmental insurer or purchaser of mortgage loans in the secondary market, such as Federal National Mortgage Association or Federal Home Loan Mortgage Corporation.

(o) "Lot" will mean and refer to any unimproved portion of the Property upon which Dwelling will be constructed, as such Lot is shown on the Site Plan. A parcel of land will be deemed unimproved and thus considered to be a Lot, rather than a Dwelling, until the improvements constructed thereon are sufficiently complete to reasonably permit habitation thereof. Upon such completion, such parcel and the improvements thereon will collectively be considered to be a Dwelling for purposes of this Declaration.

(p) "Member" will mean and refer to an Owner with appurtenant membership in the Association as defined in Section 7.1.

(q) "Mortgage" will mean and refer to a mortgage, security deed, deed of trust, installment land sales contract, or other similar security instrument granting, creating, or conveying a lien upon, a security interest in, or a security title to a Lot or Dwelling.

(r) "Mortgagee" will mean and refer to the holder of a Mortgage, its successor and assign.

(s) "Nonprofit Corporation Act" means and refers to the South Carolina Nonprofit Corporation Act of 1994, South Carolina Code Sections 33-31-101, et. seq., as amended.

(t) "Occupant" will mean and refer to any person, including, without limitation, any Owner, occupying or otherwise using a Dwelling within the Development, and their respective families, servants, agents, guests, and invitees.

(u) "Of Record" will mean and refer to the place of filing a writing in the applicable public records, currently being the Charleston County R.M.C. Office, as will give legal notice to the world of the matters set forth in the writing so filed.

(v) "Owner" will mean and refer to one or more persons, including Declarant, who or which owns fee simple title to any Lot or Dwelling, its respective heirs, executors, legal representatives, successors, and assigns, excluding, however, those persons having such an interest under a Mortgage. In the event that there is filed Of Record any installment land sales contract covering any Lot or Dwelling, the Owner thereof will be deemed to be the purchaser under the installment sales contract and not the fee simple title holder. An installment land sales contract will be an instrument whereby the purchaser is required to make payment for such property for a period extending beyond nine (9) months from the date of the contract, and where the purchaser does not receive title to such property until all such payments are made, although the purchaser is given use thereof.

(w) "Property" will mean and refer to those pieces, parcels and lots of land described on Exhibit "A," and all Additions to Property which may become subject to this Declaration pursuant to the provisions of Article 2 hereof, or any portion thereof, together with all improvements thereon.

(x) "Referendum" will mean and refer to the vote of Members by mailed ballots on certain actions submitted to the Members by the Board of Directors, as more particularly set forth herein and in the Bylaws.

(y) "Site Plan" will mean and refer, collectively, to those certain subdivision plats prepared by Engineering, Surveying & Planning dated September 20, 1996 and recorded in the RMC on June 23, 1997 in Plat Book EB, Page 892, entitled "Final Plat, The Anchorage Plantation - Phase I, Lots 1, 2, 3, 77 and 78, Wadmalaw Island, Charleston County, South Carolina" (hereinafter sometime referred to as, the "Phase I Plat"), and dated May 1, 2000, amended May 30, 2000 and recorded in the RMC June 16, 2000 in Plat Book EE, Pages 81-86, Entitled "Conditional Plat, The Anchorage Phase II, Lots 4 thru 72, Wadmalaw Island, Charleston County, South Carolina," (the latter survey sometimes hereinafter being referred to as, the "Phase II Plat") and all re-subdivisions, modifications, revisions and additions thereto. Further, "Site Plan" will mean and refer to any subdivision plat for any Additional Property placed Of Record in furtherance of the development scheme for The Anchorage, as it exists from time to time.

(z) "Supplemental Declaration" will mean and refer to any amendment to this Declaration filed Of Record, which makes any changes hereto.

ARTICLE 2. THE GENERAL PLAN FOR THE ANCHORAGE

2.1 Plan of Development of The Property. The Property initially contains seventy-four (74) Lots as shown on the Site Plan, upon each of which one Dwelling may be constructed, and such private roads and other Common Areas serving the Lots and Dwellings as are, from time to time, denominated as such in this Declaration or by the Declarant on the Site Plan or in any deed, lease, use agreement, Supplemental Declaration or memorandum thereof filed Of Record, and which are installed and existing. All Lots and Dwellings within the Development will be and are hereby restricted exclusively to single-family residential use and will be subject to the standards and restrictions set forth in Article 5 hereof, including, but not limited to, restrictions and standards applicable to accessory buildings, including guest houses set forth in Section 5.1.1. Without the consent of any person, Declarant will have the right, but not the obligation, during the Declarant Control Period, to make improvements and changes to all Common Areas and to all such properties owned by Declarant, including, without limitation, (a) installation and maintenance of any improvements, (b) changes in the location of the boundaries of any such properties owned by Declarant, and (c) installation and maintenance of any water, sewer, and other utility systems and facilities

2.2 Additions To Property. Other property may become subject to this Declaration in the following manner:

2.2.1 Additions By Declarant. During the Declarant Control Period, the Declarant shall have the right, without further consent of the Association or any Owner to bring within the plan and operation of this Declaration, or to consent thereto, the whole or any portion of any property contiguous or nearly contiguous to the Property and whether or not owned by the Declarant. Such property may be subjected to this Declaration as one parcel or as several smaller parcels at different times. The additions authorized under this subsection shall be made by filing Of Record a Supplemental Declaration with respect to the land to be added hereto and which shall extend the operation and effect of the covenants and restrictions of this Declaration thereto, and which, upon filing Of Record of a Supplemental Declaration, shall constitute a part of the Property.

(a) The Supplemental Declaration may contain such complementary additions and/or modifications of the covenants and restrictions contained in this Declaration as may be necessary or convenient, in the sole judgment of the Declarant to reflect the different character, if any, of the land added hereto, and as are not materially inconsistent with, this Declaration, but such modifications shall have no effect on the Property described in Section 2.1 above.

(b) The option reserved under this Section 2.2.1 may be exercised by Declarant only by the execution of a Supplemental Declaration filed Of Record and the filing Of Record of a Site Plan showing the land being added or such portion or portions thereof as are being added to the Development by such amendment, as well as the Lots and Common Areas therein. Any such Supplemental Declaration shall expressly submit the added land to all or specific provisions of this Declaration, as may be provided therein, and such other covenants, restrictions, conditions and easements as Declarant, in its sole discretion, shall determine.

2.2.2 Additions of Other Properties. Upon approval by two-thirds (2/3) of the votes of the Members pursuant to a Referendum therefor or upon approval by two-thirds (2/3) of the votes of the Members present, in person or by proxy, at a duly held meeting at which a quorum is present, the owner of any property contiguous or nearly contiguous to the Property and who desires to add it to the plan of this Declaration and to subject it to the jurisdiction of the Association, may file Of Record a Supplemental Declaration with respect to the property to be added, which will extend the operation and effect of the covenants and restrictions of the Declaration to such property, thereafter constituting a part of the Property. Any such Member approval shall be reflected in a consent to such Supplemental Declaration executed by the President of the Association.

2.2.3 Additions By Merger. Upon merger or consolidation of the Association with another association, following approval by two-thirds (2/3) of the votes of the Members pursuant to a Referendum therefor or upon approval by two-thirds (2/3) of the votes of the Members present, in person or by proxy, at a duly held meeting at which a quorum is present, the Association's property rights and obligations may, by operation of law, be transferred to another surviving or consolidated association, or in the alternative, the properties, rights, and obligations of another association may, by operation of law, be added to the properties of the Association as a surviving corporation pursuant to a merger. The surviving or consolidated Association may administer the existing property, together with the covenants and restrictions established upon any other properties, as one plan. No merger or consolidation will effect any revocation, change, or addition to the covenants established by this Declaration within the Property, including, without limitation, the maximum limits on Assessments and dues of the Association, or any other matter substantially affecting the interests of Members of the Association. Lands which become subject to this Declaration under the provisions of this Section 2.2.3 may in the future be referred to as a part of the Property.

2.3 Conveyances Of Common Areas. All parcels of land shown as Common Areas on the Site Plan or which are identified herein as Common Areas and require a conveyance to vest in the Association ownership and use thereof, will be deeded or an easement will be granted with respect thereto by Declarant within two (2) years after the Declarant has completed improvements thereon. Upon any such conveyance or grant of easement, if such is required, or upon completion of any improvements thereon or thereto by the Declarant, the Association will immediately become responsible for all maintenance, repair and replacements therefor, the operation thereof and such additional construction of improvements as may be authorized by the Board of Directors. For purposes of measuring the foregoing two (2) -year period, any improvements will be deemed completed the later of the date all required certificates or permits of occupancy or use are issued therefor, or the date such improvements may be used in the manner and for the purposes for which they are constructed. It is the purpose of this provision to provide that the Association will be responsible for all maintenance of Common Areas when improvements thereto have been completed, notwithstanding the fact that the Declarant is not obligated to deed or grant an easement for such properties until two (2) years after improvements have been completed thereon. Any such conveyance by the Declarant will be conveyed subject to:

- (a) All restrictive covenants filed Of Record at the time of conveyance; and
- (b) The right of access of the Declarant, its successors and assigns, over and across such property; and
- (c) The right of both the Declarant, during the Declarant Control Period, or the Association, after expiration of the Declarant Control Period, and the ARC to approve all structures, construction, repairs, changes in elevation and topography and the location of any object (including vegetation) within the Common Areas prior to the commencement of such activities or location of any object therein;
- (d) All utilities and drainage easements; and
- (e) All reserved rights set forth in Section 2.1.

Notwithstanding anything in the foregoing to the contrary, the Declarant will not be required to so convey the Common Areas where such conveyance would be prohibited under agreements to which the Declarant is a party on the date of establishment of such Common Areas, but, in such case, Declarant will be allowed to postpone such conveyance, without a penalty, until such time as said prohibition terminates, is released or is nullified.

In consideration of the benefits accruing to the Association and to the Members under this Declaration and in consideration of the covenants and agreements of the Declarant hereunder, the Association hereby agrees to accept title to any property, or to any interest in property, now or hereafter conveyed to it pursuant to the

terms and conditions of this Declaration. Upon the due recording of a deed, easement, lease or other instrument or memorandum of conveyance Of Record to the Association, title or such other interest in property conveyed will vest in and to the Association without the necessity of any further act, deed or approval of any person, including the grantor, lessor and/or Association.

2.4 Owner's Interest Subject to Plan of Development. Every purchaser of a Lot and Dwelling will purchase such property, and every Mortgagee and lienholder holding an interest therein will take title, or hold such security interest with respect thereto, subject to the plan of development for The Anchorage and this Declaration.

ARTICLE 3. ARCHITECTURAL GUIDELINES: APPROVALS

3.1 Purpose. In order to enhance the beauty of the Development, to establish and preserve harmonious and aesthetically pleasing designs incorporated into the Development, and to protect and promote values for the Development and Dwellings located therein or thereon, no Lot site plan will be undertaken (including staking, clearing, excavation, grading and other site work, exterior alteration of existing improvements, and planting or removal of landscaping materials) nor any structures placed, erected, or installed upon any Lot or adjacent to any Lot where the purpose of the structure is to service the Lot, except in accordance with this Article 3 and upon approval as herein provided unless specifically exempted from the application and approval requirements hereof by specific terms and conditions hereof pursuant to this Declaration or pursuant to a writing signed by Declarant in recordable form. Structures existing on the Property as of the date of the recording of the Declaration shall not be subject to the Design Guidelines.

3.2 Architectural Review Committee. The Declarant will establish an Architectural Review Committee ("ARC") to administer the architectural and aesthetic approval process for the Development. The ARC under this Declaration will consist of not more than five (5) nor less than three (3) members, who need not be Lot Owners. The terms of office for each member and other matters of governance to be applicable to the ARC, will be established by the Declarant prior to the time any review and approval process hereunder would otherwise have to take place. A member appointed by the Declarant may be removed with or without cause by the Declarant at any time by written notice to the appointee, and any successor appointed to fill the vacancy will serve the remainder of the term of the former member. Notwithstanding the foregoing to the contrary, any member appointed to the ARC following assignment of the whole or any portion of ARC functions pursuant to Section 3.2.1 below is subject to the prior approval of Declarant until that date which is three (3) years following the termination of the Declarant Control Period. The ARC is responsible for administering the Design Guidelines, adopted and amended from time to time as hereinafter provided, and for the review and approval process conducted in accordance with this Article 3. The ARC is authorized to retain the services of consulting architects, landscape architects, urban designers, engineers, inspectors, and/or attorneys in order to advise and assist the ARC in performing its functions set forth herein. The ARC may establish and charge reasonable fees for review of applications hereunder and may require such fees to be paid in full prior to review of any application. Such fees may include the reasonable costs incurred by the committees in having any application reviewed by architects, engineers or other professionals.

3.2.1 Right to Assign ARC Functions. The Declarant reserves the right to assign to the Association, at its sole discretion at any time during the Declarant Control Period, the whole or any portion of its rights reserved in this Declaration which are exercisable by the ARC. The Association does hereby agree to accept any such assignment of rights without the necessity of any further action by it. Upon the expiration of three (3) years following the termination of the Declarant Control Period, any then remaining ARC rights of the Declarant are deemed assigned to the Association, which will succeed to all the rights of Declarant over the ARC then remaining unassigned without further action on the part of either the Declarant or the Association.

3.2.2 Liability of ARC Members. No member of the ARC, or any assignee of rights hereunder, will be liable to any Unit Owner for any decision, action or omission made or performed by the ARC member in the course of his duties unless the member acted in bad faith or in reckless disregard of the rights of any person or of the terms of this Declaration.

(a) Indemnification. Until all the ARC functions are assigned, the Declarant will, to the full extent permitted by law, indemnify all persons designated from time to time by the Declarant to serve as members of the ARC exercising unassigned rights hereunder from and against any liability, including attorney fees, as may be incurred by the members contrary to the provisions of this Section 3.2.2. Following any such assignment by the Declarant, members of the ARC or successor board exercising rights so assigned are indemnified by the Association.

3.3 Design Guidelines. The Declarant will prepare the initial design and development guidelines, as well as the form of application and review procedures therefor (the "Design Guidelines"), which will apply to all development and construction activities within the Development. The Design Guidelines may contain general provisions applicable to all of the Development, as well as specific provisions which may vary according to Community, location therein, unique characteristics, and intended use.

3.3.1 Interior Improvements. Generally speaking, the Design Guidelines will not cover interior improvements, which will, generally, not be subject to review and approval by the ARC, unless the review and approval may otherwise be required because the interior improvements are made within an area plainly within view of adjacent properties.

3.3.2 Drainage. The Design Guidelines may provide that, in connection with the ARC's approval and to prevent excessive drainage or surface water runoff, the ARC may have the right to establish a maximum percentage of property which may be covered by buildings, structures, or other improvements, which guidelines may be promulgated on the basis of topography, percolation rates of the soil, soil types and conditions, vegetation cover, and other environmental factors, or to impose guidelines for the installation of storm water management facilities deemed appropriate to limit or control runoff.

3.3.3 Siting, Setbacks, Height and Impervious Area Limitations. Unless otherwise specifically provided or allowed in writing by the Declarant or by applicable zoning or governmental authority, and subject to the limitation provided in Section 3.3.3(a) below, the siting of improvements, including driveways, setbacks from other properties, and maximum Dwelling height and impervious area limitations will be vested solely in the ARC and promulgated in the Design Guidelines. Any such limitations established by the ARC or the Declarant may be more, but not less, restrictive than zoning or other governmental authority and shall take precedence over the same.

(a) Phase II Stormwater Filter Buffer. A stormwater filter buffer of 50 foot average width shall be located landward along the established DHEC-OCRM critical line as shown on the Phase II Plat (the "Phase II Stormwater Filter Buffer"). The Phase II Stormwater Filter Buffer is intended to provide a strip of natural vegetation through which runoff from yards will be filtered prior to entering the marsh (to remove/reduce fertilizers, pesticides, and/or pet waste). No clear-cutting, filling, excavation or construction activity (other than necessary for permitted drainage of water access structures approved by the ARC) shall be allowed within the Phase II Stormwater Filter Buffer. Limited clearing of trees and ground cover to provide and maintain sight vistas may be allowed by the ARC, subject to the ARC's approved clearing guidelines and locations therefor. Only indigenous vegetation or species that are naturally adapted to local conditions without fertilization shall be planted within the Phase II Stormwater Filter Buffer, and subject to an ARC-approved landscape plan therefor. All ARC approval required or permitted under this Section 3.3.3(a) shall be undertaken pursuant to the ARC's jurisdiction under Section 3.4 below.

3.3.4 Other Guidelines. The Development's Design Guidelines may provide, in the sole discretion of Declarant, and, following the Declarant Control Period, the ARC, applicable guidelines (a) prohibiting

EXHIBIT 1 TO COMPLAINT

or restricting the erection and use of temporary structures; (b) setting permissible times of construction and requirements concerning construction debris; (c) covering the allowance of and, where allowed, the content, size, style and placement location for signage; (d) requiring or encouraging visually screened service and boat storage yard areas; (e) establishing exterior lighting design and location criteria; (f) prohibiting or limiting installation and use of wells; (g) requiring installation of mailboxes of consistent design and composition, and (h) setting conditions for property subdivision or consolidation, and for subjecting Development property to further covenants, conditions, restrictions and easements; provided, however, Declarant's activities may be excepted or exempted from any and all such guidelines. The within listing of possible guidelines is not an exhaustive listing and is intended merely to provide an example of the diversity of guidelines as may be incorporated in the Design Guidelines, and will not act as a limitation upon guidelines and guidelines as may or may not be implemented.

3.3.5 Guidance: Final Authority of ARC. The Design Guidelines are intended to provide guidance, and will not be the exclusive basis for decisions of the ARC, and compliance with the Design Guidelines may not guarantee approval of any application. The ARC will have the sole discretion to determine whether plans and specifications submitted for approvals are acceptable to it. The refusal of approval of any plans and specifications or the approval of same as a variance from any the Design Guideline may be based by the ARC upon any ground which is consistent with the objects and purposes of this Declaration, as may be supplemented by the Design Guidelines, including purely aesthetic considerations, so long as such grounds are not arbitrary or capricious.

3.3.6 Inspections and Permit and Certificate Issuance. The Design Guidelines may also provide procedures for ARC inspection of work, for the issuance of a permit to commence work and for issuance of a certificate following completion thereof, in addition to any such permits and certificates as may be issued by governmental authority with jurisdiction thereof, which may constitute conditions precedent to use or occupancy.

3.3.7 Fees and Charges. In addition to application fees and charges, the Design Guidelines may provide a schedule of fees, charges, required damage or other deposits, fines for noncompliance, and other amounts due and payable by an Owner as part of the application, review and approval processes, which schedule the ARC may increase, modify and amend at any time. All fees and charges provided herein will constitute specific Assessments and a lien upon the Unit to which the fees and charges relate.

3.4 ARC Building Construction and Landscaping Approval. To preserve the architectural and aesthetic appearance of the Development, no landscaping, grading, excavation, or filling of any nature whatsoever, and no construction of improvements of any nature whatsoever, will be commenced or maintained by the Association or any Owner, other than Declarant, on any portion of the Development, including, without limitation, the construction or installation of sidewalks, driveways, parking lots, decks, patios, courtyards, amenities and recreational facilities, walls, fences, or exterior lights, nor will any building construction, exterior addition, change or alteration, be made (including, without limitation, painting or staining of any exterior surface), unless and until application is made to the ARC pursuant to the Design Guidelines and the plans and specifications therefor are approved by the ARC.

3.5 Approval Not a Guarantee. No approval of plans and specifications and no publication of Design Guidelines by the ARC will be construed as representing or implying that the plans, specifications, or guidelines will, if followed, result in properly designed improvements. Such approvals and guidelines will in no event be construed as representing or guaranteeing that any dwelling or other improvement built in accordance therewith will be built in a good and workmanlike manner. Neither Declarant, the Association, nor the ARC is responsible or liable for any defects in any plans or specifications submitted, revised, or approved pursuant to the terms of this Article 3, nor any defects in construction undertaken pursuant to the plans and specifications.

ARTICLE 4. PLAN OF DEVELOPMENT FOR DOCKS ALONG ADJACENT WATERWAYS; OTHER ENVIRONMENTAL MATTERS

4.1 Construction of Docks and Bulkheads. Owners of Lots fronting on a navigable, saltwater creek or waterway may be permitted to erect dock and/or bulkheads (where appropriate in the discretion of the Declarant and governmental authority with jurisdiction thereof) upon their Lots and between the outer boundary of their Lots and the high water mark of contiguous navigable waters upon complying with the following terms and conditions:

4.1.1 Plans and Specifications; Siting. Complete plans and specifications, including color or finish must be submitted to the ARC in writing for approval in accordance with Article 3, and must conform to the architectural standards therefor adopted by the ARC in conformity with construction, siting and other conditions established by OCRM, including, but not limited to, requirements concerning permitted roof structures, lighting, maximum lengths, and square footage. Docks shall only be constructed within an area of said Lot which is more than twenty (20') feet from the centerline of the extended corridor lines applicable thereto and shown on the copy of the Dock Master Plan ("DMP") approved by the Office of Ocean and Coastal Resource Management of the S.C. Department of Health and Environmental Control ("OCRM") and attached as Exhibit "D" (a larger copy of which is maintained at the offices of the Declarant); provided, however, the ARC will approve a dock being built within said area and less than twenty (20) feet from the centerline of the extended corridor line shown applicable thereto if, and only if, the dock to be constructed is for the benefit of said Lot and one or more adjacent or nearly contiguous Lots to the same extended corridor line shown on the DMP; all Owners affected thereby or joining in the construction of said dock join in the submittal to be made to the ARC and OCRM; valid and enforceable easements for access to and from said dock are executed by all Owners affected thereby; and the plans and specifications for said dock conform to the architectural standards adopted for such multiple user dock and are approved by OCRM.

(a) Joint Docks.

(i) General Rules of Law of Party Structures to Apply. Every joint dock built for the use and benefit of more than one Owner shall constitute a party structure. To the extent not inconsistent with the provisions of this Declaration, the general rules of law regarding party walls and liability for property damage due to negligence or willful acts or omissions shall apply thereto.

(ii) Maintenance, Damage and Destruction. All Owners who make use of a joint use dock shall share the cost of reasonable repair and maintenance equally. If a joint use dock is destroyed or damaged by fire or other casualty, then to the extent that such damage is not covered by insurance and repaired out of the proceeds of insurance, any Owner who has used the joint use dock may restore it. If another Owner subsequently uses the restored dock, he shall contribute equally to the restoration cost. However, any such contribution will not prejudice the right to call for a larger contribution from another joint dock user under any rule of law regarding liability for negligent or willful acts or omissions.

(iii) Right to Contribution Runs With Land. The right of an Owner to contribution from any other Owner under this Section shall be appurtenant to the land and shall pass to such Owner's successors-in-title.

(iv) Disputes. Any dispute concerning a joint use dock wall shall be subject to the dispute resolution procedures set forth in Article 14.

4.1.2 Governmental Approval of Docks. Owners shall comply with all applicable governmental regulations, laws and ordinances for obtaining approval from agencies having approval authority, including, but not limited to, the OCRM. No representation is made by Declarant that any such agency approval will be granted, nor shall any such representation be inferred from the matters set forth herein. The copy of the plat of the DMP attached

as Exhibit "D" and the establishment of extended corridor lines shown on the DMP are intended solely as a means to promote Declarant's plan of development to maintain and enhance responsible conservation and recreational opportunities along the Development's abutting waterways, and do not constitute a covenant, guaranty or warranty to any Owner that required agency approval(s) will be granted. Declarant reserves the right to adjust any extended corridor line shown on the DMP now or hereafter established if such adjustment is deemed by Declarant to be warranted to give full effect to its development plan, and such change to the DMP is approved by OCRM.

4.1.3 Alteration of Docks. Any alterations of the plans and specifications or of the completed structure must also be submitted to the ARC in writing and the ARC's approval in writing must be similarly secured prior to construction, the ARC being granted the same rights to disapprove alterations as it retains for disapproving the original structures. Governmental approval of any such alteration shall be undertaken and completed as may be required by the original permit therefor and by applicable regulations.

4.1.4 Maintenance of Docks. All Owners who construct, or cause to be constructed, docks as herein provided, must maintain said structures in good repair and keep the same safe, clean and orderly in appearance at all times, and further agree, if required by the ARC, to paint or otherwise treat with preservatives all wood or metal located above the high water mark, exclusive of pilings, and to maintain such paint or preservatives in an attractive manner. The ARC shall be the judge as to whether the docks are clean, orderly in appearance, and properly painted or preserved in accordance with reasonable standards as may be adopted therefor by the ARC, and where the ARC notifies the particular Owner in writing that said dock fails to meet acceptable standards, said Owner shall thereupon remedy such conditions within thirty (30) days of notice from and to the satisfaction of the ARC, and that failing to so remedy such conditions, each affected Owner hereby covenants and agrees that the ARC may make the necessary repairs, but is not obligated to do so, or take such actions as will bring said dock up to acceptable standards, all such repairs and actions to be at the sole expense of the Lot Owner in question and a lien upon his Lot as a specific Assessment.

4.2 Wood Stork Roosting Area. Lots 30, 31, 32, 37, 38, 39, 40, 41, 42 and 43 are adjacent to or in the vicinity of an impoundment area, which serves as or is in proximity to a wood stork roosting area, a bird protected by law as an endangered species. Each Owner of Lots 30, 31, 32, 37, 38, 39, 40, 41, 42 and 43, by acceptance of a deed thereto, hereby acknowledges and agrees that the Lot and the Owner and Occupants thereof may be subject to guidelines adopted by the ARC, in conformity with requirements of the United States Department of the Interior, that may limit the time and scope of construction and other human activity within established setbacks from identified wood stork roosts. A copy of such guidelines and United States department of the Interior requirements forming the basis therefor are available from the Declarant and the ARC.

ARTICLE 5. OWNERS' COVENANTS AND USE RESTRICTIONS

5.1 Building Restrictions. Except as may be otherwise set forth in this Declaration, in the Site Plan, in any Supplemental Declaration, in any agreement with Declarant, the maintenance of structures existing as of the date of filing of this Declaration, or by specific deed restriction, the following building restrictions will apply with respect to the properties subject to this Declaration:

5.1.1 Number of Buildings on Lots. No structure will be constructed on a Lot other than one (1) Dwelling and one (1) accessory building, which may include a detached private garage, servant's quarters, guest house or pool house, provided the use of such dwelling or accessory building does not overcrowd the Lot and provided further, that such building is not used for any activity normally conducted as a business. Such accessory building may not be constructed prior to the construction of the main building. A guest suite or like facility may be included as part of the main dwelling or accessory building, but said suite may not be rented or leased except as part of the entire premises including the main dwelling.

5.1.2 Square Footage Requirements. All residential Dwellings constructed on the Lots shall have a minimum of two thousand five hundred (2,500) square feet of living space, being the enclosed and covered areas within the Dwelling, exclusive of garages, carports, porches, terraces, balconies, decks, patios, courtyard, greenhouses, atriums, storage areas, attics, and basements.

5.1.3 Completion of Improvements. The exterior of all Dwellings and other structures constructed upon any Lot must be completed within eighteen (18) months after the construction of same shall have commenced, except where such completion is impossible or would result in great hardship to the Owner or builder thereof due to strikes, fires, national emergencies or natural calamities. No Dwelling under initial construction shall be occupied until construction is completed and all necessary approvals of any governmental authorities have been obtained.

5.1.4 Other Requirement of Residences. In addition, all residential structures constructed on a Lot will be designed and constructed in compliance with the requirements of the Building Code of Charleston County, and/or such other political subdivision with jurisdiction thereof, related to construction in flood hazard areas.

5.2 Trees. No Owner, other than Declarant, shall be entitled to cut, remove, or mutilate any trees, shrubs, bushes, or other vegetation having a trunk diameter of six (6) inches or more at a point of four and one-half (4½) feet above the ground level, or other significant vegetation as designated, from time to time, by the ARC, without obtaining the prior approval of the ARC, provided that dead or diseased trees which are inspected and certified as dead or diseased by the ARC or its representatives, as well as other dead or diseased shrubs, bushes, or other vegetation, shall be cut and removed promptly from any property by the Owner thereof. Nothing herein shall be construed so as to limit any applicable law or ordinance.

5.3 Alteration of Setback Lines in the Best Interest of Development. Where because of size, natural terrain, or any other reason in the opinion of the Declarant, it should be in the best interest of the Development that the setback lines of any Lot should be altered or changed, then the Declarant reserves unto itself, its successors or assigns, and no other, the right to change said setback lines to meet such conditions. The Declarant specifically reserves the right to transfer and assign this right of approval to the ARC hereinafter established.

5.4 Use of Lots and Dwellings. Except as permitted by Section 5.21, each Lot and Dwelling will be used for residential purposes only, and no trade or business of any kind may be carried on therein. The use of a portion of a Dwelling as an office by an Owner or Occupant will not be considered to be a violation of this covenant if such use does not create regular customer, client, or employee traffic; provided that in no event will any Lot or Dwelling be used as the office of or storage area for any building contractor, real estate developer or real estate broker, except as may be on a temporary basis, with the express written approval of the Declarant during the Declarant Control Period, and thereafter by the Board of Directors, and in accordance with reasonable rules and regulations promulgated therefor. Nothing contained herein shall be construed so as to prohibit the construction of houses to be sold on a Lot or the showing of Dwellings for the purpose of selling houses in the Development; and nothing herein shall be construed to prevent the Declarant or its permittees from erecting, placing or maintaining signs, structures and offices as it may deem necessary for its operation and sales in the Development. Lease or rental of a Dwelling for residential purposes will also not be considered to be a violation of this covenant so long as the lease (a) is for not less than the entire Dwelling and all the improvements thereon, and (b) is otherwise in compliance with rules and regulations as may be promulgated and published from time to time by the Declarant and the Board of Directors. All leases or rental agreements will be required to be for a duration of 6 months or more and will be in writing, and upon request, the Owner will provide the Declarant and Board of Directors with copies of such lease or rental agreement. Any Occupant will in all respects be subject to the terms and conditions of this Declaration and the rules and regulations adopted hereunder.

5.4.1 Time Sharing and Vacation Multiple Ownership Plans. No part of the Property subject to this Declaration, including any improvements thereon or to be built thereon, will be used for or subject to any type of Vacation Time Sharing Plan or Vacation Multiple Ownership Plan as defined by the 1976 Code of Laws for the State of South Carolina, as amended, Section 27-32-10, *et. seq.*, or any subsequent laws of this State dealing with that or similar type of ownership by a Unit Owner, or which is used for, in conjunction with and/or as an advertised part of any time share exchange program which makes available as accommodations the Unit and which is not otherwise registered as a Vacation Time Sharing Plan or Vacation Multiple Ownership Plan or which utilizes the Unit as accommodations for time share sale prospects of any person, without the prior written approval of the Declarant, which it may grant or deny in whole, or may grant to some and deny to others, in its sole discretion.

5.5 Antennas. No television antenna, radio receiver, or other similar device will be attached to or installed on any portion of the Development, except as required by the Telecommunications Act of 1996 and implementing rules therefor issued by the Federal Communications Commission and by the Association in conformity with rules or guidelines of the Federal Communications Commission; provided, however, the Declarant and the Association will not be prohibited from installing equipment necessary for master antenna, security, cable television, mobile radio, or other similar systems within the Development.

5.6 Clotheslines. No clotheslines or drying yards shall be located upon the premises so as to be visible from any Common Area or from any adjoining property or Lot.

5.7 Propane Gas Tanks. Any propane gas tanks shall either be buried underground on the Lot or screened from view in accordance with design guidelines adopted therefor by the ARC.

5.8 Firearms and Fireworks. No firearms or fireworks of any variety shall be discharged upon the Lots, in any Dwelling or upon any Common Area. The term "firearms" shall include, without limitation, guns, "B-B" guns and pellet guns.

5.9 Exclusion of Above Ground Utilities. All electrical service and telephone lines shall be placed underground and no outside electrical lines shall be placed overhead. No exposed or exterior radio or television transmission or receiving antenna shall be erected, placed or maintained on any part of a Lot. Provided, however, that the normal service pedestals, etc., used in conjunction with such underground utilities shall be permitted within the Development. Overhead utilities shall be permitted during the construction period and until utility companies can place them underground.

5.10 Signs. Except as may be required by law or by legal proceedings, no signs or advertising posters of any kind, including, but not limited to, "For Rent," "For Sale," and other similar signs, shall be erected by an Owner, the Association, or any agent, broker, contractor or subcontractor thereof, nor shall any sign or poster be maintained or permitted on any window or on the exterior of any improvements or on any unimproved portion of property located within the Development, without the express written permission of the ARC. The approval of any signs and posters, including, without limitation, name and address signs, shall be upon such conditions as may be from time to time determined by the ARC and may be arbitrarily withheld. Notwithstanding the foregoing, the restrictions of this Section 5.10 shall not apply to the Declarant or to any person having the prior written approval of the Declarant. In addition, the Association, shall have the right to erect reasonable and appropriate signs on any portion of the Common Areas in accordance with architectural design standards adopted therefor by the ARC and approved by governmental authority with jurisdiction thereof.

5.11 Pets. No animals of any kind shall be kept by any Occupant upon any portion of the Development, provided that a reasonable number of generally recognized house pets, not to exceed three (3), may be kept in Dwellings, subject to rules and regulations adopted by the Association, and further provided that such pet or pets are kept or maintained solely as domestic pets and not for any commercial purpose. No pet shall be allowed to make an

unreasonable amount of noise or to become a nuisance. Pets shall be under leash at all times when walked or exercised in any portion of the Common Areas, and the owner of such pet shall clean up after such pet. Upon the written request of any Occupant, the Board of Directors may conclusively determine, in its sole and absolute discretion, whether, for purposes of this Section 5.11, a particular pet is a generally recognized house pet or such pet is a nuisance, and the Board shall have the right to require the owner of a particular pet to remove such pet from the Development if such pet is found to be a nuisance or to be in violation of these restrictions. The Board of Directors shall have the further right, subject to Section 13.2, to fine any Occupant for the violation of these pet restrictions by such Occupant, and the Occupant shall be liable to the Association for the cost of repair of any damage to the Common Areas caused by the Occupant's pet. Any such fine or cost of repair shall be added to and become a part of that portion of any Assessment next coming due to which such Dwelling and its Owner are subject.

5.12 Lakes. No lake area shown on any map of the Development shall be used for swimming, boating or diving, nor shall the use of any personal flotation devices, jet skis or other such items be permitted on any lake. Fishing by Owners maybe permitted subject to Association rules and regulations. No piers, docks or barriers shall be constructed on any portion of lakes, streams or ponds, nor attached to the shoreline or banks thereof, except those that may be constructed by the Declarant. No Lot Owner may use or permit to be used any water from any lakes or other bodies of water for irrigation of such Owner's Lot. Neither the Declarant nor the Association shall be responsible for any loss, damage, or injury to any person or property arising out of the authorized or unauthorized use of lakes, ponds, or streams within or contiguous to the Development. Nothing shall be done which disturbs or potentially disturbs wetlands within the Development in any manner unless approved by the proper regulatory authority. No dredging or filling shall be undertaken on any property adjacent to any water body or wetland.

5.13 Drainage. No Owner shall channel or direct drainage water onto a neighboring Lot or Common Area except in accordance with a drainage plan approved by Declarant.

5.14 Artificial Vegetation, Exterior Sculpture and Similar Items. No artificial vegetation shall be permitted on the exterior of any portion of the Subdivision. Exterior sculpture, fountains, flags, and similar items are subject to Declarant's or the ARC's prior approval; provided, however, that nothing contained herein shall prohibit the appropriate display of the American flag.

5.15 Nuisances. No rubbish or debris of any kind will be dumped, placed, or permitted to accumulate upon any portion of the Development, nor will any nuisance or odors be permitted to exist or operate upon or arise from the Development, so as to render any portion thereof unsanitary, unsightly, offensive, or detrimental to persons using or occupying any other portions of the Development. Noxious or offensive activities will not be carried on in any part of the Development, and the Association and each Owner and Occupant will refrain from any act or use which could cause disorderly, unsightly, or unkempt conditions, or which could cause embarrassment, discomfort, annoyance, or nuisance to the Occupants of other portions of the Development or which could result in a cancellation of any insurance for any portion of the Development, or which would be in violation of any law or governmental code or regulation. Without limiting the generality of the foregoing provisions, no exterior speakers, horns, whistles, bells, or other sound devices, except security and fire alarm devices used exclusively for such purposes, will be located, used, or placed within the Development, except as may be permitted pursuant to terms, conditions, rules and regulations adopted therefor by the Board of Directors. Any Owner or Occupant who dumps or places any trash or debris upon any portion of the Development will be liable to the Association for the actual costs of removal thereof plus an administrative fee of \$100.00, or such other sum set therefor by the Board as a recoupment of administrative costs in administering the cleanup and notices to the Owner and Occupant, and such sum will be added to and become a part of that portion of any Assessment next becoming due to which such Owner and his property is subject.

5.16 Motor Vehicles, Trailers, Boats, Etc. Each Owner will provide for parking of automobiles off the streets and roads within the Development. There will be no outside storage or parking upon any portion of the Development of any mobile home, trailer (either with or without wheels), motor home, tractor, truck (other than

pick-up trucks), commercial vehicles of any type, camper, motorized camper or trailer, boat or other watercraft, boat trailer, motorcycle, motorized bicycle, motorized go-cart, or any other related forms of transportation devices, except on the Owner's Lot and if screened from view in accordance with design guideline adopted therefor by the ARC. Furthermore, although not expressly prohibited hereby, the Board of Directors may at any time prohibit or write specific restrictions with respect to the operating of mobile homes, motor homes, campers, trailers of any kind, motorcycles, motorized bicycles, motorized go-carts, all terrain vehicles (ATVs), and other vehicles, or any of them, upon any portion of the Development if in the opinion of the Board of Directors such prohibition or restriction will be in the best interests of the Development. Such policies may change from time to time with changing technology. The storage of any such vehicles on an Owner's Lot within an area screened from view in accordance with design guidelines adopted therefor by the ARC will be permitted, even if operating the same is prohibited. No Owners or other Occupants of any portion of the Development will repair or restore any vehicle of any kind upon or within a property subject to this Declaration except (a) within enclosed garages, (b) within an area screened from view in accordance with design guidelines adopted therefor by the ARC, or (c) for emergency repairs, and then only to the extent necessary to enable the movement thereof to a proper repair facility.

5.17 Mining and Drilling. No derrick or other structure designed for use in boring for oil or natural gas shall be erected, placed or permitted upon any part of the Development, nor shall any oil, natural gas, petroleum, asphalt or hydrocarbon products or materials of any kind be produced or extracted from the premises.

5.18 Garbage Disposal. Each Lot Owner shall provide garbage receptacles or similar facilities in accordance with reasonable standards established by the Declarant, or a roll-out garbage rack of the type approved by the Declarant, which shall be visible from the streets on garbage pickup days only. No garbage or trash incinerator shall be permitted upon the premises. No burning, burying or other disposal of garbage on any Lot or within the Development shall be permitted (except vegetative debris may be burned only during the period of construction of improvements on any Lot); provided, however, the Declarant shall be permitted to modify the requirements of this Section 5.18 where necessary to comply with orders of governmental bodies.

5.19 Owner's Landscape Maintenance Between Lot Line and Adjacent Paving. Each Owner will be responsible for maintaining on a regular basis the landscaping, if any, and ground cover along the right-of-way roadside or sidewalk, as applicable, bordering the Owner's Lot, whether or not such area is a part of the Owner's Lot. Each Owner will perform such maintenance within the unpaved area of right-of-way immediately adjacent to a Lot's lot line, and will be of such quality of maintenance as is required to maintain a Development consistency in appearance and cleanliness. An Owner's responsibility under this Section 5.19 to provide regular maintenance will be fulfilled regardless of whether or not an Owner has constructed improvements upon his Lot or whether or not the Owner permanently resides outside of the Development.

5.20 Owner's Landscape Maintenance Between Lot Line and Adjacent Lake or Pond. Each Owner will be responsible for maintaining on a regular basis the landscaping, if any, and ground cover along the edge of any lake or pond (above the waterline, from time to time existing) bordering the Owner's Lot, whether or not such area is a part of the Owner's Lot. Each Owner will perform such maintenance with such quality of maintenance as is required to maintain a Development consistency in appearance and cleanliness. An Owner's responsibility under this Section 5.20 to provide regular maintenance will be fulfilled regardless of whether or not an Owner has constructed improvements upon his Lot or whether or not the Owner permanently resides outside of the Development.

5.21 Development, Sales and Construction Activities of Declarant. Notwithstanding any provisions or restrictions contained in this Declaration to the contrary, the Declarant and its agents, employees, successors, and assigns are permitted to maintain and carry on such facilities and activities as may be reasonably required, convenient, or incidental to the development, completion, improvement, and sale of the whole or any portion of the Property, including, without limitation, the installation and operation of development, sales and construction trailers and offices, signs and models, provided that the location of any such trailers of any assignees of Declarant's rights under

this Section 5.21 are subject to Declarant's prior written approval. The right of Declarant to maintain and carry on such facilities and activities will include specifically the right of Declarant to use Dwellings as models and as offices for the sale or lease of Lots and Dwellings and for related activities.

5.22 Use of Trademark. Each Owner and Occupant, by acceptance of a deed to any lands, tenements or hereditament within the Development hereby acknowledges that "The Anchorage" is a service mark and trade mark. Each Owner and Occupant agrees to refrain from misappropriating or infringing this service mark or trademark.

5.23 Owner Recording Additional Restrictions on Property. No Owner may impose additional restrictive covenants on any lands within the Property beyond those contained in this Declaration without approval of the Declarant during the Declarant Control Period, and thereafter without consent of the Board of Directors. The Declarant may impose additional restrictive covenants on property then owned by the Declarant without the consent of any other Owner or the Association.

5.24 Repurchase Option. Until termination of the Declarant Control Period, until the expiration of ten (10) years following the date this Declaration is placed Of Record, or until the rights of the Declarant set forth in this Section 5.24 are relinquished by the Declarant in a writing filed Of Record, whichever shall occur first, the Declarant will have the right and option to purchase any Lot, or Dwelling within the Development which is offered for sale by the Owner thereof, such option to be at the price and on the terms and conditions of any bona fide offer therefor which is acceptable to such Owner and which is made in writing to such Owner. The Owner will promptly submit a copy of the same to Declarant, and Declarant will have a period of ten (10) business days (exclusive of Saturday, Sunday and Federal holidays) from and after the presentation of such offer to Declarant in which to exercise its purchase option by giving such Owner written notice of such exercise in accordance with Section 16.15. If Declarant fails to respond or to exercise such purchase option within said ten (10)-day period, Declarant will be deemed to have waived such purchase option. If Declarant responds by declining to exercise such option, Declarant will execute an instrument evidencing its waiver of its repurchase option, which instrument will be in recordable form. In the event that Declarant does not exercise its purchase option and such sale to a third party is not consummated on such terms and conditions set forth in the bona fide offer within six (6) months of the date in which the offer is transmitted to Declarant, or within the period of time set forth in such bona fide offer, whichever is later, the terms and limitations of this Section 5.24 will again be imposed upon any sale by such Owner. If Declarant elects to purchase, the transaction will be consummated within the period of time set for closing in said bona fide offer, or within thirty (30) days following delivery of written notice by Declarant to such Owner of Declarant's decision to so purchase such Lot or Dwelling, whichever is later.

5.25 Owner's Re-subdivision. No Common Area or Lot will be subdivided, or its boundary lines changed, nor will application for the same be made to any political subdivision with jurisdiction thereof, except with the prior written approval of the Declarant, during the Declarant Control Period, and thereafter except with the prior written approval of the Board of Directors. However, the Declarant reserves the right to so subdivide, and to take such other steps as are reasonably necessary to make the re-platted property suitable and fit as a building site, including, but not limited to, the relocation of easements, walkways, rights-of-way, private roads, bridges, parks, and Common Areas.

5.25.1 Consolidation of Lots. The provisions of this Section 5.25 will not prohibit the combining of two (2) or more contiguous Lots into one (1) larger Lot. Following the combining of two (2) or more Lots into one (1) larger Lot, only the exterior boundary lines of the resulting larger Lot will be considered in the interpretation of this Declaration. Consolidation of Lots, as described herein, must be approved by the Declarant during the Declarant Control Period, and thereafter by the Board of Directors, said approval to be granted in its respective sole discretion upon the terms and conditions established by it from time to time, including specific provisions for the payment of Assessments.

5.26 Assignment of Declarant's Rights to the Association. The Declarant reserves the right to assign to the Association, at its sole discretion, its rights reserved in this Declaration, including all rights set forth in this Article 5. The Association hereby agrees to accept any and all assignments of rights hereunder, and no further action will be required by it.

5.27 Other Rights and Reservations. THE OMISSION OF ANY RIGHT OR RESERVATION IN THIS ARTICLE WILL NOT LIMIT ANY OTHER RIGHT OR RESERVATION BY THE DECLARANT WHICH IS EXPRESSLY STATED IN OR IMPLIED FROM ANY OTHER PROVISIONS IN THIS DECLARATION.

ARTICLE 6. PROPERTY RIGHTS

6.1 General Rights of Owners. Each Lot and Dwelling will for all purposes constitute real property which will be owned in fee simple and which, subject to the provisions of this Declaration, may be conveyed, transferred, and encumbered the same as any other real property. Each Owner will be entitled to the exclusive ownership and possession of his said property, subject to the provisions of this Declaration, including without limitation, the provisions of this Article 6. If any chutes, flues, ducts, conduits, wires, pipes, plumbing, or any other apparatus or facilities for the furnishing of utilities or other services or for the provision of support to any Lot or Dwelling lie partially within and partially outside of the designated boundaries of the Lot, any portions thereof which serve only such property will be deemed to be a part thereof, and any portions thereof which serve more than one such Lot or Dwelling or any portion the Common Areas will be deemed to be a part of the Common Areas. The ownership of each property subject to this Declaration will include, and there will pass with each property as an appurtenance thereto, whether or not separately described, all of the right and interest in and to the Common Areas as established hereunder, and the limitations applicable, which will include, but not be limited to, membership in the Association. Each Owner will automatically become a Member of the Association and will remain a Member thereof until such time as his ownership ceases for any reason, at which time his membership in the Association will automatically pass to his successor-in-title to his or its property.

6.2 Owner's Easement of Enjoyment. Subject to the provisions of this Declaration and the rules, regulations, fees, and charges from time to time established by the Board of Directors in accordance with the By-Laws and the terms hereof, every Owner and Occupant will have a nonexclusive right, privilege, and easement of use and enjoyment in and to the Common Areas, to the extent so entitled hereunder, such easement to be appurtenant to and to pass and run with title, subject to the rights, restrictions, reservations, covenants, easements and obligations reserved, granted or alienable in accordance with this Declaration, including, but not limited to:

6.2.1 Right Of Association To Borrow Money. The right of the Association to borrow money (a) for the purpose of improving the Development, or any portion thereof, (b) for acquiring additional Common Areas, (c) for constructing, repairing, maintaining or improving any facilities located or to be located within the Development, or (d) for providing the services authorized herein, and, subject to the provisions of Section 11.2, to give as security for the payment of any such loan a mortgage or other security instrument conveying all or any portion of the Common Areas; provided, however, that the lien and encumbrance of any such security instrument given by the Association will be subject and subordinate to any and all rights, interest, options, licenses, easements, and privileges herein reserved or established for the benefit of Declarant, any Owner, or the holder of any Mortgage, irrespective of when such Mortgage is executed or given.

6.2.2 Declarant's Reserved Rights and Easements. The rights and easements specifically reserved to Declarant in this Declaration.

6.2.3 Association's Rights to Grant and Accept Easements. The right of the Association to grant and accept easements as provided in Section 6.7 and to dedicate or transfer fee simple title to all or any portion of the Common Areas to any public agency or authority, public service district, public or private utility, or other person, provided that any such dedication or transfer of the simple title must be approved by a majority of those present in person or by proxy at a duly held meeting of the Association and by Declarant, during the Declarant Control Period and thereafter for so long as Declarant owns any of the Property primarily for the purpose of development or sale.

6.2.4 Association's Rights and Easements. The rights and easements specifically reserved in this Declaration for the benefit of the Association, its directors, officers, agents, and employees.

6.2.5 Declarant's Easements for Additional Property. The Declarant's right to add Additional Property to this Declaration pursuant to Section 2.2.1 and the rights and easements reserved in Section 6.5.1 hereof for the benefit of the Additional Property so added to this Declaration.

6.3 Access, Ingress and Egress, Roadways. All Owners, by accepting title to property conveyed subject to this Declaration, waive all rights of uncontrolled and unlimited access, ingress, and egress to and from such property and acknowledge and agree that such access, ingress, and egress will be limited to roads, sidewalks, walkways, and trails located within the Development from time to time, provided that pedestrian and vehicular access to and from all such property will be provided at all times. Subject to the right of the Declarant to dedicate any roadways within the Development pursuant to Section 6.3.2, there is reserved unto Declarant, the Association, and their respective successors and assigns the right and privilege, but not the obligation, to maintain guarded or electronically-monitored gates controlling vehicular access to and from the Development, provided that access to the Property may be granted to any person who gives reasonable evidence satisfactory to entry guards, if there are any, that entry is with the specific permission of the Owner, or his duly authorized agent. Neither the Declarant nor the Association will be responsible, in the exercise of its reasonable judgment, for the granting or denial of access to the Property in accordance with the foregoing.

NEITHER THE DECLARANT NOR THE ASSOCIATION SHALL IN ANY WAY BE CONSIDERED INSURERS OR GUARANTORS OF ANY GATE OR CONTROLLED ACCESS TO THE PROPERTY OR SAFETY MEASURES UNDERTAKEN WITH RESPECT THERETO BY EITHER OR BOTH OF THEM, NOR SHALL EITHER OR BOTH BE LIABLE FOR ANY LOSS OR DAMAGE RESULTING FROM ANY FAILURE TO PROVIDE CONTROLLED ACCESS OR SAFETY MEASURES, OR FROM LEAVING ANY GATE OPEN, AS PERMITTED UNDER SECTION 6.3.3 BELOW, OR FROM A FAILURE OR INEFFECTIVENESS OF ANY SUCH CONTROLLED ACCESS OR SAFETY MEASURES UNDERTAKEN BY EITHER OR BOTH OF THEM. NO REPRESENTATION, WARRANTY OR COVENANT IS GIVEN TO ANY OWNER OR OCCUPANT BY EITHER OR BOTH OF THE DECLARANT AND THE ASSOCIATION THAT ANY CONTROLLED ACCESS OR SAFETY MEASURES INSTALLED OR UNDERTAKEN CANNOT BE BYPASSED OR COMPROMISED, OR THAT THEY WOULD, IN FACT, AVERT DAMAGE OR LOSS RESULTING FROM THAT WHICH THEY ARE DESIGNED TO PREVENT, AND EACH OWNER BY ACCEPTANCE OF A DEED TO A LOT OR DWELLING AND EACH OCCUPANT THEREOF SHALL INDEMNIFY AND HOLD THE DECLARANT AND ASSOCIATION HARMLESS FROM ANY DAMAGE AND COSTS AND EXPENSES, INCLUDING ATTORNEY FEES, INCURRED BY EITHER OR BOTH OF THEM AS A RESULT OF ANY SUCH ASSERTION OR DETERMINATION.

6.3.1 Uniform Act Regulating Traffic. In order to provide for safe and effective regulation of traffic, the Declarant reserves the right to file Of Record the appropriate consent documents making the Uniform Act Regulating Traffic on Highways of South Carolina (Chapter V, Title 56 of the Code of Laws of South Carolina, 1976)

applicable to all of the private streets and roadways within the Development. Moreover, the Declarant may promulgate from time to time additional parking and traffic regulations which will supplement the above-mentioned State regulations as it relates to conduct on, over and about the private streets and roadways in the Development. These supplemental regulations will initially include but will not be limited to those set out hereinafter and the Declarant reserves the right to adopt additional regulations or to modify previously promulgated regulations from time to time and to make such adoption or modification effective thirty (30) days after mailing notice of same in accordance with Section 16.15 to the record Owners within the Development as of January 1 of the year in which such regulations are promulgated.

(a) The Declarant, or the Association after title to any private streets and roadways has passed to it from the Declarant, may post "no parking" signs along such private streets and roadways within the Development where it, in its sole discretion, determines it to be appropriate to do so. Violators of said "no parking" signs are subject to having their vehicles towed away and will be required to pay the cost of such towing and storage before their vehicle may be recovered. The act of towing said vehicles will not be deemed a trespass or a violation of the Owners' property rights, because the Owner will be deemed to have consented to such action by accepting the right to use the private roads and streets within the Development.

6.3.2 Public Roadways Within The Development. The Declarant reserves the right to dedicate any portion of the roadways within the Development to the State of South Carolina or any political subdivision thereof for the purpose of granting public access thereto and over said roadway and for the purpose of having said political subdivision assume responsibility for maintenance of such roadways. The Declarant further reserves the right to impose upon the Association the requirement of maintaining any such dedicated roadway until such time as the roadway is brought up to standards acceptable to such public body and maintenance thereof is assumed by such public body; provided, however, Declarant may, in its sole discretion, reserve an easement over any such public roadway to be primarily maintained by such public body for the purpose of doing additional maintenance to said public streets and roads and to maintain landscaping along the unpaved rights-of-way thereof, and thereafter denominate in a Site Plan or Supplemental Declaration that said easement will constitute a Common Area of the Development to be maintained by the Association. The Board of Directors may levy a Special Assessment against all Owners, without the necessity of a vote pursuant to Section 12.5.1 hereof, in an amount sufficient to provide funds required to bring any roadway up to standards acceptable to any public body for the assumption by it of maintenance of a said roadway.

6.3.3 Declarant's Right to Maintain Open Gate. Notwithstanding anything herein contained to the contrary, the Declarant hereby reserves unto itself, its successors and assigns, the right and option to control any gate to the Development and to leave the gate in an open position for the unobstructed and uncontrolled passage of construction vehicles for persons engaged in both infrastructure and building construction activities. The within right, if exercised, will be limited to the hours of 6 a.m. to 6 p.m. and will terminate upon expiration of the Declarant Control Period.

6.4 Easements Over Private Roadways.

6.4.1 Public and Service Vehicles. Police, fire, water, health and other authorized municipal officials, employees and their vehicles; paramedic, rescue and other emergency personnel and their vehicles and equipment; school bus and U.S. Postal Service delivery drivers and their vehicles; private delivery or courier service personnel and their vehicles; and persons providing garbage collection services within the Development and their vehicles and equipment will each have a perpetual, non-exclusive easement for access, ingress and egress over the private roadways constituting a portion of the Common Areas, solely for the performance of their official duties.

6.4.2 McKee Tract Easement. There is hereby reserved for the use and benefit of Kelly T. McKee and Gladys H. McKee, their heirs and assigns (hereinafter, "McKee"), a non-exclusive, appurtenant easement

over and across the right-of-way shown and designated on the Site Plan as "ANCHOR WATCH DRIVE 70' R/W" from the point the said road intersects with Maybank Highway to the property now or formerly belonging to McKee located within or adjacent to the boundaries of the Development, and being the same easement described in Section 11.06 of the Walpole Declaration. McKee shall pay the sum of One Hundred Twenty-five and 00/100 (\$125.00) Dollars per year to the Association, as their share of the cost of upkeep of the road that they are entitled to use. The McKees' property is not a part of the Development unless and until the McKees or their heirs or assigns specifically agree that the property shall be part of the Development. McKee's use of the road and easement granted therein shall also be governed by the terms of those certain agreements Of Record in Book B90, Page 400 and Book A286, Page 57; provided, however, nothing herein shall be construed as to grant to the Association or any other person any right or option to acquire any property now or formerly belonging to the McKees. Nothing herein shall be deemed to provide to the McKees the right to use any Common Area of the Development except the road over which the McKees are granted the easement provided herein unless and until the McKees' property is added to the Development as provided in Section 2.2. The within easement is and shall remain appurtenant to the McKees' property and shall run with the land herein described.

6.5 Easements for Declarant. During the period that Declarant owns any of the Property for sale, Declarant will have an alienable and transferable right and easement on, over, through, under, and across the Common Areas for the purpose of constructing improvements in and to the Lots and for installing, maintaining, repairing and replacing other improvements to the Property contemplated by this Declaration or as Declarant desires, in its sole discretion, including, without limitation, any improvements or changes permitted and described by Article 2, and for the purpose of doing all things reasonably necessary and proper in connection therewith, provided in no event will Declarant have the obligation to do any of the foregoing.

6.5.1 Declarant's Easements for Any Additional Property. There is hereby reserved for Declarant, and its successors, assigns, and successors-in-title to the Additional Property, for the benefit of and as an appurtenance to the Additional Property, when added to this Declaration pursuant to Section 2.2.1, and as a burden upon the then existing Development, perpetual, non-exclusive rights and easements for (a) pedestrian, vehicular, access, ingress, egress, parking over, across, within, and on all private roads, sidewalks, trails, parking facilities, and lagoons, from time to time located within the Common Areas or within easements serving the Common Areas, (b) the installation, maintenance, repair, replacement, and use within the Common Areas, and those portions of properties encumbered pursuant to Section 6.7 for security systems and utility facilities and distribution lines, including, without limitation, drainage systems, storm sewers, and electrical, gas, telephone, water sewer, and master television antenna and/or cable system lines, and (c) drainage and discharge of surface water onto and across the then existing Development, provided that such drainage and discharge shall not materially damage or affect the then existing Development or any improvements located thereon.

6.6 Changes in Boundaries: Additions to Common Areas. Declarant expressly reserves the right to change and realign the boundaries of the Common Areas and any Lots or Dwellings between such adjacent properties owned by Declarant, provided that any such change or realignment of boundaries will not materially decrease the acreage of the Common Areas and will be evidenced by a revision of or an addition to the Site Plan which will be filed Of Record.

6.7 Easements for Utilities. There is hereby reserved for the benefit of Declarant, the Association, and their respective successors and assigns, the alienable, transferable, and perpetual right and easement, as well as the power to grant and accept easements to and from any public authority or agency, public service district, public or private utility, or other person, upon, over, under, and across (a) all of the Common Areas in accordance with this Declaration; (b) those strips of land, one hundred (100') feet in width, running adjacent to and parallel with the front lines of Lots, not to conflict with any drainage easements thereon, and as further shown on the Site Plan; and (c) such other such easement areas shown on any Site Plan or recited in any Supplemental Declaration for the purpose of installing, replacing, repairing, maintaining, and using master television antenna and/or cable systems, security and

similar systems, and all utilities, including, but not limited to, storm sewers and drainage systems and electrical, gas, telephone, water, and sewer lines. Such easements may be granted or accepted by Declarant, its successors or assigns, or by the Board of Directors, provided, however, that during the Declarant Control Period and thereafter for as long as the Declarant owns any of the Property primarily for the purpose of development and sale, the Board of Directors must obtain the written approval of Declarant prior to granting and accepting any such easements. To the extent practical, in Declarant's sole discretion, all utility lines and facilities serving the Development and located therein will be located underground. By virtue of any such easement and facilities, it will be expressly permissible for the providing utility company or other supplier or servicer, with respect to the portions of the Development so encumbered, (i) to erect and maintain pipes, lines, manholes, pumps, and other necessary equipment and facilities, (ii) to cut and remove any trees, bushes, or shrubbery, (iii) to grade, excavate, or fill, or (iv) to take any other similar action reasonable necessary to provide economical and safe installation, maintenance, repair, replacement, and use of such utilities and systems.

6.8 Easement for Walks, Paths, and Signs. There is hereby reserved for the benefit of Declarant and the Association the alienable, transferable, and perpetual right and easement upon, over and across (a) all portions of the Common Areas in which improvements are not constructed or erected, and (b) all areas shown and noted on any Site Plan or described in any Supplemental Declaration for the installation maintenance, and use of sidewalks, leisure trails, bike paths, traffic directional signs, and related improvements.

6.9 Easements for the Association. There is hereby reserved a general right and easement for the benefit of the Association, and to any manager employed by the Association and any employees of such manager, to enter upon any Lot, Dwelling, or any portion thereof in the performance of their respective duties. Except in the event of emergencies, this easement is to be exercised only during normal business hours and then, whenever practicable, only upon advance notice to and with permission of the Owner directly affected thereby.

6.10 General Maintenance Easement. There is hereby reserved for the benefit of Declarant and the Association an alienable, transferable, and perpetual right and easement to enter upon any Property subject to this Declaration for the purpose of providing insect and reptile control, mowing, removing, clearing, cutting, or pruning underbrush, weeds, stumps, or other unsightly growth and removing trash, so as to maintain reasonable standards of health, fire safety, and appearance within the Development, provided that such easements will not impose any duty or obligation upon Declarant or the Association to perform any such actions, or to provide garbage or trash removal services. Furthermore, it is hereby reserved for the benefit of the Declarant and the Association an alienable, transferable, and perpetual right and easement, but not the obligation, to enter upon any unimproved portions of a Lot or Dwelling which is located within twenty (20') feet from the water's edge of any lagoon, pond or other body of water within the Development for the purpose of (a) mowing such area and keeping the same clear and free from unsightly growth and trash, (b) maintaining such bodies of water, such maintenance to include, without limitation, dredging and the maintenance of reasonable water quality standards, and (c) installing, constructing, repairing, replacing, and maintaining erosion control devices, provided that the foregoing reservation of easements will not be deemed to limit the responsibility therefor by Owners under Section 8.1 hereof. The costs thereof incurred as a result of the action or inaction of any Owner will be paid by such Owner, and until paid will be a continuing lien upon the Owner's Lot or Dwelling.

6.11 Environmental Easement. There is hereby reserved for the benefit of Declarant and the Association an alienable, transferable, and perpetual right and easement on, over, and across all unimproved portions of properties subject to this Declaration for the purpose of taking any action necessary to effect compliance with environmental rules, regulations, and procedures from time to time promulgated or instituted by the Board of Directors, or by any governmental entity, such easement to include, without limitation, the right to implement erosion control procedures and practices, the right to drain standing water, and the right to dispense pesticides.

6.12 Irrigation Wells and Pumps. There is hereby reserved for the benefit of the Association, for the purpose of irrigating any portions of the Development, an alienable, transferable, and perpetual right and easement (a) to pump water from lagoons, ponds, and other bodies of water located within the Development, and (b) to drill, install, locate, maintain, and use wells and pumps within the Common Areas.

6.13 Easements Deemed Granted and Reserved. All conveyances of a Lot hereunder, whether by the Declarant or otherwise, will be deemed to have granted and reserved, as the context will require, all easements set forth in this Declaration, including, but not limited to, those set forth in this Article 6.

6.14 No Partition. There will be no judicial partition of the Development or any part thereof, nor will any person acquiring any interest in the Development or any part thereof seek any such judicial partition unless the Development has been removed from the provisions of this Declaration.

ARTICLE 7. MEMBERSHIP

7.1 Membership. Every Owner, including the Declarant, of a Lot and Dwelling will be a Member of the Association. Ownership of a Lot will be the sole qualification for such membership. In the event that fee title to a Lot or Dwelling is transferred or otherwise conveyed, the membership in the Association which is appurtenant thereto will automatically pass to such transferee, notwithstanding any failure of the transferor to endorse to his transferee any certificates or other evidences of such membership. The foregoing is not intended to include Mortgagees or any other persons who hold an interest merely as security for the performance of an obligation, and the giving of a security interest will not terminate or otherwise affect an Owner's membership in the Association.

7.2 Voting Rights. The Association will have two (2) types of voting memberships which are as follows:

TYPE A: Type A Members will be Owners (including the Declarant) of Lots and Dwellings. A Type A Member will be entitled to one (1) vote for each Lot and Dwelling owned.

TYPE B: The Type B Member will be the Declarant or its designated assign. The Type B Member will be entitled to three (3) votes for each vote held by Type A Members, plus one (1) vote during the Declarant Control Period. Thereafter, the Type B Member will exercise votes only as to its Type A Memberships.

Payment of Special Assessments or Emergency Special Assessments will not entitle Type A Members to additional votes. Only those Members in good standing and eligible to vote pursuant to the Bylaws shall be entitled to cast any vote required or permitted hereunder, and only the votes of Members in good standing and eligible to vote shall be considered in any calculation of votes or any required percentage thereof.

7.2.1 Voting By Multiple Owners. When any Lot or Dwelling of a Type A Member of the Association is owned Of Record in the name of two or more persons, other than husband and wife (either of whose vote will bind both, by an entity, or in any other manner of joint or common ownership, the vote for such Lot or Dwelling will be exercised as such co-Owners determine among themselves and advise the Secretary of the Association in writing prior to any meeting; or the vote will be exercised by such co-Owner, or his duly appointed proxy, as will be designated in a writing by all co-Owners recorded in the R.M.C. Office for Charleston County, a copy of which will be delivered to the Secretary of the Association and will remain effective for all meetings until revoked by the co-Owners in a similar writing or until such designation terminates pursuant to the terms of such writing.

7.3 Association Governance by Board. The Association will be governed by a Board of Directors consisting of Three (3) or five (5) members. Initially, during the Declarant Control Period, the Board will consist of three (3) members appointed by the Declarant, and following expiration of the Declarant Control Period, the Board will consist of five (5) members elected as provided in the Bylaws of the Association.

7.4 Meetings and Membership Voting. Except as otherwise provided in this Declaration, rules and procedures of the Association, including, but not limited to, conducting elections, meetings (both regular and special), and for casting of votes by members, and the number thereof required for quorums and approval or ratification, shall be as set forth in the Bylaws.

ARTICLE 8. MAINTENANCE

8.1 Responsibilities of Owners. Unless specifically identified herein as the responsibility of the Association, all maintenance and repair of Lots and Dwellings, or the marsh and waterfront property adjacent to any such property, together with all other improvements thereon or therein and all lawns, landscaping, and grounds on and within such property will be the responsibility of the Owner thereof. Each Owner will be responsible for maintaining his or its property in a neat, clean, and sanitary condition, and such responsibility will include the maintenance and care of all exterior surfaces of all Dwellings, buildings, and other structures and all lawns, trees, shrubs, hedges, grass, and other landscaping. Except as provided in Section 8.2.2 hereof, each Owner will also be obligated to pay for the costs incurred by the Association for repairing, replacing, maintaining, or cleaning any item which is the responsibility of such Owner, but which responsibility such Owner fails or refuses to discharge. No Owner will (i) decorate, change, or otherwise alter the appearance of any portion of the exterior of a Dwelling, building or other structure, or the landscaping, grounds, or other improvements within his or its property unless such decoration, change, or alteration is first approved, in writing, by the ARC, or (ii) do any work which, in the reasonable opinion of the Board of Directors, would jeopardize the soundness and safety of the Development, reduce the value thereof, or impair any easement or hereditament thereto, without in every such case obtaining the written approval of the Board of Directors and the Owners, and the Mortgagees of property directly affected thereby or benefiting from such easement or hereditament.

8.2 Association's Responsibility.

8.2.1 General. Except as may be herein otherwise specifically provided, the Association will maintain and keep in good repair all portions of the Common Areas and any easement area encumbering properties of Owners for which the Association is responsible under this Declaration, including responsibility prior to transfer to the Association in accordance with Section 2.3, or under any Supplemental Declaration, which responsibility will include the maintenance, repair, and replacement of (a) all drainage not under the expressly specified jurisdictional care and maintenance of any governmental authority, and walking, ingress and egress easements shown and noted on the Site Plan, (b) all private roads, road shoulders, walks, trails, lagoons, ponds, parking lots, landscaped areas, and other improvements situated within the Common Areas or easements, (c) security systems and utility lines, pipes, plumbing, wires, conduits, and related systems which are a part of its said properties and which are not maintained by a public authority, public service district, public or private utility, or other person, and (d) all lawns, trees, shrubs, hedges, grass, and other landscaping situated within or upon its said properties. The Association will not be liable for injury or damage to any person or property (i) caused by the elements or by any Owner or any other person, (ii) resulting from any rain or other surface water which may leak or flow from any portion of its properties, or (iii) caused by any pipe, plumbing, drain, conduit, appliance, equipment, security system, or utility line or facility, the responsibility for the maintenance of which is that of the Association, becoming out of repair. Nor will the Association be liable to any Owner for loss or damage, by theft or otherwise, of any property of such Owner which may be stored in or upon any portion of its properties or any other portion of the Property. No diminution or abatement of Assessments will be claimed or allowed by reason of any alleged failure of the Association to take some

action or to perform some function required to be taken or performed by the Association under this Declaration, or for inconvenience or discomfort arising from the making of improvements or repairs which are the responsibility of the Association, or from any action taken by the Association to comply with any law, ordinance, or with any order or directive of any municipal or other governmental authority, the obligation to pay such Assessments being a separate and independent covenant on the part of each Owner.

8.2.2 Work In Behalf of Owners. In the event that Declarant or the Board of Directors determines that: (a) any Owner or Occupant has failed or refused to discharge properly his or its obligations with regard to the maintenance, cleaning, repair, or replacement of items for which he or it is responsible hereunder, or (b) that the need for maintenance, cleaning, repair, or replacement which is the responsibility of the Association hereunder is caused through the willful or negligent act of an Owner or Occupant, and is not covered or paid for by insurance in whole or in part, then, in either event, Declarant or the Association, except in the event of an emergency situation, may give such Owner written notice in accordance with Section 16.15 of Declarant's or the Association's intent to provide such necessary maintenance, cleaning, repair, or replacement, at the sole cost and expense of such Owner, and setting forth with reasonable particularity the maintenance, cleaning, repairs, or replacement deemed necessary. Except in the event of emergency situations, such Owner will have fifteen (15) days within which to complete the same in a good and workmanlike manner, or in the event that such maintenance, cleaning, repair, or replacement is not capable of completion within said fifteen (15)-day period, to commence said maintenance, cleaning, repair, or replacement and diligently proceed to complete the same in a good and workmanlike manner. In the event of emergency situations or the failure of any Owner to comply with the provisions hereof after such notice, Declarant or the Association may provide (but will not have the obligation to so provide) any such maintenance, cleaning, repair, or replacement at the sole cost and expense of such Owner and said cost will be added to and become a part of the Assessment to which such Owner and his property is subject and will become a lien against such property. In the event that Declarant undertakes such maintenance, cleaning, repair, or replacement, the Association will promptly reimburse Declarant for Declarant's costs and expenses.

ARTICLE 9. INSURANCE AND CASUALTY LOSSES

9.1 Insurance.

9.1.1 Association's Property Insurance. The Board of Directors will have the authority to obtain and continue in effect adequate property insurance, in such form as the Board deems appropriate, for the benefit of the Association. Such coverage will insure all insurable improvements in and to the Common Areas against loss or damage by fire or other hazards, including, without limitation, extended coverage, flood, vandalism, and malicious mischief, such coverage to be in an amount sufficient to cover the full replacement cost (without depreciation but subject to such deductible levels as are deemed reasonable by the Board) of any repair or reconstruction in the event of damage or destruction from any such hazard.

9.1.2 Association's Liability Insurance. The Board will have the authority to and will obtain and continue in effect a public liability policy covering all the Common Areas and all damage or injury caused by the negligence of the Association, its Members, its directors and officers, or any of its agents. Such public liability policy will provide such coverages as are determined to be necessary by the Board of Directors.

9.1.3 Fidelity Bonds. The Association will obtain, maintain and pay the premiums, as a Common Expense, upon a blanket fidelity bond for all officers, directors, trustees and employees of the Association and all other persons handling or responsible for funds belonging to or administered by the Association, including any professional management company assisting with the administration of the Association. The total amount of the fidelity bond coverage required will be based upon the best business judgment of the Board of Directors. Fidelity bonds will meet the following requirements: (a) the Association will be named as an obligee; (b) the bonds will

contain waivers of all defenses based upon the exclusion of persons serving without compensation from the definition of "employees" or similar terms or expressions; and (c) the bond will provide that it may not be canceled or substantially modified (including cancellation for nonpayment of a premium) without at least ten (10) days prior written notice to the Association and each Mortgagee listed as a scheduled holder of a first Mortgage in the fidelity bond.

9.1.4 Association's Other Insurance. The Board will have the authority and may obtain (a) workers' compensation insurance to the extent necessary to comply with any applicable laws and (b) other types and amounts of insurance as may be determined by the Board to be necessary or desirable, including, but not limited to, fidelity and directors' and officers' liability coverage.

9.1.5 Association's Policies. All such insurance coverage obtained by the Board of Directors will be written in the name of the Association as trustee for each of the Owners and costs of all such coverage will be a Common Expense. Exclusive authority to adjust losses under policies obtained by the Association and hereafter in force with respect to the Development will be vested in the Board of Directors; provided, however, that no mortgagee or other security holder of the Common Areas having an interest in such losses may be prohibited from participating in the settlement negotiations, if any, related thereto. Insofar as permitted by law, the Association will be required to make every effort to secure insurance policies with the provisions hereinafter set forth:

(a) All policies will be written with a company holding a rating of A+ in a financial category of 10, or a better rating and financial category, as established by Best's Insurance Reports, if such a company is available or, if not available, its equivalent rating or the best possible rating.

(b) All property insurance policies will be for the benefit of the Owners and their Mortgagees as their interests may appear.

(c) All policies will contain a waiver of the insurer's right to cancel without first giving thirty (30) days' prior written notice of such cancellation to the Association and to any Mortgagee to which a mortgagee endorsement has been issued.

(d) In no event will the insurance coverage obtained and maintained by the Association's Board of Directors hereunder be brought into contribution with insurance purchased by individual Owners or their Mortgagees, and all policies will contain a provision that the "other insurance" clauses in such policies exclude from consideration policies obtained by individual Owners or their Mortgagees.

(e) All policies will contain a waiver of subrogation by the insurer as to any claims against the Association, the Association's directors and officers, the Owners, Occupants, and the Association's manager.

(f) All policies will contain a provision that no policy may be cancelled, invalidated, or suspended on account of the conduct of one or more of the individual Owners or Occupants on account of the acts of any director, officer, employee, or agent of the Association or of its manager, without prior demand in writing delivered to the Association to cure the defect, and the allowance of a reasonable time thereafter within which the defect may be cured.

(g) All liability insurance will contain cross-liability endorsements to cover liability of the Association to an individual Owner.

9.1.6 Owner's Insurance. It will be the individual responsibility of each Owner at his own expense and election to provide public liability, property damage, title, and other insurance with respect to his or its

own Lot and Dwelling. The Board of Directors may require all Owners to carry public liability and property damage insurance with respect to their respective properties and to furnish copies or certificates thereof to the Association.

9.2 Damage or Destruction to Common Areas. Immediately after damage or destruction by fire or other casualty to all or any part of the Common Areas covered by insurance written in the name of the Association, the Board of Directors or its duly authorized agent will proceed with the filing and adjustment of all claims arising under such insurance, and, in any such event, the Board will obtain reliable and detailed estimates of the cost of repair or reconstruction of the damaged or destroyed property. Repair or reconstruction, as used in this Article 9, means repairing or restoring the damaged property substantially to the same condition in which it existed prior to the fire or other casualty. Unless within sixty (60) days following any damage or destruction to all or a part of the Common Areas, Declarant, for so long as Declarant owns any of the Property primarily for development or sale, and the Board acting on the vote of seventy-five percent (75%) or more of the votes of the entire Association, by Referendum or at a duly held meeting of Members (which percentage will also constitute the quorum required for any such meeting), will otherwise agree, the Association will restore or replace such damaged improvements. If any insurance proceeds for such damage or destruction are not sufficient to defray the cost thereof, including any amount attributable to Association's insurance deductible, and such deficiency cannot be appropriated from a reserve fund as may have been established for such purpose, the Board of Directors may levy a Special Assessment against all Owners, without the necessity of a vote pursuant to Section 12.5.1 hereof, such Special Assessment to be in an amount sufficient to provide funds to pay such excess cost or repair or reconstruction. Such a Special Assessment will be levied against the Owners equally in the same manner as Annual Assessments are levied, and additional Special Assessments may be made at any time during or following the completion of any repair or reconstruction. Any and all sums paid to the Association under and by virtue of such Assessments will be held by and for the benefit of the Association together with the insurance proceeds, if any, for such damage or destruction. Such insurance proceeds and Assessments will be disbursed by the Association in payment for such repair or reconstruction pursuant to and in accordance with such method of distribution as is established by the Board of Directors. Any proceeds remaining after defraying such costs will be retained by and for the benefit of the Association. If it is determined that the damage or destruction for which the insurance proceeds are paid will not be repaired or reconstructed, such proceeds will be retained by and for the benefit of the Association, and the ruins of the Common Areas damaged or destroyed by fire or other casualty will be cleared and the Common Areas left in a clean, orderly, safe, and slightly condition.

9.3 Damage or Destruction to Owners' Properties. In the event of damage or destruction by fire or other casualty to any property subject to this Declaration, or the improvements thereon, and in the further event that the Owner responsible for the repair and replacement of such property elects not to repair or rebuild, such Owner will promptly clear away the ruins and debris of any damaged improvements or vegetation and leave such property in a clean, orderly, safe, and slightly condition. Should such Owner elect to repair or rebuild such property or other improvements thereon, such Owner will repair or rebuild substantially to the same condition as existed prior to such fire or other casualty and in accordance with all applicable standards, restrictions, and provision of this Declaration (including, without limitation, the procedures and architectural guidelines under Article 5) and all applicable zoning, subdivision, building, and other governmental regulations. All such work or repair or construction will be commenced promptly following such damage or destruction and will be carried through diligently to conclusion.

ARTICLE 10. CONDEMNATION

10.1 Condemnation of Common Areas. Whenever all or any part of the Common Areas of the Development will be taken by any authority having the power of condemnation or eminent domain, or is conveyed in lieu thereof by the Board acting on the affirmative vote of seventy-five percent (75%) or more of the votes of the entire Association, by Referendum or at a duly held meeting of Members, which percentage will also constitute the quorum required for any such meeting, and following written approval by the Declarant for so long as Declarant owns

any of the Property primarily for development or sale, the award or proceeds made or collected for such taking or sale in lieu thereof will be payable to the Association and will be disbursed or held as follows:

10.1.1 Common Areas With Improvements. If the taking or sale in lieu thereof involves a portion of the Common Areas on which improvements have been constructed, then, unless within sixty (60) days after such taking the Declarant, for so long as Declarant owns any of the Property primarily for development or sale, and the Board, acting on the vote of seventy-five percent (75%) or more of the votes of the entire Association, by Referendum or at a duly held meeting of Members (which percentage will also constitute the quorum required for any such meeting), will otherwise agree, the Association will restore or replace such improvements so taken, to the extent practicable, on the remaining lands included in the Common Areas which are available therefore, in accordance with the plans approved by the Board of Directors, the ARC, and by Declarant during the Declarant Control Period. If the awards or proceeds are not sufficient to defray the cost of such repair and replacement and such deficiency cannot be appropriated from a reserve fund as may have been established for such purpose, the Board of Directors may levy a Special Assessment against all Owners, without the necessity of a vote pursuant to Section 12.5, such Special Assessment to be in an amount sufficient to provide funds to pay such excess cost or repair or reconstruction. Such a Special Assessment will be levied against the Owners equally in the same manner as Annual Assessments are levied, and additional Special Assessments may be made at any time during or following the completion of any repair or reconstruction. If such improvements are not to be repaired or restored, the award or proceeds will be retained by and for the benefit of the Association.

10.1.2 Common Areas Without Improvements. If the taking or sale in lieu thereof does not involve any improvements to the Common Areas, or if there are net funds remaining after any such restoration or replacement of such improvements is completed, then such award, proceeds, or net funds will be retained by and for the benefit of the Association.

10.1.3 Including Owner's Property. If the taking or sale in lieu thereof includes all or any part of an Owner's property and also includes any part of the Common Areas, then a court of competent jurisdiction will apportion such award or proceeds and such award or proceeds will be disbursed to the Association and the Owners so affected so as to give just compensation to the Owners for their interest in such property; provided, however, such apportionment may instead be resolved by the agreement of (i) the Board of Directors, (ii) the Owners of all properties wholly or partially taken or sold, together with the Mortgagees for each such property, and (iii) Declarant, for so long as Declarant owns any of the Property primarily for development or sale.

10.2 Condemnation of Owners' Properties.

10.2.1 Election Not To Restore. In the event that all or any part of a property subject to this Declaration, or any improvements thereon is taken by any authority having the power of condemnation or eminent domain, or is conveyed in lieu thereof, and in the further event that the Owner thereof elects not to restore the remainder of such property, then the Owner making such election will promptly clear away any remaining improvements damaged or destroyed by such taking or conveyance and will leave such property and any remaining undamaged improvements thereon in a clean, orderly, safe, and slightly condition. In addition, if the size or configuration of such property remaining after such taking or conveyance is insufficient to permit the restoration of the remaining improvements thereon or therein to their condition prior to such taking or conveyance in compliance with all applicable standards, restrictions, and provision of this Declaration and all applicable zoning, subdivision, building, and other governmental regulations, then such Owner will have the option, after clearing away all remaining improvements or portions thereof and placing the remainder in a clean, orderly, safe, and slightly condition referred to above, of deeding the remaining portion of the property to the Association as a part of the Common Areas, and thereafter any such Owner will not have any further voting rights or membership rights or privileges in the Association or with respect to the Development and will not be subject to any further Assessments imposed by the Association and payable after the date of such deeding and attributable to such property deeded to the Association.

10.2.2 Election to Restore. In the event that any part of a property subject to this Declaration, or any improvements thereon, is taken by any authority having the power of condemnation or eminent domain, or is conveyed in lieu thereof, and if the Owner thereof elects to restore the remainder of the property, such Owner making such election will restore such remainder thereof as nearly as practicable to the same condition it was in prior to such taking or conveyance and in accordance with all applicable standards, restrictions, and provisions of this Declaration and all applicable zoning, subdivision, building, and other governmental regulations. All such work of restoration will be commenced promptly following such taking or conveyance and will be carried through diligently to conclusion.

ARTICLE 11. FUNCTIONS OF THE ASSOCIATION

11.1 Board of Directors and Officers. The Association, subject to the rights of Declarant and the rights and duties of the Owners set forth in this Declaration, will be responsible for the exclusive management and control of the Common Areas and all improvements thereon (including furnishings and equipment related thereto) and will keep the same in a good, clean, attractive, and sanitary condition, order, and repair, pursuant to the terms and conditions thereof. Except to the extent otherwise required by the provisions of the Nonprofit Corporation Act, this Declaration, the Bylaws, or the Articles of Incorporation, the powers herein or otherwise granted to the Association shall be exercised by the Board of Directors, acting through the officers of the Association and their duly authorized delegates, without any further consent or action on the part of the Owners. As provided in Section 16.1 hereof and notwithstanding any other provision to the contrary contained in any instruments evidencing or establishing the Development, Declarant will have the right to appoint or remove any member or members of the Board of Directors or any officer or officers of the Association during the Declarant Control Period. Each Owner, by acceptance of a deed to or other conveyance of a Lot or Dwelling vests in Declarant such authority to appoint and remove directors and officers of the Association as provided by this Section 11.1 and by Section 16.1 hereof.

11.2 Duties and Powers. The duties and powers of the Association will be those set forth in the provision of the Nonprofit Corporation Act, the Bylaws, and the Articles of Incorporation, together with those reasonably implied to effect the purposes of the Association; provided; however, that if there are conflicts or inconsistencies between the Nonprofit Corporation Act, this Declaration, the Bylaws, or the Articles of Incorporation, the provisions of the Nonprofit Corporation Act, this Declaration, the Articles of Incorporation, and the Bylaws, in that order, will prevail, and each Owner of a property within the Development, by acceptance of a deed or other conveyance therefor, covenants to vote in favor of such amendments as will remove such conflicts or inconsistencies. The Association may exercise any other right or privilege given to it expressly by this Declaration or the Bylaws, together with every other right or privilege reasonable to be implied from the existence of any right or privilege given to it herein or reasonably necessary to effectuate any such right or privilege. Such powers of the Association will include, but will not be limited to, the power to purchase one or more properties subject to this Declaration and to hold, lease, mortgage, sell, and convey the same. Such duties may include, but will not be limited to, arranging with governmental agencies, public service districts, public or private utilities, or others, as a Common Expense or by billing directly to the Owners, to furnish trash collections, water, sewer, and/or security service for the properties subject to this Declaration. Notwithstanding the foregoing provision of this Section 11.2 or any other provision of this Declaration to the contrary, during the Declarant Control Period the Association will not, without the written approval of Declarant, borrow money or pledge, mortgage, or hypothecate all or any portion of the Common Areas.

11.2.1 Ownership of Properties. The Association will be authorized to own, purchase, lease, use under any use agreement, and maintain (subject to the requirements of any Federal, State or local governing body of South Carolina) Common Areas, equipment, furnishings, and improvements devoted to the uses and purposes expressed and implied in this Declaration, including, but not limited to, the following uses:

- (a) For walks, paths or trails throughout the Property;

(b) For security services, including security stations, maintenance building and/or guardhouses;

(c) For providing any of the services which the Association is authorized to offer under Section 11.2.2 below; and

(d) For purposes set out in deeds or agreements by which Common Areas are conveyed or by which use rights are granted to the Association.

11.2.2 Services. The Association will be authorized (unless prohibited by the requirements of any Federal, State or local governing body) to provide such services required to promote the uses and purposes for which the Association is formed as expressed or implied in this Declaration, including, but not limited to, the following services:

(a) Cleanup and maintenance of all private roads, roadways, road shoulders, roadway medians, parkways, lakes, lagoons, waterways, drainage areas and easements, marshes and Common Areas within the Property and also all public properties which are located within or in a reasonable proximity to the Property such that their deterioration would affect the appearance of the Property as a whole;

(b) Landscaping of Common Areas and walking paths within or constituting a Common Area;

(c) Lighting throughout the Property;

(d) Maintenance of any installed electronic and other access and control devices for the protection of the Property, if any such devices are ever installed, and assistance to the local police and sheriff departments in the apprehension and prosecution of persons who violate the laws of South Carolina within the Property;

(e) Insect and pest control to the extent that it is necessary or desirable in the judgment of the Board of Directors to supplement the service provided by the state and local governments;

(f) The services necessary or desirable in the judgment of the Board of Directors to carry out the Association's obligations and business under the terms of this Declaration and to collect Annual Assessments, Special Assessments, Emergency Special Assessments, specific Assessments, and other fees and charges collectable from the Owners hereunder;

(g) To take any and all actions necessary to enforce these and all covenants and restrictions affecting the Property and to perform any of the functions or services delegated to the Association in any covenants or restrictions applicable to the Property;

(h) To set up and operate an architectural review board in the event that the Association is assigned the whole or any portion of the function of the ARC by the Declarant.

(i) To construct improvements on Common Areas for use for any of the purposes or as may be required to provide the services as authorized in this Section;

(j) To provide administrative services including but not limited to legal, accounting and financial; and communications services informing Members of activities, notice of Meetings, Referendums, etc., incident to the above listed services;

- (k) To provide liability and hazard insurance covering improvements and activities on Common Areas;
- (l) To provide water, sewage, and any necessary utility services not provided by a public body, private utility or the Declarant;
- (m) To provide any or all of the above listed services to another Association or Owners of real property under a contract, the terms of which must be approved by the Board of Directors; and
- (n) To provide for hearings and appeal process for violations of rules and regulations.

11.3 Agreements. Subject to the prior approval of Declarant during the Declarant Control Period, all agreements and determinations lawfully authorized by the Board of Directors will be binding upon the Association and all Owners, their heirs, legal representatives, successors, and assigns, and all others having an interest in the Development or the privilege of possession and enjoyment of any part of the Development will comply with and be subject to the authorized actions of the Board of Directors. In performing its responsibilities hereunder, the Association, through its Board of Directors, will have the authority to delegate to persons of its choice such duties of the Association as may be determined by the Board of Directors. In furtherance of the foregoing and not in limitation thereof, the Association may obtain and pay for the services of any person or entity to manage its affairs or any part thereof, to the extent it deems advisable, as well as such other personnel as the Association will deem necessary or desirable for the proper operation of the Development, whether such personnel are furnished or employed directly by the Association or by any person or entity with whom or with which it contracts. All costs and expenses incident to the employment of a manager will be a Common Expense. During the term of such management agreement, such manager may, if authorized by the Board of Directors, exercise all of the powers and will be responsible for the performance of all the duties of the Association, excepting any of those powers or duties specifically and exclusively reserved to the directors, officers, or Members of the Association by this Declaration or the By-Laws. Such manager may be an individual, corporation, or other legal entity, as the Board of Directors will determine, and may be bonded in such a manner as the Board of Directors may require, with the cost of acquiring any such bond to be a Common Expense. In addition, the Association may pay for, and the Board of Directors may hire and contract for, such legal and accounting services as are necessary or desirable in connection with the operation of the Development or the enforcement of this Declaration, the By-Laws, or the rules and regulations of the Association.

11.3.1 Management Agreement. During the Declarant Control Period, Southern Lifestyles VIII LLC, or an affiliate may be employed as the manager of the Association and the Development, with the option on the part of Southern Lifestyles or its affiliate to renew such employment for three (3) successive one-year terms from and after the termination of the Declarant Control Period. Every grantee of any interest in the Development, by acceptance of a deed or other conveyance of such interest, will be deemed to ratify such management agreement.

11.4 Mortgage or Pledge. Subject to the provisions of Section 6.2.1, the Board of Directors will have the power and authority to mortgage the property of the Association and to pledge the revenues of the Association as security for loans made to the Association which loans will be used by the Association in performing its authorized functions. The Declarant may make loans to the Association, subject to approval by the Declarant of the use to which such loan proceeds will be put and the terms pursuant to which such loans will be repaid. Notwithstanding anything in this Declaration to the contrary, the Association will not be allowed to reduce the limits of the regular Annual Assessment at any time there are outstanding any amounts due the Declarant as repayment of any loans made by the Declarant to the Association.

11.5 Personal Property and Real Property for Common Use. The Association, through action of its Board of Directors, may acquire and hold tangible and intangible personal property and real property and may dispose of

the same by sale or otherwise. All funds received and title to all properties acquired by the Association and the proceeds thereof, after deducting therefrom the costs incurred by the Association in acquiring or selling the same, will be held by and for the benefit of the Association. The shares of the Owners in the funds and assets of the Association cannot be individually assigned, hypothecated, or transferred in any manner, except to the extent that a transfer of the ownership of a Lot or Dwelling also transfers the membership in the Association which is an appurtenance to such Lot and Dwelling.

11.6 Rules and Regulations. As provided in Article 13 hereof, the Association, through its Board of Directors, may make, amend, revoke and enforce reasonable rules and regulations governing the use of the Lots, Dwellings, and Common Areas, which rules and regulations will be consistent with the rights and duties established by this Declaration.

11.7 Reduction in Services. During the calendar years of 2000 and 2001, and during the first two years when any additional property may be added to this Declaration, the Board of will define and list a minimum level of services which will be furnished by the Association. So long as the Declarant is engaged in the development of properties which are subject to the terms of this Declaration, the Association will not reduce the level of services it furnishes below such minimum level. Such minimum level of service will expressly include an obligation of the Association to maintain the Common Areas and pay the costs and expenses set forth in any lease or use agreement therefor.

11.8 Obligation of the Association. The Association will not be obligated to carry out or offer any of the functions and services specified by the provisions of this Article except as specified in Section 11.7 above. The functions and services to be carried out or offered by the Association at any particular time will be determined by the Board of Directors taking into consideration the funds available to the Association and the needs of the Members of the Association. Special Assessments will be submitted for approval as herein provided. Subject to the provisions of Section 11.7 above, the functions and services which the Association is authorized to carry out or to provide may be added or reduced at any time upon the sole approval of the Declarant during the Declarant Control Period, and thereafter, the functions and services which the Association is authorized to carry out or to provide may be added or reduced by the Board acting on the vote of fifty-one percent (51%) or more of the votes of the entire Association, by Referendum or at a duly held meeting of Members (which percentage will also constitute the quorum required for any such meeting).

ARTICLE 12. ASSESSMENTS

12.1 Purpose of Assessments. The Assessments for Common Expenses provided for herein will be used for the general purposes of promoting the recreation, health, safety, welfare, common benefit, and enjoyment of the Owners and Occupants of the Development, and maintaining the Development and improvements therein, all as may be more specifically authorized from time to time by the Board of Directors.

12.2 Creation of Lien and Personal Obligation of Assessments. Each Owner, by acceptance of a deed or other conveyance thereof, whether or not it will be so expressed in such deed or conveyance, is deemed to covenant and agree to pay to the Association: (a) Annual Assessments, such Assessments to be established and collected as provided in Section 12.3, (b) Special Assessments, such Assessments to be established and collected as provided in Section 12.5, (c) Emergency Special Assessments, such Assessments to be established and collected as provided in Section 12.6, (d) individual or specific Assessments pursuant to Section 12.8. Any such Assessments payable, together with late charges, simple interest at a rate established from time to time by the Board of Directors, and court costs and attorneys' fees incurred to enforce or collect such Assessments, will be an equitable charge and a continuing lien upon the property of the Owner thereof who is responsible for payment. Each Owner will be personally liable for Assessments, coming due while he is the Owner of a property, and his grantee will take title to such property

subject to the equitable charge and continuing lien therefor, but without prejudice to the rights of such grantee to recover from his grantor any amounts paid by such grantee therefor; provided, however, the lien for unpaid Assessments will be subordinate to the lien of any unpaid taxes and any Institutional Mortgage or Mortgage held by Declarant. Sale or transfer of any Lot or Dwelling will not affect the lien of the Assessments; however, the sale or transfer of any Lot or Dwelling, which is subject to any Institutional Mortgage or Mortgage of Declarant, pursuant to a decree of foreclosure, will extinguish the lien of the Assessments as to payment thereof which became due prior to such sale or transfer. In the event of co-ownership of any property subject to this Declaration, all of such co-Owners will be jointly and severally liable for the entire amount of such Assessments. Assessments will be paid in such manner and on such dates as may be fixed by the Board of Directors in accordance with Section 12.3.3, provided that unless otherwise provided by the Board, the Annual Assessments will be paid in equal monthly installments. To the extent any subordinated lien and permanent charge for any Assessment is extinguished by foreclosure of any Institutional Mortgage or Mortgage of Declarant, then the amount or amounts otherwise secured thereby which cannot otherwise be collected will be deemed a Common Expense collectible from all Owners, including the person who acquires title through the foreclosure sale.

12.3 Establishment of Annual Assessment. Until an initial budget of Common Expenses of the Association has been prepared by either the Declarant or the Board of Directors and a copy of the initially adopted budget and the Annual Assessments established thereby is provided to each owner, no Annual Assessments shall be charged to or collected from the Owners. Upon adoption of the initial budget and Annual Assessments, any full, annual budget amount being prorated for the remainder of the fiscal year in which so adopted, the Association shall bill each Owner for his or her share of the Annual Assessments, as hereinafter provided, and each Owner shall pay said amount. It will be the duty of the Board of Directors at least ninety (90) days prior to the first day of the Association's first full fiscal year after the fiscal year in which the initial budget and Annual Assessments are adopted, and each fiscal year thereafter, to prepare a budget covering the estimated Common Expenses during the coming year, such budget to include a reserve account, if necessary, for the capital needs of the Association. The Board will cause the budget and the proposed total of the Annual Assessments to be levied against properties subject to this Declaration for the following year to be delivered to each Owner at least thirty (30) days prior to the first day of the fiscal year for which the budget and Assessments are established. Each Lot and Dwelling shall be responsible for that portion of the total Annual Assessments determined by multiplying the total Common Expenses by a fraction, the numerator of which is the number of "Assessment Units" assigned to the Lot or Dwelling and the denominator of which is the total number of Assessment Units assigned to all Lots and Dwellings existing at the date such budget is finalized. Each Lot (without residential improvements) shall be assigned one (1) Assessment Unit; and each Dwelling (a Lot with a completed residence thereon) will be assigned two (2) Assessment Units.

12.3.1 Disapproval of Annual Assessments. The annual budget and Annual Assessments, as determined by the Board of Directors, as hereinabove provided, will become effective unless disapproved (a) solely by the Declarant in writing during the Declarant Control Period, and (b) thereafter by seventy-five percent (75%) or more of the votes of the entire Association at a special meeting of Members called therefor and held pursuant to the provisions of the Bylaws, which percentage will also constitute the quorum required for any such meeting. Notwithstanding the foregoing, in the event the proposed budget and Annual Assessments are disapproved or in the event the Board of Directors fails for any reason to determine an annual budget and to set the Annual Assessments, then and until such time as a budget and Annual Assessment will have been determined as provided herein, the budget and Annual Assessments will be the Default Budget and Default Annual Assessments calculated in accordance with Section 12.4.

12.3.2 Special Board Action to Increase. If the Board of Directors determines that the important and essential functions of the Association will not be properly funded in any year by the Annual Assessment herein provided, it may increase such Assessment; provided, however, an increase in Annual Assessments in any year pursuant to special Board action as aforesaid will in no way affect Annual Assessments for subsequent years.

12.3.3 Billing of Annual Assessments. The Annual Assessments will be billed annually, quarterly or monthly, as determined by the Board, and will be due and payable on or before the last day of the month in which billed.

12.3.4 Rounding. All Annual Assessments charged by the Association will be rounded off to the nearest dollar.

12.3.5 For Common Expenses. The Common Expenses to be funded by the Annual Assessments may include, but will not necessarily be limited to, the following:

- (a) management fees and expenses of administration, including legal and accounting fees;
- (b) utility charges for utilities serving the Common Areas and charges for other common services for the Development, including trash collection and security services, if any such services or charges are provided or paid by the Association;
- (c) the cost of any policies of insurance purchased for the benefit of all the Owners and the Association as required or permitted by this Declaration, including fire, flood, and other hazard coverage, public liability coverage, and other insurance coverage determined by the Board to be in the interests of the Association and the Owners;
- (d) the expenses of maintenance, operation, and repair of those portions of the Common Areas which are the responsibility of the Association under the provisions of this Declaration;
- (e) the expenses of any architectural review board established to receive and administer the whole or any portion of the ARC functions transferred and conveyed to the Association which are not defrayed by plan review charges;
- (f) ad valorem real and personal property taxes assessed and levied against the Common Areas;
- (g) such other expenses as may be determined from time to time by the Board of to be Common Expenses, including, without limitation, taxes and governmental charges not separately assessed against Lots or Dwellings; and
- (h) the establishment and maintenance of a reasonable reserve fund or funds (i) for maintenance, repair, and replacement of those portions of the Common Areas which are the responsibility of the Association and which must be maintained, repaired, or replaced on a periodic basis, (ii) to cover emergencies and repairs required as a result of casualties which are not funded by insurance proceeds, and (iii) to cover unforeseen operating contingencies or deficiencies arising from unpaid Assessments or liens, as well as from emergency expenditures and other matters, all as may be authorized from time to time by the Board of Directors.

12.4 Determination of Default Budget and Default Annual Assessment. Upon the failure of the Board of Directors to adopt a budget, or upon the disapproval of any budget pursuant to Section 12.3.1, the Default Budget and Default Annual Assessments will be the greater of:

- (a) The then existing budget and Annual Assessments, increased in proportion to the percentage increase, if any, in the "CPI-U," as hereinafter defined, from December of the preceding year to November

of the then current year in which the said maximum budget and Annual Assessment is being determined, or by five (5%) percent, whichever is greater; or

(b) The budget and Annual Assessments for the year in which this Declaration is filed Of Record by the Declarant, increased to the year in which the said maximum budget and Annual Assessment is being determined in proportion to the percentage increase, if any, in the "CPI-U," as hereinafter defined, from December of the year preceding the year in which this Declaration is filed Of Record to November of the year in which the said maximum budget and Annual Assessment is being determined, or by five (5%) percent per annum, compounded, whichever is greater.

The "CPI-U" will mean the Consumer Price Index for All Urban Consumers (1982-84=100), or, if such index is discontinued or revised, by reference to such other government index or computation with which it is replaced or which would produce substantially the same measure as would be obtained if such index had not been discontinued or revised.

12.4.1 Change in Default Amounts Upon Merger or Consolidation. The limitations of Section 12.4 will apply to any merger or consolidation in which the Association is authorized to participate under Section 2.2.3, and under the Bylaws of the Association.

12.5 Special Assessments for Improvements and Additions. In addition to the regular, Annual Assessments authorized by Section 12.3 hereof, the Association may levy Special Assessments, for the following purposes:

- (a) Construction or reconstruction, repair or replacement of capital improvements upon the Common Areas, including the necessary fixtures and personal property related thereto;
- (b) To provide for the necessary facilities and equipment to offer the services authorized herein;
- (c) To cover any shortfall, whether by way of deductible or otherwise, in insurance proceeds recovered; and
- (d) To repay any loan made to the Association to enable it to perform the duties and functions authorized herein.

12.5.1 Special Assessments: Approval by Declarant and Disapproval by Members. Except as otherwise permitted in Sections 6.3.2, 9.2, 10.1 and 12.6 hereof, any Special Assessment will only be levied if: (a) during the Declarant Control Period the Declarant approves, in writing, such Special Assessment; and (b) after the Declarant Control Period the Special Assessment is not disapproved by sixty-seven percent (67%) or more of the votes of the entire Association at a special meeting of Members called therefor and held pursuant to the provisions of the Bylaws, which percentage will also constitute the quorum required for any such meeting. The notices of such special meeting will include one statement from the Directors favoring the Special Assessment and one statement from those Directors opposing the Special Assessment containing the reasons for those Directors' support and opposition for the Special Assessment, if any such statements are provided by the Directors supporting and opposing the Special Assessment (Directors being under no obligation to provide such statements). Neither statement, either supporting or opposing the Special Assessment, will exceed five pages in length.

12.5.2 Apportionment. Special Assessments will be apportioned among the Lots and Dwellings in relation to their then existing Assessment Units and in the same manner as Annual Assessments.

12.6 Emergency Special Assessments. In addition to the Annual Assessments authorized by Section 12.3 and the Special Assessment authorized by Section 12.5 hereof, the Association may levy Assessments for repairs, reconstruction, alterations or improvements due to emergencies of any type, as determined by the Declarant during the Declarant Control Period, and/or by the Board of Directors, in their sole discretion ("Emergency Special Assessment"). Any Emergency Special Assessment may be imposed without a vote of the Members. Emergency Special Assessments will be apportioned among the Lots and Dwellings in relation to their then existing Assessment Units and in the same manner as Annual Assessments unless it is determined by the Declarant and/or Board that another apportionment thereof is more reasonable and more equitably justified by the circumstances giving rise to such emergency.

12.7 Declarant's Properties. Anything contained herein to the contrary notwithstanding, Declarant will be exempt from the payment of Annual Assessments, Special Assessments and Emergency Special Assessments with respect to unimproved Lots and unoccupied Dwellings owned by the Declarant and subject to this Declaration. The Declarant hereby covenants and agrees, however, that during the Declarant Control Period it will annually elect either to pay an amount equal to the Annual Assessment for each such Lot and Dwelling owned by it or to pay the difference between the amount of Assessments collected on all other Lots and Dwellings not owned by Declarant and the amount of actual expenditures by the Association during the fiscal year, but not in a sum greater than the Annual Assessments Declarant would pay if not exempt therefrom. Unless the Declarant otherwise notifies the Board in writing at least sixty (60) days before the beginning of each fiscal year, the Declarant will be deemed to have elected to continue paying on the same basis as existed during the immediately preceding year. Furthermore, so long as the Declarant owns any Lot or Dwelling for sale, the Declarant may, but will not be obligated to, reduce the Annual Assessment for any year to be paid by Owners. Any such reduction in the amount assessed against the Owner will be funded as a subsidy by the Declarant. Any such subsidy will, in the Declarant's sole discretion, be (a) a contribution to the Association, (b) an advance against future Annual Assessments due from said Declarant, or (c) a loan to the Association. The amount and character (contribution, advance or loan) of such payment by the Declarant will be conspicuously disclosed as a line item in the budget and will be made known to the Owners. The payment of such a subsidy in any year will under no circumstances obligate the Declarant to continue payment of such subsidy in future years, unless otherwise provided in a written agreement between the Association and the Declarant. Any such subsidy payment by Declarant may be made in-kind.

12.8 Individual Specific Assessments. Any expenses incurred by the Association or the Declarant because of the actions of one or more Owners or Occupants, or because of their failure to act, and with respect to which such expenses are chargeable thereto and recoverable therefrom pursuant to any provision of this Declaration, and any fines as may be imposed against an Owner in accordance with Article 13 hereof will be specially assessed as a specific Assessment against each such Owner and the Owner's Lot or Dwelling.

12.9 Effect of Nonpayment; Remedies of the Association. An Assessment shall be due in full not later than the last day of the month in which the Assessment is billed, and any Assessment or portions thereof which is not paid when so due will be delinquent. Any delinquent Assessment will incur a late charge in an amount as may be determined by the Board from time to time and, upon adoption of a policy therefor by the Board of Directors, will also commence to accrue simple interest at the rate set by the Board of Directors from time to time. A lien and equitable charge as herein provided for each Assessment installment shall attach simultaneously as the same will become due and payable, and if an Assessment installment has not been paid as aforesaid, the entire unpaid balance of the Assessment installments remaining to be paid during the fiscal year may be accelerated by the option of the Board and be declared due and payable in full. The continuing lien and equitable charge of such Assessment will include all costs of collection (including reasonable attorneys' fees and court costs), and any other amounts provided or permitted hereunder or by law, subordinate only to liens for unpaid taxes, any Institutional Mortgage and any Mortgage held by Declarant as provided in Section 12.2 above. In the event that the Assessment remains unpaid sixty (60) days following the date when so due, the Association may institute suit to collect such amounts and to foreclose its lien. The equitable charge and lien provided for in this Section will be in favor of the Association, and each

Owner, by his acceptance of a deed or other conveyance to a Lot, vests in the Association and its agents the right and power to bring all actions against him personally for the collection of such Assessments as a debt and/or to foreclose the aforesaid lien in like manner as a mortgage of real property. The Association will have the power to bid on the Lot or Dwelling at any foreclosure sale and to acquire, hold, lease, mortgage, and convey the same. No Owner may waive or otherwise escape liability for the Assessments provided for herein, including by way of illustration but not limitation, non-use of the Common Areas or abandonment of his Lot, and an Owner will remain personally liable for Assessments, including interest and late charges which accrue prior to a sale, transfer, or other conveyance of his Lot.

12.10 Certificate. The Treasurer, any Assistant Treasurer, or the manager of the Association will, within ten (10) days of a written request and upon payment of a fee set from time to time by the Board of Directors, furnish to any Owner or such Owner's Mortgagee which requests the same, a certificate signed by the Treasurer, Assistant Treasurer, or manager setting forth whether the Assessments for which such Owner is responsible have been paid, and, if not paid, the outstanding amount due and owing, together with all fines, accrued interest, and other penalty charges. Such certificate will be conclusive evidence against all but such Owner of payment of any Assessments stated therein to have been paid.

12.11 Date of Commencement of Assessments. The Assessments provided for herein will commence on the date on which a Lot is conveyed to a person other than Declarant and will be due and payable in such manner and on such schedule as the Board of Directors may provide. Annual Assessments, Special Assessments and Emergency Special Assessments will be adjusted for such property according to the number of months then remaining in the then fiscal year of the Association and the number of days then remaining in the month in which such property is first conveyed.

12.11.1 Working Capital Collected At Initial Closing. Notwithstanding anything to the contrary in this Declaration, a working capital fund will be established for the Association by collecting from each Owner who acquires title to his Lot from the Declarant a working capital amount equal to 2/12ths of the Annual Assessment then in effect, which Assessment will be due and payable, and will be transferred to the Association, at the time of transfer of each Lot by the Declarant to any other Owner. Such sum is and will remain distinct from the Annual Assessment and will not be considered advance payment of the Annual Assessment. The working capital receipts may be used by the Association in covering operating expenses as well as any other expense incurred by the Association pursuant to this Declaration and the Bylaws.

ARTICLE 13. RULE MAKING

13.1 Rules and Regulations. Subject to the provisions hereof, the Board of Directors may establish reasonable rules and regulations concerning the use of Lots, Dwellings, and the Common Areas, and facilities located thereon. In particular but without limitation, the Board of Directors may promulgate from time to time rules and regulations which will govern activities which may, in the judgment of the Board of Directors, be environmentally hazardous, such as application of fertilizers, pesticides, and other chemicals. Copies of such rules and regulations and amendments thereto will be furnished by the Association to all Owners prior to the effective date of such rules and regulations and amendments thereto. Such rules and regulations will be binding upon the Owners and Occupants until and unless any such rule or regulation is specifically overruled, cancelled, or modified by the Board of Directors or any such rule or regulation is disapproved by a majority or more of the votes of the entire Association at a special meeting of Members called therefor and held pursuant to the provisions of the Bylaws, which percentage will also constitute the quorum required for any such meeting. Any action by the Board to adopt, overrule, cancel or modify any rule or regulation, or any vote of Members disapproving any rule or regulation, will not be effective and binding upon the Owners and Occupants until and unless the same is approved by the Declarant during the Declarant Control Period.

13.2 Authority and Enforcement. Subject to the provisions of Section 13.3 hereof, upon the violation of this Declaration, the Bylaws, or any rules and regulations duly adopted hereunder, including, without limitation, the failure to timely pay any Assessments, the Board will have the power (i) to impose reasonable monetary fines which will constitute an equitable charge and a continuing lien as a specific Assessment, (ii) to suspend an Owner-Member's right to vote in the Association, or (iii) to suspend an Owner's or Occupant's right to use any of the Common Areas. The Board will have the power to impose all or any combination of these sanctions, and may establish each day a violation remains uncured as a separate violation for which a fine is due; provided, however, an Owner's access to its property over the private roads and streets constituting Common Areas will not be terminated hereunder. An Owner or Occupant will be subject to the foregoing sanctions in the event of such a violation by such Owner or Occupant. Any such suspension of rights may be for the duration of the infraction and for any additional period thereafter, not to exceed thirty (30) days.

13.3 Procedure. Except with respect to the failure to pay Assessments, the Board will not impose a fine, suspend voting rights, or infringe upon or suspend any other rights of an Owner or other Occupant of the Development for violations of the Declaration, By-Laws, or any rules and regulations of the Association, unless and until the following procedure is followed:

13.3.1 Demand to Cease and Desist. Written demand to cease and desist from an alleged violation will be served upon the Owner responsible for such violation specifying:

- (a) The alleged violation;
- (b) The action required to abate the violation; and
- (c) A time period of not less than ten (10) days during which the violation may be abated without further sanction, if such violation is a continuing one, or if the violation is not a continuing one, a statement that any further violation of the same provision of this Declaration, the By-Laws, or of the rules and regulations of the Association may result in the imposition of sanctions after notice and hearing.

13.3.2 Notice of Hearing. Within twelve (12) months of such demand, if the violation continues past the period allowed in the demand for abatement without penalty, or if the same violation subsequently occurs, the Board may serve such Owner with written notice, in accordance with Section 16.15 of a hearing to be held by the Board in executive session. The notice will contain:

- (a) The nature of the alleged violation;
- (b) The time and place of the hearing, which time will be not less than ten (10) days from the giving of the notice;
- (c) An invitation to attend the hearing and produce any statement, evidence, and witnesses on his behalf; and
- (d) The proposed sanction to be imposed.

13.3.3 Hearing. The hearing will be held in executive session of the Board of Directors pursuant to the notice and will afford the alleged violator a reasonable opportunity to be heard. Prior to the effectiveness of any sanction hereunder, proof of notice and the invitation to be heard will be placed in the minutes of the meeting. Such proof will be deemed adequate if a copy of the notice together with a statement of the date and matter of delivery is entered by the officer, director, or other individual who delivered such notice. The notice requirement

will be deemed satisfied if an alleged violator appears at the meeting. The minutes of the meeting will contain a written statement of the results of the hearing and the sanction imposed, if any.

ARTICLE 14. ALTERNATIVE DISPUTE RESOLUTION & LITIGATION

14.1 Agreement to Avoid Costs of Litigation and to Limit Right to Litigate Disputes. The Declarant, Association, Owners, and any persons not otherwise subject to the Declaration who agree to submit to this Article 14 (collectively, "Bound Parties") agree to encourage the amicable resolution of disputes between and among themselves involving this Declaration or the Development, and to avoid the emotional and financial costs of litigation. Accordingly, each Bound Party covenants and agrees that all claims, grievances and disputes (including those in the nature of counterclaims or cross-claims) between Bound Parties involving the Declaration or the Development, including without limitation, claims, grievances or disputes arising out of or relating to the interpretation, application or enforcement thereof (collectively "Claims"), except for "Exempt Claims" under Section 14.2, are subject to the procedures set forth in Section 14.3.

14.2 Exempt Claims. The following Claims ("Exempt Claims") are exempt from the provisions of Section 14.3:

- (a) any suit by the Association against a Bound Party to enforce any Assessments or other charges hereunder; and
- (b) any suit by the Association to obtain a temporary restraining order (or equivalent emergency equitable relief) and other relief the court may deem necessary in order to maintain the status quo and preserve any enforcement power of the Association hereunder until the matter may be resolved on the merits pursuant to Section 14.3 below; or
- (c) any suit between Owners which does not include the Declarant or the Association as a party, if such suit asserts a Claim which would constitute a cause of action independent of the Declaration and the Development; or
- (d) any suit in which an indispensable party is not a Bound Party; or
- (e) any suit which otherwise would be barred by any applicable statute of limitation; or
- (f) any suit involving a matter which is not an Exempt Claim under (a) through (e) above, but as to which matter the Bound Party against whom the Claim is made waives the mandatory provisions of Section 14.3 below.

Any Bound Party having an Exempt Claim may submit it to the alternative dispute resolution procedures set forth in Section 14.3, but there is no obligation to do so.

14.3 Mandatory Procedures for Non-Exempt Claims. Any Bound Party having a Claim ("Claimant") against a Bound Party involving this Declaration or the Development, or all or any combination of them ("Respondent"), other than an Exempt Claim under Section 14.2, will not file suit in any court or initiate any proceeding before any administrative tribunal seeking redress or resolution of the Claim until it has complied with the procedures set forth in Exhibit "C" to this Declaration, and then only to enforce the results hereof:

14.4 Litigation. No judicial or administrative proceeding, including any mandatory procedure under Section 14.3 above, with an amount in controversy exceeding \$25,000.00, will be commenced or prosecuted by the

Association unless approved by 75% or more of the votes of the entire Association, by Referendum or at a duly held meeting of Members called for the purpose of approving the proceeding, which percentage will also constitute the quorum required for any such meeting. This Section will not apply, however, to (a) actions brought by the Association to enforce the provisions of this Declaration (including, without limitations, the foreclosure of liens); (b) the imposition and collection of Assessments; (c) proceedings involving challenges to ad valorem taxation; (d) counterclaims brought by the Association in proceedings instituted against it; or (e) actions brought by the Association to enforce written contracts with its suppliers and service providers. This Section will not be amended unless the amendment is approved by the requisite percentage of votes of Members, and pursuant to the same procedures, necessary to institute proceedings as provided above. This provision will apply in addition to the negotiation and arbitration provisions of this Article 14 and the procedures therefor set forth in Exhibit "C" to this Declaration, if applicable.

14.5 Miscellaneous Alternative Dispute Resolution Provisions.

14.5.1 Conflicting Provisions. Any conflict or discrepancy between the terms and conditions set forth in this Article 14 and the procedures set forth in Exhibit "C" and any term, condition or procedure of the American Arbitration Association, or any remedy allowed at law or in equity, the terms, conditions, procedures and remedies set forth herein and in Exhibit "C" will control.

14.5.2 TIME IS OF ESSENCE. All periods of time set forth herein or calculated pursuant to provisions of this Article 14 will be strictly adhered to, TIME BEING OF THE ESSENCE hereof.

ARTICLE 15. MORTGAGEE PROTECTION

15.1 Introduction. This Article 15 establishes certain standards and covenants which are for the benefit of the holders, insurers and guarantors of certain mortgages. This Article 15 is supplemental to, and not in substitution for, any other provisions of the Declaration, the Bylaws of the Association and the Articles of Incorporation of the Association (the "Constituent Documents"), but in the event of conflict, this Article shall control. Unless the Board of Directors shall vote to suspend this provision, the Board shall periodically amend this Article from time to time, to be consistent with generally applicable requirements of the Federal National Mortgage Association governing mortgagee approval requirements.

15.2 Eligible Mortgagees. Wherever in the Constituent Documents the approval or consent of a specified percentage of "Eligible Mortgagees" is required, it shall mean the approval or consent of the Institutional Mortgagees holding first lien Mortgages on Lots which have provided to the Association written requests, stating their names and addresses and the street addresses of the Lots to which their Mortgages relate, to receive written notice of the matters for which they are entitled to vote, and which in the aggregate have allocated to them such specified percentage of votes in the Association when compared to the total allocated to all Lots then subject to first Mortgages held by Eligible Mortgagees.

15.3 Notice of Actions. The Association shall give prompt written notice to each Eligible Mortgagee of:

(a) Any condemnation loss or any casualty loss which affects a material portion of the Common Interest Community or any Lot in which there is a first Security Interest held, insured, or guaranteed by such Eligible Mortgagee or Eligible Insurer as applicable;

(b) Any delinquency in the payment of Assessments owed by an Owner whose Lot is subject to a first Mortgage held, insured, or guaranteed, by such Eligible Mortgagee which remains unpaid for a period of sixty (60) days.

(c) Any lapse, cancellation, or material modification of any insurance policy or fidelity bond maintained by the Association;

(d) Any proposed action which would require the consent of a specified percentage of Eligible Mortgagees as specified in Section 15.4; and

(e) Any judgment rendered against the Association.

15.4 Consents Required: Constituent Documents' Changes. Notwithstanding any lower requirement permitted by the Constituent Documents or the Nonprofit Corporation Act, no amendment of any material provision of the Constituent Documents by the Owners described in this Section 15.4 may be effective without the vote of sixty-seven percent (67%) or more of the votes of the entire Association, by Referendum or at a duly held meeting of Members (which percentage will also constitute the quorum required for any such meeting), or any greater vote required in the Constituent Documents or the Nonprofit Corporation Act, and until approved in writing by at least fifty-one percent (51%) of the Eligible Mortgagees (or any greater Eligible Mortgagee approval required by the Constituent Documents). The foregoing approval requirements do not apply to amendments effected by the exercise of any rights of the Declarant to amend the Constituent Documents during the Declarant Control Period. Consent of an Eligible Mortgagee is deemed granted if no denial is received within thirty (30) days after the Eligible Mortgagee receives notice of the proposed changes. Material provisions requiring such Members' vote and Eligible Mortgagees' approval include, but are not limited to, any provision affecting:

- (a) Assessments, assessment liens, or subordination of assessment liens;
- (b) Voting rights;
- (c) Reserves for maintenance, repair and replacement of the Common Areas;
- (d) Responsibility for maintenance and repairs;
- (e) Reallocation of interests in the Common Areas or Limited Common Areas except that when Limited Common Areas are reallocated by agreement between Lot Owners, only those Lot Owners and only the Eligible Mortgagees which hold Mortgages on such Lots must approve such action;
- (f) Rights to use Common Areas and Limited Common Areas;
- (g) Boundaries of Lots except that when boundaries of only adjoining Lots are involved, or a Lot is being subdivided, then only those Lot Owners and the Eligible Mortgagees holding mortgages on such Lot or Lots must approve such action.
- (h) Convertibility of Lots into Common Areas or Common Areas into Lots;
- (i) Expansion or contraction of the Development, or the addition, annexation or withdrawal of property to or from the Development;

- (j) Insurance or fidelity bonds;
- (k) Leasing of Lots;
- (l) Imposition of restrictions on a Lot Owner's right to sell or transfer his or her Lot;
- (m) Establishment of self-management when professional management had been required previously by the Constituent Documents or by an Eligible Mortgagee;
- (n) Restoration or repair of the Property after a hazard damage or partial condemnation in a manner other than that specified in the Constituent Documents;
- (o) Termination of the legal status of the Development after occurrence of substantial destruction or condemnation; and
- (p) Any provision that expressly benefits Mortgage holders, insurers or grantors.

15.5 Actions. Notwithstanding any lower requirement permitted by the Constituent Documents or the Nonprofit Corporation Act, the Association may not take any of the following actions without the approval of at least fifty-one (51%) of the Eligible Mortgagees or such higher percentage as set forth herein:

- (a) The conveyance or encumbrance of the Common Areas or any portion thereof, as to which at least a sixty-seven percent (67%) approval by Eligible Mortgagees is required. The granting of easements for public utilities or for other public purposes consistent with the intended use of the Common Areas for the benefit of the Development shall not be deemed a conveyance or encumbrance within the meaning of this clause;
- (b) The restoration or repair of the Property after damage or a partial condemnation in a manner other than that specified in the Constituent Documents;
- (c) The termination of the legal status of the Development for reasons other than substantial destruction or condemnation, as to which at least sixty-seven percent (67%) approval by Eligible Mortgagees is required;
- (d) The alteration of any partition or creation of any aperture between adjoining Lots when Lot boundaries are not otherwise being affected, in which case only the owners of Lots affected and Eligible Mortgagees of those Lots need approve the action;
- (e) The merger of the Association with any other common interest community;
- (f) The granting of any easements, leases, licenses and concessions through or over the Common Areas excluding, however, any utility easements serving or to serve the Development and excluding any leases, licenses or concessions for no more than one year;
- (g) The assignment of the future income of the Association, including its right to receive Common Expense assessments; and
- (h) Any action taken not to repair or replace the Property.

The foregoing consents do not apply to the exercise of any right reserved by the Declarant in the Constituent Documents.

15.6 Change From Monthly Assessment. The Association may not change the period for collection of regularly budgeted Common Expenses Assessments to other than monthly without the consent of all Eligible Mortgagees.

15.7 Declarant's Reserved Rights. No rights reserved by the Declarant may be voluntarily abandoned or terminated by the Declarant unless all persons holding security interests in the Declarant's reserved rights consent to the abandonment or termination.

15.8 Inspection of Books. The Association shall permit any Eligible Mortgagee to inspect the books and records of the Association during normal business hours.

15.9 Financial Statements. The Association shall provide any Eligible Mortgagee which submits a written request, with a copy of an annual financial statement within one hundred twenty (120) days following the end of each fiscal year of the Association. Such financial statement shall be audited by an independent certified public accountant if the number of Lots is 50 or more, or if the number of Lots is less than 50 and no audited statement is otherwise required under the Constituent Documents, any Eligible Mortgagee may have an audited statement prepared at its own expense.

15.10 Enforcement. The provisions of this Article 15 are for the benefit of Eligible Mortgagees and their successors, and may be enforced by any of them by any available means, at law, or in equity.

15.11 Attendance at Meetings. Any representative of an Eligible Mortgagee may attend any meeting which a Lot Owner may attend.

ARTICLE 16. GENERAL PROVISIONS

16.1 Control of Declarant. NOTWITHSTANDING ANY OTHER LANGUAGE OR PROVISION TO THE CONTRARY IN THIS DECLARATION, IN THE ARTICLES OF INCORPORATION, OR IN THE BYLAWS OF THE Association, Declarant hereby retains for the duration of the Declarant Control Period the right to appoint and remove any member or members of the Board of Directors and any officer or officers of the Association. Every grantee of any interest in the Development, by acceptance of a deed or other conveyance of such interest, agrees that Declarant will have the authority to appoint and remove directors and officers of the Association in accordance with the foregoing provisions of this Section 16.1. The provisions of this Section 16.1 are supplemental to, and not in substitution of, other rights retained by Declarant pursuant to this Declaration.

16.1.1 Voting Agreement and Proxy. By acceptance of a deed or other conveyance of a real estate interest subject hereto, an Owner-Member does hereby grant, and if further required, does agree to vote in a manner to provide, to Declarant all voting rights and other corporate powers specifically reserved to and designated for Declarant under this Declaration. **IN CONNECTION WITH THIS VOTING AGREEMENT, EACH MEMBER APPOINTS DECLARANT AS PROXY FOR SUCH MEMBER WITH FULL POWER OF SUBSTITUTION TO VOTE FOR THE MEMBER ON ALL SUCH MATTERS ON WHICH THE MEMBER MAY BE ENTITLED TO VOTE, AND WITH RESPECT TO WHICH THERE IS A RESERVATION OR DESIGNATION OF VOTING RIGHTS IN DECLARANT UNDER THIS DECLARATION, AND WITH ALL POWERS WHICH THE MEMBER WOULD POSSESS IF PERSONALLY PRESENT AT ANY MEETING**

OF MEMBERS. SUCH APPOINTMENT WILL BE, UPON A MEMBER'S ACCEPTANCE OF A DEED OR OTHER CONVEYANCE AND WITHOUT THE NECESSITY OF FURTHER ACTION BY THE DECLARANT OR THE MEMBER, A POWER COUPLED WITH AN INTEREST AND IRREVOCABLE. Such appointment will be effective as of the date on which a deed or other conveyance of an interest to the Owner-Member is filed Of Record. This irrevocable proxy will automatically terminate on the date Declarant's voting rights as a Type B Member terminate. The within voting agreement and proxy are in addition to, and not in substitution of, all rights of Declarant herein provided, which will run with the Property.

16.1.2 Creation of New Board. Upon the expiration of the Declarant Control Period, election of the Board will pass to the Owners as provided in the Bylaws. Following election of a new Board of Directors, Declarant will deliver all books, accounts, and records, if any, which Declarant has kept on behalf of the Association and any agreements or contracts executed by or on behalf of the Association during such period and which Declarant has in its possession.

16.2 Amendments by Declarant. During the Declarant Control Period, the Declarant may amend this Declaration or the Bylaws by an instrument in writing filed Of Record without the approval of any Owner or Mortgagee; provided, however, that, (a) in the event that such amendment has a material adverse effect upon any Owner's rights hereunder or adversely affects the title to any Lot or Dwelling, such amendment will be valid only upon the written consent thereto by a majority in number of the then existing Owners affected thereby; and (b) in the event that such amendment would materially and adversely affect the security title and interest of any Mortgagee, such amendment will be valid only upon the written consent thereto of all such Mortgagees so affected. Any amendment made pursuant to this Section 16.2 will be certified by Declarant as having been duly approved by Declarant, and by such Owners and Mortgagees if required, and will be effective only upon it being filed Of Record or at such later date as will be specified in the amendment itself. Furthermore, following the Declarant Control Period, this Declaration and the Bylaws may be amended solely by the Declarant filing same Of Record if such amendment is necessary, in the reasonable determination of the Declarant, (i) to bring any provision hereof or thereof into compliance or conformity with the provisions of any applicable governmental statute, rule, or regulation or any judicial determination which will be in conflict therewith, (ii) to enable any reputable title insurance company to issue title insurance coverage with respect to any properties subject to this Declaration, (iii) if such amendment is required by an institutional or governmental lender or purchaser of mortgage loans, including, for example, the Federal National Mortgage Association or Federal Home Loan Mortgage Corporation, to enable such lender or purchaser to make or purchase mortgage loans on any properties subject to this Declaration, or (iv) to enable any governmental agency or reputable private insurance company to insure Mortgages on the properties or other improvements subject to this Declaration. Each Owner by acceptance of a deed or other conveyance of a Lot or Dwelling agrees to be bound by amendments permitted by this Section 16.2, and further agrees, if requested by the Declarant, such Owner will consent to such amendment.

16.3 Amendments by the Association. Amendments to this Declaration or the Bylaws, other than those authorized by Section 16.2 hereof, will be proposed and adopted in the following manner:

(a) Notice of the subject matter of the proposed amendment will be included in the notice of the meeting of the Association at which such proposed amendment is to be considered and will be delivered to each Member of the Association.

(b) At such meeting, a resolution adopting a proposed amendment may be proposed by either the Board of Directors or Members of the Association. Such amendment must be approved by sixty-seven percent (67%) or more of the votes of the entire Association, by Referendum or at a duly held meeting of Members called for the purpose of approving a proposed amendment, which percentage will also constitute the quorum required for

any such meeting; provided, however, (i) that any amendment which materially and adversely affects the security title and interest of any Mortgagee must be approved by such Mortgagee; (ii) during the Declarant Control Period, such amendment must be approved by Declarant; and (iii) in the event that such amendment also is an amendment to the Bylaws, the amendment will be adopted pursuant to the applicable procedures of the Nonprofit Corporation Act.

(c) The agreement of the required percentage of the Owners and, where required, Declarant and any Mortgagee, to any amendment of this Declaration pursuant to this Section 16.3 will be evidenced by their execution of such amendment, or, in the alternative, the sworn statement of the President of the Association attached to or incorporated in the amendment executed by the Association, which sworn statement will state unequivocally that the agreement of the required parties was lawfully obtained. Any such amendment of this Declaration will become effective only when filed Of Record or at such later date as may be specified in the amendment itself.

Anything contained in this Section 16.3 to the contrary notwithstanding, no amendment under this Declaration shall be made, or any vote therefor effective, if the result or effect thereof would have a material adverse effect upon Declarant or any right, limitation, approval or easement of Declarant without the prior written approval of the Declarant, including, but not limited to, this Section 16.3 and any matter set forth in Sections 2.2.1, 2.3, 2.4, 5.4, 5.4.1, 5.13, 5.21, 5.22, 5.23, 5.24, 5.25.1, 5.26, 5.27, 6.2.5, 6.3, 6.3.3, 6.5, 6.5.1, 6.6, 6.7, 11.2, 11.3, 11.3.1, 12.5.1, 12.7, 16.2, 16.8, 16.9, and 16.14.

16.4 Duration. The provisions of this Declaration will run with and bind title to the Property, will be binding upon and inure to the benefit of all Owners and Mortgagees, and will be and remain in effect for a period of thirty (30) years from and after the date this Declaration is filed Of Record, provided that rights and easements which are stated herein to have a longer duration will have such longer duration. Upon the expiration of said thirty (30)-year period, this Declaration will be automatically renewed for successive ten (10)-year periods. The number of ten (10)-year renewal periods will be unlimited, with this Declaration being automatically renewed and extended upon the expiration of each ten (10)-year renewal period for an additional ten (10)-year period; provided, however, that there will be no renewal or extension of this Declaration, if, during the last year of an initial thirty (30)-year period or the last year of any ten (10)-year renewal period, 75% or more of the votes of the entire Association, by Referendum or at a duly held meeting of Members called for the purpose of approving the proceeding, which percentage will also constitute the quorum required, approve terminating this Declaration at the end of the then current term. In the event that the Association votes to terminate this Declaration, an instrument evidencing such termination will be filed Of Record, such instrument to contain a certificate wherein the President of the Association swears that such termination was duly adopted by the requisite number of votes. Every purchaser or grantee of any interest in any Property, by acceptance of a deed or other conveyance therefor, thereby agrees that the provisions of this Declaration will run with and bind title to the Property as provided hereby.

16.5 Termination of the Association. In the event that this Declaration is declared to be void, invalid, illegal, or unenforceable in its entirety, or in such a significant manner that the Association is not able to function substantially as contemplated by the terms hereof, for any reason, by the adjudication of any court or other tribunal having jurisdiction over the parties hereto and the subject matter hereof, and such adjudication occurs within ten (10) years following the date of recording this Declaration, all Common Area belonging to the Association at the time of such adjudication will revert to the Declarant, and the Declarant will own and operate said Common Areas as Trustee for use and benefit of Owners within the Property as set forth below. If said adjudication will occur on a date more than ten (10) years after the date of recording of this Declaration, or if the Members of the Association should vote not to renew and extend this Declaration as provided for in Section 16.4, all Common Areas owned by the Association at such time will be transferred to a properly appointed Trustee, which Trustee will own and operate said Common Areas for the use and benefit of Owners within the Property as set forth below:

(a) Each lot, parcel or tract of land located within the Property will be subject to an Annual Assessment which will be paid by the Owner thereof to the Declarant or Trustee, whichever becomes the successor in title to the Association. The amount of such Annual Assessment and its due date will be determined solely by the Declarant or the Trustee, as the case may be, but the amount of such Annual Assessment on any particular lot, parcel or tract of land will not exceed the amount actually assessed against that lot, parcel or tract of land in the last year that Assessments were levied by the Association, subject to the adjustment set forth in subparagraph (b) immediately below.

(b) The rate of the Annual Assessment which may be charged by the Declarant or Trustee hereunder on any particular lot or parcel may be automatically increased each year by either five (5%) percent or the percentage increase between the first month and the last month of the Annual Assessment period in the CPI-U issued by the U.S. Bureau of Labor Statistics in its monthly report, whichever of these two percentage figures is larger. The actual amount of such increase in the regular Annual Assessment on a parcel will equal the regular Annual Assessment on such lot or parcel for the previous year multiplied by the larger of the two percentage factors set forth above. If the CPI-U is discontinued, then there will be used the most similar index published by the United States Government that may be procured indicating changes in the cost of living.

(c) Any past due Annual Assessment together with interest thereon at the greater of fifteen (15%) percent or the maximum annual rate permitted by law from the due date and all costs of collection including reasonable attorney's fees will be a personal obligation of the Owner at the time that the Annual Assessment becomes past due, and it will also constitute and become a charge and continuing lien on the lot or parcel of land and all improvements thereon, against which the Assessment has been made, in the hands of the then Owner, his heirs, devisees, personal representatives and assigns.

(d) The Declarant, or the Trustee, as the case may be, will be required to use the funds collected as Annual Assessments for the operation, maintenance, repair and upkeep of the Common Areas. Declarant or Trustee may charge as part of the cost of such functions the reasonable value of its services in carrying out the duties herein provided. Neither the Declarant nor the Trustee will have the obligations to provide for operation, maintenance, repair and upkeep of the Common Areas once the funds provided by the Annual Assessment have been exhausted.

(e) The Declarant will have the right to convey title to the Common Areas and to assign its rights and duties hereunder, provided that the transferee accepts such properties subject to the limitations and uses imposed hereby and affirmatively acknowledges its acceptance of the duties imposed hereby.

(f) The Trustee will have the power to dispose of the Common Areas (subject to the limitations of Article 4), free and clear of the limitations imposed hereby; provided, however, that such disposition will first be approved in writing by fifty-one (51%) percent of the Owners of Property within the Property or in the alternative will be found, in the exercise of reasonable business judgment, to be in the best interest of the Owners of property within the Property. The proceeds of such a sale will first be used for the payment of any debts or obligations constituting a lien on the Common Areas, then for the payment of any obligations incurred by the Trustee in the operation, maintenance, repair and upkeep of such Property, then for the payment of any obligations distributed among the Owners of property within the Development, exclusive of the Trustees, in a proportion equal to the portion that the Default Annual Assessment on property owned by a particular Owner bears to the total Default Annual Assessment for all property located within the Property.

16.6 Perpetuities. If any of the covenants, conditions, restrictions, or other provisions of this Declaration will be unlawful, void, or voidable for violation of the rule against perpetuities, then such provisions will continue

only until twenty-one (21) years after the death of the last survivor of the now living descendants of Mrs. Rose Kennedy, mother of U. S. Senator Edward Kennedy.

16.7 Interpretation. In all cases, the provisions set forth or provided for in this Declaration will be construed together and given that interpretation or construction which, in the opinion of Declarant or the Board of Directors will best effect the intent of the general plan of development. The provisions hereof will be liberally interpreted and, if necessary, they will be so extended or enlarged by implication as to make them fully effective. The provisions of this Declaration will be given full force and effect notwithstanding the existence of any zoning ordinance or building codes which are less restrictive. The effective date of this Declaration will be the date of its filing Of Record. The captions of each Article and Section hereof as to the contents of each Article and Section are inserted only for convenience and are in no way to be construed as defining, limiting, extending, or otherwise modifying or adding to the particular Article or Section to which they refer. This Declaration will be construed under and in accordance with the laws of the State of South Carolina.

16.8 No Affirmative Obligation Unless Stated. ANY RESERVATION OR RIGHT OF THE DECLARANT WHICH IS STATED IN OR IMPLIED FROM THIS DECLARATION WILL NOT GIVE RISE TO ANY AFFIRMATIVE OBLIGATION OR DUTY ON THE PART OF THE DECLARANT UNLESS EXPRESSLY STATED IN THIS DECLARATION.

16.9 No Implied Liabilities or Duties. ANY RULES OR REGULATIONS ESTABLISHED BY THE DECLARANT PURSUANT TO THIS DECLARATION WILL NOT EXPRESSLY OR IMPLIEDLY CREATE ANY DUTY OF CARE TO ANY PROPERTY OWNER.

16.10 Gender and Grammar. The singular wherever used herein will be construed to mean the plural when applicable, and the necessary grammatical changes required to make the provisions hereof apply either to corporations or other entities or to individuals, men or women, will in all cases be assumed as though in each case fully expressed.

16.11 Severability. Whenever possible, each provision of this Declaration shall be interpreted in such manner as to be effective and valid, but if the application of any provision of this Declaration to any person or to any property will be prohibited or held invalid, such prohibition or invalidity will not affect any other provision or the application of any provision which can be given effect without the invalid provision or application, and to this end the provisions of this Declaration are declared to be severable.

16.12 Rights of Third Parties. This Declaration will be filed Of Record for the benefit of Declarant, the Owners, and their Mortgagees as herein provided, and by such recording, no adjoining property owner or third party will have any right, title or interest whatsoever in the Development, except as provided herein, or in the operation or continuation thereof or in the enforcement of any of the provisions hereof, and, subject to the rights of Declarant and Mortgagees as herein provided, the Owners will have the right to extend, modify, amend, or otherwise change the provisions of this Declaration without the consent, permission, or approval of any adjoining owner or third party.

16.13 Notice of Sale, Lease, or Mortgage. In the event an Owner sells, leases, mortgages, or otherwise disposes of any Lot, the Owner must promptly furnish to the Association in writing the name and address of such purchaser, lessee, mortgagee, or transferee.

16.14 No Trespass. Whenever the Association, Declarant, or the ARC are permitted by this Declaration to enter upon, correct, repair, clean, maintain, preserve, or do any other action within any portion of the Development, the entering thereon and the taking of such action will not deem to be trespass.

BK R 351PG444

16.15 Notices. Notices required hereunder will be in writing and will be delivered by hand or sent by United States Mail, postage prepaid. All notices to Owners will be delivered or sent to such addresses as have been designated in writing to the Association, or if no address has been so designated, at the addresses of such Owners' respective Lots. All notices to the Association will be delivered or sent in care of Declarant to Declarant's main office, P.O. Box 267, Wadmalaw Island, South Carolina 29487 or to such other address as the Association may from time to time notify the Owners. All notices to Declarant will be delivered or sent to Declarant's main office, P.O. Box 267, Wadmalaw Island, South Carolina 29487, or to such other address as Declarant may from time to time notify the Association. Notices to Mortgagees will be delivered or sent to such addresses as such Mortgagees specify in writing to the Association. Notices to any other person or persons entitled to same hereunder will be delivered or sent to such address or addresses as such person or persons specify, from time to time, in writing to the sender, or, in the absence thereof, to such address or addresses as will, in the exercise of reasonable judgment by the sender, reasonably expected to be received by such person or persons.

[SIGNATURES APPEAR ON FOLLOWING PAGE]

BK R 351PG445

IN WITNESS WHEREOF, duly authorized officers of the undersigned Declarant have executed this Declaration under seal, this 20th day of July, 2000.

Signed, sealed and
delivered in the
presence of

Benjamin J. Wozniak III
Anthony A. Lysian

DECLARANT:

SOUTHERN LIFESTYLES VIII LLC
a North Carolina limited liability company

BY: Stephen LeeIts: Partner

ASSOCIATION ACKNOWLEDGMENT

The undersigned Officer of The Anchorage Property Owners' Association, in behalf of itself and its existing and future Members of the Association, does hereby acknowledge the foregoing Covenants, Conditions And Restrictions For The Anchorage, consenting to all the terms and conditions thereof and agreeing to be bound thereby.

ASSOCIATION:

Signed, sealed and
delivered in the
presence of:

Benjamin J. Wozniak III
Anthony A. Lysian

The Anchorage Property Owners' Association

By: forIts: President

BK R 351PG446

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Personally appeared before me Bryan L. Walpole, III and made an oath that (s)he saw Southern Lifestyles VIII LLC, a North Carolina limited liability company by its duly authorized officer(s), sign, seal, and as its act and deed deliver the within written Declaration of Covenants, Conditions and Restrictions for The Anchorage, and that (s)he with the other witness witnessed the execution thereof.

Bryan L. Walpole, III (SEAL)

Sworn to before me this
20th day of June, 2000.

Alvin L. Lyma
Notary Public for South Carolina

My Commission expires: 7/13/2003

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

Personally appeared before me Bryan L. Walpole, III and made an oath that (s)he saw Property Owners' Association, by Loren Dickey, its President, sign, seal, and as its act and deed deliver the within written Association Acknowledgment to the Declaration of Covenants, Conditions and Restrictions for, and that (s)he with the other witness witnessed the execution thereof.

Bryan L. Walpole, III (SEAL)

Sworn to before me this
20th day of June, 2000.

Alvin L. Lyma
Notary Public for South Carolina
My Commission expires: 7/13/2003

EXHIBIT 1 TO COMPLAINT

EXHIBIT "A"

BK R 351PG447

All those certain pieces, parcels and lots of land shown on a plat entitled "FINAL PLAT, THE ANCHORAGE PLANTATION - PHASE I, LOTS 1, 2, 3, 77 AND 78, WADMALAW ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" prepared by Engineering, Surveying & Planning, Inc. recorded in the RMC Office for Charleston County in Book EB, Page 892.

- ALSO -

All those certain pieces, parcels and lots of land shown on a plat entitled "CONDITIONAL PLAT, THE ANCHORAGE PLANTATION - PHASE II, LOTS 4 THRU 72, WADMALAW ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" prepared by Engineering, Surveying & Planning, Inc. recorded in the RMC Office for Charleston County in Book EE, Pages 81 Thru 86.

NPCHAR1.142005 1-AGR-(DLL) 024171-00012

BK R 351PG448

EXHIBIT "B"BYLAWS
OF
THE ANCHORAGE
PROPERTY OWNERS' ASSOCIATIONARTICLE I
NAME AND LOCATION

1.1 Name and Location. The name of the corporation is "ANCHORAGE PLANTATION HOMEOWNERS ASSOCIATION," hereinafter referred to as the "Association." The principal office of the Association shall be located at the Development, or at such other place as may be designated by the Board.

ARTICLE II
DEFINITIONS

2.1 Incorporation. The definitions contained in the Declaration are incorporated by reference herein.

(a) The Declaration. "Declaration" shall mean and refer to the Declaration of Covenants, Conditions, and Restrictions for recorded in the Office of Register of Mesne Conveyances for Charleston County, South Carolina, and subsequent amendments thereto.

ARTICLE III
MEETING OF MEMBERS AND VOTING

3.1 Annual Meeting. The first meeting of the Members, whether an annual or a special meeting, shall be held on the second Saturday of December which is more than nine (9) months following the date of the close of the sale of the first Lot or Dwelling in the Project. Subsequent annual meetings of the Members shall be held thereafter at an hour and place within thirty (30) days of the same month and day of such first meeting, as set by the Board.

3.2 Special Meetings. Special meetings of the Members shall be promptly scheduled at any time by the Board upon vote of a majority of the Board of Directors or upon written request of the President. A special meeting of the Members shall be called upon written demand delivered to the Secretary by the Members representing five percent (5%) of the total voting power of the Association, notice of which shall be by written notice to all Members within thirty (30) days of the Secretary's receipt of the demand. For purposes of determining the five percent (5%), the record date shall be thirty (30) days before delivery of the written demand. Upon the failure of the Association to send notice of a special meeting within thirty (30) days following delivery of written demand as aforesaid, any Member signing the demand may set the time and place of the special meeting and give notice thereof to all Members in accordance with the Nonprofit Corporation Act.

3.3 Notice and Place of Meetings. Unless otherwise provided in the Declaration, the Articles of Incorporation, in these By-Laws, or in the Nonprofit Corporation Act, written notice of each meeting of the Members, annual or special, shall be given by, or at the direction of, the Secretary, by mailing a copy of such notice, first class mail, postage prepaid, at least thirty (30) but not more than sixty (60) days before such meeting to each Member, addressed to the Member's address last appearing on the books of the Association, or supplied by such Member to the Association for the purpose of notice. In the case of written demand of Members representing five percent of the total voting power of the (5%) Association, written notice of such meeting shall be given not more than thirty (30) days after written demand is delivered to the Association. Such notice shall specify the place, day and hour of the

meeting, and, in the case of a special meeting, the purpose of the meeting, and shall provide for voting by proxy. If action is proposed to be taken at any meeting for approval for any of the following proposals, the notice shall also state the general nature of the proposal: (a) removing a Director without cause; (b) filling vacancies in the Board of Directors by the Members; or (c) amending the Articles of Incorporation. Meetings shall be held within the Project or at a meeting place within the same county, as close to the Project as possible.

Notice of a meeting of Members need not be given to any Member who signs a waiver of notice, in person or by proxy, either before or after the meeting. The waiver must be delivered to the Association for inclusion in the minutes or filing with the corporate records. Attendance of a Member at a meeting, in person or by proxy, shall of itself constitute waiver of notice, except when the Member attends a meeting solely for the purpose of stating his objection, at the beginning of the meeting, to the transaction of any business on the ground that the meeting is not lawfully called or convened. Objection by a Member shall be effective only if written objection to the holding of the meeting or to any specific action so taken is filed with the Secretary of the Association.

3.4 Quorum. Unless otherwise provided herein, in the Declaration, the Articles of Incorporation, or the Nonprofit Corporation Act, the presence of Members representing one-third ($\frac{1}{3}$) of the votes of all Members, in person or by proxy, shall constitute a quorum for the transaction of business. The Members present at a duly called or held meeting at which a quorum of one-third ($\frac{1}{3}$) of the votes of all Members is present may continue to do business until adjournment, notwithstanding the withdrawal from the meeting of enough Members to leave less than such required quorum, provided that Members representing twenty percent (20%) of the total votes of the Association remain present in person and/or by proxy, and provided further that any action taken shall be approved by a majority of the Members required to constitute such quorum. If the required quorum is not present, another meeting may be called, not less than ten (10) nor more than sixty (60) days following the first meeting, and the required quorum at the subsequent meeting shall be the Members present, in person or by proxy, and entitled to vote. Unless otherwise provided, any reference hereafter to "votes cast" at a duly called meeting shall be construed to be subject to the quorum requirements established by this Section 3.4. If a time and place for the adjourned meeting is not fixed by those in attendance at the original meeting or if for any reason a new date is fixed for the adjourned meeting after adjournment, notice of the time and place of the adjourned meeting shall be given to Members in the manner prescribed in Section 3.3.

3.5 Ballots and Representative Voting.

(a) Voting Referendum; Written Ballots. Any vote of Members on a matter which would be cast at an annual, regular or special meeting may be taken, without a meeting, by written ballot delivered to every Member by the Association. The ballot shall set forth the matter to be voted upon and provide thereon a place to vote for or against such matter. Approval by written ballot without a meeting shall be effective only when the number of votes cast by ballot equals or exceeds the quorum required to be present had the matter been considered at a meeting, and the number voting for the matter equals or exceeds the number of votes required to approve it had the matter been considered at a meeting at which the requisite quorum is present. A solicitation of votes by ballot shall (1) indicate the record date for Members eligible to vote; (2) indicate the number of returned ballots voting for or against the matter that is required to satisfy the quorum requirement; (3) state the required number of votes or percentage voting in favor of the matter required to approve it (except in the case of election of directors, which shall be by plurality); and (4) state the date and time by which a Member's completed ballot must be received by the Secretary in order to be counted in the vote to be taken. A ballot, once delivered to the Secretary, may not be revoked. A Member's signed ballot shall be delivered to the Secretary by hand delivery, by U.S. mail, or by such other means as shall be permitted under South Carolina law, including, but not limited to and if allowed, overnight courier service, facsimile and e-mail transmission, internet form submission, or by any other technology or medium, now existing or hereafter devised, provided in every such case the sender retains proof of transmission and receipt.

(b) Proxies. All of the provisions of this Section 3.5(b) are subject to Section 16.1.1 of the Declaration. To the extent that a provision set forth in this Section is inconsistent with Section 16.1.1 of the Declaration, the provisions of Section 16.1.1 of the Declaration shall control. At all meetings of Members, each Member may vote in person or by proxy. The appointment form of proxy shall be in writing and received by the Secretary before the appointed time of the meeting. Every proxy appointment shall automatically cease upon conveyance by the Member of his Lot or Dwelling, or upon receipt of written notice by the Secretary of the death or judicially declared incompetence of a Member prior to the counting of the vote, upon revocation of the appointment of the proxy in accordance with the Nonprofit Corporation Act, or upon the expiration of eleven (11) months from the date of the proxy. Unless the proxy appointment form otherwise states, it shall be deemed to confer the authority to execute consents and waivers and to exercise the right to examine the books and records of the Association. Any proxy appointment form distributed by any person to the membership of the Association shall afford the opportunity to specify a choice between approval and disapproval of each matter or group of matters to be acted upon set forth in the notice of the meeting. The appointment shall provide that, where the Member specifies a choice, the vote shall be cast by the proxy in accordance with that choice. The form shall also identify the person or persons acting as the proxy and the length of time it will be valid. In addition, voting by a proxy shall comply with any other applicable requirements of the Nonprofit Corporation Act. The Member's signed proxy appointment form shall be delivered to the Secretary by hand delivery, by U.S. mail, and by such other means as shall be permitted under South Carolina law, including, but not limited to and if allowed, overnight courier service, facsimile and e-mail transmission, internet form submission, or by any other technology or medium, now existing or hereafter devised, provided in every such case the sender retains proof of transmission and receipt.

3.7 Membership and Voting. Membership in the Association will be as set forth in the Declaration and in the Articles of Incorporation.

Except as otherwise provided in the Declaration, the Articles of Incorporation, these By-Laws, or the Nonprofit Corporation Act, any action by the Association which must have the approval of the Members before being undertaken shall require voting approval by a majority of the votes cast by Members present at which the required quorum is present. An abstention shall be counted as a negative vote in calculating the majority. Members are divided into Type A and Type B Members for the sole purpose of computing voting rights and shall not vote as a class. Owners of Lots and dwellings in all phases shall have the same voting rights.

3.7 Eligibility to Vote: Voting rights attributable to Lots and Dwellings shall not vest until Assessments against those Lots and Dwellings have been levied by the Association. Only Members in good standing shall be entitled to vote on any issue or matter presented to the Members for approval. In order to be in good standing, a Member must be current in the payment of all assessments levied against the Member's Lots or Dwellings and not subject to any suspension of voting privileges as a result of disciplinary proceeding conducted in accordance with the Declaration. A Member's good standing shall be determined as of the record date established in accordance with section 3.8. The Association shall not be obligated to conduct a hearing in order to suspend a Member's voting privileges on the basis of the nonpayment of assessments, although a delinquent Member shall be entitled to request such a hearing.

3.8 Record Dates:

A. Record Dates Established by the Board: For the purpose of determining which Members are entitled to receive notice of any meeting, vote, act by written ballot without a meeting, or exercise any rights in respect to any other lawful action, the Board may fix, in advance, a "record date" and only Members of record on the date so fixed are entitled to notice, to vote, or to take action by written ballot or otherwise, as the case may be, notwithstanding any transfer of any membership on the books of the Association after the record date, except as

otherwise provided in the Articles of Incorporation, by agreement, or in the Nonprofit Corporation Act. The record dates established by the Board pursuant to this section shall be as follows:

(1) Record Date for Notice of Meetings: In the case of determining those Members entitled to notice of a meeting, the record date shall be no more than ninety (90) nor less than ten (10) days before the date of the meeting;

(2) Record Date for Voting: In the case of determining those Members entitled to vote at a meeting, the record date shall be no more than sixty (60) days before the date of the meeting;

(3) Record Date for Action by Written Ballot Without Meeting: In the case of determining Members entitled to cast written ballots, the record date shall be no more than sixty (60) days before the day on which the first written ballot is mailed or solicited; and

(4) Record Date for Other Lawful Action: In the case of determining Members entitled to exercise any rights in respect to other lawful action, the record date shall be no more than sixty (60) days prior to the date of such other action.

(5) "Record Date" Means as of the Close of Business: For purposes of this subparagraph A, a person holding a membership as of the close of business on the record date shall be deemed the Member of record.

B. Failure of Board to Fix a Record Date: If the Board, for any reason, fails to establish a record date, rules set forth in the Nonprofit Corporation Act shall apply:

3.9 Action Without Meeting: Any action that may be taken at any annual or special meeting of Members (except the election of Directors) may be taken without a meeting in accordance with the provisions of the Nonprofit Corporation Act. Any form of written ballot distributed by any person to the membership of the Association shall afford the opportunity to specify a choice between approval and disapproval of each matter or group of matters to be acted upon, except it shall not be mandatory that a candidate for election to the Board be named in the written ballot. The written ballot shall provide that, where the Member specifies a choice, the vote shall be cast in accordance with that choice.

3.10 Conduct of Meetings: Meetings of the membership of the Association shall be conducted in accordance with a recognized systems of parliamentary procedure or such parliamentary procedures as the Association may adopt. Except as otherwise provided by law, any proper matter may be presented at the meeting for action. Members of the Association shall have access to Association records in accordance with the Nonprofit Corporation Act. No Member of the Association shall have any right as an Association Member to attend any meeting of the Board, except such meetings of the Board as the Board of Directors shall, in the exercise of its sole discretion, open to the membership or any other person. In any matter relating to the discipline of an Association Member, the Board shall always meet in closed session if requested by that Member, and the Member shall be entitled to attend such closed session.

ARTICLE IV

BOARD OF DIRECTORS; SELECTION; TERM OF OFFICE

4.1 Number. The affairs of the Association shall be managed by a Board of Directors, all of whom must be Members of the Association, or an officer, director, employee or agent of a Member, including Declarant. The initial Board of Directors shall consist of three (3) Directors who shall be appointed by the Declarant.

shall have the sole right to appoint and remove any member or members of the Board of Directors of the Association pursuant to the Declaration until the expiration of the Declarant Control Period. Within sixty (60) days after the expiration of the Declarant Control Period, the Members shall elect five (5) Directors. The Association shall either call, and give not less than thirty (30) days' and not more than sixty (60) days' notice of, such special meeting of the Members to elect the Board of Directors, or the date on which the Association shall count the written ballots distributed to the Members with such notice for the election of the Board of Directors. Each year thereafter, the Members shall elect such number of Directors as shall exist whose terms are expiring.

4.2 Term of Office. The election of Directors shall be by plurality, the number of nominees equal to the number of vacancies to be filled receiving the greatest number of votes being elected. However, at the meeting of the Association following expiration of the Declarant Control Period held to elect five (5) Directors or the date following expiration of the Declarant Control Period when written ballots are to be counted for the election of such Directors pursuant to Section 4.1, the two (2) nominees receiving the highest number of votes will each be elected for a term of two (2) years, and the next three (3) nominees receiving the highest number of votes will each be elected for a term of one (1) year. At the expiration of the initial term of office of each respective Director, his successor shall be elected to serve for a term of two (2) years. Unless vacated sooner, each Director shall hold office until the Director's term expires and a successor is elected.

4.3 Removal; Vacancies. A Director appointed by the Declarant may only be removed by the Declarant, otherwise, a Director may be removed from office, with or without cause, at any regular or special meeting of the Members by sixty-seven percent (67%) of the votes of the Members voting in person or by proxy at a meeting at which a quorum is present. A successor to any removed Director may be elected at the same meeting at which the vacancy is created by the removal of the Director. A Director whose removal is proposed to be voted upon at any meeting shall be given notice of the proposed removal not less than 10 days prior to the date of the meeting and shall be given an opportunity to be heard at the meeting. In the event of death or resignation of a Director, the vacancy shall be filled by majority vote of the Board at a duly held meeting, or by the sole remaining Director. A successor Director shall serve for the unexpired term of his or her predecessor. The Members may elect a Director at any time to fill any vacancy not filled by the Directors.

4.4 Compensation. No Director shall receive compensation for any service rendered to the Association. However, any Director may be reimbursed for his actual expenses, if reasonable, that are incurred in the performance of his or her duties, including, but not limited to, travel expenses.

4.5 Indemnification of Corporate Agents. The Association shall indemnify any present or former Director, officer, employee or other agent of the Association to the fullest extent authorized under the Nonprofit Corporation Act, or any successor statute, and may advance to any such person funds to pay expenses that may be incurred in defending any action or proceeding on receipt of an undertaking by or on behalf of such person to repay such amount unless it is ultimately determined that such person was not entitled to indemnification under this provision.

ARTICLE V NOMINATION AND ELECTION OF DIRECTORS

5.1 Nomination. Nomination for election to the Board of Directors shall be made by a Nominating Committee. Notice to the Members of the meeting shall include the names of all those who are nominees at the time the notice is sent. Nominations to be placed on the ballot may also be solicited by the Nominating Committee or the Board from the membership, and if the election is to take place at a meeting and not solely by written ballot, nominations may also be made from the floor at the meeting. The Nominating Committee shall consist of a Chairman, who shall be a member of the Board of Directors, and two (2) or more Members of the Association. The

Nominating Committee shall be appointed by the Board of Directors not less than sixty (60) days prior to the meeting of the Members at which the election is to be held, or if the election is to take place solely by written ballot not less than sixty (60) days prior to the date set on the ballot as the election date when ballots are to be counted, and shall serve until the close of the election. The Nominating Committee shall make as many nominations for election to the Board of Directors as it shall in its discretion determine, but not less than the number of vacancies that are to be filled. All candidates shall have reasonable opportunity to communicate their qualifications to Members and to solicit votes.

5.2 Election. The first election of the Board shall be conducted as set forth in Section 4.1. At such election the Members or their proxies may cast as many votes as they are entitled to exercise under the provisions of the Declaration. The persons receiving the largest number of votes shall be elected. No cumulative voting shall be permitted. Voting for Directors at a meeting shall be by secret written ballot. Voting for Directors may also be conducted by written ballot pursuant to Section 3.5(a).

ARTICLE VI MEETINGS OF DIRECTORS

6.1 Regular Meetings. Regular meetings of the Board of Directors shall be held at least annually at such place within the Project, and at such hour as may be fixed from time to time by resolution of the Board. If a larger meeting room is required than exists within the Project, the Board shall select a room as close as possible to the Project. Should a regularly scheduled meeting fall upon a legal holiday, then that meeting shall be held at the same time on the next day which is not a legal holiday, excluding Saturday and Sunday.

6.2 Special Meetings. Special meetings of the Board of Directors shall be held when called by written notice signed by the President, Vice President or Secretary of the Association, or by any two (2) Directors. Notice of the special meeting shall specify the time and place of the meeting and the nature of the special business to be considered.

6.3 Quorum. A majority of the Directors then in office (but not less than two (2)) shall constitute a quorum for the transaction of business. Every act performed or decisions made by a majority of the Directors present at a duly held meeting at which a quorum is present shall be regarded as the act of the Board. A meeting at which a quorum is initially present may continue to transact business, notwithstanding the withdrawal of Directors, if any action taken is approved by a majority of the required quorum for that meeting.

6.5 Executive Session. The Board may, with approval of a majority of the Directors present at a meeting in which a quorum for the transaction of business has been established, adjourn a meeting and reconvene in executive session to discuss and vote upon personnel and matters involving contracts of which the Association is a party, litigation in which the Association is or may become involved, and orders of business of a similar nature. The nature of any and all business to be considered in executive session shall first be announced in open session.

6.6 Telephone Meetings. Any meeting, regular or special, may be held by conference telephone or similar communication equipment, so long as all Directors participating in the meeting can hear one another, and all such Directors shall be deemed to be present in person at such meeting. An explanation of the action shall be filed with the minutes of the proceedings of the Board.

6.7 Waiver of Notice. The transaction of any meeting of the Board of Directors, however called and noticed or wherever held, shall be as valid as though taken at a meeting duly held after regular call and notice, if (a) a quorum is present, and (b) either before or after the meeting, each of the Directors not present signs a written waiver of notice, a consent to holding the meeting, or an approval of the minute. The waiver of notice or consent need not

specify the purpose of the meeting. Notice of a meeting shall also be deemed given to any Director who attends the meeting without protesting before or at its commencement about the lack of adequate notice.

6.8 Notice of Adjourned Meeting. Notice of the time and place of holding an adjourned meeting need not be given, unless the meeting is adjourned for more than twenty-four (24) hours, in which case personal notice of the time and place shall be given before the time of the adjourned meeting to the Directors who were not present at the time of the adjournment.

6.9 Action Without Meeting. Any action required or permitted to be taken by the Board of Directors may be taken without a meeting, if all members of the Board, individually or collectively, consent in writing to that action. Such action by written consent shall have the same force and effect as a unanimous vote of the Board of Directors. Such written consent or consents shall be filed with the minutes of the proceedings of the Board.

6.10 Notices Generally. Notice of any meeting of the Board of Directors, whether regular or special, shall be given to each Director by one (1) of the following methods; (a) by personal delivery; (b) written notice by first class mail, postage prepaid; (c) by telephone communication, either directly to the Director or to a person at the Director's office who would reasonably be expected to communicate such notice promptly to the Director; (d) by telegram, charges prepaid; or (e) by facsimile transmission to the fax number of the Directors or to e-mail address of the Directors, with proof of transmission and receipt thereof being retained in the minutes of the meeting. All such notices shall be given or sent to the Director's address, telephone number, fax number or e-mail address as shown on the records of the Association. Such notice shall be sent to all Directors not less than seventy-two (72) hours prior to the scheduled time of the meeting, provided, however, notices sent by first class mail shall be deposited into a United States mailbox at least four (4) days before the time set for the meeting. Notices given by personal delivery, telephone, telegraph, facsimile transmission or e-mail shall be delivered, telephoned, given to the telegraph company, faxed or e-mailed, as the case may be, at least seventy-two (72) hours before the time set for the meeting. Notice of any meeting need not be given to any Director who has signed a waiver of notice or written consent to holding of the meeting.

ARTICLE VII POWERS AND DUTIES OF THE BOARD OF DIRECTORS

7.1 Duties. It shall be the duty of the Board of Directors to:

- A. Maintenance: Perform the maintenance described in the Declaration;
- B. Insurance: Maintain insurance as required by the Declaration;
- C. Discharge of Liens: Discharge by payment, if necessary, any lien against the Common Areas and assess the cost thereof to the Member or Members responsible for the existence of the lien (after notice and hearing as required by these Bylaws);
- D. Assessments: Fix, levy, collect and enforce Assessments as set forth in the Declaration;
- E. Expenses and Obligations: Pay all expenses and obligations incurred by the Association in the conduct of its business including, without limitation, all licenses, taxes, or governmental charges levied or imposed against the property of the Association;
- F. Records: Cause to be kept minutes of annual meetings of Members and to present such minutes to the Members at the next annual meeting of the Members; minutes of any special meeting when such

statement is requested in writing by one-fourth (1/4) of the Class "A" Members; and to keep adequate and correct books and records of account, minutes of proceedings of its Board and committees, and a roll of its Members giving their names and addresses and classes of membership;

G. Supervision: Supervise all officers, agents and employees of the Association, and to see that their duties are properly performed;

H. Review of Financial Records: Review on at least a quarterly basis a current reconciliation of the Association's operating and reserve accounts, the current year's actual reserve revenues and expenses compared to the current year's budget, and an income and expense statement for the Association's operating and reserve accounts. In addition, the Board shall review the latest account statements prepared by the financial institutions where the Association has its operating and reserve accounts. For purposes herein, "reserve accounts" shall mean monies that the Association's Board has identified for use to defray the future repair or replacement of, or additions to, these major components which the Association is obligated to maintain.

I. Reserve Account Withdrawal Restrictions: Require that at least two (2) signatures are needed for the withdrawal of monies from the Association's reserve accounts, at least one (1) of whom shall be a member of the Board. One (1) signature may be that of the Association's manager or such manager's designee.

J. Reserve Account Fund Management: The Board shall not expend funds designated as reserve funds for any purpose other than the repair, restoration, replacement, or maintenance of, or litigation involving the repair, restoration, replacement, or maintenance of, major components which the Association is obligated to repair, restore, replace, or maintain and for which the reserve fund was established.

K. Reserve Studies: At least every five (5) years the Board shall cause an independent analysis of the reserve component of the operating budget to be conducted to confirm that component replacement costs and useful lives are accurately reflected in the reserve allocation.

7.2 Powers. The Board of Directors shall have power to:

A. Manager: Employ a manager as provided in the Declaration;

B. Adoption of Rules: Adopt rules in accordance with the Declaration, including rules setting aside Common Area parking spaces as handicap parking only, and adopt rules limiting the number of cars which will be permitted to be parked in the Common Area parking spaces;

C. Assessments, Liens and Fines: Levy and collect Assessments and impose fines as provided in the Declaration.

D. Enforcement: Enforce these Bylaws and/or the Declaration as provided in Article 13 of the Declaration.

E. Contracts: Contract for goods and/or services in accordance with the Declaration.

F. Delegation: Delegate its authority and powers to committees, officers or employees of the Association or to a manager employed by the Association. The Board may not delegate the authority to procure insurance, make capital expenditures for additions or improvements chargeable against the reserve funds; to conduct hearings concerning compliance by an Owner or his tenant, lessee, guest or invitee with the Declaration or rules and regulation promulgated by the Board, or to make a decision to levy monetary fines, impose special Assessments

against individual Lots and Dwellings, temporarily suspend an Owner's rights as a Member of the Association or otherwise impose discipline following any such hearing; to make a decision to levy Annual or Special Assessments; or to make a decision to bring suit, record a claim of lien, or institute foreclosure proceedings for default in payment of Assessments. Any such delegation shall be revocable by the Board at any time. The members of the Board, individually or collectively, shall not be liable for any omission or improper exercise by the manager of any such duty, power or function so delegated by written instrument executed by a majority of the Board.

G. Appointment of Trustee: Appoint a trustee as provided in the Declaration.

H. Borrowings. Borrow money (i) for the purpose of improving the Development, or any portion thereof, (ii) for constructing, repairing, maintaining or improving any facilities located or to be located within the Development, (iii) for providing services authorized herein, and, (iv) to give as security for the payment of any such loan a mortgage or other security instrument conveying all or any portion of the Common Areas; provided, however, that the lien and encumbrance of any such security instrument given by the Association will be subject and subordinate to any and all rights, interest, options, licenses, easements, and privileges herein reserved or established for the benefit of Declarant, any Owner, or the holder of any Mortgage, irrespective of when such Mortgage is executed or given.

I. Other Powers: In addition to any other power contained herein or in the Declaration, the Association may exercise the powers granted to a nonprofit mutual benefit corporation as enumerated in the Nonprofit Corporation Act

7.3 Prohibited Acts. The Board shall not take any of actions prohibited of it under the Declaration except with the vote or written consent of a majority of the Members other than Declarant.

ARTICLE VIII OFFICERS AND THEIR DUTIES

8.1 Enumeration of Officers. The officers of this Association shall be a President and Secretary, who shall at all times be members of the Board of Directors, a Vice President, and a Treasurer, and such other officers as the Board may from time to time by resolution create.

8.2 Election of Officers. The Declarant shall have the sole right to appoint and remove officers during the Declarant Control Period. Thereafter, all officers shall hold office at the pleasure of the Board.

8.3 Term. The officers of this Association shall be elected annually by the Board and each shall hold office for one (1) year unless he or she shall sooner resign, or shall be removed, or otherwise disqualified to serve.

8.4 Special Appointments. The Board may elect such other officers as the affairs of the Association may require, each of whom shall hold office for such period, have such authority, and perform such duties as the Board may, from time to time, determine.

8.5 Resignation and Removal. Any officer may be removed from office (but not from the Board, if the officer is also a Board member) by the Board with or without cause. Any officer may resign at any time by giving written notice to the Board, the President or the Secretary. Such resignation shall take effect on the date of receipt of such notice or at any later time specified therein, and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

8.6 Vacancies. A vacancy in any office may be filled by appointment by the Board. The officer appointed to such vacancy shall serve for the remainder of the term of the officer he replaces.

8.7 Duties. The duties of the officers are as follows:

A. President. The President shall preside at all meetings of the Board of Directors; shall see that orders and resolutions of the Board are carried out; shall sign all leases, mortgages, deeds and other written instruments and shall sign all promissory notes. The President shall have the general powers and duties of management usually vested in the office of the President of a South Carolina nonprofit mutual benefit corporation, and shall have such powers and duties as may be prescribed by the Board or by these Bylaws.

B. Vice President. The Vice President shall act in the place of the President in the event of his or her absence, inability or refusal to act, and shall exercise and discharge such other duties as may be required by the Board.

C. Secretary. The Secretary shall record the votes and keep the minutes of all meetings and proceedings of the Board and of the Members; serve notice of meetings of the Board and of the Members; keep appropriate current records showing the Members of the Association together with the addresses, and shall perform such other duties as required by the Board. The ministerial functions of the Secretary in recording votes, keeping minutes, sending notices, and keeping the records of names and addresses of Members may be delegated to an Association manager.

D. Treasurer. The Treasurer shall receive and deposit in appropriate bank accounts all monies of the Association and shall disburse such funds as directed by resolution of the Board of Directors; shall sign all promissory notes of the Association; shall keep proper books of account; and shall prepare and shall distribute budgets and statements. The ministerial functions of the Treasurer in sending Assessment notices, receiving and depositing Assessments, keeping books and ledgers of account, and preparing and distributing budgets and statements may be delegated to an Association manager.

ARTICLE IX COMMITTEES

9.1 Appointment. An Architectural Review Committee may be appointed as provided in the Declaration, and a Nominating Committee shall be appointed as provided in these Bylaws. In addition, the Board of Directors may appoint other committees as deemed appropriate in carrying out its purpose. No committee, regardless of Board resolution, may: (a) take any final action on matters which, under the Nonprofit Corporation Act also requires Members' approval; (b) fill vacancies on the Board of Directors or in any committee; (c) amend or repeal Bylaws or adopt new Bylaws; (d) amend or repeal any resolution of the Board of Directors; (e) appoint any other committees of the Board of Directors or the members of those committees; (f) approve any transaction to which the Association is a party and in which one (1) or more Directors or committee members have a material financial interest.

ARTICLE X BOOKS AND RECORDS

10.1 Inspection by Members. The membership register (including names, mailing addresses, telephone numbers and voting rights), books of account and minutes of meetings of the Members, of the Board (including drafts and summaries), and of committees shall be made available for inspection and copying by any Member of the Association, or by his duly appointed representative, at any reasonable time and for a purpose reasonably related to his interest as a Member, at the office of the Association or at such other place within the Project as the Board shall

prescribe. Board minutes shall be available to Members within thirty (30) days of the meeting, and shall be distributed to any Member upon request and upon reimbursement of the costs in making that distribution.

10.2 Rules for Inspection. The Board shall establish reasonable rules with respect to:

- A. Notice to be given to the custodian of the records by the Member desiring to make the inspection;
- B. Hours and days of the week when such an inspection may be made;
- C. Payment of the cost of reproducing copies of documents requested by a Member.

10.3 Inspection by Directors. Every Director shall have the absolute right at any reasonable time to inspect all books, records and documents of the Association and the physical properties owned or controlled by the Association. The right of inspection by a Director includes the right to make extracts and copies of documents, at the expense of the Association.

10.4 Documents Provided by Board. Upon written request, the Board shall, within ten (10) days of the mailing or delivery of such request, provide an Owner with a copy of the governing documents of the Project, a copy of the most recent budget and statements of the Association, and a true statement in writing from an authorized representative of the Association as to the amount of the Association's current Annual and Special Assessments and fees, as well as any Assessments levied upon the Owner's interest which, as of the date of the statement, are or may be made a lien upon the Owner's Lots or Dwellings. The Board may impose a fee for providing the foregoing which may not exceed the reasonable cost to prepare and reproduce the requested documents.

ARTICLE XI MISCELLANEOUS

11.1 Amendments. Prior to close of the sale of the first Lot or Dwelling, Declarant may amend these Bylaws. After sale of the first Lot or Dwelling these Bylaws may be amended, only as provided in the Declaration or in the Nonprofit Corporation Act.

11.2 Conflicts. In the case of any conflict between the Articles of Incorporation and the Bylaws, the Articles of Incorporation shall control; and in the case of any conflict between the Declaration and these Bylaws, the Declaration shall control.

11.3 Fiscal Year. Unless directed otherwise by the Board, the fiscal year of the Association shall begin on the first day of January and end on the thirty-first (31st) day of December of every year, except that the first fiscal year shall begin on the date of incorporation.

EXHIBIT 1 TO COMPLAINT

CERTIFICATE

BK R 351PG459

I, the undersigned, the duly elected and acting Secretary of THE ANCHORAGE PROPERTY OWNERS' ASSOCIATION, a South Carolina nonprofit mutual benefit corporation, do hereby certify that the foregoing Bylaws were adopted as the Bylaws of the Association on July 20, 2000 and that the same do now constitute the Bylaws of the Association.

Dated: 7/20/00



Director/President

BK R 351PG460

EXHIBIT "C"

1. Mandatory Procedures for Non-Exempt Claims. Any Claimant with a Claim against a Respondent shall comply with the following procedures.

1.1 Notice. Within a reasonable time after the Claim in question has arisen, and in each event prior to the date when institution of legal or equitable proceedings based on the Claim would be barred by the applicable statute of limitation, Claimant will notify Respondent in writing of the Claim (the "Notice"), stating plainly and concisely:

1.1.1 the nature of the Claim, including applicable date, time, location, persons involved, Respondent's role in the Claim and the provisions of the Declaration or other authority out of which the Claim arises;

1.1.2 what Claimant wants Respondent to do or not do to resolve the Claim; and

1.1.3 that Claimant wishes to resolve the Claim by mutual agreement with Respondent and is willing to meet in person with Respondent at a mutually agreeable time and place to discuss, in good faith, ways to resolve the Claim.

1.2 Negotiation.

1.2.1 Each Claimant and Respondent (the "Parties") will make every reasonable effort to meet in person and confer for the purpose of resolving the Claim by good faith negotiation, not later than 30 days following the Notice, unless otherwise agreed by the Parties.

1.2.2 Upon receipt of a written request from any Party, accompanied by a copy of the Notice, the Board may appoint an attorney licensed to practice law in the State of South Carolina to assist the Parties in resolving the dispute by negotiation, if in its discretion it believes his or her efforts will be beneficial to the Parties. Such an attorney will have been actively engaged in the practice of law for at least fifteen (15) years, specializing in commercial transactions with substantial experience in planned real estate developments and will not have a conflict of interest with any of the Parties.

1.3 Final and Binding Arbitration.

1.3.1 If the Parties do not resolve the Claim through negotiation within 30 days of the date of the Notice (or within such other period as may be agreed upon by the Parties) ("Termination of Negotiation"), a Claimant will have 30 days within which to submit the Claim to binding arbitration under the auspices and the Commercial Arbitration Rules of the American Arbitration Association; and in accordance with the substantive and procedural laws of the state of South Carolina, except as said rules, procedures and substantive laws are applied otherwise as follows:

(a) Unless the parties mutually set another date, within ten (10) days following Termination of Negotiation, Claimant and Respondent will jointly select one arbitrator, whose decision will be absolutely binding on all Parties; provided, however, if Claimant and Respondent are unable to jointly select one arbitrator within said ten (10)-day period, or on or before any later day set by them by which to select an arbitrator, the arbitrator will be selected in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The arbitration will be conducted in Charleston, South Carolina before a neutral person who is a member of the Bar of the State of South Carolina, who has been actively engaged in the practice of law for at least fifteen (15)

years, specializing in commercial transactions with substantial experience in planned real estate developments, and who has no conflict of interest with any Party. The arbitrator may award any remedy or relief that a court of the State of South Carolina could order or grant, including, without limitation, specific performance of any obligation created under this Declaration, or the issuance of an injunction, as well as the imposition of sanctions for abuse or frustration of the arbitration process; provided, however, the arbitrator will have no authority to award punitive damages or any other damages not measured by the actual damages of the "Prevailing Party," as said term is hereinafter defined, and may not, in any event, make any ruling, finding or award that does not conform to the terms and conditions of this Declaration.

(b) In the event Claimant does not submit the Claim to binding arbitration as aforesaid, the Claim is deemed abandoned, and Respondent is released and discharged from any and all liability to Claimant arising out of the Claim; provided, nothing herein will release or discharge Respondent from any liability to a person not a Party to the foregoing proceedings, or the mandatory requirements of this Paragraph 14.3 with respect to any subsequently arising new dispute or claim by the Claimant which is identical or similar to the Claim previously deemed abandoned under this Paragraph 1.3.1(b).

This Paragraph 1 is an agreement of the Bound Parties to arbitrate all Claims against Respondent, except Exempt Claims, and is specifically enforceable under South Carolina law. The arbitration award (the "Award") is final and binding on the Parties, and judgment upon the Award rendered by the arbitrator may be entered upon it in any court of competent jurisdiction.

2. Allocation of Costs of Resolving Claims.

2.1 Costs of Notice and Negotiation. Each Party will bear all of its own costs incurred prior to and during the proceedings described in Paragraphs 1.1 and 1.2, including the fees of its attorney or other representative. Claimant and Respondent will share equally the costs and expenses of any attorney appointed by the Board pursuant to Paragraph 1.2, whose compensation will be at a rate equal to his or her then current regular hourly billing rate, unless the Board is able to arrange with the Parties and the arbitrator to agree otherwise, and who will be entitled to receive his or her then customary costs and expenses.

2.2 Arbitration Costs. In the event the Claim proceeds to arbitration pursuant to Paragraph 1.3, the "Prevailing Party," as hereinafter defined, will receive from the non-Prevailing Party, all of its costs and expenses, including reasonable expert and attorney's fees, incurred from commencement of selection of the arbitrator under Paragraph 1.3 to the issuance of the Award. Furthermore, the non-Prevailing Party will pay all costs and expenses of the arbitration, including the costs and expenses of any attorney appointed by American Arbitration Association pursuant to Paragraph 1.3, whose compensation will be at a rate equal to his or her then current regular hourly billing rate, unless the American Arbitration Association is able to arrange with the Parties and the arbitrator to agree otherwise, and who will be entitled to receive his or her then customary costs and expenses. The "Prevailing Party" will be determined as follows:

2.2.1 Not less than ten (10) days prior to the first day of the proceeding, a Party or Parties may file and serve on the other Party(ies) an offer of settlement, and within five (5) days thereafter the Party(ies) served may respond by filing and serving such Party(ies) its own offer of settlement. An offer of settlement will state that it is made under this paragraph and will specify the amount which the Party(ies) serving the settlement offer is/are willing to agree constitutes a settlement of all claims in dispute, including the Claim and all counterclaims.

2.2.2 An offer of settlement is considered rejected by the recipient unless an acceptance, in writing, is served on the Party(ies) making the offer prior to the first day of the proceeding.

BK. R 351PG462

2.2.3 If an offer of settlement is rejected, it may not be referred to for any purpose in the proceeding, but may be considered solely for the purpose of awarding fees, costs and expenses of the proceeding under Paragraph 1.3 and as provided in this section.

2.2.4 If the Claimant makes no written offer of settlement, the amount of the Claim made or asserted by the Claimant during the action is deemed to be such Claimant's final offer of settlement hereunder.

2.2.5 If the Respondent makes no written offer of settlement, the final offer of settlement by the Respondent will be the amount asserted during the action to be due in satisfaction of the Claimant's claims, otherwise the Respondent's offer of settlement hereunder is deemed to be zero.

2.2.6 If the respondent asserts a counterclaim, then offers of settlement shall take into consideration such counterclaim in the manner above provided. Furthermore, any Award shall also take into account such counterclaim.

2.2.7 The Party(ies) whose offer, made or deemed made, is closer to the Award granted in the proceeding is considered the "Prevailing Party" hereunder. If the difference between Claimant's and Respondent's offers and the Award is equal, neither Claimant nor Respondent is considered to be the Prevailing Party for purposes of determining the award of fees, costs and expenses of arbitration.

3 Enforcement of Resolution. If the Parties agree to resolve any Claim through negotiation in accordance with Paragraph 1.2 and any Party thereafter fails to abide by the terms of the agreement reached through negotiation, or if, following arbitration, any Party thereafter fails to comply with the Award, then any other Party may file suit or initiate administrative proceedings to enforce the agreement or Award without the need to again comply with the procedures set forth in Paragraph 14.3. In such event, the Party taking action to enforce the agreement or Award is entitled to recover from the noncomplying Party (or if more than one noncomplying Party, from all the Parties jointly and severally) all costs incurred in enforcing the agreement or Award, including, without limitation, attorney's fees and court costs.

EXHIBIT "D"

THE ANCHORAGE - DOCK MASTER PLAN

1
NPCHAR1:142005.1-AGR-(DL) 074171-00012

Exhibit "D"

BX R 351PG464

Office of Ocean and Coastal
Resource Management1362 McMillan Avenue, Suite 400
Charleston, SC 29405

(803) 744-5838 FAX (803) 744-5847

April 12, 1999

Mr. John B. Walpole
Sunny Point Farms
P. O. Box 8
Wadmalaw Island, S. C. 29487

Re: Anchorage Plantation
Dock Master Plan

Dear Mr. Walpole:

The Office of Ocean and Coastal Resource Management planning and permitting staff have reviewed and has conceptually approved the dock master plan for the Anchorage Plantation development located on Bohicket Creek and its tributaries, on Wadmalaw Island, Charleston County, S. C. This plan will be used as an advisory opinion in permitting, but designation of any lot as a "dock lot" does not guarantee the issuance of any permits. The following comments will also be made part of the file and any subsequent permit review.

1. Any modifications or changes to the subdivision plan submitted with P/N #93-3E-119/149-P will null and void this dock master plan.
2. Dock sizes will be limited to a 50 square foot pierhead only on creeks that measure 20' or less as measured from marsh grass to marsh grass. Dock sizes will be limited to a 120 square foot dock on creeks that measure from 21' to 50' from marsh grass to marsh grass. Dock sizes will be limited to 160 square foot dock on creeks that measure 51' to 150' from marsh grass to marsh grass. Special geographic circumstances may warrant larger structures for docks within the 120 and 160 square foot classification.
3. Channelward extension of docks will be evaluated at the time of permit application but will generally be limited to 1/4 of the creek's width as measured from marsh grass to marsh grass.
4. Precedent in the vicinity for roof structures will be considered as well as the potential for impacting the view of others. Roofs, which have the potential to impact views, will not be allowed, while those that have minimal impact may be allowed.
5. All parts of any permitted dock structure should generally remain a minimum of 20' inside extended corridor lines. However, OCRM may require docks to be built closer than 20' when it would substantially decrease walkway length.

EXHIBIT 1 TO COMPLAINT

Exhibit "D"

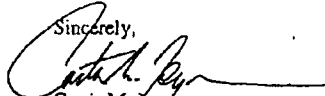
BK R 351PG465

Mr. John Walpole
April 12, 1999
Page 2

This letter will be made part of the dock master plan file and will be considered as part of any future permit review. Additional concerns and further restrictions may occur as part of the permit public review. Reference must be given to this dock master plan in all contracts of sale of affected lots. *OCRM strongly suggests the developer record this DMP in the local RMC office.* This would place potential buyers on notice that their property may be affected by the DMP. This master plan shall be presumed to take precedence over applications inconsistent with this plan unless new information is revealed in an application to address and overcome the concerns identified in the dock master plan.

Please call me at 747-4323-122 or 744-5838 if you have any questions.

Sincerely,



Curtis M. Joyner
Permitting DMP Coordinator

laurelhillapp
cc:Mr. Chris Brooks
Mr. Richard Chinnis
Mr. Mark Caldwell

2

2

BK K 387PG751

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

EASEMENT AGREEMENT

Whereas, Southern Lifestyles VII, LLC ("Grantor") is the owner of the property described below, and

Whereas, pursuant to the Purchase Agreement for Unimproved Real Estate entered into with John B. Walpole and Theodora W. Walpole ("Grantees") (the "Agreement"), Grantor agreed to grant Grantees, their heirs and assigns, the right to use the access to Bohicket Creek over the community boat ramp and courtesy dock located on the said property and the right to use any road within the said property for purposes of ingress and egress to the properties owned or lease by Grantees and to the boat ramp and courtesy dock, and

Whereas, the Grantor is aware that Grantee may subdivide their property located adjacent to the property owned by the Grantor and that the purchasers of the Grantee's property or any portion thereof shall have the rights granted herein,

NOW THEREFORE, IN CONSIDERATION of the sum of Five and 00/100 (\$5.00) Dollars, the receipt whereof is hereby acknowledged and the obligation of the Grantor under the Agreement, Grantor hereby grants, bargains sells and releases to Grantees, their heirs and assigns, (1) and easement over the roads and streets constructed by Grantor on the property described in Exhibit "A", the "Burdened Property", attached hereto and incorporated by reference for purposes of ingress and egress to properties owned or leased to Grantees adjacent to the Burdened property described in Exhibit "B"; the "Benefitted Property", and (2) the right for the Grantees, their heirs and assigns to use the community boat ramp and courtesy dock located on the Burdened property for the purpose of access to Bohicket Creek.

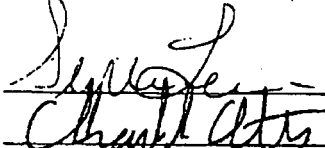
The rights granted hereunder are appurtenant to the land, shall run with the land and are for the benefit of the Grantees, their heirs and assigns.

Grantor and Grantee agree that in the event the "Benefitted Property" is subdivided, and sold to someone other than the present owner and his/her children, each subsequent owner of a residential building lot shall be obligated to pay an annual fee for the right to enjoy the easements granted herein. The annual fee shall initially be the amount of Fifty and 00/100 (\$50.00) Dollars for the first year that ownership changes, and shall increase by the amount of Five and 00/100 (\$5.00) Dollars each year thereafter. Payment of this fee shall be made to the Anchorage Plantation Homeowners Association, or its successors and assigns, and shall be due and payable each year during the month of November. Grantee shall cause this obligation to be set forth in the deed of any conveyance of the Benefitted Property, which obligation shall be appurtenant to and run with the land.

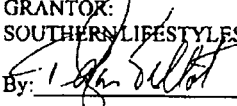
This easement shall be binding on the parties hereto their heirs, successors and assigns.

In the event Grantor or an affiliated entity of Grantor acquires title to the Benefitted Property, this easement may be cancelled by the recording of an Easement Cancellation Notice executed by Grantor and Grantees.

IN WITNESS whereof the Grantors have caused this easement to be executed the date set forth by their names.



Witnesses as to Grantor

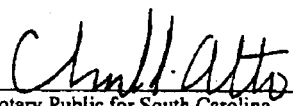
GRANTOR:
SOUTHERN LIFESTYLES VIII, LLC
By: 

Its: President

STATE OF SOUTH CAROLINA)
COUNTY OF) **ACKNOWLEDGMENT**

BEFORE me personally appeared SOUTHERN LIFESTYLES VIII, LLC, to me well known to be the person(s) described in and who execute the foregoing instrument, and he/she acknowledged to and before me, an officer duly authorized in the state and county aforesaid to take acknowledgments, that he/she executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal this 8 day of November, 2001.



Notary Public for South Carolina
My Commission Expires: 4-4-2004

[Signature]
Chad H. Alts
Witnesses as to Grantees

GRANTEES:
[Signature]
JOHN B. WALPOLE
[Signature]
THEODORA W. WALPOLE

STATE OF SOUTH CAROLINA)
COUNTY OF)

ACKNOWLEDGMENT

BEFORE me personally appeared JOHN B. WALPOLE AND THEODORA W. WALPOLE, to me well known to be the persons described in and who execute the foregoing instrument, and he/she acknowledged to and before me, an officer duly authorized in the state and county aforesaid to take acknowledgments, that he/she executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal this 9 day of November 2001.

[Signature]
Notary Public for South Carolina
My Commission Expires: 4-4-2004

EXHIBIT "A"

TRACT "A"

All that piece, parcel or tract of land lying and being on Wadmalaw Island, Charleston County, South Carolina, containing 359.847 acres, more or less consisting of lots 4 - 72, a 2.289 ac. dock lot, a 2.742 ac. dock and boat landing lot and a 0.614 ac. future Anchor Line Drive, and being more particularly described on that certain plat entitled "CONDITIONAL PLAT THE ANCHORAGE PHASE II, LOTS 4-72, WADMALAW ISLAND, CHARLESTON COUNTY, SC" dated May 1, 2000, and revised May 30, 2000, prepared by Engineering, Surveying & Planning, Inc., and recorded in Plat Book EE Pages 81-86 Charleston County RMC Office

TRACT "B"

X²
Lots 1, 2, 3, 77, and 78, and 8.839 acres designated as Anchor Watch Drive (having a 70' right-of-way) as shown on plat entitled "FINAL PLAT, THE ANCHORAGE PLANTATION - PHASE I, lots 1, 2, 3, 77 AND 78, WADMALAW ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" prepared by Joel P. Porcher of Engineering, surveying and Planning, Inc., dated June 9, 1997 and recorded in Plat Book EB, page 892, aforesaid records.

Being the property conveyed to the Grantor herein by deed of the Grantees herein dated June 16, 2000 and recorded in Book N 349 at page 168, RMC Office for Charleston County.

EXHIBIT "B"

ALL that certain tract of land, containing 1,046.4 acres, more or less, known as "Anchorage Plantation" on Wadmalaw Island, in Charleston County, State of South Carolina, on S.C. Route 700, approximately 4.4 miles south of Bluff Point Road intersection; bounded now or formerly as follows: Northwest by S.C. Route 700, by lands of School District 9, Hassell, Cummings, Barnwell and Sinkler; Northeast by Kitchen Hall Creek and lands of McKee and Nash; Southeast by Bohicket Creek and by lands of Nash and McKee; Southwest by lands of Nash, McKee, various other owners, and School District 9; and, West by lands of Sinkler and Barnwell; said tract of land being more particularly described according to plat of survey prepared by Cummings and McCrady, Inc., dated January, 1966, which plat, recorded in the RMC Office for Charleston County, South Carolina, in Plat Book U, at Page 40, is by reference incorporated herein as part of this description.

LESS AND EXCEPT 41.7 acres thereof more or less conveyed by the Mower Lumber Company by deed dated June 2, 1969, and recorded in Book R-92, at Page 359, in the RMC Office for Charleston County, South Carolina, particularly described as follows: All that certain tract of land containing 41.7 acres, more or less, known as "Part of Anchorage Plantation" on Wadmalaw Island in Charleston County, State of South Carolina; bounded now or formerly as follows: North by lands of Sinkler; East by Kitchen Hall Creek; South by Bohicket Creek; and West by the remainder of the tract above described; according to a plat of survey prepared by Cummings & McCrady, Inc., dated March, 1969, which plat recorded in Plat Book Y, at Page 113, RMC Office for Charleston County, South Carolina, is by reference incorporated herein as part of this description.

AND LESS AND EXCEPT the property described as Exhibit "A" attached hereto.

Being the property conveyed to the Grantees herein by deed from Mower Lumber Company dated July 31, 1980 and recorded in the RMC Office for Charleston County in Book Z 122 at page 417; deed from the College of Charleston Foundation dated December 23, 1991 and recorded in the RMC Office for Charleston County in Book B 209 at page 310; and deed from Nancy C. Smythe et al dated November 1, 1991 and recorded in the RMC Office for Charleston County in Book R 207 at page 493.

TMS # 199 00 00 017

Finkel + Altman BK K 387PG756

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W

OK,
Felicia

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CHARLIE LYBRAND
REGISTER
CHARLESTON COUNTY SC

11.02B

BK K 409PG481

STATE OF SOUTH CAROLINA)
) AMENDED EASEMENT AGREEMENT
 COUNTY OF CHARLESTON)

WHEREAS, on or about November 8, 2001, Southern Lifestyles VIII, LLC ("Grantor") conveyed an easement to John B. Walpole and Theodora W. Walpole ("Grantees") which Easement Agreement was recorded in the RMC Office for Charleston County on November 8, 2001 in Book K-387, at page 751; and

WHEREAS, the parties have agreed to make certain changes to said agreement which changes are necessary to reflect the intentions of the parties at the time the Agreement was entered into; and

WHEREAS, Grantor is the owner of the property described in Exhibit "A" below and Grantees are the owners of the property described in Exhibit "B" below; and

WHEREAS, pursuant to the Purchase Agreement for Unimproved Real Estate entered into with the Grantees (the "Agreement"), Grantor agreed to grant Grantees, their heirs and assigns, the right to use the access to Bohicket Creek over the community boat ramp and courtesy dock located on the said property and the right to use any road within the said property for purposes of ingress and egress to the properties owned or leased by Grantees and to the boat ramp and courtesy dock; and

WHEREAS, the Grantor is aware that Grantees may subdivide their property located adjacent to the property owned by the Grantor and that the purchasers of the Grantees' property or any portion thereof shall have the rights granted herein;

NOW THEREFORE, IN CONSIDERATION of the sum of Five and 00/100 (\$5.00) Dollars the receipt whereof is hereby acknowledged and the obligation of the Grantor under the Agreement, Grantor hereby grants, bargains, sells and releases to Grantees, their heirs and assigns, (1) an easement over the roads and streets constructed by Grantor on the property described in Exhibit "A"; the "Burdened Property", attached hereto and incorporated by reference for purposes of ingress and egress to properties owned or leased to Grantees adjacent to the Burdened Property described in Exhibit "B"; the "Benefitted Property", and (2) the right for the Grantees, their heirs and assigns to use the community boat ramp and courtesy dock located on the Burdened Property for the purpose of access to Bohicket Creek.

The rights of the Grantees to access to the Burdened Property shall be at such places on the Burdened Property as may be approved by Charleston County.

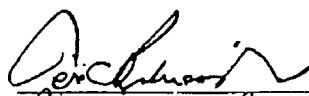
The rights granted hereunder are appurtenant to the land, shall run with the land and are for the benefit of the Grantees, their heirs and assigns.

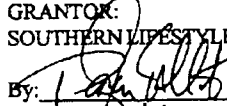
Grantor and Grantee agree that in the event the "Benefitted Property" is subdivided, and sold to someone other than the present owner and his/her children, each subsequent owner of a residential building lot shall be obligated to pay an annual fee for the right to enjoy the easements granted herein. The annual fee shall initially be the amount of Fifty and 00/100 (\$50.00) Dollars for the first year that ownership changes, and shall increase by the amount of Five and 00/100 (\$5.00) Dollars each year thereafter, provided that at no time shall the payment required to be made by the subsequent owner of a residential building lot exceed the sum of One Hundred and 00/100 (\$100.00) Dollars per year. Payment of this fee shall be made to the Anchorage Plantation Homeowners Association, or its successors and assigns, and shall be due and payable each year during the month of November. Grantee shall cause this obligation to be set forth in the deed of any conveyance of the Benefitted Property, which obligation shall be appurtenant to and run with the land.

This easement shall be binding on the parties hereto their heirs, successors and assigns.

In the event Grantor or an affiliated entity of Grantor acquires title to the Benefitted Property, this easement may be cancelled by the recording of an Easement Cancellation Notice executed by Grantor and Grantees.

IN WITNESS whereof the Grantors have caused this easement to be executed the date set forth by their names.


Phyllis D. Pennell
 Witnesses as to Grantor

GRANTOR:
 SOUTHERN LIFESTYLES VIII, LLC
 By: 
 Its: President

BK K 409PG483

STATE OF SOUTH CAROLINA)
)
 COUNTY OF Charleston)

ACKNOWLEDGMENT

BEFORE me personally appeared SOUTHERN LIFESTYLES VIII, LLC, to me well known to be the person(s) described in and who execute the foregoing instrument, and he/she acknowledged to and before me, an officer duly authorized in the state and county aforesaid to take acknowledgments, that he/she executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal this 13th day of June, 2002.

Phillip D. Pennell
 Notary Public for South Carolina

My Commission Expires: 2/18/2004

Curtis Small
TBR
 Witnesses as to Grantees

GRANTEES:

John B. Walpole
 JOHN B. WALPOLE
Theodora W. Walpole
 THEODORA W. WALPOLE

STATE OF SOUTH CAROLINA)
)
 COUNTY OF)

ACKNOWLEDGMENT

BEFORE me personally appeared JOHN B. WALPOLE AND THEODORA W. WALPOLE, to me well known to be the persons described in and who execute the foregoing instrument, and he/she acknowledged to and before me, an officer duly authorized in the state and county aforesaid to take acknowledgments, that he/she executed said instrument for the purposes therein expressed.

WITNESS my hand and official seal this 14th day of June, 2002.

TBR
 Notary Public for South Carolina
 My Commission Expires: 11-02-08

EXHIBIT "A"

TRACT "A"

All that piece, parcel or tract of land lying and being on Wadmaw Island, Charleston County, South Carolina, containing 359.847 acres, more or less consisting of lots 4 - 72, a 2.289 ac. dock lot, a 2.742 ac. dock and boat landing lot and a 0.614 ac. future Anchor Line Drive, and being more particularly described on that certain plat entitled "CONDITIONAL PLAT THE ANCHORAGE PHASE II, LOTS 4-72, WADMALAW ISLAND, CHARLESTON COUNTY, SC" dated May 1, 2000, and revised May 30, 2000, prepared by Engineering, Surveying & Planning, Inc., and recorded in Plat Book EE Pages 81-86 Charleston County RMC Office

TRACT "B"

Lots 1, 2, 3, 77, and 78, and 8.839 acres designated as Anchor Watch Drive (having a 70' right-of-way) as shown on plat entitled "FINAL PLAT, THE ANCHORAGE PLANTATION - PHASE I, lots 1, 2, 3, 77 AND 78, WADMALAW ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" prepared by Joel P. Porcher of Engineering, surveying and Planning, Inc., dated June 9, 1997 and recorded in Plat Book EB, page 892, aforesaid records.

Being the property conveyed to the Grantor herein by deed of the Grantees herein dated June 16, 2000 and recorded in Book N 349 at page 168, RMC Office for Charleston County.

BK K 409PG485

EXHIBIT "B"

ALL that certain tract of land, containing 1,046.4 acres, more or less, known as "Anchorage Plantation" on Wadmalaw Island, in Charleston County, State of South Carolina, on S.C. Route 700, approximately 4.4 miles south of Bluff Point Road intersection; bounded now or formerly as follows: Northwest by S.C. Route 700, by lands of School District 9, Hassell, Cummings, Barnwell and Sinkler; Northeast by Kitchen Hall Creek and lands of McKee and Nash; Southeast by Bohicket Creek and by lands of Nash and McKee; Southwest by lands of Nash, McKee, various other owners, and School District 9; and, West by lands of Sinkler and Barnwell; said tract of land being more particularly described according to plat of survey prepared by Cummings and McCrady, Inc., dated January, 1966, which plat, recorded in the RMC Office for Charleston County, South Carolina, in Plat Book U, at Page 40, is by reference incorporated herein as part of this description.

AND LESS AND EXCEPT the property described as Exhibit "A" attached hereto.

IT IS the intent of the parties that this Easement is extended to ALL tracts, parcels and lots of land, +/- 750 acres, seized by the Grantees located in Anchorage Plantation, Wadmalaw Island, Charleston County, South Carolina, as of the date of the recording of this Easement. Said tracts, parcels and lots of land are more fully described as the "Residual" on a plat entitled "CONDITIONAL PLAT, THE ANCHORAGE PHASE II, OUTFALL DRAINAGE EASEMENTS, LOTS 4 THRU 72, WADMALAW ISLAND, CHARLESTON COUNTY, SOUTH CAROLINA" prepared by Joel L. Porcher, L.S. of Engineering, Surveying & Planning, Inc., dated May 1, 2000, revised May 30, 2000, and recorded on June 16, 2000, in Plat Book EE at Page 81 through Page 86, inclusive, in the RMC Office for Charleston County, South Carolina.

Being the property conveyed to the Grantees herein by deed from Mower Lumber Company dated July 31, 1980 and recorded in the RMC Office for Charleston County in Book Z 122 at page 417; deed from the College of Charleston Foundation dated December 23, 1991 and recorded in the RMC Office for Charleston County in Book B 209 at page 310; and deed from Nancy C. Smythe et al dated November 1, 1991 and recorded in the RMC Office for Charleston County in Book R 207 at page 493.

TMS # 199-00-00-017

EXHIBIT 2 TO COMPLAINT

BK K 409PG486

Seibel + Altman

amend / 2002

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K409-481
2002 JUN 17 PM 12:15

CHARLES L. GRAND
REGISTER
CHARLESTON COUNTY SC

ω

ω

Buist • Moore • Smythe • McGee • PA

February 5, 2004

THOMAS L. HARPER, JR.
ATTORNEY AT LAW
E-Mail: tharper@bmsmlaw.com
DIRECT DIAL: 843-720-4636
FAX: 843-723-7398

By Fax Only
Gerald M. Finkel, Esq.
Finkel & Altman, LLC

RE: Anchorage Plantation Homeowners Association
BMSM File No. 11926.0000

Dear Mr. Finkel:

This law firm represents the Anchorage Plantation Homeowners Association (the "Association"). I have been asked by the Association to inquire about various matters pertaining to the proposed development by your client, John B. Walpole, of certain real property (the "Walpole Property") located adjacent to Anchorage Plantation as the same is currently configured. In particular, based upon its review of materials submitted by your client to the Charleston County Planning Department, the Association is concerned that Mr. Walpole intends to use the roads, thoroughfares and other common areas located within Anchorage Plantation for the construction and improvement of the Walpole Property. It also appears that Mr. Walpole may intend to tie the roads constructed upon the Walpole Property to Anchorage Plantation. As you would expect, the Association does not want to see either of these happen.

By deed dated January 9, 2003, Southern Lifestyles VIII, LLC conveyed to the Association all the streets, roads, roadways, drives and other thoroughfares located in Anchorage Plantation. I have reviewed the restrictive covenants encumbering Anchorage Plantation (the "Declaration"), and do not believe that Mr. Walpole (or the owner of the Walpole Property) has the right either to enter onto Anchorage Plantation for the development of the Walpole Property, or to connect the roads on the Walpole Property to the current roads in Anchorage Plantation for use by the owner(s) of the Walpole Property. These roads are private and were conveyed to the Association without reservation by Southern Lifestyles VIII, LLC for the sole use of the owners of Anchorage Plantation. While the Declaration does reserve an access easement over Anchorage Plantation in favor of the Declarant for the benefit of the Additional Property (as those terms are defined in the Declaration), the Walpole Property does not fall within the definition of the Additional Property, and I am unaware of any reservation of a right of access over Anchorage Plantation in favor of Mr. Walpole.

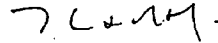
It is, of course, possible either that my client's concerns about Mr. Walpole's intentions are unfounded, or that some other agreement or instrument of record exists which I have not seen

Gerald M. Finkel, Esq.
February 5, 2004
Page 2

but which affects this legal analysis. If either of these is the case, I would ask that you let me know as soon as possible so that we can minimize any further confusion or delay in this development process.

I look forward to speaking with you about this matter.

Sincerely yours,



Thomas L. Harper, Jr.

TLH/dlh

cc: Anchorage Plantation Homeowners Association

{00574249.}

FINKEL & ALTMAN, L.L.C. EXHIBIT 3 TO COMPLAINT
ATTORNEYS AND COUNSELORS AT LAW

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THE CARROLL BUILDING
24 NORTH MARKET STREET, SUITE 200
CHARLESTON, SOUTH CAROLINA 29401

MAILING ADDRESS
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GEORGETOWN OFFICE
717 C FRONT STREET
GEORGETOWN, SOUTH CAROLINA
29442
(843) 527-3201

REPLY TO CHARLESTON OFFICE

February 13, 2004

GERALD M. FINKEL, ESQUIRE
gfinkel@finkelaltman.com

VIA FACSIMILE AND U. S. MAIL

Thomas L. Harper, Esquire
Buist Moore Smythe & McGee, PA
Post Office Box 999
Charleston South Carolina 29402

RE: *Anchorage Plantation Homeowner's Association*
BMSM File Number: 11926.0000
Our File Number: 18430/14842

Dear Tom:

Pursuant to your letter of February 5, 2004, and our subsequent telephone conversation of February 9, 2004, I am enclosing an Amended Easement Agreement between Southern Lifestyles VIII, LLC to John B. Walpole and Theodora W. Walpole dated June 13, 2002, and recorded in the office of the Register of Deeds in Book K 409 at Page 481-485. This Amended Easement was specifically bargained for and anticipated the development of the adjacent property as stated in the Easement.

In addition to the foregoing, Article IX, Section 9.2 of the original Purchase Agreement for Unimproved Real Estate dated November 8, 2001, allowed the purchaser, at its sole expense, to tie into seller's irrigation ponds for purposes of withdrawing water for landscaping irrigation. This tie-in was recently accomplished and the Agreement has subsequently lapsed. We are unclear as to whether or not the Homeowner's Association wishes to renew their right to take the water from these irrigation ponds.

Our clients intend to develop an upscale community comparable with the first phase. They want to be good neighbors and obviously see a number of synergies between the respective phases of development.

I look forward to resolving any outstanding issues with you.

With best personal regards, I remain

Sincerely yours,



Gerald M. Finkel

GMF/mmj

cc: John & Theodora Walpole (via facsimile only)

Z:\WPDATA\CLIENTS\14842\Harper.021104.wpd

EXHIBIT 3 TO COMPLAINT

Buist • Moore • Smythe • McGee • P.A.

March 18, 2004

THOMAS L. HARPER, JR.
ATTORNEY AT LAW
E-Mail: tharper@bmsmlaw.com
DIRECT DIAL: 843-720-4636
FAX: 843-723-7398

Gerald M. Finkel, Esq.
Finkel & Altman, LLC
1201 Main Street, Suite 1800
P. O. Box 1799
Columbia, South Carolina 29202

RE: Anchorage Plantation Homeowners Association
BMSM File No. 11926.0000

Dear Gerry:

Thank you for your letter of February 13, 2004, regarding the Amended Easement Agreement pursuant to which Southern Lifestyles VIII, LLC ("Southern Lifestyles") granted John and Theodora Walpole (the "Walpoles") the right of use of the community boat ramp, community dock, and any roads within Anchorage Plantation (the "Easement") for the benefit of a tract of land contiguous to Anchorage Plantation consisting of approximately 792 acres owned by the Walpoles, TMS No. 199-00-00-017 (the "Walpole Property").

Your letter was the first that the Anchorage Plantation Homeowners Association had heard of the Walpoles being granted rights in the Anchorage Plantation common areas after they sold out to Southern Lifestyles. Needless to say, the Association is very disturbed by this agreement between the Walpoles and Southern Lifestyles. In light of the potential construction of 107 homes on the Walpole Property, the effect of the Easement on Anchorage Plantation could be devastating. The nominal annual consideration of \$50 per "Walpole lot" for the use of the ramp, dock and roads is severely below market value, and does not come close to covering the additional costs associated with this dramatic increase in use of such facilities. By way of reference, the annual assessments at Anchorage Plantation currently total \$900 per lot, almost all of which is devoted to the maintenance and upkeep of these facilities. The Easement provides no obligation to the Walpoles (or the subsequent owners of the Walpole lots) to pay for any extraordinary repairs, maintenance or improvements to these facilities, even though the development of the Walpole Property as planned will substantially more than double the number of homesites with apparent rights in them. The fact that there is a permanent cap of this fee at \$100 per Walpole lot means that this problem will only be exacerbated in the future.

The Anchorage Plantation restrictive covenants provide means by which the Walpole Property could have been brought into Anchorage Plantation. If this approach had been adopted,

EXHIBIT 3 TO COMPLAINT

Gerald M. Finkel, Esq.
March 18, 2004
Page 2

the lot owners of the Walpole Property would have to pay their pro rata share of the expenses of the dock, ramp and roads. Instead, these owners would be allowed to use these amenities without paying their fair share.

There is ample caselaw in this and other states holding that residential real estate developers owe a fiduciary duty to their homeowners. We believe there is no question that the Walpoles breached this duty when they contracted for the right to the Easement in their agreement to sell Anchorage Plantation to Southern Lifestyles. The Walpoles engaged in self-serving conduct to maximize the value of the Walpole Property, even though they knew that the Easement would substantially impair the marketability and the value of Anchorage Plantation.

What is more, both the Walpoles and Southern Lifestyles marketed Anchorage Plantation by emphasizing the security and exclusivity of that development. Numerous purchasers of lots at Anchorage bought their property for a premium based on the kind of development that your clients and Southern Lifestyles promised to make Anchorage Plantation. What was known only to the Walpoles and Southern Lifestyles was that steps had been taken by them to violate that exclusivity by opening the development to a significant number of outside properties – more, in fact, than Anchorage Plantation itself contains.

For these reasons, we believe that various causes of action exist against the Walpoles and Southern Lifestyles which will lead to the assessment of substantial money damages against both. However, we also believe that the Easement is ineffective because it violates the Anchorage Plantation restrictive covenants encumbering the roads, dock and boat ramp. Except for certain express reservations for specific purposes, those restrictions dedicate and reserve these facilities for the use of Anchorage Plantation itself. Allowing outsiders to use these common areas violates both the language and spirit of the restrictive covenants, and the Association intends to have the Easement declared null and void.

I have been instructed to advise your clients that the Association intends to commence appropriate legal proceedings against the Walpoles unless substantial progress has been made in the next ten (10) days towards resolving these issues consensually. Given that the Walpoles have not yet begun their development of the Walpole Property in earnest, it seems to be a good time to invite your clients to propose a solution to this problem.

(0033352.1)

EXHIBIT 3 TO COMPLAINT

Gerald M. Finkel, Esq.
March 18, 2004
Page 3

I look forward to speaking with you about this matter.

Sincerely yours,



Thomas L. Harper, Jr.

TLH/dlh

cc: Southern Lifestyles VIII, LLC
Anchorage Plantation Homeowners Association

00551182.1

EXHIBIT 3 TO COMPLAINT

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GEORGETOWN OFFICE
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GEORGETOWN, SOUTH CAROLINA
29442
(843) 527-3381

REPLY TO COLUMBIA OFFICE

March 29, 2004

Gerald M. Finkel, Esquire
jfinkel@finkellaw.com

VIA FACSIMILE (843) 723-7398

AND U.S. MAIL

Thomas L. Harper, Jr., Esquire
Buist, Moore, Smythe & McGee, P.A.
5 Exchange Street
Post Office Box 999
Charleston, South Carolina 29402-0999

RE: Anchorage Plantation Homeowners Association
Your File No. 11926.0000
Our File No. 15430-14342

Dear Tom:

I am in receipt of your letter of March 18, 2004. Your arguments against the Walpoles are based on several seriously flawed premises.

First of all, if my letter was the first notice that the Anchorage Plantation Homeowners Association "had heard of the Walpoles being granted rights in the Anchorage Plantation common areas after they sold out to Southern Lifestyles" then it is obvious that they did not do any title search when Southern Lifestyles conveyed the dock and land on July 29, 2003 and the roads and right-of-way easements on June 13, 2003 to your clients. The initial easement to the Walpoles was recorded on November 8, 2001 and the amended easement was executed on June 14, 2002. Both agreements were matters of public record.

It is important to note that the Anchorage Plantation Homeowners Association was not incorporated until July 14, 2000. The operative document is the Second Amendment To and Restatement of Declaration of Covenants, Conditions and Restrictions dated July 21, 2000 and recorded in Book R 351 at Page 391. Article I., Section 1.1(i) defines Declarant as Southern Lifestyles VIII LLC. Subsection (j) defines the Declarant Control Period as the time period commencing on the date the Declaration was filed of record and ending on the earlier of December 31, 2015, or three (3) months after the conveyance by the Declarant, in the ordinary course of business, property representing ninety-five (95) percent of the total number of lots intended for development on all of the property. Article II., Section 2.3 provides for the conveyances of common area. It states, *inter alia*:

EXHIBIT 3 TO COMPLAINT

Letter to Thomas L. Harper, Jr., Esquire

Page 2

March 29, 2004

2.3 Conveyances Of Common Areas. All parcels of land shown as Common Areas on the Site Plan or which are identified herein as Common Areas and require a conveyance to vest in the Association ownership and use thereof, will be deeded or an easement will be granted with respect thereto by Declarant within two (2) years after the Declarant has completed improvements thereon.

Any such conveyance by the Declarant will be conveyed subject to:

- (a) All restrictive covenants filed Of Record at the time of conveyance; and
- (b) The right of access of the Declarant, its successors and assigns, over and across such property, ...

At all relevant times, Southern Lifestyles was the grantee of the property and the Declarant. The closing vesting Southern Lifestyles with title took place on June 16, 2000 - prior to any sales of individual lots to homeowners. Part of the consideration to the Walpoles for the transfer of the land and certain financing concessions, was the grant of the easement. The seller of property has no fiduciary duty to a purchaser's inchoate homeowners. I would agree that there is case law holding that a residential real estate developer owes a fiduciary duty to homeowners. E.g. *Concerned Dunes West Residents v. Georgia Pacific Corp.*, 562 S.E.2d 633 (S.C. 2002). However, I am at a loss to find any authority for the proposition that such authority extends past the developer to the prior grantor of the property to be developed. As explained in *Concerned Dunes West Residents*, a developer's fiduciary duty is similar to that of a promoter of a corporation in that "both are entrusted to by interested investors to bring about a viable organization to serve a specific function." *Id.* at 636. The RESTATEMENT (3rd) OF PROPERTY further clarifies this by explaining the source of this fiduciary duty does not stem from the developer's role as seller, but because "the developer also creates the [home owners] association . . . and then controls the association through the election and appointment of the directors and officers." *Id.*, cmt a, *see also* Boken, *Developers Fiduciary Duty*, 45 S.C. L. REV. 195 (1993). Simply put, the developer's duty stems from its formation and control of the initial association, and not from the sale of the land. Thus, Southern Living may have a fiduciary duty to your clients, but since the Walpoles were mere grantors of the property and had no role as developers in the control and operations of the association, they have no fiduciary obligations to your clients.

Tom, I do not believe that the threat of litigation is the appropriate way to advance your client's interest in this matter and would be ill advised. Nevertheless, if your clients are determined to proceed with litigation, they should be advised that in light of this clarification we would counterclaim for Abuse of Process and/or violation of the Frivolous Civil Proceedings Sanctions. From our perspective, the threat of litigation is a continuing effort by the Anchorage Plantation Homeowners Association to extort a collateral advantage by thwarting Mr. Walpole's development plans on the adjacent property. As Mr. Walpole owes no fiduciary obligations to your clients, we suggest that your clients govern themselves accordingly.

AT CLIENTS 4842 Harper (b) and

EXHIBIT 3 TO COMPLAINT

Letter to Thomas L. Harper, Jr., Esquire

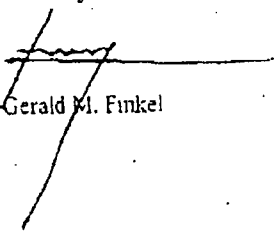
Page 3

March 29, 2004

I will be happy to discuss this matter further with you.

With kindest personal regards, I remain

Sincerely,



Gerald M. Finkel

GMF/la

cc: John and Theodore Walpole

**AS AND FOR A THIRD DEFENSE
GENERAL DENIAL**

3. Defendants deny each and every allegation not specifically admitted herein and demand strict proof thereof.

**AS AND FOR A FOURTH DEFENSE
SPECIFIC DENIAL**

4. Upon information and belief, Defendants admit the allegations of Paragraph 1.

5. Defendants admit the allegations of Paragraph 2.

6. As to the allegations of Paragraph 3, Defendants deny the allegations as stated. Plaintiff owns the roads and common areas through the dedication of the same, which occurred by instruments recorded in 2003. Defendants further state that the Declaration attached is the Second Amended Declaration.

7. Defendants do not have sufficient information to admit or deny the allegations of Paragraph 4.

8. As to the allegations of Paragraph 5, the Walpoles deny the allegations.

9. Defendants admit the allegations of Paragraph 6.

10. As to the allegations of Paragraph 7, the Walpoles admit that they have received approval to subdivide the Walpole property into six lots. Defendants deny the remaining allegations.

11. As to the allegations of Paragraph 8, Defendants admit that the Walpole property is not encumbered by the Declaration. Defendants deny that they do not enjoy the right to use the road and boat dock.

12. As to the allegations of Paragraph 9, Defendants deny the allegations as stated.

13. As to the allegations of Paragraph 10, Defendants crave reference to the document and deny any allegations not specifically set forth therein.

14. As to the allegations of Paragraph 11, Defendants crave reference to the document and deny any allegations not specifically set forth therein. By way of further response, the allegations of Paragraph 11 require a legal conclusion and reference the rights and obligations of a party other than the Defendants and as such no response is required.

15. As to the allegations of Paragraph 12, they require a legal conclusion. By way of further response, the rights of Defendants as to the use of the areas at issue were established by easement prior to the recordation of the referenced document.

16. As to the allegations of Paragraph 13, Defendants crave reference to the document and deny any allegations that are not specifically set forth therein. By way of further response, Defendants do not have sufficient information to respond as to the actions of Plaintiff.

17. As to the allegations of Paragraph 14, Defendants deny the allegation as stated. The easements granted to Defendants were granted by contract dated prior to the Declaration and were merely recorded as set forth in said Paragraph 14.

18. As to the allegations of Paragraph 15 and the remaining allegations, Defendants deny that the easement was "purported." Defendants admit that the Easements contain the provision alleged.

19. As to the allegations of Paragraph 16, Defendants admit that the easements run with the land.

20. As to the allegations of Paragraph 17, Defendants admit the allegations.

21. As to the allegations of Paragraph 18, Defendants do not have sufficient information to admit or deny the allegations.

22. As to the allegations of Paragraph 19, Defendants reassert and incorporate the responses set forth in Paragraphs 1 through 21 as through fully set forth herein.

23. As to the allegations of Paragraph 20, Defendants deny the characterization of the referenced correspondence and crave reference to same. By way of further response, Defendants state that the rights granted in the easements are set forth therein and would crave reference to said documents.

24. As to the allegations of Paragraph 21, Defendants deny the allegations as stated.

25. As to the allegations of Paragraph 22, Defendants deny the allegations, as the easements were granted prior to the Declaration.

26. As to the allegations of Paragraph 23, said allegations require a legal conclusion, and as such Defendants would crave reference to same.

27. As to the allegations of Paragraph 24, the allegations reference a party not the Defendants, as well as call for a legal conclusion, and as such no response is required.

28. As to the allegations of Paragraph 25, the allegations reference a party not the Defendants and further requires a legal conclusion. As such no response is required.

29. As to the allegations of Paragraph 26, said allegations reference a party other than Defendants and further requires a legal conclusion. As such no response is required.

30. As to the allegations of Paragraph 27, Defendants deny the allegations set forth in the first sentence. By way of further response, Defendants do not have sufficient information to admit or deny the remaining allegations and further said allegations require a legal conclusion.

31. As to the allegations of Paragraph 28, Defendants deny the allegations and demand strict proof thereof.

32. As to the allegations of Paragraph 29, Defendants deny said allegations.

33. As to the allegations of Paragraph 30, Defendant reassert and incorporate the allegations of Paragraphs 1 through 32 as though fully set forth herein.

34. As to the allegations of Paragraph 31, the allegations are denied as stated.

35. As to the allegations of Paragraph 32, the allegations are denied.

36. As to the allegations of Paragraph 33, the allegations are denied.

37. As to the allegations of Paragraph 34, the allegations are denied.

**AS AND FOR A FIFTH DEFENSE
LACK OF STANDING**

38. By way of affirmative defense, Defendants allege that Plaintiff does not have the necessary standing and/or authority to bring this suit based upon the requirements of the Second Amended Declarations and Covenants of Anchorage Plantation Homeowners Association.

**AS AND FOR A SIXTH DEFENSE
INTERVENING ACT OF THIRD PARTY**

39. To the extent that the Plaintiff complains of acts or omissions of Southern Lifestyles VII LLC, acting as Developer and Declarant of the Anchorage Plantation development and Homeowners Association, said acts and omissions are the intervening act of a third party for which Defendants owe no duty or remedy to Plaintiff.

**AS AND FOR A SEVENTH DEFENSE
STATUTE OF LIMITATIONS**

40. Plaintiff's claims are barred by the relevant Statute of Limitations.

**AS AND FOR AN EIGHTH DEFENSE
WAIVER, LACHES, ESTOPPEL**

41. Plaintiff's claims are barred by the doctrines of waiver, laches, and/or estoppel.

**AS AND FOR A NINTH DEFENSE
NOTICE**

42. Plaintiff's claims are barred as Plaintiff accepted the conveyance of the roadways and boat dock with actual and / or constructive knowledge of the existence of the easement.

**AS AND FOR A TENTH DEFENSE
UNJUST ENRICHMENT**

43. The easement agreement complained of herein was a result of the benefit of the bargain between the parties thereto.

44. The Plaintiff and the individual homeowners benefitted from the transactions negotiated between Defendants and Southern Lifestyles VII LLC, which resulted in the conveyance of the property now known as the Anchorage Plantation development from the Defendants.

45. To defeat a portion of this transaction, the easements, would unjustly enrich the Plaintiff to the detriment of the Defendants.

**AS AND FOR AN ELEVENTH DEFENSE
RELIANCE**

46. Defendants have acted in justifiable reliance of the validity of the easement as recorded.

47. In reliance of the validity of the agreement, Defendants have expended substantial time and actual costs.

48. Plaintiff's claims should therefore be barred as Defendants have acted justifiably and to their detriment.

**AS AND FOR A TWELFTH DEFENSE
FAILURE TO EXHAUST STATUTORY REMEDIES**

49. Plaintiff's claims are barred by its failure to exhaust administrative and statutory remedies.

**AS AND FOR A THIRTEENTH DEFENSE
COLLATERAL ESTOPPEL**

50. Plaintiff's claims are barred by the doctrine of collateral estoppel.

**AS AND FOR A FOURTEENTH DEFENSE
RATIFICATION**

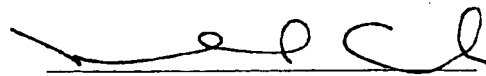
51. Plaintiff's claims are barred by the doctrine of ratification, as Plaintiff has ratified the acts of Southern Lifestyles VII LLC by its acts and conduct with knowledge of the easement.

**AS AND FOR A FIFTEENTH DEFENSE
RESERVATION OF RIGHT**

52. Defendants specifically reserve the right to incorporate additional defenses as may be deemed appropriate pursuant to the further investigation of the facts and allegations of the parties.

WHEREFORE, for the reasons stated herein, Defendants respectfully request that this Honorable Court dismiss the Plaintiff's Complaint or in the alternative to enter judgment in favor of Defendants, award the fees and costs incurred to Defendants, and award all other relief to Defendants as this Court may find just and proper.

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April 27, 2010

Page 7 of 7

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markeley Dennis, Circuit Court Judge

Case No. 2010-CP-10-00482

Anchorage Plantation
Homeowners Association,

Respondent,

v.

John B. Walpole and Theodora
W. Walpole

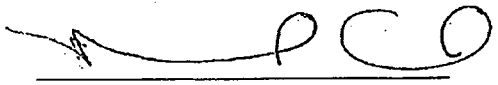
Appellants.

NOTICE OF APPEAL

John B. Walpole and Theodora W. Walpole appeal the order of the Honorable R. Markeley Dennis entered November 2, 2015. Appellants received written notice of entry of this order on November 2, 2015. Appellants further appeal the order of the Honorable R. Markeley Dennis entered February 8, 2016, denying Appellants' Motion for Reconsideration.

Attorney of record for Respondent, Anchorage Plantation Homeowners Association, is
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February 16, 2016


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SC Court of Appeals

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
ANCHORAGE PLANTATION)
HOMEOWNERS ASSOCIATION, INC.)
Plaintiff,)
v.)
JOHN AND THEODORA WALPOLE,)
Defendants.)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

C.A. No. 10-CP-10-0452

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FILED

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JULIE ARMSTRONG
CLERK OF COURT

ORDER AND JUDGMENT

This matter is before the court after trial for final disposition on the merits.

The Honorable ~~Kristi~~ Lee Harrington, Circuit Judge, oversaw the first three days of trial that were conducted on February 26, February 27, and June 21, 2013. Because Judge Harrington was unable to proceed in the matter due to various scheduling conflicts, the undersigned succeeded Judge Harrington and took over the matter.

After reviewing the transcripts of the proceedings before Judge Harrington and exhibits entered into evidence, I determined that the case could be completed before me under Rule 63, SCRPC, without prejudice to the parties,. At the commencement of the final hearing date on August 21, 2015, counsel for the parties agreed to my deciding the merits and handling the proceedings to conclusion.

Based on my review of the transcript and exhibits, as well as the testimony and exhibits admitted on the final hearing day of August 21, I determined it was unnecessary to recall any witness.

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In this action Plaintiff, Anchorage Plantation Homeowners Association, Inc. (the "Association") seeks to have the Court invalidate an easement granted by Southern Lifestyles, VIII, LLC to Defendants, John and Theodora Walpole (the "Walpoles"), in November 2001, later amended in June 2002. The Walpoles contend that the easement, as amended, is valid and enforceable, alleging several defenses to the Complaint that seeks declaratory and injunctive relief.

Having fully considered the testimony, exhibits, and arguments of counsel, and applying the applicable law, I make the following findings of facts and conclusions of law:¹

FINDINGS OF FACT

On July 31, 1980, the Walpoles acquired title to 1046.4 acres, more or less, known as Anchorage Plantation on Wadmalaw Island. (Plaintiff's Exhibit 1).

On or about June 23, 1997, the Walpoles recorded a plat for a portion of the Anchorage, described as "the Anchorage Plantation-Phase I," that included the first section of an entry road called Anchor Watch Drive along with the subdivision of five lots (lots 1, 2, 3, 77, and 78) at the then-terminus of Anchor Watch Drive. (Plaintiff's Exhibit 2). The plat also created a spur road near the then-terminus of Anchor Watch Drive described as Drop Anchor Lane. (Plaintiff's Exhibit 2). The roadways described on the plat comprised 8.839 acres. The plat contained the following note that was accompanied by the signature of the Walpoles:

WE HEREBY DEDICATE THE ROADS AND DRAINAGE
EASEMENTS SHOWN HEREON TO THE USE OF THE

¹ The separate headings, "Findings of Fact" and "Conclusions of Law," are not meant to be conclusive as to the nature of every determination made under the respective heading. There may be some conclusions of law in the findings of fact and vice versa.

RMD/2

ANCHORAGE PLANTATION HOMEOWNERS
ASSOCIATION. THE APPROVAL OF THIS PLAT IN NO
WAY OBLIGATES THE COUNTY OF CHARLESTON TO
ACCEPT FOR CONTINUED MAINTENANCE ANY OF THE
ROADS OR EASEMENTS SHOWN ON THIS PLAT.

(Plaintiff's Exhibit 2).

On June 24, 1997, the Walpoles recorded the Declaration of Covenants, Conditions, Easements, Restrictions, Charges and Liens for the Anchorage Plantation Homeowners Association (the "Original Declaration"). (Plaintiff's Exhibit 3) It was re-recorded on July 13, 1999, because the first recorded version omitted the property description that was Exhibit "A" to the original declaration. (Plaintiff's Exhibit 4). The Original Declaration defined the "Declarant" as the Walpoles.

The Original Declaration encumbered the roadways and lots described on the plat dated June 9, 1997, recorded on June 23, 1997 (Plaintiff's Exhibits 2, 3, and 4). The encumbering provision at the beginning of the original Declaration specifies as follows:

NOW, THEREFORE, the Declarant declares that the real property described as the Properties in Article II hereof is and shall be held, transferred, sold, conveyed, given, donated, leased, occupied, and used subject, among others, to the Covenants, Restrictions, Conditions, Easements, Charges, Assessments, affirmative obligations and liens (herein sometimes referred to as the "Covenants" or "Declaration of Covenants") hereinafter set forth.

(Plaintiff's Exhibits 3 and 4).

The Original Declaration specifically addressed easements. The Walpoles, as the Declarant, reserved a blanket easement over all of the Association's common areas for utilities in Section 8.02. The Original Declaration, however, did not include an easement or right of use in favor of the Walpoles over any of the common areas,

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although the Original Declaration did grant a right of use to Anchor Watch Drive to other individuals to access their lot.

Section 11.06 of the Original Declaration granted to "Kelly T. McKee and Gladys H. McKee, their heirs and assigns ("McKee")" a right to use Anchor Watch Drive from its intersection with Maybank Highway to the property owned by the McKees located at the then-terminus of Anchor Watch Drive. (Plaintiff's Exhibits 3 and 4, p. 15; Plaintiff's Exhibit 2, sheet 2 of 2). Section 11.06 required McKee to pay \$125 per annum to the Anchorage Plantation Homeowners Association "as their share of the costs of the upkeep of the road that they are entitled to use." To comply with other terms of Section 11.06, McKee signed the Original Declaration agreeing that they, their heirs and assigns shall be responsible to pay the fee and agreeing that the obligation may be enforced the same as any fee charged to any owner in Anchorage Plantation subdivision. (Plaintiff's Exhibits 3 and 4).

On January 11, 2000, the Walpoles entered a Purchase Agreement for Real Estate with Southern Lifestyles, LLC (the "First Purchase Agreement") to sell it Phase I of the Anchorage as well as an additional 278 acres described on the Preliminary Subdivision Plat for lots 1-35, 30-50, and 52-78, known as Phase II, for \$10,100,000. (Plaintiff's Exhibit 5). Phases I and II included the Walpoles' acreage fronting on Bohicket Creek intersected by Anchor Watch Drive with lots on either side of it. (Exhibit A to Plaintiff's Exhibit 5).

Pertinent to the matters at issue, Article X of the First Purchase Agreement included terms giving the Seller (the Walpoles) certain rights to use the property including the following:

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10.3 Purchaser agrees to provide Seller access to Bohicket Creek over the community boat ramp and courtesy dock located in Phase II until such time as Purchaser closes on the purchase of the Option B Property. Seller shall have the right to use any road within the Property and the Option Property for purposes of ingress and egress to properties owned or leased by Seller. . . .

(Plaintiff's Exhibit 5, p. 8)

Section 11.2 of the First Purchase Agreement provided that the agreements *made by the Seller*, i.e., the Walpoles, in the First Purchase Agreement survived the delivery of the deed and the closing. (Plaintiff's Exhibit 5, p. 8) This provision did not provide for the survival of the obligations of *the Purchaser* including those in Section 10.3.

The Walpoles wanted to sell the entirety of the property in a single transaction to Southern Lifestyles, but Southern Lifestyles was unable to acquire the entire tract at one time. Instead, Southern Lifestyles agreed to purchase the waterfront acreage of Phases I and II first. Article VIII of the First Purchase Agreement granted an option to Southern Lifestyles to purchase Phase III consisting of the remaining approximately 780 acres of the interior residual land owned by the Walpoles for \$3,500,000. (Plaintiffs' Exhibit 5).

On June 16, 2000, a conditional plat for the Anchorage Phase 2 was recorded in the RMC Office for Charleston County for lots 4 through 72 that also redesignated lot 77 and 78 of Phase 1 as lots 73 and 74, respectively. (Plaintiff's Exhibit 6). This conditional plat included the remainder of the future proposed Anchor Watch Drive, a dock between lots 46 and 47, and a dock and boat landing between lots 54 and 55. (Plaintiff's Exhibit 6, sheets 4 and 5). The Walpoles signed a certificate on this conditional plat that was identical to that in the 1997 plat for Phase I dedicating the roads and drainage

RMD 1/5

easements shown on the conditional plat to the use of the Anchorage Plantation Homeowners Association. Just as with the 1997 plat for Phase I, the 2000 conditional plat that included Phase II did not reflect an easement over the roads in favor of the Walpoles or the interior property that they would continue to own.

On June 16, 2000, the Walpoles executed and recorded the First Amendment to the Original Declaration bringing the property described in the conditional plat of Phase II under the Original Declaration. (Plaintiff's Exhibit 8). As with the Original Declaration, the Declarant declares in the First Amendment that this added property "shall be held, transferred, sold, conveyed, given, donated, leased, occupied, and used subject, to the covenants, restrictions, conditions, easements, charges, assessments, affirmative obligations and liens" of the Original Declaration. (Plaintiff's Exhibit 8).

That same day, June 16, 2000, the Walpoles conveyed legal title to Phases I and II to Southern Lifestyles VIII, LLC. (Plaintiff's Exhibit 7). The property description attached as Exhibit "A" to the deed specifically referred to "lots 4-72, a 2.289 ac. dock lot, a 2.742 ac. dock and boat landing dock lot and a .614 ac. future Anchor Line Drive, along with the property described in the 1997 final plat of Phase I." In the deed to Southern Lifestyles VIII, LLC of Phases I and II, the Walpoles did not reserve an easement or right of access across the common areas of Phases I and II. (Plaintiff's Exhibit 7).

On July 14, 2000, Anchorage Plantation Homeowners Association became a non-profit corporation. (Plaintiff's Exhibit 9).

On July 21, 2000, Southern Lifestyles VIII, LLC, recorded the Second Amendment to and Restatement of Declaration of Covenants, Conditions and

2-10-01/6

Restrictions for the Anchorage (the "Restated Declaration"). (Plaintiff's Exhibit 10). The Restated Declaration completely replaced the Original Declaration and First Amendment. (Plaintiff's Exhibit 10, p. 1). Southern Lifestyles, VIII, LLC, as Declarant, imposed the Restated Declaration on all the property acquired by it including Anchor Watch Drive and the other common areas of the Association, by the following:

NOW, THEREFORE, Declarant hereby declares that all of the property described in Exhibit "A" and any additional property as may be added by subsequent amendment hereto, and in accordance with the terms and conditions hereof, is subjected to this Second Amendment to and Restatement of Declaration of Covenants, Conditions and Restrictions for The Anchorage ("Declaration"); that the terms and conditions of the Walpole Declaration and the Walpole Amendment are subsumed under this Declaration and shall have no further independent force and effect; and that the property described in Exhibit "A" will be held, transferred, sold, conveyed, leased, occupied, and used subject to the following easements, restrictions, covenants, charges, liens, and conditions which are for the purpose of protecting the values and desirability of, and which will touch and concern and run with title to the real properties subjected to the Declaration and which will be binding on all parties having any right, title, or interest in the described properties or any portion thereof, and their respective heirs, successors, successors-in-title, and assigns, and will inure to the benefit of each owner thereof.

(Plaintiff's Exhibit 10, pp. 1-2)(emphasis added).

I find the Restated Declaration encumbered all right, title, and interest of Southern Lifestyles VIII, LLC, in and to the real property known as Phases I and II of the Anchorage.

The Restated Declaration defines the "Common Areas" to include all real and personal property "hereafter deeded or leased to" the Association wherein the property is denominated as a common area. (Plaintiff's Exhibit 10, p. 2, Section 1.1(g)) As

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described in the further findings below, the private roads of Phases I and II, the community boat ramp, and courtesy dock were later deeded to the Association as common areas. I find they constituted common areas under the Declaration.

Further, according to the Restated Declaration's definition, "[a]ll common areas are to be devoted to and intended for the common use and enjoyment of the Declarant, Owners, and their respective guests, and invitees, as well as third-parties with easements in and to such common areas, as herein provided" (Plaintiff's Exhibit 10, p. 2) (emphasis added).

The Walpoles are third parties with respect to the Restated Declaration. The Restated Declaration does not grant an easement in and to the common areas to the Walpoles. Section 6.4.2 of the Restated Declaration, however, does grant a non-exclusive, appurtenant easement to McKee for the same section of Anchor Watch Drive on the same terms as in the Original Declaration. (Plaintiff's Exhibit 10, pp. 19-20). This provision specifically states that it does not provide McKee the right to use any common areas except over which McKee was granted the easement unless and until the McKees' property was added to the development and became a part of the Association as provided in Section 2.2 of the Restated Declaration. (Plaintiff's Exhibit 10, pp. 19-20).

Section 2.2 of the Restated Declaration specifies the terms and conditions for the addition of contiguous or nearly contiguous real property to the Restated Declaration by recording a supplemental declaration with respect to that land. (Plaintiff's Exhibit 10, p. 5). The interior residual acreage of the Walpoles was never added to the Association by supplemental declaration.

Handwritten signature/initials.

Section 2.3 of the Restated Declaration sets forth the terms and conditions for the conveyances of the common areas by the Declarant to the Association specifying, among other things, that any such conveyance will be subject to "(b) the right of access of the Declarant, its successors and assigns, over and across such property...." (Plaintiff's Exhibit 10, p. 6). Section 2.3 also provides that "the Association hereby agrees to accept title to any property, or to any interest in property, now or hereafter conveyed to it pursuant to the terms and conditions of this Declaration." (Plaintiff's Exhibit 10, pp. 6-7).

Article 6 of the Restated Declaration addresses "PROPERTY RIGHTS." This article does not grant any rights to the Walpoles to the common areas nor does it grant the right to the Declarant to grant an easement or right of access to the Walpoles for the common areas.

Section 6.2. describes the "Declarant's Reserved Rights and Easements" as "the rights and easements specifically reserved to Declarant in this Declaration." (Plaintiff's Exhibit 10, p. 17). Section 6.2.5 titled "Declarant's Easements for Additional Property" affirms "the Declarant's right to add Property to this Declaration pursuant to Section 2.2.1 in the rights and easements reserved in Section 6.1. hereof for the benefit of the Additional Property so added to this Declaration." (Plaintiff's Exhibit 10, p. 18).

Section 6.4 titled "Easements Over Private Roadways" contains the following specific provision describing the temporary easement of the Declarant over the private roadways during the time it owns any of the lots for sale:

6.5 Easements for Declarant. During the period that Declarant owns any of the Property for sale, Declarant will have an alienable and transferable right and easement on, over, through, under, and across the common areas for

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the purpose of constructing improvements in and to the Lots and for installing, maintaining, repairing and replacing other improvements to the Property contemplated by this Declaration or as Declarant desires, in its sole discretion, including, without limitation, any improvements or changes permitted and described by Article 2, and for the purpose of doing all things reasonably necessary and proper in connection therewith, provided in no event will Declarant have the obligation to do any of the foregoing.

(Plaintiff's Exhibit 10, p. 20)(emphasis added).

Section 6.5.1 titled "Declarant's Easements for Any Additional Property" reserves for Declarant, and its successors, assigns, and successors-in-title, an easement of access to and use of the common areas in favor of any Additional Property when added to the Restated Declaration pursuant to Section 2.2.1. (Plaintiff's Exhibit 10, p. 20). The Walpoles' acreage was never added to the Restated Declaration pursuant to Section 2.2.1.

Section 6.7 titled "Easements for Utilities" reserves to the Declarant in the Association the right and easement, as well as the power to grant and accept easements, over the common areas for the purpose of providing utilities, according to the terms of this section. The easement in question in this case is not an easement for purposes of providing utilities.

Section 16.12 titled "Rights of Third Parties" provides, in pertinent part that "this Declaration will be filed Of Record for the benefit of Declarant, the Owners, and their Mortgagee as herein provided, and by such recording, no adjoining property owner or third party will have any right, title or interest whatsoever in the Development, except as provided herein. . ." (Plaintiff's Exhibit 10, p. 46)(emphasis added). Since the Restated Declaration does not provide for any right in favor of the Walpoles in any

Plaintiff's Exhibit 10

of its other terms, this provision excludes the Walpoles, who are adjoining owners, from any rights associated with the Development that includes its common areas.

Section 15.5 of the Restated Declaration titled "Actions" specifies that the Association may not grant an easement, license, or concession through or over the common areas (except for utilities) without the approval of at least 51% of the institutional mortgagees holding first mortgages on the lots. No approval of the easement in question in this case was sought from the institutional mortgagees,

On December 15, 2000, Southern Lifestyles VIII, and the Walpoles entered a Purchase Agreement for Unimproved Real Estate (the "Second Purchase Agreement") for the approximately 780 acres of Phase III that replaced the option to purchase Phase III in the First Purchase Agreement. (Plaintiff's Exhibit 13). The Second Purchase Agreement required the closing for Phase III to occur no later than June 15, 2002. (Plaintiff's Exhibit 13, p. 4). The Second Purchase Agreement included reference to the right of access in the First Purchase Agreement: "10.13 The provisions of the [First] Agreement between the parties dated January 11, 2000 contained in Articles VI and X shall apply to this [Second] Agreement as contemplated under the [First] Agreement of January 11, 2000." (Plaintiff's Exhibit 13, p. 8).

Southern Lifestyles, VIII, LLC, intended to close on the purchase of Phase III but ran into financial difficulties. On July 5, 2001, Southern Lifestyles, VIII, LLC, granted a mortgage to the Walpoles on 23 of the lots in Phases I and II to secure amounts owed the Walpoles under the Second Agreement, as amended. (Plaintiff's Exhibit 15). Southern Lifestyles, VIII, LLC, went so far to have its engineers to prepare a subdivision and site plan for Phase III. (Defendant's Exhibit 16). Southern Lifestyles, VIII, LLC,

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intended to submit Phase III to the Restated Declaration and make it a part of the Association if it acquired Phase III. Had that occurred, the lot purchasers in Phase III would have been subject to all the terms and conditions of the Restated Declaration, including liability for assessments and being subject to rules and regulations applicable to the common areas.

Concerned that Southern Lifestyles, VIII, LLC, might not be able to close on Phase III, the Walpoles desired to obtain an easement for the benefit of their residual parcel for the use of the community boat landing and dock as well as the roads in Phases I and II, in the event the closing did not occur. To that end, Charles S. Altman, attorney for the Walpoles, wrote a letter dated October 30, 2001, to Neil C. Robinson, Jr., attorney for Southern Lifestyles, VIII, LLC.. The letter stated that the Walpoles still desired that Southern Lifestyles, VIII, LLC, acquire Phase III but that they were unwilling to continue negotiations with it and grant it concessions unless it granted the Walpoles the easement drafted by Mr. Altman.

On November 8, 2001, Southern Lifestyles, VIII, LLC, signed the Easement Agreement prepared by Mr. Altman that is at the center of this dispute. (Plaintiff's Exhibit 17). The Easement Agreement purported to grant the Walpoles, their heirs and assigns, an easement over the roads and streets of Phases I and II described as the "Burdened Property", for purposes of ingress and egress to the Walpoles' property, described as the "Benefited Property." (Plaintiff's Exhibit 17). The Easement Agreement also granted "the right for the Grantees [the Walpoles], their heirs and assigns to use the community boat ramp and courtesy dock located on the Burdened Property for the purpose of access to Bohicket Creek." (Plaintiff's Exhibit 17, p. 1).

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The Easement Agreement also specified that if the Benefited Property was subdivided and sold to third persons, each subsequent owner of a lot would be obligated to pay an annual fee "for the right to enjoy the easements granted herein" of \$50 for the first year, increasing by \$5 per year thereafter. (Plaintiff's Exhibit 17). The fee was to be paid to the Association. (Plaintiff's Exhibit 17). The applicable zoning allowed the subdivision of the residual property into 107 residential lots whose future purchasers would receive the benefit of the Easement Agreement.

According to its attorney, Robinson, Southern Lifestyles, VIII, LLC, recognized that questions might later be raised as to the validity of the Easement Agreement and that it might be subject to later legal challenge. Because it still intended to acquire Phase III and add it to the Association and Restated Declaration by a future supplemental declaration, Southern Lifestyles, VIII, LLC, considered that, if it closed on Phase III, it could cancel the easement by recording an easement cancellation notice as provided in the Easement Agreement. (Plaintiff's Exhibit 17, p. 2).

On June 13, 2002, Southern Lifestyles, VIII, LLC and the Walpoles entered an Amended Easement Agreement that was essentially the same with only one or two changes. The Amended Easement Agreement capped at \$100 fee per lot that started at \$50. (Plaintiff's Exhibit 18).

The court takes judicial notice of the deeds of conveyance recorded in the RMC office at the time Southern Lifestyles VIII, LLC, and the Walpoles entered the Easement Agreement. A court is entitled to take judicial notice of deeds of record even though not introduced into evidence. Wiseman v. Cambria Prods. Co., 61 Ohio App. 3d 294, 300, 572 N.E.2d 759, 762, (Ohio Ct. App., Lawrence County 1989). In Wiseman the Ohio

RMD/13

appellate court rejected an appeal challenging the trial court's taking judicial notice of a deed of record after the close of the evidence, reasoning as follows:

The question posed by this assignment of error, however, is whether the court erred by taking judicial notice of the Neal-Ironton deed. Appellant contends judicial notice of the Neal-Ironton deed constituted judicial notice of an "adjudicated fact." Appellant also contends the court erred by taking judicial notice after "all proceedings had stopped." Appellant further contends the Neal-Ironton deed is not part of the record.

We find the Neal-Ironton deed to be a proper subject of judicial notice.

Evid.R. 201(B) permits courts to take judicial notice of facts which are not subject to reasonable dispute and which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Appellant cites no authority which would prevent the court from taking judicial notice after a hearing or trial. Quite to the contrary, Evid.R. 201(F) permits courts to take judicial notice "at any stage of the proceeding." With regard to appellant's contention that the Neal-Ironton deed is not part of the record, we note appellant cites no authority which would require a court taking judicial notice of a deed to make that deed part of the court record.

Wiseman v. Cambria Prods. Co., 61 Ohio App. 3d 294, 300, 572 N.E.2d 759, 762, (Ohio Ct. App., Lawrence County 1989).

The same reasoning would apply under South Carolina's parallel rule of evidence, Rule 201, SCRE, "Judicial Notice of Adjudicative Facts." Other courts have reached the same result as Wiseman. See, Fontenot v. Wells Fargo Bank, N.A., 198 Cal. App. 4th 256, 265, 129 Cal. Rptr. 3d 467, 476 (Cal. App. 1st Dist. 2011) ("[C]ourts have taken judicial notice of the existence and recordation of real property records, including deeds of trust, when the authenticity of the documents is not challenged... Taken together, the decisions discussed above establish that a court may take judicial notice of the fact of a document's recordation, the date the document was recorded and executed, the parties to the transaction reflected in the document, ..."); Pratt v. Kelly, 585 F.2d 692, 696 (4th Cir. 1978)(court may take judicial notice of deed).

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The deeds recorded in the RMC Office for Charleston County show that between the time it acquired Phases I and II on June 16, 2000, and its execution of the Easement Agreement on November 8, 2001, Southern Lifestyles, VIII, LLC sold and conveyed title to over 50 of the 74 lots in Phases I and II. This number is consistent with the mortgage granted by Southern Lifestyles VIII, LLC, to the Walpoles on July 5, 2001, that was secured by only 23 of the 74 original lots. (Plaintiff's Exhibit 15). Three of these deeds to third-parties who purchased before the Easement Agreement were admitted into evidence. (Plaintiff's Exhs. 11, 12, and 16). One of those persons who purchased a lot before the purported easement was executed was Steve Brostoff, current president of the Association, who testified at trial. (Plaintiff's Exhibit 16).

Attorney Elizabeth W. Settle, whom the court qualified as an expert in real estate development matters, testified the Easement Agreement would not appear in the chain of title for the lots purchased by persons before the purported easement was recorded. (Trial Tr. 02/26-27/13, pp. 51-52). She also rendered her opinion that Southern Lifestyles, VIII, LLC, did not have the authority to grant the easement based on the terms and conditions of the Declaration that encumbered the common areas as well as the other real property comprising Phases I and II of the Anchorage. (Trial Tr. 02/26-27-13, pp. 66-67 ??)

Robinson, who represented Southern Lifestyles, VIII, LLC, whose testimony was offered as a fact witness rather than an expert witness, testified he believed Southern Lifestyles, VIII, LLC had the authority to execute the easement in its capacity as owner, as opposed to its capacity as Declarant. But, as noted, his state of mind was not

Brost/15

offered as an expert opinion. The Walpoles did not present expert testimony to rebut Settle's opinion.

Robinson admitted that the typical real estate practice would have been for the Walpoles to reserve an easement in favor of the owners of Phase III in their deed of Phases I and II if they wanted to preserve a right of access or use to the land conveyed. The Walpoles did not reserve any rights to the common areas in Phases I and II in the deed of conveyance to Southern Lifestyles, VIII, LLC. (Plaintiff's Exhibit 7). Robinson acknowledged there was no express provision in the Restated Declaration authorizing the Declarant to grant an easement of this nature to a third person for use of the common areas.

On January 13, 2003, Southern Lifestyles, VIII, LLC, deeded Anchor Watch Drive and the other roads within Phases I and II of the Anchorage to the Association as common properties. (Plaintiff's Exhibit 20). On July 29, 2003 Southern Lifestyles, VIII, LLC, deeded the community boat landing dock and land for the amenity center to the Association. (Plaintiff's Exhibit 22).

In 2004 attorney Thomas L. Harper, Jr., representing the Association, wrote attorney Gerald M. Finkel, attorney for the Walpoles, concerning the Easement Agreement. Harper asserted that the easement was not authorized under the Declaration and legally invalid. Finkel asserted that the easement was valid. (See Defendants' Exhibits 1-4).

In January 2005 the Walpoles obtained approval from Charleston County to subdivide the 780 acres into six large lots. (Plaintiff's Exhibit 33 and 34). Harper sent a letter dated March 7, 2005, to the Charleston County Planning Director opposing the

RMO/16

subdivision to the extent the Walpoles relied on the Easement Agreement for the right to use Anchor Watch Drive and any other streets within the Association. (Defendants' Exhibit 15).

On February 10, 2005, the Walpoles recorded the subdivision plat for their 780 interior acres dividing them into six large lots. Plaintiff's Exhibit 34. Although the Walpoles contend that their access to lots numbered 5 and 6 is through the cul de sac at the far end of Anchor Watch Drive, the plat indicates that the access to these two lots is through a private 50' ingress and egress across the Walpoles' property called Salt Bottom Way. Plaintiff's Exhibit 34, Sheet 9 of 9.

Further, no issue has been joined as to whether the Walpoles have an easement of necessity across Anchor Watch Drive to either of these two lots or Lot 1 on the 2005 plat (on the south side of Anchor Watch Drive). The Walpoles have not pleaded an affirmative cause of action for a determination of an easement of necessity and did not allege an easement of necessity as an affirmative defense. Answer of Walpoles filed April 27, 2010. Rule 8(c) of the South Carolina Rules of Civil Procedure requires a defendant to affirmatively set forth in addition to the listed defenses "any other matter constituting an avoidance or affirmative defense." Generally, the failure to plead an affirmative defense constitutes a waiver of that defense. Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 615, 703 S.E.2d 221, 224 (2010).

The Walpoles have not sold any of the six lots that now constitute the residual interior acreage. There was no proof of any third person relying on the purported easement, as amended.

P-11008/17

The Walpoles did not offer any proof as to the method or rationale, if any, for setting the initial fee for each future lot at \$50, increasing annually to no more than \$100. Billy Walpole, the Guardian ad Litem for Defendant John Walpole, testified that he had no knowledge of the basis for setting the fee at this figure. Unlike the provision in the Restated Declaration granting the McKee access, the terms of the purported easement do not grant to the Association the right to collect the fee in the same manner as an assessment due the Association from one of its members.

The current annual assessment for each of the 74 lots and Phases I and II of the Anchorage is \$1,400. (Trial Tr. 06/21/13, pp. 8, 11-12). Approximately \$343 of this assessment is budgeted to road repair and maintenance. (Trial Tr. 06/21/13, p.8).

The Association spent over \$400,000 building the outdoor picnic area and men's and women's bathrooms located at the community boat landing and dock, which the members describes as their amenity center, (Trial Tr. 02/26-27/13, pp. 139-140). There are a dozen parking spaces for cars with trailers to launch and retrieve boats. (Trial Tr. 02/26-27/13, pp. 119-120).

Brostoff testified to the Association's extensive concerns about the purported easement if the 107 lots are subdivided on the residual property owned by the Walpoles as allowed under Charleston County zoning. These concerns included the following: that the fee to be paid is far below a fair proportionate share to repair and maintain the roads, boat landing, and community dock (Trial Tr. 02/26-27/13, pp. 116-119); that there is insufficient parking for the anticipated cars and boat trailers from the owners of the 107 lots (Trial Tr. 02/26-27/13, pp. 119-120); that there is insufficient fresh water capacity at the community boat landing if the number of boats were considerably

R-moo/18

increased (Trial Tr. 02/26-27/13, pp. 119-121); that the Association has no means to enforce collection or to deny access to a property owner who did not pay the fee (Trial Tr. 02/26-27/13, p. 145); privacy and security concerns if the Association has to provide an access code to the entrance security gate to all the lot owners in the residual property (Trial Tr. 02/26-27/13, p. 124); the high costs of maintaining the automatic access gate which would have to be funded entirely by the members of the Association, not by the outside property owners (Trial Tr. 02/26-27/13, pp. 113, 141); that the outside owners, not being members of the Association, would not be bound by the rules and regulations of the Association governing the use of an access to the community boat landing and dock (Trial Tr. 02/26-27/13, pp. 123-125); and that the large trucks associated with the construction of houses on the interior lots would cause significant wear and tear on Anchor Watch Drive accelerating its deterioration and need for repair. (Trial Tr. 02/26-27/13, p. 123).

The Board of Directors of the Association authorized the bringing of the within action against the Walpoles. The Board has provided reports on the status of this litigation to the members at their annual meeting. (Trial Tr. 02/26-27/13, pp. 125, 153-156, 157-161). 75% of the members did not formally approve the litigation by vote or referendum.

CONCLUSIONS OF LAW

The Complaint alleges separate causes of action seeking declaratory and injunctive relief. The Association does not seek damages. The primary relief sought is the invalidation of the easement, as amended.

Amended 1/19

"The character of an action as legal or equitable depends on the relief sought." Cedar Cove Homeowners Association, Inc. v. DiPietro, 268 S.C. 254, 258, 628 S.E.2d 284, 286 (Ct. App. 2006). "[A]n action sounding in law may be transformed to one in equity because equitable relief is sought." Insurance Financials Services, Inc. v. S.C. Ins. Co., 271 S.C. 289, 293, 247 S.E.2d 315, 318 (1978). "Normally an action to quiet title to property is an action in equity. Clark v. Hargrave, 323 S.C. 84, 86, 473 S.E.2d 474, 476 (Ct. App. 1996).

The threshold question is whether or not Southern Lifestyles, VIII, LLC, had the legal authority to grant the easement to the Walpoles. At the time Southern Lifestyles, VIII, LLC, and the Walpoles executed the Easement Agreement and Amended Easement Agreement, the Restated Declaration encumbered the common areas. According to the Restated Declaration's terms, all land acquired by Southern Lifestyles, VIII, LLC, including the common areas, was subject to the terms and conditions of the Restated Declaration, as were any conveyances by Southern Lifestyles, VIII, LLC.

The easement, as amended, is a purported conveyance of an interest in real property. Even though Southern Lifestyles, VIII, LLC, had yet to convey legal title to the common areas in question to the Association at the time it purported to grant the easement and amended easement to the Walpoles, their fee title interest was subject to the terms and conditions of the Restated Declaration. It is not a question of which entity held legal title to the common areas in question at the time the easement and amended easement were executed. Rather, the controlling consideration is whether the property, including the common areas, was encumbered by the Restated Declaration, which they were.

Amot/ao

Restrictive covenants such as those in the Restated Declaration are contractual in nature and bind the parties thereto in the same manner as would any other contract. Queens Grant, II Horizontal Property Regime vs. Greenwood Development Corporation, 368 S.C. 242, 361, 628 S.E.2d 902, 913 (Ct. App. 206). Hence, Southern Lifestyles, VIII, LLC, was bound by the terms and conditions of the Restated Declaration just as the persons taking title to lots within the Association were. Restrictive covenants, including those created by Restated Declaration, "will be enforced unless they are indefinite or contravene public policy." Ibid. A developer may generally reserve in the restrictive covenants the right to take certain actions; if those actions are taken, they must be exercised in a reasonable manner in strict compliance with the procedures set forth in the declaration of covenants. Id. (In context of specific right reserved in Declaration to developer to amend the Declaration of Covenants).

Here, the pertinent provisions of the Restated Declaration are clear and unambiguous. The Restated Declaration does not empower the Declarant to grant an easement to an outside property owner to use the common areas except as specifically stated in the Restated Declaration. Section 6 of the Restated Declaration (Plaintiff's Exhibit 10) specifically enumerates the various "PROPERTY RIGHTS" in Phases 1 and 2. As found above, none of the property rights reserved to the Declarant in the Restated Declaration includes the right to grant a perpetual easement to a third person to use the common areas. Robinson acknowledged this omission.

"The canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d

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578 (S.C. 2000). The failure of the Declaration to instill such a right in the Declarant legally implies that it was excluded.

If under the terms of the Restated Declaration, Southern Lifestyles, VIII, LLC, did not have the authority to grant the easement, then the easement is of no legal effect. "No person can convey an interest which the grantor does not have in the land described in the deed, even though the terms of the deed may purport to do so." Cummings v. Varn, 413 S.E.2d 829, 832 (1992).

If a declarant could validate actions and transactions that are contrary to the terms of a declaration by contending such actions and transactions were in its capacity as owner rather than declarant, a developer could entirely defeat the purpose of the declaration simply by asserting that a prohibited action was done in its capacity as owner. Such alleged authority in the capacity of the owner rather than as declarant would entitle the owner/declarant to circumvent the restrictions in the declaration that are matters of record and relied upon by the members of an association in purchasing their properties. Here, Southern Lifestyles, VIII, LLC, sold as many as 50 lots before entering and recording the Easement Agreement. Neither the Restated Declaration in this case nor the law makes this distinction. The commitments of Southern Lifestyles, VIII, LLC, as Declarant in the Declaration would become meaningless if this were the case. Moreover, Southern Lifestyles, VIII, LLC specifically stated in the recitals that it purchased Phases I and II and was proceeding with the Declaration "as the owner of the Walpole property, which is more fully described in Exhibit "A". (Plaintiff's Exhibit 10, p. 1).

Amended 2/22

In Raman Chandler Properties, L.C. vs. Caldwell's Creek Homeowners Association, Inc., 178 S.W.3d 384 (Ct. Tex. 2005), a homeowners' association brought suit against a developer seeking a determination that a declaration of restrictive covenants did not authorize the declarant-developer to grant an access easement over the plaintiff association's common areas in favor of the property owners in a new adjoining development. Just as in this case, the defendant in Raman Chandler Properties, L.C. asserted that the developer had the right to grant the easement because it still held legal title to the common areas when it granted the easement. The court rejected this argument:

Under these facts, the actual legal ownership of the common areas is irrelevant. The primary issue is whether the Developer, in 1999, retained the right to unilaterally amend the plat or create and burden the common area for the benefit of a different association by granting it an easement. The answer is "No." Restrictive covenants that run with the land such as these generally burden and govern all lots within the subdivision to which they were intended to apply. . . Thus, only if the Developer followed the specific procedure for amending the restrictions or the plat as set forth in the Covenants could it have had the right to create such an easement for the benefit of some entity or owner other than the Association and its lot owners. . . Additionally, regardless of ownership, the lots comprising the common areas were and are subject to the Restrictive Covenants created by the original dedication and restrictions as well as any amendments to them. Once an Association shows that a plan or scheme exists for the benefit of all lot owners, it has shown a right to enforcement of such covenants and restrictions.

178 S.W.3d 393-394 (emphasis added).

As previously found, the Restated Declaration's definition of common areas includes those parcels within the development intended for the common use of the

RMD/23

owners even though legal title will be conveyed to the Association sometime in the future. (Plaintiff's Exhibit 10, Section 1.1.(g), p. 2).

I find and conclude that the Restated Declaration did not reserve to the Declarant the right to grant the easement in question. The easement is outside the authority reserved to the Declarant in the Declaration. Further, the members of the Association purchasing lots before the easement was granted had no notice that the Declarant might grant such an easement since the Restated Declaration did not vest the Declarant with such authority. The purchasers of the 50 or so lots would not have had record notice of the Easement Agreement since it was executed after title was conveyed for their lots. As such, the Easement Agreement falls outside the chain of title for the subsequent purchasers of those lots who would not have record notice of the purported easement.

Further, as shown by the testimony about the expenses associated with the repair and maintenance of the common areas in question, the amount of the fee is grossly out of proportion to the actual expenses. The Walpoles offered no proof explaining how the \$50 annual fee (subject to an annual adjustment and \$100 cap) was determined or that this amount was fair and reasonable. McKee, who only uses one short section of Anchor Watch Drive and has no access to any of the Association's other common areas, pays \$125 per year. The Walpoles have suggested to the Court that it could adjust the fee. Not only has no claim been asserted to reform the instrument but the threshold question is whether the easement is valid and enforceable in the first instance regardless of the reasonableness of the fee to be paid by the owners of the future lots.

R.M.D. 24

The Walpoles rely, in part, on Section 2.3 of the Restated Declaration. This section governs conveyance of the common areas and does not authorize the Declarant to grant the easement at issue. This section specifies that conveyances of the common areas by the Declarant to the Association are subject to, among other things, the restrictive covenants of record at the time of conveyance and the "right of access of the Declarant, its successors and assigns over and across such property. . . ."

A right of access is not an easement. A right of access is in the nature of a license by which an owner allows another to come onto land for a specific purpose, unlike an easement which is a grant of an interest in real property that burdens the servient estate for the benefit of the dominant estate. 25 Am. Jur. 2d, Easements and Licenses Section 2. Additionally, the Restated Declaration specifically distinguishes between rights and easement by recognizing they are different. Section 6.2.2 refers to the "rights and easements specifically reserved to Declarant in this Declaration." (Plaintiff's Exhibit 10, p. 17). The Declarant's easement over the roadways that are common areas are specifically for the purpose of constructing and maintaining, repairing and replacing improvements to the property, as set forth in Section 6.5. (Plaintiff's Exhibit 10, p. 20).

For the same reasons, the Purchaser's right of access in the First and Second Purchase Agreements that were unrecorded and have terminated is also not an easement. Moreover, the survival provision of these two agreements provides that only the rights of the Purchaser survive termination or closing. They did not provide for the survival of any rights of the Seller.

Once Southern Lifestyles, VIII, LLC, sold the lots and transferred the common areas to the Association, it no longer had an interest in the Phases 1 and 2. A grantor who no longer has an interest in the real property subject to a restriction in its favor lacks standing to enforce the restriction. McLeod v. Baptiste, 315 S.C. 246, 247, 433 S.E.2d 834, 835 (1993); AJG Holdings, LLC v. Dunn, 410 S.C. 346, 347, 764 S.E.2d 912, 912 (S.C. 2014). Similarly, once it relinquished all interest in Phases 1 and 2, any alleged easement granted to Southern Lifestyles VIII, LLC, to the common areas could no longer be enforced. To the extent that Southern Lifestyles, LLC, conveyed its interests in the easements in its favor under the Restated Declaration, those easements expired years ago, in 2003, when it no longer had an interest in the real property comprising Phases 1 and 2 and control of the Association was turned over to the members.

The Restated Declaration sets forth the limited easements granted to the Declarant. To the extent Southern Lifestyles VIII, LLC, as Declarant held these easements, its attempted transfer of its non-exclusive easement rights to a third party whose use would increase the burden on the servient estate is also invalid under the law governing easements. In Rhett v. Gray, 401 S.C. 478, 736 S.E.2d 873 (Ct. App. 2012), our Court of Appeals invalidated a purported transfer of an access easement by the owner of the dominant estate. The Court of Appeals recited numerous legal principles governing easements that are applicable to this case:

"[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden." . . . "As a general rule, an easement appurtenant to one parcel of land may not be extended by the owner of the dominate estate to other parcels owned by him, whether adjoining or distinct tracts, to

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which the easement is not appurtenant." . . . "If an easement is appurtenant to a particular parcel of land, any extension thereof to other parcels is a misuse of the easement." . . . Enlarging an easement to include adjoining tracts increases the burden... A fundamental principle is that an easement for the benefit of a particular piece of land cannot be enlarged and extended to other parcels of land, whether adjoining or distinct tracts, to which the right is not attached. In other words, an easement appurtenant to a dominant tenement can be used only for the purposes of that tenement; it is not a personal right, and cannot be used, even by the dominant owner, for any purpose unconnected with the enjoyment of his estate. The purpose of this rule is to prevent an increase of the burden upon the servient estate, and it applies whether the easement is created by grant, reservation, prescription, or implication.

736 S.E.2d 881-883 (Internal citations omitted)(emphasis added).

Further, any right of access or alleged easement of Southern Lifestyles, VIII, LLC, was appurtenant to Phases 1 and 2. It was not a right of Southern Lifestyles, VIII, LLC, that it could transfer to anyone. Under the fundamental legal principles governing easements, Southern Lifestyles, VIII, LLC, could not extend its purported easement to include the more than 700 interior acres owned by the Walpoles that have never been incorporated into the Association. Any easement held by Southern Lifestyles, VIII, LLC, was appurtenant to Phases 1 and 2, and was not appurtenant to the Walpoles's interior acreage. For this additional reason, the purported easement granted to the Walpoles is invalid and unenforceable.

As previously found and concluded, Southern Lifestyles VIII, LLC, did not have an easement for the general use of the common areas for an indefinite time. Its easements were limited to specific purposes incident to the development of Phases 1 and 2 for the period of that development. But, if its rights to the use of the common

Amended 12/27

areas were unrestricted and tantamount to an easement, which they were not, its purported non-exclusive grant of its easement to the Walpoles is unenforceable and invalid under the principles stated by the court in Rhett.

The Court also finds and concludes that the purported easement granted by Southern Lifestyles VIII, LLC, to the Walpoles would materially and unfairly increase the burden on the servient estate. The easement purports to grant the right to use the Association's roads, boat landing, and community dock to as many as 107 lot owners and their guests, more than doubling the burden on these common areas of the Association. As the testimony indicated, these owners would be paying only a fraction of the cost of repairing and maintaining those common areas.

In South Carolina developers have a fiduciary duty to turn over common areas in good repair or provide the association with sufficient funds to make needed repairs to bring them to good condition. Concerned Dunes West Residents v Georgia-Pacific, 349. S.C. 251, 562 S.E.2d 633 (2002). While the case at hand involves common areas that the developer turned over with legal burdens rather than physical burdens, the same principles appear to apply.

"After the developer has relinquished control of the association to the members, the association has the power to terminate without penalty . . . any contract or lease that is not bona fide, or was unconscionable to the members other than the developer at the time it was entered into, under the circumstances then prevailing." Restatement (Third) of Property (Servitudes) § 6.19 (2000). "The developer's duty to turn over control can be thwarted if the developer obligates the association to long-term arrangements that effectively deprive the owners of control of the common property." Id. at Comment d. I

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find and conclude that the Easement Agreement, as amended, if enforced would be unconscionable to the 74 members of the Association based on the Court's previous findings concerning the burdens the Easement Agreement, as amended, places on the members of the Association and the common areas. Southern Lifestyles, VIII, LLC granted the purported easement under duress to keep alive their opportunity to acquire Phase III.

The dedications of the roads in Phases 1 and 2 to the Association at the time of recording of the plats also restricted the right of the owner to control their use thereafter. As held in Timberlake Plantation Co. v. County of Lexington, 314 S.C. 556, 560, 431 S.E.2d 573, 575 (S.C. 1993), "[t]here is no essential difference between a dedication and a grant. Grady v. City of Greenville, 129 S.C. 89, 95, 123 S.E. 494, 497 (1924). It is clear then, that while a landowner may dedicate land for a specific, limited, and defined purpose, he cannot retain discretion to alter or control future use of the property once it has been accepted by the public." 431 S.E.2d 575. Once the roads, including Anchor Watch Drive, were dedicated to the Association, the owner of them -- first the Walpoles and then Southern Lifestyles VIII, LLC -- no longer retained discretion to alter or control future use of the roads except pursuant to the terms of the Original Declaration and later Restated Declaration. The fact that Southern Lifestyles had no yet conveyed legal title to the roads to the Association at the time it purported to grant the easement to the Walpoles is of no significance since the roads had previously been dedicated to the Association.

Rm007/29

The Walpoles assert a number of defenses. The two main defenses are that the Association lacks standing or authority to bring the suit and that the Association's claims are barred by the statute of limitations.

The Walpoles base their lack of standing defense on the following provision in the Restated Declaration that refers to the necessity of a vote of the membership before certain litigation may be initiated:

14.4 Litigation. No judicial or administrative proceeding, including any mandatory procedure under Section 14.3 above, with an amount in controversy exceeding \$25,000.00, will be commenced or prosecuted by the Association unless approved by 75% or more of the of the votes of the entire Association, by Referendum or at a duly held meeting of Members called for the purpose of approving the proceeding, which percentage will also constitute the quorum required for any such meeting. This Section will not apply, however, to (a) actions brought by the Association to enforce the provisions of this Declaration (including, without limitations, the foreclosure of liens); (b) the imposition and collection of Assessments; (c) proceedings involving challenges to ad valorem taxation; (d) counterclaims brought by the Association in proceedings instituted against it; or (e) actions brought by the Association to enforce written contracts with its suppliers and service providers.

Plaintiff's Exhibit 10, Restated Declaration, pp. 38-39.

The Association established, and I find, that the board approved this litigation and that the members have been kept abreast of it. The Association did not establish that 75% of the members approved the suit by referendum or vote at a duly authorized meeting. However, that omission does not mean the Association has no standing or authority to bring this action.

As stated in the terms of Section 14.4, its 75% vote requirement does not apply to litigation where the amount in controversy does not exceed \$25,000. Here, the Association is not seeking damages of any amount. The relief sought is declaratory and injunctive. Hence, the conditions of Section 14.4 do not apply.

AMDO 30

Even if Section 14.4 were considered applicable, its terms exclude "(a) actions brought by the Association to enforce the provisions of this Declaration...." In this action the Association seeks to enforce the provisions of the Restated Declaration that, among other things, did not authorize the Declarant to grant the easement in question to the Walpoles and that reserves the common areas to "common use and enjoyment of the Declarant, Owners, and their respective guests, and invitees, as well as third parties with easements in and to such Common Areas, as herein provided." Plaintiff's Exhibit 10, Restated Declaration, p. 2. No vote of the members was required.

Section 11.2.2 (g) of the Restated Declaration specifically authorizes the Association: "To take any and all actions necessary to enforce these and all covenants and restrictions affecting the Property and to perform any of the functions or services delegated to the Association in any covenants or restrictions applicable to the Property..." Plaintiff's Exhibit 10, Restated Declaration, p. 29.

I find and conclude the Association has standing and authority to bring this action.

The Court also notes that the Walpoles are third parties for purposes of the Restated Declaration and, as such, lack standing under both the controlling statutes and case law to assert that the initiation of the suit is *ultra vires* under the provisions of the Restated Declaration.

S.C. Code Section 33-31-304 provides, in pertinent part, as follows:

(a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not

acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.

S.C. Code Ann. § 33-31-304

The Walpoles do not come within the limited category of persons described in section 33-31-304(b) who may challenge the authority of the Association to bring this action.

This statute is in keeping with legal precedent that an outsider has no standing to challenge whether an adverse party was authorized to bring an action under its governance documents. DeBorde v. St. Michael & All Angels Episcopal Church, 272 S.C. 490, 501, 252 S.E.2d 876, 881 (1979) ("Petitioners contend that this grant is not broad enough to permit respondent's operation of a cemetery for the benefit of its parishioners. The simple answers to this contention are twofold: (1) this issue was not raised by the complaint; and, (2) **even had it been, petitioners, not being members of the Parish, have no standing to raise it.**" (emphasis added)). The Walpoles, not being members of the Association, have no standing to assert that the maintenance of this proceeding is not authorized under the provisions of the Restated Declaration. Indeed, the Restated Declaration expressly denies them standing. As previously found and discussed, section 16.12 of the Restated Declaration excludes the Walpoles from enforcing any provisions of the Restated Declaration: "**...no adjoining property owner or third party will have any right, title or interest whatsoever** in the Development, except as provided herein, or in the operation or continuation thereof **or in the enforcement of any of the provisions hereof, ...**" Plaintiff's Exhibit 10, Section 16.12, p. 46.

Turning to the statute of limitations, the Walpoles assert that this action is time barred because as early as March 18, 2004, a lawyer for the Association was on notice

of the easement and asserted it was ineffective for being in violation of the provisions of the Restated Declaration. (Defendant's Exhibit 3, Letter of Harper dated March 18, 2004). The Walpoles assert the Association should have brought this lawsuit within the three year statute of limitations set forth in section 15-3-530 of the South Carolina Code, applicable to "Actions *Other Than* for the Recovery of Real Property." (emphasis added). By its terms, this particular statute of limitations does not apply.

This action falls under the provisions of S. C. Code §15-67-10 entitled "Recovery of Real Property" that provides as follows:

Any person in possession of real property, by himself or his tenant, or any person having or claiming title to vacant or unoccupied real property may bring an action against any person who claims or who may or could claim an estate or interest therein or a lien thereon adverse to him for the purpose of determining such adverse claim and the rights of the parties, respectively."

S.C. Code §15-67-10.

The statute of limitations for the "recovery of real property" is ten years. Section 15-3-340 of the South Carolina Code, applicable to "Actions for Recovery of Real Property," requires simply that a party seeking to bring an action for the recovery of real property bring suit within 10 years of his possession of such property: "No action for the recovery of real property . . . may be maintained unless it appears that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question *within ten years before the commencement of the action.*" (emphasis added). This action is timely since the Association is still in possession of, and holds title, to the Association's common areas.

The Court further notes that because this is an action in equity the statute of limitations does not apply. Dixon v. Dixon, 362 S.C. 388, 400, 608 S.E.2d 849, 855

(2005); Mazloom v. Mazloom, 382 S.C. 307, 675 S.E.2d 746 (S.C. Ct. App. 2009).

Instead, any question as to the timeliness of the bringing of the action must be assessed under the doctrine of laches.

As explained by our Supreme Court, "[l]aches is neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done. Whether a claim is barred by laches is to be determined in light of [the] facts of each case, taking into consideration whether the delay has worked injury, prejudice, or disadvantage to the other party; delay alone in assertion of a right does not constitute laches." Robinson v. Estate of Harris, 391 S.C. 114, 118, 705 S.E.2d 41, 43, (2011). In Robinson our Supreme Court found laches where the plaintiff had waited more than sixty years to challenge a conveyance in 1946, the property had been transferred through probate, and other irreversible actions had occurred.

Here the Walpoles did not establish that failure to bring the suit before January 20, 2010, caused injury, prejudice, or disadvantage to them. The Walpoles have been on notice since 2004 that the Association asserted the purported easement was ineffective. There was no proof the Walpoles had conveyed lots to third persons nor that any third person has relied on the purported easement. I find and conclude the Walpoles did not establish the basis for the defense of laches by the preponderance of the evidence.

Moving to the other defenses, the Walpoles assert that the Association's acceptance of the conveyance of the deeds to the common areas from Southern Lifestyles VIII, LLC, subject to matters of record somehow bars their claims. The

Walpoles overlook that under the terms of the Restated Declaration the Association was required to accept the deeds to the common areas: "In consideration of the benefits accruing to the Association and to the Members under this Declaration and in consideration of the covenants and agreements of the Declarant hereunder, the Association hereby agrees to accept title to any property, or to any interest in property, now or hereafter conveyed to it pursuant to the terms and conditions of this Declaration." Plaintiff's Exhibit 10, Restated Declaration, Section 2.3, pp. 6-7. The Association's failure to object to the deed to the common areas does not constitute consent or ratification of any act of Southern Lifestyles VIII, LLC, as Declarant.

I have considered the remaining affirmative defenses alleged in the Walpoles' Answer and, without separately enumerating them, find and conclude that they are either not legal defenses to the claims asserted by the Association or that the Walpoles did not establish such defenses by the preponderance of the evidence.

"The remedy of injunction rests in the sound discretion of the trial court" and "depends upon the equities between the parties." Gibbs v. Kimbrell, 311 S.C. 261, 270, 428 S.E.2d 725, 730-31 (Ct. App. 1993). The Court finds and concludes that the remedy of injunction through a recorded cancellation of the Easement Agreement and Amended Easement Agreement further the interests of equity and is necessary to correct the matters of record and protect the Association and its members who are purchasers of the lots in Phases I and II.

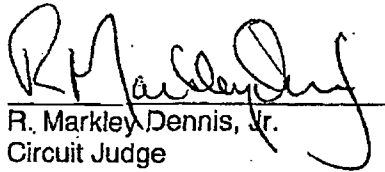
Based on the foregoing, the Court declares that the Easement Agreement recorded at Book K387, Page 751 (Plaintiff's Exhibit 17) and the Amended Easement Agreement recorded at Book K409, Page 481 (Plaintiff's Exhibit 18) are void *ab initio*

and of no legal effect. The Court further enters a permanent injunction invalidating the purported easements and ordering that this invalidation and cancellation be made a matter of public record in the RMC Office for Charleston County.

IT IS THEREFORE ORDERED AND DECREED that a declaratory judgment be entered for the Plaintiff adjudicating that the Easement Agreement recorded at Book K387, Page 751 (Plaintiff's Exhibit 17) and the Amended Easement Agreement recorded at Book K409, Page 481 (Plaintiff's Exhibit 18) are invalid, void *ab initio*, and of no legal effect.

IT IS FURTHER ORDERED that the register of deeds is ordered to record and index in the RMC office for Charleston County the Cancellation of Easement Agreement and Amended Easement Agreement appended to this Order and Judgment.

AND IT IS SO ORDERED.


R. Markley Dennis, Jr.
Circuit Judge

October 29, 2015
Charleston, South Carolina

RMD 36

STATE OF SOUTH CAROLINA	)	<u>COURT ORDERED</u>
	)	<u>CANCELLATION OF EASEMENT</u>
COUNTY OF CHARLESTON	)	<u>AGREEMENT</u>

WHEREAS, Southern Lifestyles, VIII, LLC as Grantor, entered into an Easement Agreement with John B. Walpole and Theodora W. Walpole as Grantees that is recorded in the RMC office for Charleston County at Book K 387, p. 751; and

WHEREAS, these same parties entered an Amended Easement Agreement recorded in the RMC office for Charleston County at Book K 409, p. 481; and

WHEREAS, in the Easement Agreement, as amended, the Grantor purported to grant certain rights to the Grantees over the Burdened Property described in Exhibit "A" to the Easement Agreement and Amended Easement Agreement; and,

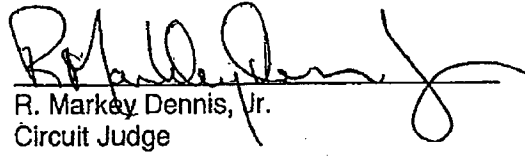
WHEREAS, the Anchorage Plantation Homeowners Association brought an action in the Court of Common Pleas for Charleston County, Civil Action No. 2010-CP-10-482 seeking, among other things, a determination that the Easement Agreement and Amended Easement Agreement are invalid; and

WHEREAS, the Circuit Court entered an order and judgment dated October 29th, 2015, copy attached hereto, declaring that the Easement Agreement and Amended Easement Agreement are invalid *ab initio* and of no effect and that this invalidation be made a matter of public record in the RMC office for Charleston County.

NOW, THEREFORE, in accordance with the Order and judgment entered by this Court on October 29th, 2015, the Easement Agreement between Southern Lifestyles VIII, LLC, as Grantor, and John B. Walpole and Theodora W. Walpole as Grantees, recorded at Book K 387, p. 781 in the RMC office for Charleston County and the Amended Agreement between these same parties recorded at Book K 409, p. 481, in

Rmat/37

the RMC office for Charleston County are both declared and adjudged to be void *ab initio*, cancelled, and of no further force and effect.


R. Markey Dennis, Jr.
Circuit Judge

10/29/2015

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
Case No. 2010-CP-10-0482

Anchorage Plantation Homeowners
Association

Plaintiff,

John B. Walpole and
Theodora W. Walpole

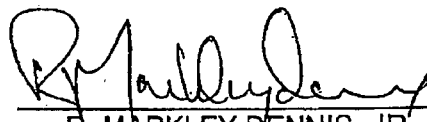
Defendants.

ORDER

FILED
2016 FEB - 8 AM 10:01
JULIE J. ARMSTRONG
CLERK OF COURT

This matter comes before me upon Plaintiff's Motion for Reconsideration, filed on 11/10/2015. After fully considering said Motion, this Court finds no need for oral argument in this matter and therefore the Motion for Reconsideration is DENIED;

AND IT IS SO ORDERED!


R. MARKLEY DENNIS, JR.
Presiding Judge

Charleston, South Carolina

February 4, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

FEB 17 2016

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

R. Markeley Dennis, Circuit Court Judge

Case No. 2010-CP-10-00482

Anchorage Plantation
Homeowners Association,

Respondent,

v.

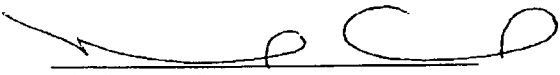
John B. Walpole and
Theodora W. Walpole

Appellant.

PROOF OF SERVICE OF NOTICE OF APPEAL

I certify that I have served the Notice of Appeal by delivering the same via United States Mail, postage prepaid, on February 16, 2016, to Respondent to its attorney of record, G. Trenholm Walker, Pratt-Thomas Walker, P.A., 16 Charlotte Street, Charleston, South Carolina 29403.

February 16, 2016



Charles S. Altman
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The South Carolina Court of Appeals

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February 18, 2016

Mr. Charles S. Altman, Esquire
575 King Street
Suite A
Charleston SC 29403

Re: Anchorage Plantation v. John Walpole
Appellate Case No. 2016-000281

Dear Counsel:

This Court has received your notice of appeal, and the case has been assigned the appellate case number that appears above. Please use this number on all future correspondence relating to this matter.

All parties to this matter are advised that all filings must comply with the requirements of Rule 267 of the South Carolina Appellate Court Rules (SCACR). The SCACR are available online at www.sccourts.org/courtreg. Additionally, any filings submitted by counsel admitted in South Carolina must include counsel's bar number.

The attention of the parties is directed to the order relating to the inclusion of personal data identifiers and other sensitive information in documents filed with the Supreme Court of South Carolina and the South Carolina Court of Appeals. The order can be found at www.sccourts.org/courtOrders/displayOrder.cfm?orderNo=2014-04-15-02. Please note that the responsibility for insuring that information is redacted or sealed as

required by this order rests with counsel and the parties. This office will *not* review filings for redaction or to determine if materials should be sealed.

This is to advise that the title in the above matter should read as follows:

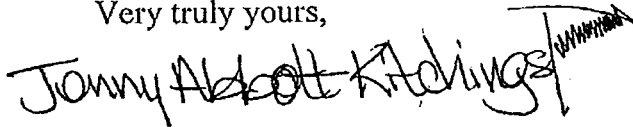
Anchorage Plantation Homeowners Association, Respondents,

v.

John B. Walpole and Theodora W. Walpole, Appellants.

All future records in this matter should be changed to reflect this title. If you have any questions, please do not hesitate to contact this office.

Very truly yours,

A handwritten signature in black ink that reads "Jonny Abbott Kitchings". The signature is written in a cursive, slightly slanted style. There is a horizontal line above the signature, and a small, dark, scribbled mark at the end of the signature.

CLERK

cc: Meredith L. Coker, Esquire
George Trenholm Walker, Esquire

STATE OF SOUTH CAROLINA
COUNTY OF BERKELEY

COURT OF GENERAL SESSIONS

Anchorage Plantation Home
Home Owner's Association,

PLAINTIFF,

v.

John Walpole, et al.,

DEFENDANT.

TRANSCRIPT OF HEARING
C/A No. 2010-CP-10-0482

Berkeley County Courthouse
February 26-27, 2013

BEFORE:

HONORABLE KRISTI HARRINGTON, PRESIDING JUDGE.

APPEARANCES:

G. Trenholm Walker, Esquire
Chip McQueeney, Esquire
Attorneys for Plaintiff

Meredith Coker, Esquire
Charles Altman, Esquire
Attorneys for Defendants

TAKEN BY MELISSA R. SINGLETARY
CERTIFIED VERBATIM REPORTER

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EXHIBITS

(There were Exhibits pre-marked in this hearing by counsel)

1 The Court: Alright counsel, state your name for the
2 record and the party you represent.

3 Ms. Coker: My name is Meredith Coker from the
4 firm of Altman and Coker along with co-counsel Charles
5 Altman and we represent the Defendants Theodora Walpole
6 and Billy Walpole is here as Guardian ad Litem for
7 Defendant John Walpole.

8 The Court: Alright and you are?

9 Mr. McQueeney: Your Honor my name is Chip McQueeney
10 along with Trenholm Walker. I represent the Plaintiff
11 Home Owner's, Anchorage Plantation Home Owner's
12 Association.

13 The Court: Alright. From you?

14 Mr. Walker: Good morning. Trenholm Walker here for
15 the Plaintiff.

16 The Court: And what are we doing here today? Non
17 jury trial. What are the causes of action that are
18 remaining?

19 Mr. Walker: Alright I have, Your Honor we have a
20 very short opening and maybe I could explain that to you.

21 The Court: Okay. I don't need your opening right
22 now. I just want to make sure that we're prepared to go
23 forward and what we're prepared to move forward and the
24 Defendants are in agreement.

25 Mr. Walker: Everything ...

1 The Court: What happens, let me tell you why I do
2 that, because at the end then you may make this very
3 brilliant opening and then Mr. Altman is going to stand
4 up and say we weren't prepared to go forward on that or
5 whatever, for whatever reason. Let's just make sure that
6 we are all in agreement in what we're doing here today.

7 Mr. Walker: So, we have a cause of action with a
8 declaratory judgment and injunction.

9 The Court: And what are you asking me to do today?

10 Mr. Walker: We are asking you to make a
11 determination whether the two easements in question are
12 valid. That's, that's the core question. And if you
13 decide that they aren't, we would ask the Court to enter
14 an order in the records office that they are invalid and
15 I think our injunction is to look at, but it's to craft
16 the relief around that determination , so that the future
17 purchasers would not think that they have, future
18 purchases from the Defendants, would not think that they
19 have the easement.

20 The Court: Ms. Coker is that what we're doing here
21 today? Is that what you're prepared to address here
22 today?

23 Ms. Coker: Yes, Your Honor and as part of the second
24 cause of action or second remainder seeking the permanent
25 injunction, it's kind of our position that that will be

1 determined by in part, the first cause of action and then
2 the additional argument would spin off of that.

3 The Court: Alright now Mr. Walker I'd love to hear
4 your brilliant opening.

5 Mr. Walker: Well, I don't know if I can live up to
6 that; it's one o'clock on this Tuesday afternoon, but I
7 will give you a little introduction to the case.

8 The Court: Perfect.

9 OPENING STATEMENT BY MR. WALKER:

10 Mr. Walker: As you know from reviewing all of the
11 materials, this is a suit on behalf of our client
12 Anchorage Plantation Home Owner's Association challenging
13 two easements that were granted in 2001 and 2002. If I
14 might approach, this aerial that was prepared by the
15 Defendants, I think it will give you an idea of what
16 we're talking about and also orient you on the property.
17 The land that we're talking about is on Wadmalaw Island
18 and it's out Maybank Highway, half way I guess, between
19 the fork, where you go to Farris Bluff and Rockville. So
20 you would go to fork to Rock Hill about four miles down
21 the road is a farm that is owned by the Walpoles.
22 Approximately twelve, thirteen years ago they sold a
23 portion of this land to Southern Lifestyles, subject to
24 covenants that included the creation of the Home Owner's
25 Association that we represent. The land that was sold to

1 Southern Lifestyles that was subject to the declaration
2 is basically right here that you see with the dots, those
3 represent various spots that have been sub-divided from
4 that and the declaration of covenants that we're talking
5 about for the association applies only to this area that
6 was purchased by Southern Lifestyles. The declaration is
7 very specific about the rights of the declarant who is
8 the developer Southern Lifestyles. Very specific about
9 how other properties are brought into the association,
10 specific about assessments and you know from your work
11 dealing with covenants and all, that they are
12 comprehensive. After the property was encumbered by this
13 declaration of restrictive covenants which I think was
14 either a first or amended declaration of covenants for
15 this land. The declarant granted an easement to the
16 Walpoles who owned this residually approximately seven
17 hundred acres in the interior. The Walpoles had zoning to
18 put up to a hundred and seven lots there. The easement
19 purported to grant to the Walpoles an easement both to
20 them and to their assigns to use the roads within our
21 community, to use the dock within our community, the
22 community dock, and to use the boat landing within our
23 community. The easement stated that the subsequent owners
24 or the subsequent assignees from the Walpoles would pay a
25 hundred dollars a year towards, to the association,

1 towards any maintenance or use expenses associated with
2 these common properties that are owned by the
3 association. Obviously, since they could sub-divide up to
4 a hundred and seven lots there could be a hundred and
5 seven different property owners who would want to use the
6 dock, the boat landing and the roads. You will hear in
7 testimony and you will have the exhibits before you that
8 show that the declaration restricted the rights of the
9 declarant. We are here today to challenge that easement.
10 We're here seeking a determination that the then
11 declarant easement in favor of the Walpoles to this back
12 property are invalid. They are invalid for a number of
13 reasons. The first reason is a fundamental principle of
14 property law that the declarant couldn't convey a right
15 greater than the declarant had and in this case the
16 rights of the declarant were determined by the
17 declaration. The declaration gave a limited grant of
18 access to the declarant for such things as marketing the
19 property, installing utilities, all those things, but it
20 didn't grant the declarant the right to go out and convey
21 an interest in the property of the association to a third
22 person who is not a member of the association. You will
23 also hear and see that the declaration specifically has a
24 mechanism for incorporating land into the association. As
25 most declarations do, there's a provision allowing

1 additional property that's adjacent to be brought in by
2 supplemental declaration. Under those circumstances, if
3 the property were brought in, then those owners would be
4 subject to the rules and regulations of the association
5 and pay the same assessment as everybody else. We are
6 also going to demonstrate to you that in addition to
7 being invalid because the original declarant didn't have
8 the right to expand the scope of what it had that this is
9 invalid because it would constitute unjust enrichment.
10 What these potential owners would pay is just a fraction
11 of the expenses of our association to maintain two, over
12 two miles of roads, to maintain the dock, to maintain the
13 parking area. You will hear about an amenity center that
14 costs several hundred thousand dollars, it's in the same
15 location and that it would be unfair to allow the
16 declarant in violation of it's rights to convey this
17 easement. The first witness that we're going to call Beth
18 Settle and Mr. McQueeney will do the examination and she
19 will walk the court through the documents of record, so
20 that you will have a proper understanding of the sequence
21 in which things happened, but it comes back in our eyes,
22 to a question of law. And we will at the end of the case
23 seek a ruling as a matter of law. It's a question of
24 law, the declarant never had the right that would allow
25 the declarant to convey these rights of access to a third

1 person who is not a member of the association and whose
2 land hasn't been brought into the association.

3 The Court: Ms. Coker do you care to make an
4 opening?

5 Ms. Coker: Yes, Your Honor.

6 OPENING STATEMENT BY MS. COKER:

7 Ms. Coker: In this case there aren't a lot of
8 material
9 facts in dispute. I'm going to wander over and fill in
10 some of the details from Mr. Walker's summary.

11 Originally, and decades back, the Walpoles were the
12 owner of both the area marked in red, which is the
13 residual tract we're discussing and all of these yellow
14 dots and so forth. So the entire tract was a single
15 parcel and then phase one and phase two were cut off or
16 sub-divided off of that and sold to Southern Lifestyles.
17 That contract to Southern Lifestyles reserved an easement
18 to the Walpoles over the roadways and to the dock. The
19 roadways and the boat ramp were already in, because the
20 Walpoles built those. Moreover the original contract of
21 purchase and sale had an option for Southern Lifestyles
22 to purchase what, at that point, was known as Phase Three
23 of Anchorage Plantation. There was always an intent on
24 the Walpoles side and the developers side to continue the
25 development pursuant to zoning rights and so forth. Now,

1 once the purchase of, purchases of phases one and two
2 were consummated, there was thereafter a first amended
3 contract that was again in 2000, that was to take down
4 Phase Three. It specifically referenced by a corporation,
5 that reservation of easement rights to the Walpoles. So,
6 and for a variety of reasons not really relevant today,
7 that contract was never fully consummated. When it came
8 to everyone's attention in 2001 that Southern Lifestyles
9 would not be able to purchase Phase Three, the parties
10 being Southern Lifestyle and the grantees in this case,
11 the Walpoles, came to a position to record the easement
12 the Walpoles already had, so that the parties going
13 forward would be in the same position that they would
14 have been in had the deal gone through as planned. Mr.
15 Walker discussed the validity of the easement as a matter
16 of law and we believe that to be the case as well. With
17 regard to property law, easements are looked at on their
18 face; if an easement is valid on its face, it's
19 presumptively valid. The fact that a easement was not
20 recorded until 2001 is irrelevant as between the grantor
21 and grantee. The declarant and the grantor, Southern
22 Lifestyles in this case, owned the property upon which
23 the easement was granted. It was granted to the residual
24 property owners John and Teddy Walpole. More over, Your
25 Honor, the restrictive covenants at issue in this case,

1 the declaration, is well settled the restrictive
2 covenants as to the run of the land are to be strictly
3 construed. We believe that there is clear language in the
4 declarations which allowed Southern Lifestyles to record
5 the easement. Moreover, at best, there may be a case of
6 ambiguity. With regard to maintenance or ambiguity those
7 restrictive covenants must be strictly construed to allow
8 the owner of the property free use of what their land is.
9 So we believe that the covenants don't really come into
10 play at this point. Finally, there is the issue of
11 timing. With regard to the conveyance from the home
12 owners, excuse me, from Southern Lifestyles to the Home
13 Owner's Association, the easements to the Walpoles were
14 recorded in 2001 and amended in 2002. The easement,
15 excuse me, the deeds conveying the roadways and the docks
16 to the Home Owner's Association from Southern Lifestyles
17 were conveyed in 2003, January and I believe June of
18 2003. So the home owner's association was on constructive
19 notice that the easement to the Walpoles were in place
20 when they took title to those properties.

21 I'd like to turn for just a second with regard to
22 what Mr. Walker stated as to unjust enrichment. I think
23 the easement on their face show an intent by the parties
24 to be fair to share the burden. I don't believe that the
25 Walpoles and their assigns have a right to the amenity

1 center. That was built later and the easement is very
2 specific as to the roadways and the dock, the boat ramp
3 and the dock that are right there. So with regard to the
4 expenses that were incurred by the HOA, as to the amenity
5 center, we don't believe that that's really an issue. If
6 there is some sort of unjust enrichment on the part of
7 the future agreement to share costs by assigns, that
8 certainly is something that the Court can handle in an
9 equitable way and does not call for the absolute
10 invalidation of the easement but perhaps more reformation
11 of a confirmation of the costs that would be assigned to
12 future folks who we concede would put a burden on the
13 roadway. Thank you, Your Honor.

14 The Court: Thank you. Call your first witness.

15 Mr. McQueeney: Thank you Your Honor. The
16 association calls Beth Settle.

17 Clerk: Place your left hand on the Bible and raise
18 your right hand please. Do you swear or affirm the
19 testimony that you'll give the court shall be the truth,
20 the whole truth and nothing but the truth, so help you
21 God?

22 Ms. Settle: I do.

23 Clerk: Please be seated. Madam, for the record, if
24 you state your full name, spelling your last name for the
25 record.

1 Witness: Elizabeth Settle, S-e-t-t-l-e. And I go by
2 Beth.

3 **DIRECT EXAMINATION OF MS. SETTLE BY MR. McQUEENEY:**

4 Q: Ms. Settle, what is your current occupation?

5 A: I am a member of Moore & Van All, LLC.

6 Q: So you're an attorney?

7 A: Yes.

8 Q: Okay, where did you go to law school?

9 A: University of South Carolina.

10 Q: Okay and when?

11 A: I graduated in 1986.

12 Q: Okay, have you been a practicing attorney since
13 then?

14 A: I have.

15 Q: Okay and what are your main areas of practice?

16 A: Commercial real estate, buying and selling of small
17 businesses and entity formation.

18 Q: As part of that work, do you draft deeds on behalf
19 of clients?

20 A: Yes.

21 Q: Do you draft purchase agreements on behalf of
22 clients?

23 A: Yes.

24 Q: Do you draft declaration of covenants, conditions
25 and restrictions ...

1 A: Yes.

2 Q: On behalf of clients? Do you draft easements on
3 behalf of clients?

4 A: Yes.

5 Q: Do you review plats as part of those duties?

6 A: I do.

7 Q: And have you targeted classes on real estate
8 generally.

9 A: CLE.

10 Mr. McQueeney: And Your Honor at this time we move
11 to approve her as an expert in land development and real
12 property matters.

13 Mr. Altman: No objection, Your Honor.

14 The Court: Okay.

15 Mr. McQueeney: Thank you, Your Honor.

16 The Court: She will be so qualified. Thank you.

17 Mr. McQueeney: Thank you Your Honor.

18 The Court: Is this the first time you've been
19 qualified as an expert?

20 Ms. Settle: I believe so. I've testified once
21 before.

22 The Court: Pretty exciting, isn't it?

23 Mr. McQueeney: There's a first time for everything.

24 Q: Your Honor, if I may approach the witness and hand
25 her this exhibit. Ms. Settle, let me show you

1 what's been marked as Plaintiff's Exhibit 1. Are you
2 familiar with that document?

3 A: I am.

4 Q: And what is that document?

5 A: That is a deed from 0:17:54 into Walpoles property
6 at Anchorage Plantation.

7 Q: Approximately how many acres is being conveyed top
8 Walpole in that deed.

9 A: A thousand forty-six save and accept the 1.7 acres.

10 Q: And what is the date of that deed?

11 A: It's dated July 31, 1980.

12 Mr. McQueeney: We've got thirty one, exhibit ...
13 Your Honor and I, you guys don't have any objections?

14 Ms. Coker: No, and in fact we, in our pre-trial
15 brief we joined in , so ...

16 Mr. McQueeney: And, Your Honor, if I can, I'd like
17 to go ahead and move those into evidence.

18 The Court: One through twenty-nine?

19 Mr. McQueeney: One through thirty-one, Your Honor.
20 Plaintiff's one through thirty-one.

21 The Court: Do you have an objection to thirty or
22 thirty-one?

23 Ms. Coker: It would be dependent on how those are
24 used. I don't believe we will, but ...

25 Mr. McQueeney: Okay. If we could do one through

1 twenty-nine.

2 Mr. Altman: Your Honor.

3 The Court: One through twenty-nine you have no
4 objection. Is that correct?

5 Ms. Coker: Yes, Your Honor.

6 The Court: Alright, Plaintiff's one through twenty-
7 nine into evidence without objection.

8 Mr. McQueeney: Thank you, Your Honor.

9 The Court: Now, just for --- have you already
10 marked them?

11 Court Reporter: They marked them, Your Honor.

12 The Court: You've marked them. Can you bring them up
13 so that she can have the opportunity to document what
14 they are?

15 Mr. McQueeney: I apologize.

16 Court Reporter: Do you have an exhibit list
17 yourself?

18 Mr. McQueeney: I do.

19 Court Reporter: Do you want to give me a copy of
20 that? That would be better. That won't hold you up.

21 The Court: Everything is marked?

22 Court Reporter: They've marked everything, Your
23 Honor, and I've got a list and I'm just going to be
24 writing on my sheet as he is talking and I'm talking.

25 The Court: Are you good?

1 Court Reporter: I'm good. Thank you.

2 The Court: Alright.

3 Mr. McQueeney: I apologize, Your Honor.

4 Q: Ms. Settle, typically what does a developer do?

5 A: A developer typically sub-divides property, prepares
6 it for sell to third parties, files the declaration,
7 tells how this arrangement is going to work.

8 Q: And when you say this arrangement, the arrangement
9 with the third parties?

10 A: The arrangement with the eventual purchasers of the
11 property that the developers what to sell.

12 Q: Okay, and do those duties include the construction
13 or installation of utilities on the property?

14 A: They do typically, yes.

15 Q: Are there any other activities as far as facilities
16 or, or construction or installation on the property
17 that the developer also has to do?

18 A: The developer would have a water dock plan, a
19 utility plan. All those types of things ...

20 Q: I'm going to hand you what's been marked as
21 Plaintiff's Exhibit Two.

22 Mr. McQueeney: Your Honor, May I approach?

23 Q: Are you familiar with that document?

24 A: I am.

25 Q: What is that document?

- 1 A: This is a final plat of Anchorage Plantation Phase
2 one, which is lots wise, one, two, three, seventy-
3 seven, seventy-eight ...
- 4 Q: Now when you say lot wise, can you elaborate any
5 further?
- 6 A: Anchorage Watch Drive, the roadway which is 8.83
7 acres.
- 8 Q: Okay and turn the, I guess the large picture. The
9 Defendant's attorney have provided the blow up. Can
10 you identify Anchor Watch Drive on that?
- 11 A: Let's see. The white lines, that's the highway, is
12 that correct?
- 13 Q: Yes.
- 14 A: Okay.
- 15 Q: Sorry. My fault Your Honor.
- 16 A: I believe it's the blue line down below the farm
17 area and coming out through the lots.
- 18 Q: Okay.
- 19 A: Correct.
- 20 Q: And again that's identified on this plat?
- 21 A: Yes and it does not go all the way through the lots
22 on this plat.
- 23 Q: Okay, how many lots again are shown on that plat?
- 24 A: Five. 1, 2, 3, 77 and 78.
- 25 Q: Does the plat show any intent to use Anchor Watch

- 1 Drive?
- 2 A: By lot owners.
- 3 Q: By lot owners or anyone?
- 4 A: Yes.
- 5 Q: And what is that?
- 6 A: There's dedication language on the plat that states,
7 signed by Mr. And Mrs. Walpole, that states we
8 hereby dedicate the roads and easements to the
9 something of the Anchorage, to the use of the
10 Anchorage Plantation Home Owner's Association.
- 11 Q: And again, that's signed by Mr. and Mrs. Walpole?
- 12 A: Yes.
- 13 Q: And Mr. and Mrs. Walpole, what was their role with
14 respect to this property at the time?
- 15 A: They were the owners of this property at the time
16 this plat was recorded.
- 17 Q: The top right corner there's another map; what does
18 that map show?
- 19 A: That shows the residual land owned by the Walpoles.
20 It's not subdivided out.
- 21 Q: And was this plat recorded?
- 22 A: Yes.
- 23 Q: And when was it recorded if you can read it?
- 24 A: I might need a magnifying glass.
- 25 Q: June 23, 1997.

1 A: I see it. June 23, 1997.

2 Q: Does this plat show any intention to reserve an
3 easement in favor of the property identified in the
4 small map in the top right of the plat?

5 A: No.

6 Q: Does it show an intention to reserve an easement on
7 Anchor Watch Drive in favor of any third parties?

8 A: No.

9 Q: Let me show you what's been marked as Plaintiff's
10 exhibit three.

11 Mr. McQueeney: May I approach, Your Honor.

12 The Court: You may.

13 Q: If I could ask you to identify that.

14 A: This is a declaration of covenants conditions,
15 easements, restrictions and charges and liens for
16 the Anchorage Plantation Home Owner's Association
17 and it's dated May 7, 1997. It's filed by Mr. and
18 Mrs. Walpole and it's recorded in the RMC office
19 for Charleston county in Book A 286 at page 37.

20 Q: Can you tell me when that declaration was recorded
21 please?

22 A: June 24, 1997.

23 Q: When a developer, typically when a developer records
24 a declaration of covenants, conditions or
25 restrictions, what is the intent of that document?

1 A: The intent of that document is to state or set forth
2 how the development is going to work. What the
3 declarant is going to do, what the developer is
4 going to do. It usually imposes on the lot numbers,
5 charge assessments, contains restrictions on how the
6 property can be used, reserves certain development
7 rights. It generally sets forth the development for
8 the property.

9 Q: And do you know when the declaration typically
10 becomes effective?

11 A: Upon filing.

12 Q: I guess the now therefore paragraph, what is
13 typically the intent of that particular paragraph?

14 A: Typically to set forth the intent of the declaration
15 which basically here says that the real property
16 described is the property shall be handled,
17 transferred, sold, conveyed, leased, occupied and
18 used subject to the restrictions, conditions,
19 easements, charges and assessments, obligations and
20 liens here and after set forth.

21 Q: With the declaration, is it typical for a community
22 organization to be formed about the same time that
23 the declaration is recorded?

24 A: It typically is, yes.

25 Q: What is the role of the association with respect to

1 the development?

2 A: The role of the association is as set forth in the
3 declaration, it's typically to enforce the
4 declaration, collect assessments, manage any common
5 areas. That type of thing.

6 Q: And what's a common area?

7 A: A common area is typically a, it's usually defined
8 in the declaration, but in general terms it's
9 something that is utilized for the benefit of all of
10 the lot owners in the development.

11 Q: In this particular declaration, how are the common
12 areas defined generally speaking?

13 A: It's all real or personal property herein now or
14 hereafter owned by the Home Owner's Association for
15 the common use and enjoyment of the owners and
16 residents.

17 Q: What real property specifically is this declaration
18 apply to?

19 A: It states that it applies to properties set forth on
20 Exhibit A, but Exhibit A is minutes so you really
21 can't tell from the face of the declaration.

22 Q: And just looking at article one, subsection five, it
23 doesn't really identify that as the property that it
24 refers to a plat. Is that the plat we discussed
25 earlier?

1 A: It is. It's page one Anchorage plat.

2 Q: And again, the Walpoles were the developer at the
3 time that the declaration was recorded?

4 A: That's correct.

5 Q: Turning to page fifteen in the agreement of the
6 declaration, excuse me. Section 11.05, the title
7 says addition of property. Can you read, I guess,
8 the first couple of sentences into the record
9 please?

10 A: The property which is contained within Anchorage
11 Plantation subdivision is a portion of Anchorage
12 Plantation. Declarant shall have right in their sole
13 discretion to add any portion of Anchorage
14 Plantation subdivision and to subject, subject such
15 added properties covenants.

16 Q: Okay and section 11.06. Can you identify what that
17 provision does?

18 A: That provision grants the Kelly and Gladys McKee an
19 easement across Anchor Watch Drive as shown on the
20 plat of Anchorage subdivision.

21 Q: Thank you.

22 Mr. McQueeney: I apologize Your Honor. I didn't
23 even give you, if I may approach. I realize I had too
24 many in my hand.

25 The Court: I have one.

1 Mr. McQueeney: Oh you do? Okay, thank you Your
2 Honor. Q: I'm going to hand you what's been identified as
3 Plaintiff's exhibit four.

4 Mr. McQueeney: May I approach? Thank you, Your
5 Honor.

6 Q: Can you identify that document for me please?

7 A: This is the recorded version of the declaration we
8 just discussed.

9 Q: Okay and what is the difference between this re-
10 recorded version of the declaration and the previous
11 version?

12 A: It's just re-recorded which is the property
13 description which is subject to the declaration.

14 Q: Okay and what is that property that's described?

15 A: It is the property shown on the final plat of
16 Anchorage Plantation we discussed a few minutes ago.
17 It shows the five lots on Anchor Watch Drive.

18 Q: And again, that plat shows a dedication of Anchor
19 Watch Drive to the Home Owner's Association?

20 A: It does.

21 Q: If I could get a real quick, page four of the re-
22 recorded declaration under article five. Can you
23 read that, the sentence right under article 7 five.

24 A: The Anchorage Plantation Home owner's association is
25 formed to provide for maintenance, preservation and

1 architectural control of the lots and common area
2 which compromise the properties into a health,
3 safety and welfare of the residence within the
4 properties.

5 Q: Do you know if Anchorage Plantation Home Owner's
6 Association had been filed of record a non profit
7 corporation at that time?

8 A: No, it had not been.

9 Q: Does that have any impact on its existence that it
10 was not formed as a non-profit at that time?

11 A: You can have an unincorporated association and so I
12 assume that's what it was.

13 Q: Is it typical to form a home owner's association
14 within a declaration?

15 A: Yes.

16 Q: Let me show you what's been marked as Plaintiff's
17 exhibit five. If I could approach? Thank you. Can
18 you identify that for the court?

19 A: This is a purchase agreement of real estate dated
20 January 9, 2000 between Mr. and Mrs. Walpole and
21 Southern Lifestyles, LLC.

22 Q: Okay does this document, do you see any indication
23 that this document has been filed with record?

24 A: No.

25 Q: What properties does this document apply to?

1 A: It's an agreement to convey two hundred and seventy
2 eight acres shown as on the preliminary subdivision
3 plat, which is attached as exhibit A.

4 Mr. McQueeney: And Your Honor, just as information,
5 the pages were out of order in the copy I had, so they
6 are printed out of order but page fourteen is inserted
7 before twelve and thirteen. And the property also
8 includes phase one property and that's the Plaintiff's
9 exhibit 2 that we've already discussed?

10 A: Yes.

11 Q: Section 4.1 on page three, under subsection A, the,
12 I guess the last two sentences on within that area
13 beginning seller will convey. What is provisionally
14 typically mean?

15 A: It's a period during which you have to examine the
16 title and object to any matters of record that you
17 find.

18 Q: To you knowledge, were there any easements of record
19 running in favor of the Walpoles at the time, strike
20 that. To your knowledge, is there any easement with
21 respect to Anchor Watch Drive running in favor of
22 anyone at the time the agreement was entered into?

23 A: Just the rights to the home owner's association
24 under the original plat per the dedication language,
25 but I'm not aware of any other recorded rights.

1 Q: The plat shown in Exhibit 2 mentions a dedication to
2 home owner's association, does that give the home
3 owner's association any rights at that time?

4 A: It is, I believe it gives them some sort of
5 equitable interest in the property. Legal title
6 would not convey until a deed has been conveyed to
7 the home owner's association but they probably have
8 got an equitable right to the property for, I think
9 the court sometimes refers to special property
10 interest.

11 Q: And what's the nature of that equitable right?

12 A: Well, for example when you have a contract of sale,
13 the courts have held that the purchaser has a
14 equitable right to the property but they don't have
15 regular title yet until they get the deed, so it's
16 some sort of right and in this case leave to use the
17 roads.

18 Q: The right to obtain the roads or the right to use
19 the roads?

20 A: Well, if, if, if the individual lot owner's didn't
21 have the right to use the roads, then they wouldn't
22 have access to their lots, so I think it's probably
23 both.

24 Q: Would it be similar to maybe a purchase contract
25 that you essentially a purchase contract being filed

1 of record?

2 A: I believe it would be similar. I'm not, you know,
3 it's not crystal clear, but it's got to mean
4 something.

5 Q: So at the time the only thing left to do was convey
6 the title?

7 A: Correct.

8 Q: To the association?

9 A: Correct.

10 Q: Going back to the purchase agreement, we've
11 discussed a option to purchase, in opening arguments
12 and that's in 7.1, is that correct?

13 A: Yes, there was an option to purchase in 7.1.

14 Q: And what property was that option to purchase in
15 line to?

16 A: That's phase three.

17 Q: And that phase three is defined as one of the
18 exhibits to the purchase agreement?

19 A: Yes, on exhibit B it's basically the 700 plus
20 residual acreage. Seven hundred plus acres.

21 Q: Section 8.2 of the agreement also on page six,
22 what's the general intent of the representation with
23 respect to ownership of the property.

24 A: The seller has fee simple title, marketable title to
25 the property subject to amenity exceptions.

1 Q: Are there any permitted exceptions listed in this
2 specific agreement?

3 A: No.

4 Q: Section 10.3 of the agreement on page 8, what is the
5 purpose of that provision?

6 A: The purchaser agrees to provide seller access to
7 Bohagen Creek, the boat ramp, access to Bohagen
8 Creek, boat ramp and courtesy dock over the
9 community, until such time as purchaser closes on
10 the purchasing option property.

11 Q: And the next sentence?

12 A: Seller shall have the right to use any road within
13 the property and the option for purposes of egress
14 and ingress the property owner's release by seller.

15 Q: Have you ever drafted a purchase agreement with a
16 retained easement running in favor of the seller of
17 the property?

18 A: Yes.

19 Mr. Altman: Judge, I'm going to object to this. I
20 don't see where what she has done in regard to some other
21 transaction would have an effect to this.

22 Mr. McQueeney: She's an expert witness and I'll tie
23 it into later, what this provision says, Your Honor.

24 The Court: How is it relevant to what we're hearing
25 today?

1 Mr. McQueeney: Because their intention is that this
2 section 10.3 in the purchase agreement is a right of the
3 seller to obtain and easement in the property. Ms. Settle
4 will testify that it is not an easement right; it's a
5 personal right, because it does not include heirs and
6 assigns, successor heirs and assigns.

7 The Court: Alright I'm going to sustain his
8 objection.

9 Mr. Altman: Thank you.

10 The Court: Thank you.

11 Q: What's the difference between a personal right and a
12 easement right?

13 A: A personal right is personal to the party being
14 right and terminates on, on the death in the case of
15 an individual or dissolution of the case and that
16 party is granted the right. It's more the nature of
17 the right to use. It's not transferrable.

18 Q: Is there language that's typically used to convey an
19 easement right to the personal right.

20 A: Yes.

21 Q: What is that language?

22 A: You use the word easement as opposed to right to
23 use, grant, bargain, sell or release an easement in
24 favor of Joe Blow, his successors and assigns which
25 rights shall be deem entitled to the land, pertinent

1 to the land shall inherit the land.

2 Q: Do you see any language of that type in this
3 purchase agreement?

4 A: No.

5 Q: Do you see it anywhere in the purchase agreement?

6 A: No.

7 Q: I'm going to hand you what's been marked as
8 Plaintiff's exhibit 6. If I may approach Your Honor?

9 The Court: Yes.

10 Q: Can you please identify that document for me?

11 A: This is a conditional plat of Anchorage phase two,
12 lots four through seventy two.

13 Q: Who filed this plat or had this plat filed?

14 A: Mr. and Mrs. Walpole.

15 Q: And their signature are on the plat?

16 A: Their signatures are on the plat.

17 Q: Does this plat show any indication of the Walpoles
18 desire to retain an easement with respect to Anchor
19 Watch Drive?

20 A: No.

21 Q: What is, is there any intent to express in the plat
22 with respect to the right to use Anchor Watch Drive?

23 A: It contains the same dedication loan which is on the
24 other plat. We hereby dedicate the roads and
25 easements shown herein to use in the Anchorage

1 Plantation Home Owner's Association.

2 Q: Is that language typically required in a plat?

3 A: It's usually required in a subdivision plat to get
4 it, record it, because the county doesn't want
5 anybody misled. That the county is going to
6 maintain the road and they want somebody on the hook
7 for maintaining the road, which is typically the
8 home owner's association.

9 Q: And this plat was recorded?

10 A: Yes it was.

11 Q: And if I told you it was recorded on June 16, 2000,
12 would that be correct?

13 A: Yes.

14 Q: I'm going to hand you what's been marked as
15 Plaintiff's exhibit seven. Please identify that?

16 A: This is a deed from Mr. and Mrs. Walpole and
17 Southern Lifestyles LLC.

18 Q: And what property does this deed apply to?

19 A: It applies to the property shown on the additional
20 plat that we just looked at 350 acres together with
21 the original five lots and property shown on the
22 original first plat we discussed.

23 Q: Okay, so that would be Plaintiff's exhibit two and
24 Plaintiff's exhibit five?

25 A: Yes.

1 Q: Is that ...

2 A: I'm sorry. Mine says Plaintiff's exhibit six.

3 Q: I'm sorry, Plaintiff's exhibit six, you're correct.

4 Does the language in the grant show any intent to
5 retain an easement in favor of any residual property
6 with Anchorage Plantation?

7 A: No.

8 Q: And approximately how much is the residual at this
9 time?

10 A: Seven hundred and something acres.

11 Q: Okay, and if the red outline here, would that be the
12 residual at that time?

13 A: Yes.

14 Q: Okay. Let me show you what's been marked as
15 Plaintiff's exhibit eight. Can you please identify
16 that document for me?

17 A: This is a first amendment to the declaration of
18 covenants, it was recorded in June, its dated June
19 16, 2000 by Mr. and Mrs. Walpole.

20 Q: Okay and that was recorded when?

21 A: June 16, 2000.

22 Q: And what is the effect of this first one?

23 A: This brings the phrase two property under the scope
24 of the declaration.

25 Q: And the phase two properties identified in

1 Plaintiff's six?

2 A: Yes.

3 Q: And again, the phase one property is already in the
4 declaration?

5 A: Correct.

6 Q: I'll show you Plaintiff's exhibit nine. Can you
7 please identify that document for me?

8 A: This is a print off from the South Carolina
9 secretary of state website which shows Anchorage
10 Plantation owner's association was formed as a
11 domestic, non profit corporation on July 14, 2000.

12 Q: And does that, mean the Anchorage Plantation Home
13 Owner's Association did not exist prior to this
14 time?

15 A: I believe it didn't exist as a non-profit entity but
16 it could have existed, probably existed as a
17 unrecorded association.

18 Q: Let me show you Plaintiff's exhibit ten. May I
19 approach? Thank you. Can you please identify that
20 document for me?

21 A: This is second amendment to the, second amendment to
22 a restatement of declaration of covenants
23 restrictions for Anchorage.

24 Q: And who, who is the declarant under this
25 declaration?

1 A: Southern Lifestyles.

2 Q: What is the typical roll of the declarant with
3 respect to declaration?

4 A: To set forth all of the terms and restrictions
5 covenants related to the development.

6 Q: And what is the specific roll of the declarant with
7 respect to the declarant under the declaration?

8 A: To act as the developer of the property.

9 Q: Is the association a party to this declaration?

10 A: No, they are not a party. They are mentioned in it.

11 Q: Are they provided certain rights in the declaration?

12 A: Yes.

13 Q: Are future home owner's provided certain rights in
14 the declaration?

15 A: Yes and obligations.

16 Q: What are those rights?

17 A: The rights of the home owners?

18 Q: Right.

19 A: They, they are taking title subject to the terms of
20 the declaration and have the rights of owners set
21 forth under the declaration.

22 Q: What are the obligations of the home owners?

23 A: To comply with the terms in the declaration to pay
24 assessments, to basically use this as a governing
25 document.

1 Q: Are there annual assessments or monthly assessments
2 or annual assessments in the declaration?

3 A: There are assessments, yes.

4 Q: Does the homeowner's have to take both annual
5 assessments and special assessments under the
6 declaration?

7 A: I'll have to find that.

8 Q: Should be page thirty two.

9 A: For annual assessments under 12.3.

10 Q: Page thirty-four.

11 A: Special assessments under 12.5 for improvements,
12 conditions and additional special assessments in
13 12.5, 1.

14 Q: Typically what is the intent in including provision
15 for assessments?

16 A: To have a mechanism to pay for to maintaining,
17 repairing and replacing the common areas.

18 Q: And that's the common areas of the association?

19 A: Yes.

20 Q: And again, the now therefore paragraph of this
21 second declaration restatement that's on page 1 at
22 the bottom.

23 A: Declarant hereby declares all the property described
24 and additional properties may be added by subsequent
25 amendment hereto in accordance with the terms and

1 conditions hereof and subject to the second
2 amendment to and restatement of declaration of
3 covenants, conditions and restrictions for the
4 Anchorage, referred to herein after as the
5 declaration, that the terms and conditions of the
6 Walpole declaration and Walpole amendment are under
7 this declaration which will have no further
8 independent force and affect and that the property
9 described will be held, transferred, sold, leased,
10 occupied or used subject to the following easements,
11 restrictions, covenants, charges, liens, additions
12 which are for the purpose of protecting the values
13 and desirability of mutual touching concerning title
14 to real property subjected to the declaration in
15 which will be binding on all parties having any
16 title on interest to this property or a portion
17 thereof and their respective heirs, assessors,
18 successors in title and assigns to the benefit of
19 each thereof.

20 Q: Does this declaration subject the property that's
21 described therein to the declaration?

22 A: Yes.

23 Q: Does it subject everyone's interest in that property
24 to the declaration?

25 A: Yes.

1 Q: Does that include the declarant?

2 A: Yes.

3 Q: Okay, does it include the association?

4 A: Yes.

5 Q: Does it include the future lot owners?

6 A: Yes.

7 Q: What is the property described?

8 A: The property is the by-laws and additional property
9 shown on the first plat we discussed and then the
10 one known as phase one and then in the phase two
11 property which is shown on the original plat we
12 discussed.

13 Q: Does this include seven hundred and seventy nine
14 acres of residual property?

15 A: No.

16 Q: Okay, page forty six of the declaration, under 16.7.
17 If you could read the first sentence of that?

18 A: In all cases and provisions set forth and provided
19 for this declaration will be construed together and
20 given that interpretation of instruction which in
21 the opinion of the declarant, the Board of Directors
22 will best affect the intent of the general planned
23 development.

24 Q: And what is the general plan of development ...

25 Mr. Altman: Your Honor I'm going to object that's

1 ...

2 The Court: You're going to object as to what?

3 Mr. Altman: The, the covenants statement or the
4 language which is in the four corners and the opinion
5 does not ... that's for the Court to decide.

6 Mr. Walker: And Your Honor to the extent, you know,
7 and I included this in my pre-trial brief and I think
8 they did too. To the extent everything is unambiguous.
9 It would be a matter of law for the court, but if there's
10 any ambiguity in it, it becomes a question of fact for
11 the court and Ms. Settle has been qualified as an expert
12 in real estate.

13 The Court: Okay. I'm going to give you a little
14 latitude. Note your objection.

15 Mr. Altman: Thank you.

16 Q: What is the general plan of development?

17 A: It is the, creates lots, creates the associations,
18 property preserves easements of conditions and
19 restrictions.

20 Q: With respect to problem areas in the declaration
21 such as this, what are those common areas typically
22 used, or who are those common areas typically used
23 for?

24 A: Typically for the benefit of the lot owners.

25 Q: Is it, is, is there a mechanism by which can create

1 rights in third properties to common areas in a
2 declaration?

3 A: It depends on what the declaration says and this
4 particular declaration you could annex additional
5 property and they would have rights in the common
6 areas. You could, you could amend the declaration
7 perhaps to give somebody a right or you could state
8 in the declaration what rights your home owners's
9 have.

10 Q: Does this declaration provide for an annexation of
11 property?

12 A: Yes it does.

13 Q: What is that process?

14 A: The process is the developer pretty much has a
15 unilateral right to bring the property within the
16 scope of any declaration.

17 Q: And is that right limited to anyone?

18 A: It's adjacent to the property.

19 Q: Is it limited in terms of the process in anyway?

20 A: The declarant has the right without the consent of
21 the association.

22 Q: And is that subject to any provision in the
23 declaration?

24 A: What you ...

25 Q: The way, the method of.

- 1 A: Yes, the method of adding property to the
2 declaration is set forth in the declaration.
- 3 Q: What section of that?
- 4 A: 2.2
- 5 Q: And in subsection B, is that the method by which?
- 6 A: Yes, what the declarant would do is file a
7 supplemental declaration, basically saying this land
8 was added to the declaration.
- 9 Q: Okay, have you seen any supplemental declaration
10 adding property to Anchorage Plantation?
- 11 A: Not to this declaration. There was one on the
12 Walpole declaration.
- 13 Q: Okay and when you say the Walpole declaration that
14 added phase two of Anchorage Plantation to the
15 property to the development?
- 16 A: Correct.
- 17 Q: Was, have you seen anything on record adding the
18 seven hundred and seventy-nine acres?
- 19 A: No.
- 20 Q: Would the additional property have to be subject to
21 the assessment of the association?
- 22 A: Yes.
- 23 Q: Would it have to be subject to the control of the association
- 24 A: Yes.
- 25 Q: Would the restrictions and regulations adopted by

1 the association apply to future lot owners?

2 A: Yes.

3 Q: And that property. So the intent is to add property
4 to the association subject to all of its covenants
5 conditions and restrictions of the declaration?

6 A: Exactly.

7 Q: Is there a method to bring, within this declaration,
8 bring a third party property in without subjecting
9 the property to the declaration?

10 A: No.

11 Q: Is there, are there any retained rights to third
12 parties with respect to common areas in the
13 association in this particular declaration?

14 A: Yes, there's an easement granted to the McKees(sp).

15 Q: Okay and that's in section, section six?

16 A: It's 6.4.2.

17 Q: Do you see any similar language conveying an
18 easement or reserving easement in favor to the
19 Walpoles for the residual property and separation?

20 A: No.

21 Q: Are there reserve easements in favor of the
22 declarant with in this declaration?

23 A: There are.

24 Q: What are those easements?

25 A: The declarant has the right to maintain a sales

1 center to grant to police and firemen, people access
2 ...

3 Q: Is there an easement to install utilities?

4 A: Yes.

5 Q: An easement to do individual construction on the
6 property?

7 A: Yes.

8 Q: Is that limited in time, in terms of scope of the
9 time, did the easement lapse?

10 A: I believe there's a control period.

11 Q: Did those types of easement typically last after the
12 declarant sold the property in the subdivision?

13 A: Typically does not.

14 Q: There is a section 2.2, excuse me 2.3 discussing the
15 conveyances of common areas. What's the general
16 intent of provisions like that?

17 A: To address how the common areas are to be conveyed
18 to the association.

19 Q: Is it typical to make reservations or make the
20 conveyance --- take exception to the conveyance
21 within the declaration?

22 A: Do you mean the conveyance is going to be subject to
23 A, B, C OR D. I would say it's typical it's not
24 done all the time. It's helpful.

25 Q: In this case there are specific exceptions to the,

1 would it be a obligation to convey the common areas
2 to the association?

3 A: Yes, I believe there is an obligation after two
4 years after the declarant has done all improvements.

5 Q: Okay, and is the conveyance subject to certain
6 rights?

7 A: The conveyance is subject to restrictive covenants
8 filed on record, the right of access of the
9 declarant it successors and assigns to cross the
10 property, the right of the declarant during the
11 declarant control period or the association after
12 that control period is over to the architectural
13 review provisions, all utilities and easements set
14 forth in 2.1.

15 Q: Is there any right that is transferable or alienable
16 within those exceptions. Let me start. What does
17 transferable and alienable mean?

18 A: Just that you can convey it to a third party.

19 Q: What would be the difference between alienable and
20 transferrable and a right running to your successors
21 and assigns?

22 A: Well first of all, I think alienable people use it
23 all the time, but I think it really relates to
24 personal property as opposed to real property so
25 it's probably not a correct term. But transferable

1 just, it goes along with successors and assigns.

2 Q: Okay, if and I guess if an easements of right is
3 reserved in favor of the successor and assign, does
4 that mean it's transferable?

5 A: Not transferable to a third party, but it could
6 convey with whatever rights the beneficiary easement
7 had.

8 Q: What would be defined as third parties?

9 A: Successors and title.

10 Q: Okay so the successor and assigns would be
11 successors and assigns to the title of the property?

12 A: Right.

13 Q: Not third parties who don't succeed assignments to
14 the title of the property?

15 A: That's typically correct. That would be the typical
16 understanding if you were putting a mortgage on the
17 property sometimes the declarant's rights are
18 assigned to the mortgage holder so if the lenders
19 doesn't have property, but again ends up owning the
20 property, that would be a successor and title
21 situation and they can succeed to the developers
22 rights.

23 Q: As far as all the covenants for the record at the
24 time of conveyance were there any restrictive
25 covenants requiring the declarant to convey any

1 portion of this property to the Walpoles?

2 A: No.

3 Q: Were there any restrictions ...

4 A: Not to my knowledge it was not.

5 Q: Were there any restrictive covenants filed in the
6 record requiring the declarant to convey any
7 easement rights to the Walpoles?

8 A: Not to my knowledge.

9 Q: The right of access of the declarant, successors and
10 assigns over and across such property, does that
11 convey a right for the declarant to transfer that
12 right of access to third parties?

13 A: I believe it's not the best drawn language but I
14 believe that the intent of that when you get to
15 article 6 and you talk about the various easement
16 the declarant has. That if the declarant ended up
17 selling all the undeveloped lots to a third party or
18 a mortgage holder took over, whatever rights of
19 access the declarant had would go to that third ---
20 to that successor title.

21 Q: Okay and I remember that you initially reviewed this
22 and you wrote something like bad language next to
23 this. What did you mean by bad language?

24 A: Well, at this point, I just know this was an
25 easement case and this looked like --- and this was

1 a access issue and this looked at first blush like
2 it might be bad language for the association.

3 Q: Okay, what changed your, if your opinion changed,
4 how did it change?

5 Mr. Altman: Your Honor I'm going to object to
6 this. She has not said her opinion changed; he is leading
7 the witness.

8 Q: Has your opinion changed at all?

9 The Court: You want to let me rule?

10 Mr. Walker: Sorry.

11 The Court: My opinion may have changed.

12 Mr. Walker: Yes, Your Honor.

13 The Court: Sustained, thank you.

14 Q: Is that still your opinion with respect to that?

15 A: Those were just notes that I was writing the first
16 time I read through the declaration. Not being a
17 litigator I didn't know where these things would end
18 up. Those are just my notes like I do when I'm
19 examining a title. But when you get to article 6,
20 so I don't think the language is great. I think it
21 could have been drawn better, but I no longer think
22 it's bad language because if you look at article 6
23 there's specific writings of access and easements
24 and the McKees it's clear the declarant knows how to
25 properly grant an easement to the McKees so I think

1 it's, plus the fact it says the right of access
2 instead of a right of access. This makes it more
3 specific to me and makes it sound as if we're
4 talking about those specific easements that were in
5 the declaration.

6 Q: So the easements we talked about earlier article 6
7 are specific rights reserved in favor of the
8 declarant?

9 A: Correct.

10 Q: And this is, you read those in context or this
11 provision in context more specific rights?

12 A: Correct.

13 Q: I mean the right of access is those more specific
14 rights.

15 A: Exactly.

16 Q: Do any of those specific rights include a right to,
17 a transferable right to, for ingress and egress to
18 the common areas for Anchor Watch Drive with in
19 Anchorage Plantation?

20 A: Do a remote third party ...

21 Q: Strike that. Do any of those rights include a right
22 to transfer a use or an easement to a third party to
23 be able to use Anchor Watch Drive and the other
24 common areas of the association?

25 A: No, I believe ...

1 Q: Okay. So they did retain a right in favor of the
2 third party?

3 A: Expressly retained in favor.

4 Q: And they knew how to do that?

5 A: Right.

6 Q: In section 6.5 we have kinda discussed this. What
7 does that provision, you don't need to read it, just
8 generally speaking.

9 A: The declarant ... as long as the declarant owns any
10 property for sell it has a transferable right across
11 the common areas for approvals and installing and
12 maintaining any improvements contemplated by the
13 declaration. That's basically it.

14 Q: So that right shows purpose to use it for
15 improvements in property for sell or market the
16 property.

17 A: Right.

18 Q: And 6.5.1 discusses maintenance for any additional
19 property, is that correct?

20 A: That's correct.

21 Q: And what is the purpose of that particular
22 provision?

23 Mr. Altman: Your Honor, I'm going to object to
24 this. The document speaks for itself and it says what it
25 says in that context unless he's saying this document is

1 ambiguous, which he kind of alluded to earlier and that
2 presents a totally different situation.

3 The Court: Mr. McQueeney.

4 Mr. McQueeney: Yes, Your Honor?

5 The Court: Your response?

6 Mr. McQueeney: Again, it's a issue of fact. If it
7 ambiguous, we argue it's unambiguous, they argue it's
8 unambiguous, but we argue if it is ambiguous that it
9 should be construed in favor of the association. I think
10 they take the opposite. If it's a issue of fact, she's
11 entitled to the expert witness to lend her experience to
12 ...

13 The Court: Alright. Overruled. You may continue.

14 Mr. McQueeney: Thank you, Your Honor.

15 Q: What's the purpose of 6.5.1?

16 A: To reserve to the declarant an easement, various
17 easements for the additional property.

18 Q: Okay, and what would be that additional property?

19 A: The, residual seven hundred and seventy acres.

20 Q: Okay and again, that would be ...

21 A: Or anything that was annexed. The property that was
22 annexed in the declaration.

23 Q: And that would be brought in through a supplemental
24 declaration?

25 A: Correct.

1 Q: And last section 16.12 on page forty six. What's the
2 purpose of that provision?

3 A: I think the purpose of the provision is to say that
4 no third parties get any rights under this
5 declaration that it only applies to the declarant
6 and owners of the lots.

7 Q: Let me show you what's been marked as Plaintiff's
8 exhibit 11. Can you identify that document for me
9 please?

10 A: This is a deed from Southern Lifestyles to James
11 Ellis, lot 58.

12 Q: And lot 58 is located where?

13 A: Phase two.

14 Q: And that's of Anchorage Plantation?

15 A: Right.

16 Q: Okay. When was this deed recorded?

17 A: It was recorded September 21, 2000.

18 Q: Okay, does Mr. Ellis take subject to the declaration
19 that we just discussed?

20 A: Yes.

21 Q: Okay, does this deed show any intent to convey an
22 easement or reserve a easement in favor of third
23 party property owners?

24 A: No.

25 Q: Would the chain of title of this deed reflect the

1 Walpole easements?

2 A: No.

3 Q: Why not?

4 A: You wouldn't find it, when you're checking the title
5 you would not find an easement in favor of the
6 Walpoles.

7 Q: Okay. As you're researching title you would go back,
8 I guess from Mr. Ellis, how far back would you go?

9 A: Typically sixty years.

10 Q: Okay, but what, as far as the previous property,
11 you'd research that previous property owner first?

12 A: Yes.

13 Q: The grantor of this deed?

14 A: Right.

15 Q: Okay. And would you research the grantor forward
16 after you found that grantor? In other words, would
17 you research the grantors chain of title with
18 respect to this subdivision after the property had
19 been conveyed to Mr. Ellis?

20 A: No.

21 Q: So you just research Southern Lifestyles Inc. LLC's
22 title up to September 21, 2000?

23 A: You would actually just research it til they own it,
24 they own it until the closing and then if you were
25 representing Joe Blow who was buying from Mr. Ellis

1 you would research Southern Lifestyles and then you
2 would check out Mr. Ellis from the time he acquired
3 it up to your closing with Joe Blow.

4 Q: So if Joe Blow purchased the property from Mr. Ellis
5 in 2012, would he discover the Walpole easements in
6 his chain of title?

7 A: He would not.

8 Q: Okay, let me show you what's been marked as
9 Plaintiff's 12. Please identify that document for
10 me?

11 A: This is a deed from Southern Lifestyles to Mr. And
12 Mrs. Ranale(sp) lot 13 Anchorage phase two.

13 Q: And again, what's the date that that deed was
14 recorded?

15 A: September 18, 2000.

16 Q: Let me show you what's been marked as Plaintiff's
17 13. Would you please identify that item for me?

18 A: This is a purchase agreement dated December 15, 2000
19 --- between Mr. and Mrs. Walpole and Southern
20 Lifestyles. It was for the 779.9 acres.

21 Q: Okay have you seen anything showing that this
22 purchase was ever consummated?

23 A: I have not.

24 Q: And again, this agreement is after the declarant has
25 already conveyed lots with respect to the property?

- 1 A: Yes.
- 2 Q: So there are other lot owners on the property?
- 3 A: Yes.
- 4 Q: Does this agreement, in and of itself, show the
- 5 intent to reserve an easement in favor of the
- 6 Walpoles with respect to the phase one and phase two
- 7 of Anchorage Plantation?
- 8 A: It doesn't contain language about expressed
- 9 easement. It references the prior agreement, it used
- 10 language that was in that prior purchase agreement.
- 11 Q: Okay and as we discussed earlier, in that prior
- 12 purchase agreement there's no language showing any
- 13 intent to convey an easement to the Walpoles at any
- 14 future time?
- 15 A: Not in my opinion.
- 16 Q: Let me show you what's been marked exhibit 14. If
- 17 you could identify that.
- 18 A: This is the additional plat of Anchorage phase two,
- 19 lots four through seventy-seven.
- 20 Q: Okay and who has that been filed by?
- 21 A: Mr. and Mrs. Walpole.
- 22 Q: Okay and when was this document recorded?
- 23 A: I'm having trouble finding the recorded stamp.
- 24 Q: It's a little bit better on the second page.
- 25 A: Okay. Your eyes are better than mine, but it looks

1 like June 19, 2001.

2 Q: And does this show any intent to reserve an easement
3 in favor of the Walpoles across the property
4 displayed in there?

5 A: No.

6 Q: Does it show any intent to reserve easement for the
7 Walpoles for Anchor Watch Drive?

8 A: No.

9 Q: Does it show an intent to reserve an easement in
10 favor of the Walpoles for the dock and boat landing
11 in Phase two?

12 A: No, I didn't see anything.

13 Q: What is the, is there any statement dedication as
14 we've seen on prior plats?

15 A: Yes there's that same dedication language.

16 Q: And that's a dedication to the Anchorage Plantation
17 Home Owner's Association of all roadways?

18 A: Correct.

19 Q: Let me show you what's been marked as Plaintiff's
20 exhibit 15. Will you please identify that document?

21 A: This is a mortgage from Southern Lifestyles to Mr.
22 and Mrs. Walpole.

23 Q: Does that mortgage reference a purchase agreement
24 between the Walpoles and Southern Lifestyles?

25 A: Yes it does.

1 Q: Does the mortgage show any intent to convey or
2 reserve an easement to the Walpoles with respect to
3 the residual properties, that seven Hundred and
4 seventy nine acres?

5 A: No, it does not.

6 Q: On page three, I guess the first full paragraph, if
7 you could, you don't have to read it out loud just
8 read it to yourself and then I'll ask you a question
9 about it?

10 A: Okay.

11 Q: Does that provide the Walpoles with a right to
12 receive purchase monies from the lots within
13 Anchorage Plantation one and two?

14 A: It does.

15 Q: Okay. I'll show you what's been marked as
16 Plaintiff's exhibit 16. If you could identify that
17 document for me please.

18 A: This is a deed from Southern Lifestyles to Steven W.
19 Brostoff and Tara Melissa White as trustees of the
20 trust, lot 62, phase two Anchorage.

21 Q: And when was that deed recorded?

22 A: July 20, 2001.

23 Q: And I'll show you what's been marked as Plaintiff's
24 exhibit 17. If you could identify that for me,
25 please.

- 1 A: This is an easement agreement between Southern
2 Lifestyles in favor of Mr. and Mrs. Walpole.
- 3 Q: And when was that easement recorded?
- 4 A: November 8, 2001.
- 5 Q: And that's after the recording of the reinstatement
6 of the declaration we just discussed?
- 7 A: Yes.
- 8 Q: It's after the conveyance of lots pursuant to that
9 declaration?
- 10 A: Correct.
- 11 Q: Do either of the purchase agreements you just
12 reviewed, do they show any intent for this easement
13 agreement to be drafted and excused by the parties?
- 14 A: Not, not such a agreement right to the title.
- 15 Q: And this easement agreement, you said goes along
16 with the title of the property?
- 17 A: Yes.
- 18 Q: And it's in favor of who?
- 19 A: Mr. and Mrs. Walpole.
- 20 Q: Okay, and is there a provision for assessments in
21 this?
- 22 A: Yes there, they are paid an annual fee in exchange
23 for using the easement rights.
- 24 Q: Okay, that's not the Walpoles, it's just the
25 successors to the Walpoles?

- 1 A: Once the Walpoles sell, sell the property to someone
2 other than the Walpoles or their children.
- 3 Q: Okay, what is that annual assessment?
- 4 A: Fifty dollars and it can increase by five dollars
5 each year thereafter.
- 6 Q: And the payment was made to?
- 7 A: Anchorage Plantation Home Owner's Association.
- 8 Q: Does this easement agreement show the intent to
9 subject the residual property owned by the Walpoles,
10 the 779 acres to the declaration for phase one and
11 phase two of Anchorage?
- 12 A: No.
- 13 Q: Does it comply with the provision in the declaration
14 that states how property can be annexed into the
15 development of Anchorage Plantation?
- 16 A: It does not.
- 17 Q: Is there, it's the easement that was provided in
18 this easement agreement, is there any provision in
19 the declaration which preserves the right to the
20 declarant to convey such an easement?
- 21 A: In my opinion there is not.
- 22 Q: Let me show you what's been marked as Plaintiff's
23 exhibit 18. Identify that for me please.
- 24 A: This is an amended easement agreement between
25 Southern Lifestyles and the Walpoles.

1 Q: And what, I could have asked you on an earlier one.
2 What is the benefitted property in this, in this
3 easement agreement?

4 A: The benefit of property is what we've been calling
5 the residual.

6 Q: And what is the burden on the property?

7 A: It's the property that is subject to the Anchorage
8 declaration.

9 Q: And that would be phase one and phase two of
10 Anchorage Plantation?

11 A: Correct.

12 Q: What specific, what is the nature of the easement
13 that's conveyed in this document?

14 A: It's an easement across roads and streets
15 constructed by Southern Lifestyles on the Anchorage
16 Plantation property and the right for the Walpoles
17 to and their heirs and assigns to use a community
18 boat ramp and courtesy dock.

19 Q: Okay in paragraph four of the amended easement real
20 estate, have you seen any agreement that discusses a
21 purchase agreement for unimproved real estate that
22 reflects that this amenity is in agreement with the
23 dock?

24 A: Only if you stretch that language about the right to
25 use and say it's an easement.

- 1 Q: Okay is that a right to use or is it the right to
2 access the property?
- 3 A: In the purchase agreement?
- 4 Q: In the declaration. Oh, I'm sorry. Yes, in the
5 purchase agreement.
- 6 A: I have to go back and look.
- 7 Q: Okay and I'm sorry. I was talking about the purchase
8 agreement. If you stretch the language of the
9 purchase agreement ...
- 10 A: That's what I'm talking about stretching ...
- 11 Q: Okay.
- 12 A: Because it actually used the word easement.
- 13 Q: Alright either of those purchase agreements, where
14 they recorded of record?
- 15 A: No.
- 16 Q: The declaration obviously was recorded of record?
- 17 A: It was.
- 18 Q: Conveyance of lot owners within Anchorage one and
19 two were recorded of record at this time?
- 20 A: Correct.
- 21 Q: Is there anything else in the record that you've
22 seen that shows that an easement will be conveyed to
23 the Walpoles at some future date?
- 24 A: No.
- 25 Q: Before the easement agreement?

- 1 A: Not based on the documents that I've been provided.
- 2 Q: What's the date this amended easement was recorded?
- 3 A: June 17, 2002.
- 4 Q: Okay, let me show you what's been marked as exhibit
- 5 19. If you could identify that document for me,
- 6 please.
- 7 A: This is final subdivision plat Anchorage Plantation
- 8 phase three, no phrase two.
- 9 Q: Okay, it's a little bit fuzzy, but who is this final
- 10 subdivision plat signed by?
- 11 A: Mr. and Mrs. Walpole.
- 12 Q: Is there any other party that signed it?
- 13 A: And Steve Brostoff on behalf of Southern Lifestyles.
- 14 Q: Now the Walpoles didn't own the property that's
- 15 shown in the plat at that time? Is that correct?
- 16 A: No, they did not.
- 17 Q: And this is a plat of just phase two of Anchorage?
- 18 A: Correct.
- 19 Q: Does it contain the dedication language to the
- 20 homeowner's association like the other plats we
- 21 discussed do?
- 22 A: Yes.
- 23 Q: And this is a recorded plat?
- 24 A: It is recorded.
- 25 Q: Okay it's recorded after the easement agreement,

1 after the easement agreements have been conveyed?

2 A: Is it June 2002?

3 Q: Yes.

4 A: This amended easement is recorded June 17, 2002.

5 Q: I believe June 20, 2002?

6 A: Then this is after.

7 Q: Does this plat show intent to retain an easement or
8 show an easement in favor of the Walpoles with
9 respect with Anchor Watch Drive?

10 A: I don't see intent.

11 Q: Does it show any intent, does it show that the
12 Walpoles owned an easement with respect to any of
13 the roads that are shown?

14 A: No.

15 Q: Does it show any easement running in favor of the
16 Walpoles with respect with the dock or the boat
17 landing?

18 A: No.

19 Q: Let me show you what's been marked as Plaintiff's
20 exhibit twenty. Can you please identify that
21 document for me.

22 A: This is a deed from Southern Lifestyles to Anchorage
23 Plantation Home Owner's Association. It is a deed of
24 the roads shown on the Anchorage Plantation plats,
25 it is recorded January 13, 2003.

1 Q: Does that show any exception for the Walpole
2 easements that we just discussed for easements of
3 record?

4 A: No.

5 Q: We discussed the equitable right of the association
6 in the early plats, in 1997 and I guess later plats
7 due to the dedication. Would this typically need a
8 deed that puts that dedication into effect?

9 A: This would, this would convey title to the
10 association.

11 Q: So this would take that equitable title and turn it
12 unto legal title, correct?

13 A: Correct.

14 Q: And the equitable title was recorded as early as
15 1997?

16 A: Are the plats just by dedication. That's correct.

17 Q: Let me show you what's been marked as Plaintiff's
18 exhibit twenty-one. Identify that item for me
19 please.

20 A: This is a down re-survey plat on Anchorage
21 Plantation phase three.

22 Q: Anchorage Plantation phase three does it appear to
23 refer to this area right here?

24 A: Correct.

25 Q: Okay and that's the residual property?

1 A: It is.

2 Q: Is that signed by both Walpoles?

3 A: I don't see that.

4 Q: Does that --- what does that plat show with respect

5 to the roads within Anchorage Plantation phase one

6 and phase two?

7 A: It just shows Anchor Watch Drive.

8 Q: And does it show the ownership of Anchor Watch

9 Drive?

10 A: I can't read the notes.

11 Q: And I'm actually talking on the portion of Anchor

12 Watch Drive. It's shown on the plat.

13 A: I mean does it say something like Anchor Watch Drive

14 owned by the Home Owner's Association? I can't read

15 this. I'm sorry. I don't know what that says.

16 Q: Let me show you what's been marked as Plaintiff's

17 exhibit twenty-two.

18 A: Well it says something like maintained by the home

19 owner's association on this plat.

20 Q: I'll show you what's been marked as Plaintiff's

21 twenty-two. Please identify that document for me.

22 A: It says a deed from Southern Lifestyles to Anchorage

23 Plantation Home Owner's Association. It is of the

24 dock, the boat landing and it's recorded July 29,

25 2003.

1 Q: Does it show, does it accept, does it expressly
2 accept the Walpole easements that we discussed?

3 A: It does not.

4 Q: Does it accept all matters of record?

5 A: It does.

6 Q: Okay. Would the matters of record be, have the date
7 of the warranty deed or would it be when the
8 equitable lien arose?

9 A: It would be the date of this deed.

10 Q: Okay. And what property specifically is being
11 conveyed to through this deed?

12 A: The dock and boat landing.

13 Q: Okay, does it include any roadways?

14 A: No.

15 Q: And the deed we discussed to the roadways does not
16 with exception to easements of record or any
17 specific Walpole easement?

18 A: It does not.

19 Q: Okay. Let me show you what's been marked twenty-
20 three. Please identify that document for me.

21 A: It's a survey plat of Anchorage Plantation phase
22 three.

23 Q: Okay, does it show any ownership of Anchor Watch
24 Drive?

25 A: It just says private. Maintained by the HOA.

1 Q: Okay. Does it show any easement running in favor of
2 the residual property that was owned by the
3 Walpoles?

4 A: I can't read the notes but I don't see anything
5 expressly on there.

6 Q: And have you reviewed this document prior to the
7 trial?

8 A: I have.

9 Q: A better version.

10 A: I have.

11 Q: Let me show you what's marked as Plaintiff's exhibit
12 twenty five.

13 Mr. McQueeney: No. I believe that's all the
14 questions I have at this time. If I could check ...

15 The Court: That's fine.

16 Q: And Ms. Settle, do you have any opinions with
17 respect to the validity in this case, the Walpoles
18 easements in this case?

19 A: I don't think the declaration was drafted, it could
20 have been drafted probably enough so that they could
21 grant an easement. I don't think that was the case,
22 so in my opinion it's not about easement. It should
23 have been done by amending the declaration or
24 annexing the property or doing it like the McKees in
25 the declaration and particular inference third party

1 purchaser would know about the easement.

2 Mr. McQueeney: No further questions.

3 The Court: Alright let's take a short break for
4 a few minutes. You may step down.

5 (Court Break)

6 The Court: All right. Mr. Altman.

7 CROSS EXAMINATION OF MS. SETTLE BY MR. ALTMAN:

8 Q: Beth, let me ask you a few background issues with
9 regard to real estate law and title examinations.
10 If you're checking a title and you review an
11 abstract, don't you --- aren't all titles subject to
12 everything that is recorded prior to the title,
13 prior to the date on the title?

14 A: Correct.

15 Q: Does that instrument necessarily have to be
16 mentioned on a plat or deed or some other document
17 in order to be applicable to the title?

18 A: Well you wouldn't find it. It's not in your chain of
19 title.

20 Q: I understand if it's not in the chain of title but
21 in your title examination.

22 A: Correct.

23 Q: And if you're looking at a document, a deed or a
24 plat and it does not reference an easement, doesn't
25 that easement --- isn't that easement still

1 applicable to the title?

2 A: It's, if it's within the search period, yes.

3 Q: Okay, you've mentioned and you've reviewed several
4 deeds and I asked whether or not those deeds
5 referenced the easement that we talking about.

6 A: Correct.

7 Q: And you said no.

8 A: Right.

9 Q: Okay and you also referenced the plats.

10 A: Correct.

11 Q: And said that it did not reference the easement?

12 A: Right.

13 Q: And some of those deeds or some of the deeds and
14 some of the easements were recorded after these
15 easements were recorded, right?

16 A: Right.

17 Q: So any deed that was issued or executed and recorded
18 after the easements would be applicable to the
19 title, would it not?

20 A: Yes. They would, they would be, but then you would
21 find them in your search. So assuming they are
22 valid, yes.

23 Q: Whether they were valid or invalid they'd be of
24 record?

25 A: Correct.

1 Q: Even if you thought they were invalid, you better do
2 something about it, correct?

3 A: Correct, right, but I think the specific question we
4 were talking about is if they were recorded if a
5 deed is recorded - if the deed was recorded to Joe
6 Blow and then Joe Blow conveys property to John
7 Smith you would not, if the deed from Joe Blow to
8 John Smith is before the date of the Southern
9 Lifestyles to Walpole easement, you wouldn't find
10 that because you could only search Southern
11 Lifestyles out to the first deed and then you would
12 run the declaration through the tracer system to see
13 if there are any amendments. So, you wouldn't check
14 out Southern Lifestyles to find, when you're
15 checking out the title Joe Blow to John Smith.

16 Q: Well, aren't you taking a chance that there was
17 nothing that would be recorded in between that
18 period of time that might be applicable?

19 A: But they're outside of your search period.

20 Q: Who decides the search period?

21 A: Well that's just the custom in South Carolina. I
22 mean you can't check everybody out. If you've given
23 up rights in property then once you've conveyed it
24 there's just no way to find it.

25 Q: So you think it's appropriate to just presume that

1 the previous title examiner did everything correct?

2 A: No, but it's not within your chain of title if it's
3 after the date of the deed.

4 Q: I want to make sure I understand you.

5 A: Okay.

6 Q: Because you're confusing me.

7 A: Okay.

8 Q: If someone came to you today.

9 A: Uh huh.

10 Q: To examine the title to one of these lots in
11 Anchorage Plantation.

12 A: Right.

13 Q: Again, a lot.

14 A: Right.

15 Q: Are you telling me that you would only examine the
16 title from the date of the current owner has it,
17 obtain it to the present date?

18 A: No.

19 Q: Well, what would be your title examination ...

20 A: I would go back sixty years and bring it forward.

21 But as you bring it forward, once Southern

22 Lifestyles conveyed out personal, if I'm

23 representing the person buying the property from

24 person one I'm not going to find, I would check out

25 Southern Lifestyles out to the date it conveyed lot

1 whatever to Anchorage and then I'm checking out
2 whoever I'm buying the lot from from that point
3 forward.

4 Q: Pursuant to the covenants that were recorded, didn't
5 they developer have certain rights to do things, add
6 property to the subdivision?

7 A: Right, so in that case they way you check that is
8 you run the declaration through the trace system and
9 it picks up any amendments to the declaration or
10 anything that references the declaration.

11 Q: So if Southern Lifestyles had gone through and
12 excised it's option for the seven hundred plus acres
13 and recorded a separate easement for the benefit of
14 the seven hundred acres.

15 A: Right.

16 Q: If you only look for the declaration of covenants
17 you would have missed that easement, correct?

18 A: That's correct.

19 Q: You would be taking, you would be willing to take
20 that chance that you would miss that easement?

21 A: Well, I don't think that's, you can't, I don't think
22 that easement is valid if it's, it's like a wild
23 deed; it's outside the chain of title.

24 Q: Am I correct that the easement that we are here
25 talking about was recorded before the deed conveying

1 Anchor Watch Drive and the boating facility to ...
2 A: You're absolutely correct.
3 Q: ... to the property owner's association?
4 A: Yes, you're absolutely correct. So if you examined
5 the title to the property at that time you would
6 find that easement.
7 Q: You would find it?
8 A: Exactly.
9 Q: Would you agree that the attorney who, any attorney,
10 should have checked that to make sure?
11 A: If they were representing the association?
12 Q: Yeah.
13 A: Well, I don't know that they had --- under the
14 declaration they were required to take title. I'm
15 probably going to, but most people, you know,
16 they're obligated to take title. I don't know that
17 they could have turned down the title and say we're
18 not going to accept the deed, because the
19 declaration said the declarant has the right to
20 convey the Home Owner's Association.
21 Q: Right. But it would have been taken subject to any
22 easements. Let's say if a tax lien had been filed
23 against Southern Lifestyles.
24 A: Right. They'd be taking title subject to that, no
25 question.

- 1 Q: They'd take title subject to that?
- 2 A: Right.
- 3 Q: Alright any other type of lien to taking a judgment?
- 4 A: Exactly.
- 5 Q: Or a mortgage.
- 6 A: It makes me nervous representing associates going
- 7 forward because I don't think they typically buy
- 8 title insurance or check the title or anything like
- 9 that.
- 10 Q: I'm going to refer you to exhibit five which is the
- 11 contract between Southern Lifestyles and Walpoles
- 12 dated January 11, 2000 and you've talked about the
- 13 fact that there is in paragraph 1043 a right of the
- 14 Walpoles to use the roads and I believe the boating
- 15 facilities, correct?
- 16 A: Correct.
- 17 Q: And I believe that you testified that that may not
- 18 be the best way to word an easement, but it did give
- 19 the Walpoles the right to use that, correct?
- 20 A: Correct.
- 21 Q: And I believe you testified that ...
- 22 A: Can I clarify, can I just clarify that?
- 23 Q: Sure.
- 24 A: As between, that's between Southern Lifestyles and
- 25 the Walpoles they gave them the right whether

1 somebody else has a argument they don't have a
2 right. I don't know.

3 Q: Okay, was, was that provisions binding on heirs, the
4 heir, assessors and assigns of the parties?

5 A: This 10.3?

6 Q: The entire contract. The provisions of the
7 contract.

8 A: Yes.

9 Q: You would agree that all the homeowners were
10 successors or assigns, the property owners were
11 successors or assigns for Southern Lifestyles,
12 correct?

13 A: Correct.

14 Q: Now, we acknowledge we know that that was not
15 recorded, correct?

16 A: Right. So how did they know about it?

17 Q: Southern Lifestyles had an obligation to allow the
18 Walpoles, their successors and assigns to use Anchor
19 Watch Drive, did they not?

20 A: Correct.

21 Q: Until Southern Lifestyles purchased the residual
22 property correct?

23 A: Correct.

24 Q: Have you ever been out to the property?

25 A: Not since it's been developed.

- 1 Q: And you've seen this map that's been up here ...
- 2 A: Right.
- 3 Q: ... since we started? Is there any indication
- 4 looking at this map that there was supposed to be
- 5 access from Anchor Watch Drive to the residual
- 6 property, if you look at it?
- 7 A: Is there any what now?
- 8 Q: Is there any indication on this map that there is
- 9 supposed to be access from Anchor Watch Drive onto
- 10 the residual property?
- 11 A: No.
- 12 Q: You don't see that?
- 13 A: Where?
- 14 Q: Well, let me show you the --- I think you describe
- 15 as Anchor Watch Drive, correct?
- 16 A: Yeah, I think that little thing you're pointing to
- 17 is Anchor Line or something.
- 18 Q: Okay Anchor Line?
- 19 A: Yeah.
- 20 Q: That's one of the roads?
- 21 A: Right.
- 22 Q: Where does it go to?
- 23 A: It goes to the residual.
- 24 Q: It goes to the residual?
- 25 A: Uh-huh.

1 Q: And from your review of the plats, do you agree that
2 this pretty well represents what was on the plats as
3 far as the development of what we'll call the
4 waterfront property?

5 A: Yes.

6 Q: Okay, do you know of any, can you imagine any reason
7 that this Anchor Line Drive would have been there
8 other than for access to the residual property?

9 A: No. The point was they were going to buy the
10 residual property.

11 Q: Right, so their intention was to have access from
12 Anchor Watch Drive onto the residual property,
13 correct?

14 A: Correct.

15 Q: Okay, now can I suggest, you can look at the very
16 end of Anchor Watch Drive? Again, it ends in blue,
17 there's nothing there. I think actually there may be
18 a cul-de-sac on the Walpole property. But that come
19 onto the residual property also, doesn't it?

20 A: I can't see exactly where it ends but certainly ends
21 right by the residual property.

22 Q: It looks like it goes on to the residual property?

23 A: It would have to go that way. I mean it would have
24 to end somewhere.

25 Q: And if we look here there's a dark area, long and

1 narrow. Does it look like there's access to Anchor
2 Watch Drive onto that?

3 A: What is that?

4 Q: I'll tell you it's a drainage ditch or an irrigation
5 ditch.

6 A: So is there ...

7 Q: Does it look like somebody could turn left off of
8 Anchor Watch Drive onto the residual property?

9 A: Into a drainage ditch?

10 Q: No, there's ...

11 A: Oh that right next to it?

12 Q: Next to it.

13 A: Yeah, if, if that's a road, yeah. It looks like a
14 road.

15 Q: Let me direct your attention to some property that
16 would be, I'm going to call it south only because
17 it's at the bottom of the map. It's part of the
18 residual which I'm pointing to here which has got
19 this by the green dot. Is there any access to that
20 other Anchor Watch Drive?

21 A: No, except by water.

22 Q: Except by water to where?

23 A: I can't see where the red line ends.

24 Q: The red line ends here.

25 A: Okay. No.

1 Q: This is part of the - the yellow lines are lots.

2 A: Right, right. No it doesn't look like it has an
3 access.

4 Q: So there's no access other than Anchor Watch Drive?

5 A: Does the red line go up to the main highway?

6 Q: It does go up to the highway. It's a seventy foot
7 right-of-way.

8 A: Yeah, I just don't know the width of the red line.

9 Q: Okay, but if ...

10 A: I mean, could that red line be a road going to that
11 property down there?

12 Q: I think it just defines the outline of the property.

13 A: Yeah, okay, I mean Anchor Watch Drive looks like the
14 obvious access. I don't know if the redline going
15 out there gives enough width for there to be a road
16 there to give access to that lowest green dot.

17 Q: So if there was no other access there would have to
18 be an access, an easement by necessity to _access
19 this property over Anchor Watch Drive, correct?

20 Mr. McQueeney: I object to that. It's irrelevant.

21 They haven't filed a counterclaim asserting a easement by
22 necessity ...

23 The Court: I'm going to give him a little latitude.
24 You can answer.

25 Mr. Altman: Thank you, Your Honor.

1 Q: At least if you're correct, the easement to the
2 property is improper ...

3 A: Uh-huh.

4 Q: Wouldn't there be an easement by necessity for this
5 bottom part, this bottom piece right here.

6 A: I mean, I think there probably would be. I did not
7 research easement by necessity to prepare for today.
8 I think if you cut off yourself there might be a
9 defense to easement by necessity, but I'm just
10 stating from memory but as a practical matter, yes.

11 Q: In your view of the contract, I just want to clarify
12 this.

13 A: Uh-huh.

14 Q: It was the intention of Southern Lifestyles which
15 you've read, to buy all of this and develop the
16 entire tract, correct? The entire property?

17 A: Correct.

18 Q: And they would have wanted to give access to the
19 rest of their property clear and convincing. Have
20 you ever been asked to, have you ever seen
21 development plans for the entire deed of Anchorage?

22 A: No.

23 Q: So if the seven hundred plus acres were shown as
24 being developed with various amenities on it, there
25 would have had to be some access. There would be

1 some intention to have some access and the property
2 owners would have known that if they had seen the
3 development plans, correct?

4 A: Correct.

5 Q: Are you aware of any communications between the
6 attorney for the Home Owner's Association and the
7 Walpoles regarding this easement prior to this suit
8 being commenced?

9 A: Not prior to the suit being commenced. I think there
10 were letters between Tom Harper and Gerald Finkle
11 that were attached to the pleadings.

12 Q: Did you read those letters?

13 A: Yes.

14 Q: Do you remember when those letters were dated?

15 A: No.

16 Mr. Altman: Your Honor, we have previously marked as
17 defendant's exhibits one, two, three and four some
18 communications between Mr. Harper who was the attorney
19 for the property owner's association at the time in 2004
20 and Mr. Gerald Finkle who was the attorney for the
21 Walpoles at the time concerning the easement. I'm going
22 to hand these two and ask her if she can identify them
23 and ever seen them before?

24 A: Yes, I've seen these.

25 Q: Do those letters contain an acknowledgment or a

1 statement to Mr. Harper that in fact this easement
2 existed?

3 A: Yes.

4 Mr. Altman: Your Honor, if I may approach the
5 witness? Let me make sure I get them in the correct
6 order. And, Your Honor, for the record, at the time
7 the letters were written by Mr. Finkle and Altman, I was
8 part of that law firm. I am no longer a part of that law
9 firm.

10 Q: Would you agree Ms. Settle at the latest in 2004,
11 the Property Owner's Association was aware that the
12 easement existed?

13 A: Yes, at least their attorney was.

14 Q: Their attorney was?

15 A: Yes.

16 Q: You think the attorney would tell their client?

17 A: Yes., I do.

18 Q: So if the attorney knew the client knew?

19 A: Right.

20 Q: Do you know when this law suit was filed?

21 A: I don't.

22 Q: If I told you it was 2010 would that surprise you?

23 A: No, because I think I was contacted about 2011 so
24 that would seem right time line.

25 Q: Going back a moment, I'm going to ask you to look at

- 1 exhibit nineteen. And I'm going to test your eye
2 sight again.
- 3 A: Okay.
- 4 Q: And I'm going to ask you to look at the very end of
5 Anchor Watch Drive and there's some notations by
6 what looks like a cul-de-sac. Do you see that?
- 7 A: Yeah, I can't read it. I do have bigger plats if
8 you want me to pull mine out.
- 9 Q: It might be helpful.
- 10 A: Okay. Do you want me to read it?
- 11 Q: Please.
- 12 A: The temporary cul-de-sac easement may be removed,
13 relocated with county approval.
- 14 Q: Okay, so what we are talking is the area at the end
15 of Anchor Watch Drive after it's gone through
16 seventy four lots?
- 17 A: Right.
- 18 Q: So again, contemplation was something was going to
19 come on the other side, correct?
- 20 A: Right.
- 21 Q: I also want to ask you to look at exhibit ten, which
22 is the declaration of covenants, the second
23 amendment. Doesn't that document contemplate other
24 property coming into the association?
- 25 A: It ...

1 Q: Other property being a part of it?

2 A: Yes, it does.

3 Q: And in two, section 2.2.7 doesn't it refer to the
4 property, I believe you said had to be adjacent,
5 doesn't it refer to merely adjacent property?

6 A: Yeah, I think I went back and said continuous or
7 merely continuous.

8 Q: In your prior testimony, I'm going to hand you
9 Defendant's exhibit thirteen and ask if you can
10 identify those.

11 A: This is my file.

12 Mr. Altman: Your Honor, if I may approach.

13 Q: I hate to hand you this and I'm sorry, we did not
14 mark the pages we marked for the witness, but there
15 are specific mentions of the covenants I want to ask
16 about. In the covenants you talked previously about
17 some language and you say this is 2.3, 2.3b that
18 you've written with an asterid I believe, "bad
19 language" and you said after you read more you
20 decided it wasn't bad language. Correct?

21 A: Correct, well it's not right but ...

22 Q: It's not?

23 A: It's not as bad as I initially thought.

24 Q: It's not great. It raises some questions doesn't
25 it?

1 A: Yes.

2 Q: And I'm going to ask you to read 2.3b to the Court.

3 A: The right of access of the declarant, its successors
4 and assigns over and across such properties.

5 Q: At the beginning of 2.3 doesn't it say it's subject
6 to the following, the conveyance, this is the
7 conveyance of the common areas, correct, that we're
8 talking about?

9 A: Right any such conveyance by the, are subject to ...

10 Q: The following?

11 A: Right.

12 Mr. Altman: Your Honor, we're on Page 6 of the
13 covenants.

14 Q: And 2.3b says, it starts off where it ends on 2.3.
15 Any such conveyance by the declarant shall be
16 conveyed subject to b the rights of access of the
17 declarant, its successors and assigns over and
18 across such property, correct?

19 A: Correct.

20 Q: And you testified that the deeds transferring the
21 roads and the boating facility which is subsequent
22 to the easement being recorded and the amended
23 easement, correct?

24 A: Correct.

25 Q: So that would raise some question, at least raise

1 some question as to would the HOA took the property.

2 The property subject to it?

3 A: Yes, it would raise a question. It's a matter of
4 record that they would find if they searched the
5 title.

6 Q: And then at the bottom of the page you have another
7 handwritten notation. What is that notation?

8 A: At best ...

9 Q: What do you mean by that?

10 A: I don't know. I reviewed this in 2011, I believe.

11 Q: Excuse me?

12 A: I reviewed this in 2011. I think I made a note, if I
13 could ask at best that language, the bad language
14 would be, the bad language would be ambiguous.

15 Q: When did you determine that the, what you refer to
16 as bad language or your opinion changed?

17 A: Well, these notes were when I'm just reading it from
18 start to finish. So, I read it several times and
19 when you get to six, do you mean what date did I
20 determine that?

21 Q: Yes.

22 A: I want to say the beginning of 2012 when I had an
23 opportunity to review these several times and
24 discuss the matter with the Home Owner's counsel,
25 that I got more comfortable with what the intent of

1 this section was.

2 Q: Do you send any notification to Plaintiff 's counsel
3 that your opinion had changed?

4 A: No. I mean I don't understand.

5 Q: Did you send him some written notes that it's bad
6 language and ...

7 A: No, I didn't send him these notes. These were my
8 notes and when y'all gave me a subpoena I don't even
9 know what the bate stamps, so I sent them to Chip
10 McQueeney and said can you please handle this
11 because I don't know what you can discover or
12 whatever.

13 Q: But that was done after the early part of 2012,
14 correct?

15 A: The bad language?

16 Q: No, the time you sent it to Mr. McQueeney?

17 A: Yes, yeah.

18 Q: But you didn't change the note then?

19 A: No.

20 Q: You left it as it was?

21 A: Right because you asked for my file and I don't
22 think I can change anything in my file.

23 Q: You don't have any handwritten notes that say that
24 your opinion changed, do you?

25 A: No.

1 covenants and declaration.

2 Mr. Walker: Your Honor, that's a matter of law for
3 the courts.

4 The Court: She's an expert. First of all let him
5 finish his question, but I'm inclined to probably,
6 depending on what I think it is, allow it. Finish your
7 question.

8 Q: If there is an ambiguity in the declaration of
9 covenants, how is the ambiguity resolved?

10 A: Well, the general law is that you construe against
11 the drafter and you construe in favor of ambiguity.
12 But I believe these covenants have a specific
13 provision about to ... it would take some time to
14 find it but I think there was something that was ...

15 Q: You made a statement in your notes that the
16 covenants has some ambiguity, don't you?

17 A: Yes, I do.

18 Q: Have you looked at any title insurance policies for
19 any of the properties for Anchorage Plantation.

20 A: I have not.

21 Q: You mentioned earlier that you had not been on this
22 property since it was developed. You'd been there as
23 a little girl?

24 A: Right. My parents were friends with the Thornhills
25 who use to own it.

1 Q: Have you looked at any deeds that were transferred
2 by Southern Lifestyles subsequent to the recording
3 of the easements?

4 A: I don't, I don't know. I randomly pulled some off
5 the record office, because again as a title searcher
6 I was just worried about how does, how does somebody
7 have notice of this thing, this easement? So, I'm
8 not sure. They would have been in my file.

9 Q: Again, no question they would have picked up the
10 easements that was there if the title search was
11 done properly, correct?

12 A: If they were prior to Southern Lifestyles.

13 Q: It would have still been on the record whether or
14 not they were prior to Southern Lifestyles or
15 anybody, else correct?

16 A: It would still be in record, but you wouldn't find
17 it in a chain of title if you were ...

18 Q: Have you ever checked the title yourself?

19 A: Uh-huh, I have.

20 Q: With regard to easements or covenants, not easements
21 but covenants, aren't they, have to be language of
22 the covenants have to be very clear to be
23 applicable?

24 A: Yes.

25 Q: If there's ambiguity regarding the terms of the

1 Q: Do you still have family on Wadmawlaw Island?

2 A: I do.

3 Q: Are they actively involved with dealing with the
4 development of this property?

5 A: No.

6 Q: Have they voiced an opinion on it?

7 A: No.

8 Q: They have not?

9 A: They have not.

10 Q: And have you been in business with anybody that is
11 actively enforced an opinion regarding the
12 development of Anchorage Plantation?

13 A: I don't know any details, but Dana Sinkler was my
14 law partner for fifteen years and his family owns
15 Rose Bank Plantation and I think that there is some
16 dispute there, but I don't really know what it is.
17 Mr. Altman: Nothing further at this point, Your

18 Honor.

19 Mr. McQueeney: Just a few, Your Honor.

20 RE-DIRECT OF MS. SETTLE BY MR. MCQUEENEY:

21 Q: If I could bring you back to the second re-statement
22 or the restated declaration that is exhibit ten?

23 A: Okay.

24 Q: And if you can, look to page forty-six, section
25 16.7.

1 Mr. Altman: Which exhibit are you referring to,
2 please?

3 Mr. McQueeney: Exhibit ten.

4 Mr. Altman: Excuse me?

5 Mr. McQueeney: Plaintiff's ten, the declaration,
6 restatement of the declaration. You were discussing with
7 Mr. Altman the provision about the interpretation of the
8 document, is that the provision you were discussing with
9 him?

10 A: Yes, yes.

11 Q: And what does that interpretation provision state?

12 A: It says that in all cases provision set forth
13 provided in this declaration will be construed
14 together and given that interpretation of
15 construction with the opinion of the declarant and
16 Board of Directors will best effect the intent of
17 the general plan development.

18 Q: Okay, what does the next sentence say?

19 A: The provision material will be interpreted and if
20 necessary they will be so extended or enlarged by
21 implication to make it fully effective.

22 Q: Okay. We talked about, you talked about with Mr.
23 Altman on record the chain of title. Is the document
24 that is of record necessarily in any particular
25 persons chain of title?

- 1 A: No.
- 2 Q: How does one put something in record within another
- 3 person's chain of title?
- 4 A: It depends --- it's the time in which you record it.
- 5 Q: Okay, so things recorded at the courthouse aren't
- 6 necessarily within the chain of title of any
- 7 particular person?
- 8 A: That's correct. There's a lady in Berkeley county
- 9 who claims she's a direct descendant of all she owns
- 10 basically all of Berkeley County.
- 11 Q: Well, that's interesting too. If someone were to
- 12 purchase property within Berkeley county after she
- 13 had recorded a deed to that effect, would they have
- 14 constructive notice to that deed?
- 15 A: You couldn't find it.
- 16 Q: Okay. If they did have constructive notice, would
- 17 they take subject to that deed?
- 18 A: If they had notice they would but I worked it out,
- 19 when I found that deed I worked it out, when I found
- 20 that deed, I worked it out with the title company so
- 21 they could be sure without reference.
- 22 Q: If they had notice of a document recorded, does that
- 23 necessarily mean you take subject to it regardless
- 24 of its ability?
- 25 A: It, not necessarily but it may be a defense if

1 you're saying you're a bonafide purchaser and you do
2 actually have notice. That's doesn't mean it
3 applies, it just means you have notice of it.

4 Q: Would Mr. Ellis' deed we talked about earlier be a
5 bonafide purchaser for value without notice to the
6 Walpoles?

7 A: I can't remember the dates. Was it his before?

8 Q: The day before the easements were recorded.

9 A: No ...

10 Mr. Altman: I'm going to object to that. Mr. Ellis,
11 we put his deed in for purpose of Mr. Ellis', he's not a
12 party to this suit, the Home Owner's Association only as
13 ...

14 The Court: Okay.

15 Mr. McQueeney: He's a member of the association and
16 I think it's relevant because once the declarant begins
17 to convey properties pursuant to the declaration third
18 party rights are created and the association has to
19 handle and enforce those third party rights.

20 The Court: Mr. Altman?

21 Mr. Altman: Your Honor, you're correct, but the
22 home owner's association is the bolder of the roads, the
23 docks that we're talking about, the boat ramp and it took
24 title subject to the easement having been recorded prior
25 to the deed into the homeowner's association and that's

1 the critical question here and the only question here.
2 What did the home owner's association know, actually or
3 have constructive notice of and were shown they had,
4 obviously had constructive notice when they took the
5 deed, because the easements were, the easement was
6 already recorded and they had actual notice no later than
7 2004 based on the exchange between Mr. Finkle and Mr.
8 Harper who was the attorney for the home owner's
9 association. What Mr. Ellis knew is irrelevant because
10 Mr. Ellis is not the party. The home owner's association
11 is the owner it took subject to.

12 Mr. Walker: Mister ...

13 The Court: But Mr. Ellis is part of that home
14 owner's association right?

15 Mr. Altman: There's no question he's part of the
16 home owner's association.

17 The Court: I'm going to allow it. I'll note your
18 exception.

19 Q: Mr. Ellis would be a bonafide purchaser for value
20 without notice from the Walpoles. Is that correct?

21 A: Right.

22 Q: Would the Walpoles have been a bonafide purchaser
23 for value without notice of the declaration?

24 A: No.

25 Q: If someone is a bonafide purchaser of value without

1 notice, does that automatically mean that they have
2 a valid title to the property?

3 A: It just means they might not be bound by a
4 restriction that somebody has claimed. They just
5 wouldn't be bound by something.

6 Q: Well, let me ask it this way. If you had notice that
7 something was invalid ...

8 A: Right.

9 Q: Does it matter that you had notice of it?

10 A: No, I don't think so.

11 Q: Does the notice somehow validate something that's
12 invalid?

13 A: No.

14 Q: Okay, so if the Walpole easements were invalid at
15 the time that they were created, does it matter if
16 someone knew about them down the road?

17 A: No.

18 Q: And as we said, the Walpoles are not bonafide
19 purchasers for value without notice of the
20 declaration?

21 A: Correct.

22 Q: The declaration would be within the Walpoles chain
23 of title?

24 A: Yes.

25 Q: And in fact, the Walpoles put the declaration on the

- 1 property to begin with, is that correct?
- 2 A: They put their declaration on the property.
- 3 Q: Which was eventually superseded by the one that
- 4 Southern Lifestyles placed on the property, correct?
- 5 A: Correct.
- 6 Q: Did the Walpoles know that the property was subject
- 7 to the declaration?
- 8 A: Yes.
- 9 Q: Now ...
- 10 A: Well that had record notice.
- 11 Q: Looking at the purchase agreement dated January 11,
- 12 2000, I'm not sure which exhibit that is off the top
- 13 of my head. I'd say four or five, actually I believe
- 14 it's five. No, I'm sorry. If you can turn to
- 15 section 10.3 of that document.
- 16 A: Right.
- 17 Q: Does it mention the, how does it describe the dock
- 18 and boat landing?
- 19 A: Purchaser shall provide seller access to the
- 20 community boat ramp and courtesy dock located on
- 21 Phrase 2.
- 22 Q: So the Walpoles knew at the time they signed that
- 23 agreement that dock and boat landing were for the
- 24 community, correct.
- 25 A: Yes, I believe so.

1 Q: They were put on actual notice that that dock and
2 boat ramp were intended for the community?

3 A: Yes.

4 Q: In fact, they intended, pursuant to their
5 declaration, to include the dock and boat ramp as
6 part of the common area for Anchorage Plantation, is
7 that correct?

8 A: I believe so. I have to go back and look.

9 Q: Go back and look then.

10 A: Okay.

11 Q: This is Plaintiff's exhibit three and subsection B
12 on page one, I believe it's on the first page. That
13 defines commons areas, correct?

14 A: Right. It includes docks.

15 Q: But the first sentence, what does the first sentence
16 say?

17 A: All real and personal property now or hereafter
18 owned by the Plantation Home Owner's Association for
19 the common use and enjoyment of the home owners and
20 residence.

21 Q: Okay, so they knew the common areas would be
22 anything that presently existed and would be,
23 conveyed to the association after that declaration,
24 correct?

25 A: Right.

1 Q: And that declaration applies to Phrase 1?

2 A: Yes.

3 Q: The amendment to the declaration incorporates phase
4 two, correct?

5 A: Correct.

6 Q: And that references a plat that we've already
7 discussed. It's Plaintiff's exhibit 6, correct?

8 A: Correct.

9 Q: And that plat shows the dock and the boat landing on
10 the plat, correct?

11 A: Yes.

12 Q: Okay, so the Walpoles knew that dock and boat
13 landing was there at the time that they submitted
14 the declaration?

15 A: Correct.

16 Q: And they did not subdivide that as a private lot
17 with a dock and boat landing. They subdivided it as
18 a dock and boat landing, correct?

19 A: Correct.

20 Q: Okay. You made the point earlier as well that the
21 Walpoles, excuse me, that the association is
22 obligated to take title to the common areas under
23 the declaration?

24 A: Correct.

25 Q: Does the, does the declaration, does the declarant

1 have a duty, with respect to those common areas, in
2 conveying it to the association?

3 A: Yes.

4 Q: What is that duty?

5 A: Well, it's generally shown under the, gosh, what's
6 the Dunes West case. You have to convey roads in
7 good conditions, you have a duty to the association.
8 The nature of fiduciary duty. You can't ... the
9 association bankrupt, that sort of thing.

10 Q: Does the declarant have fiduciary duty to the
11 association?

12 A: Yes.

13 Mr. Altman: I ...

14 The Court: I'm sorry?

15 Mr. Altman: I don't think that's within what she's
16 ...

17 Mr. McQueeney: I'll withdraw, Your Honor.

18 The Court: Okay, thank you.

19 Q: As far as, did the Walpoles undertake the
20 development on this property?

21 A: I don't know how much they did. Mr. Altman said
22 they, I believe he said they built the roads or
23 someone mentioned they built the road.

24 Q: And they formed an association, correct?

25 A: Now, I don't know who formed the association.

1 Q: Within the ...

2 A: Oh the incorporated ...

3 Q: Right.

4 A: Yeah, their, their declaration talks as if the
5 association is in effect and current, that sort of
6 thing, so yes.

7 Q: Going back to the open record versus chain and
8 title. Is there any doubt in your mind that the
9 subsequent purchaser, Mr. Ellis's lot should have or
10 would have found the Walpole easement in Mr. Ellis'
11 chain of title?

12 A: Mr. Ellis deeds were before the Walpole easement, so
13 they would not be founded.

14 Q: And if they have found it and it was invalid, would
15 it matter?

16 A: No.

17 Q: We talked about again in 10.2 in exhibit 5, which is
18 the first agreement, and you said that gives the
19 Walpoles a right to use roads and facilities as
20 between Southern Lifestyles and the Walpoles. Why is
21 it only between Southern Lifestyles and the
22 Walpoles?

23 A: Because it doesn't use, it doesn't use the customary
24 the language that's used for easements that attaches
25 the concerns of the property title to the property

1 and those sort of things.

2 Q: Is there a reason it only binds the Southern
3 Lifestyles and the Walpoles?

4 A: Well, it's not recorded, so nobody else would have
5 notice of it. And it's not stated.

6 Q: The roads that you see on this plat here, you said
7 you've interpreted plats before?

8 A: Yes.

9 Q: Would the roads such as this area right here, would
10 that show intent to convey an easement?

11 A: Not necessarily. I mean, I'm assuming when you're
12 building roads and you think they're going to buy
13 phase three, you go ahead and build at that time
14 because it's cheaper.

15 Q: And under the declaration it says the declarant may
16 add property to the declaration?

17 A: Correct.

18 Q: And it has a process for adding property to the
19 declaration?

20 A: Correct.

21 Q: That process was never followed?

22 A: Correct.

23 Q: So to the extent that road shows some sort of
24 intent, if the declaration wasn't followed and no
25 property was added that road, that intent would be

1 destroyed because it was never implemented, correct?

2 A: Correct.

3 Q: As far as the easement of necessity, is there any
4 reason you aren't prepared to address easement of
5 necessity?

6 MR. ALTMAN: I object to that, Your Honor. She's
7 answered the question. Easement by necessity. I don't
8 see where he's going, why she isn't prepared to testify?

9 The Court: What's your objection?

10 MR. ALTMAN: My objection is I think the question is
11 irrelevant and improper.

12 THE COURT: What's the relevance?

13 MR. McQueeney: The relevance is Mr. Altman raised
14 the issue of easement by necessity and she said she's not
15 prepared to address it and I ask her why she's not
16 prepared to address it. The point being that if there
17 had been a counterclaim ...

18 THE COURT: You can't tell her what she's going to
19 testify to. I will allow you ...

20 Mr. McQueeney: Your Honor ...

21 THE COURT: She can answer.

22 Mr. McQueeney: Okay.

23 Q: Is there any reason you're not prepared to address
24 easements by necessity here?

25 A: I didn't know it was a issue in the case.

1 Q: Have you seen anything indicating that it's a issue
2 in the case?

3 A: Well, Mr. Altman pointed out about that lower lot,
4 the lower area.

5 Q: The lower area?

6 A: Right.

7 Q: But I'm saying have you seen anything prior to today
8 that indicates it is an issue in the case?

9 A: No.

10 Q: You have not seen this map, prior to today?

11 A: No.

12 Q: Do you know if it has been produced prior to today?

13 A: I don't know.

14 Q: Do you know if you were given the opportunity to
15 review it yesterday?

16 A: I don't know. I saw Trenholm see it when Meredith
17 brought it in and that's the extent of my knowledge
18 of that.

19 Q: Okay. Thank you. One last thing, we went through
20 your file and we made some notes. I had asked you
21 if you changed your opinions and Mr. Altman said you
22 changed your opinions. When I asked you, Mr. Altman
23 objected. You didn't really change your opinions,
24 did you? Did you have an opinion at the time?

25 MR. ALTMAN: Objection ...

1 MR. McQueeney: That's fine.

2 Q: Did you have an opinion at the time you made the ...

3 THE COURT: Counsel ...

4 MR. McQueeney: I apologize, Your Honor.

5 The Court: Your objection is sustained. Thank you.

6 Q: Did you have any opinions at the time your made
7 those notes?

8 A: I had an initial impression. I don't if it would be
9 as strong as an opinion but that language was not
10 great. That's was my initial impression.

11 Q: Have you been deposed in this case?

12 A: No.

13 Mr. McQueeney: No further questions, Your Honor.

14 The Court: Mr. Altman.

15 MS. SETTLE - RE-CROSS EXAMINATION BY MR. ALTMAN:

16 Q: You reviewed the contract, I believe, which is
17 exhibit five?

18 A: Yes.

19 Q: And there's a provision in the contract that calls
20 for the Walpoles to have use in some fashion of the
21 roads and the boating facility, correct?

22 A: The roads and what now?

23 Q: The boating facility, the ramp and the dock?

24 A: Yes.

25 Q: And those were terms of the contact, correct?

1 A: Correct.

2 Q: And that would make them a bonafide purchaser for
3 value because that was part of the consideration for
4 the sale of the contract of sale for this property
5 and the option of this property, isn't it?

6 A: It makes them a bonafide purchaser for value, but
7 without notice, is that what you're asking or ...

8 Q: I'm saying they are a bonafide purchaser for value
9 because it is a provision in the contract part of the
10 consideration for entering into the contract with
11 Southern Lifestyles. Southern Lifestyles is
12 agreeing that if they purchased it the Walpoles
13 would have the use of Anchor Watch Drive, the other
14 roads and the boating facility.

15 A: It appears to be part of the consideration of the
16 contract. It is a part of the consideration.

17 Q: The property on the homeowner's association owns
18 Anchor Watch Drive now, doesn't it?

19 A: Correct.

20 Q: It owns Anchor Line Drive?

21 A: Correct.

22 Q: It owns the boating facility, correct?

23 A: Correct.

24 Q: It doesn't -- no individual owns the roads for the
25 boating facility, correct?

1 A: Correct.

2 Q: And the Property Owner's Association is an
3 incorporated non profit entity in the State of South
4 Carolina, correct?

5 A: Correct.

6 Q: To your knowledge has any of the property owners
7 assigned any rights that they have to the Property
8 Owners Association with regard to this property?

9 A: Not to my knowledge.

10 Q: You were asked a number of questions on redirect
11 about invalidity. If you see an easement that's
12 been recorded are you going to alone make a decision
13 if that easement was valid or invalid?

14 A: No, I wouldn't.

15 Q: You're going to take an exception in your title
16 policy and tell your client this may be an issue,
17 aren't you?

18 A: Correct.

19 Q: So, unless you go through a court action your
20 clients will be aware that there may be an issue
21 because of something you may believe is invalid but
22 you don't know, because you haven't made that
23 determination, you can't.

24 A: Well, that's true. In the best case scenario, I
25 would try to get under insurance or title insured

1 based on the facts but whether they would, who
2 knows.

3 Q: But even if the title company insured over it all
4 they are doing is assuming the risk?

5 A: That's correct. You would have to explain to the
6 client what the risk is.

7 Q: The property may be insurable but it still may not
8 be marketable, correct?

9 A: Correct.

10 Q: Southern Lifestyles had the right to amend the
11 covenants, did they not?

12 A: They did.

13 Q: And to record an amendment?

14 A: Correct.

15 Q: Record something else they might have done?

16 A: Right.

17 Q: You've seen plats of this property, even though you
18 haven't seen this map that we have up here today,
19 correct?

20 A: Correct.

21 Q: Other than the --- do the plats that you have seen
22 pretty much show the same layout?

23 A: Yes.

24 Q: The same amenities?

25 A: Yes.

1 Q: The same roads?

2 A: Yes.

3 Q: If you were driving down Anchor Watch Drive and came
4 to Anchor Line Drive and turned left on Anchor Line
5 Drive, what would be your thinking as to why it was
6 there?

7 A: Well, I mean, I don't know where their driveway is.
8 It might be on the side to where, if there's a house
9 there. But, you know, it could be a cul-de-sac.

10 Q: I'm going to submit to you that the yellow dots are
11 vacant.

12 A: Okay.

13 Q: The yellow and blue dots have houses and I don't
14 know if you can see it but I can bring it to you.
15 There's a driveway right here.

16 A: Okay.

17 Q: A circular driveway so there's no driveway issue.
18 It looks like it's going through to the adjacent
19 property to the option property, correct?

20 A: Correct.

21 MR. ALTMAN: Nothing further, Your Honor.

22 THE COURT: Okay. You may step down. Thank you.

23 Call your next witness.

24 MR. McQueeney: Your Honor, we call Mr. Steven
25 Brostoff.

1 Clerk: Do you swear or affirm the testimony you give
2 the Court will be the truth the whole truth and nothing
3 but the truth, so help you God?

4 Mr. Brostoff: I do.

5 Clerk: Thank you, please be seated.

6 (Witness complies)

7 Clerk: Sir, for the record, if you'll please state your
8 name, spelling your last name.

9 Mr. Brostoff: My name is Steven Brostoff, B-r-o-s-t-
10 o-f-f.

11 Mr. Brostoff - Examination by Mr. McQueeney:

12 Q: Mr. Brostoff, where do you live today?

13 A: 2637 Anchor Watch Drive on Wadmalaw Island and
14 that's within Anchorage Plantation.

15 Q: Do you know if that's in Phrase 1 or Phrase 2 of
16 Anchorage Plantation?

17 A: Phrase 2.

18 Q: I'm going to show you what's already been marked and
19 admitted as Plaintiff's 16. Are you familiar with
20 that document?

21 A: It looks like it's ...

22 Q: When did you purchase that property?

23 A: In July, 2001.

24 Q: Did you have any notice of the Walpole easements at
25 the time you purchased that property?

1 A: No, I did not.

2 Q: If you could turn to the last page. The deed has a
3 recorded date. When was that deed recorded?

4 A: July 20, 2001.

5 Q: Is it your understanding that that deed was recorded
6 before the Walpole easements were granted?

7 A: Yes.

8 Q: When did you actually move onto the property?

9 A: I bought this property, while I still lived in
10 California, we had moved there from Charleston
11 originally and we moved back in June, the end of the
12 June, first of July 2004. We built the property and
13 moved in in July of 2006.

14 Q: Was your current home owner's assessment for the
15 piece of property?

16 A: Currently it is \$1,400 a year..

17 Q: What was it when you purchased the property?

18 A: I don't recall what the first assessment was but I
19 know it was in the hundreds of dollars.

20 Q: Now, do you have any role within the Home Owner's
21 Association?

22 A: Yes, I'm the president.

23 Q: You're also on the Board of Directors?

24 A: Yes. I'm a board member and the President of the
25 board.

1 Q: How long have you been President of the board?

2 A: Since 2008.

3 Q: Have long have you served on the board?

4 A: Well, in addition to being president in 2008, I was
5 also on the board the years of 2005 and 2006.

6 Q: When you moved onto the property, were you aware of
7 the Walpole property?

8 A: Aware of the existence of the Walpole property?

9 Q: Correct.

10 A: Yes.

11 Q: Were you aware that the Walpoles owned the property?

12 A: Yes.

13 Q: Were you aware of any issues with respect to that
14 property?

15 A: At that time when I moved onto the property, I was.

16 Q: And that would have been in 2004?

17 A: When I moved onto the property was 2006.

18 Q: Okay.

19 A: But I was aware of the problem having to do with the
20 easement in 2004.

21 Q: Were you aware of the problem of the easement prior
22 to that?

23 A: No.

24 Q: Were you interested in what was going in with the
25 Walpole property before you knew about the Walpole

1 easement?

2 A: Not particularly because, I mean, I had been told
3 after I purchased the property, my wife and I, were
4 told that they were planning to add the rest of the
5 Walpole property to it. But by the time that 2004
6 rolled around I knew that was no longer the case so
7 up until the time of the easement no particular
8 concern.

9 Q: And the Walpoles property was never added to
10 Anchorage Plantation?

11 A: It was never added to Anchorage Plantation.

12 Q: What was your understanding with respect to how the
13 Walpole property would be added to Anchorage
14 Plantation?

15 A: Well, I knew only from the CTR's that it would have
16 to go through a process of being adding to the
17 property by voter of the membership.

18 Q: In the 2005 time range, did you discuss the Walpole
19 property as a board?

20 A: Yes, we did. After I joined the Board there was a
21 subject that had been brought up at various times.

22 Q: What's the current use of the Walpole property?

23 A: It is currently being used as a ---

24 Q: What was it being used as at the time in the 2005
25 time range?

1 A: I think it was just ... I'm not sure what they were
2 doing there at the time.

3 Q: Let me ask you about Anchor Watch Drive. Is there a
4 gate on Anchor Watch Drive?

5 A: Yes, there is a gate on Anchor Watch Drive.

6 Q: That would be in this area?

7 A: Yes.

8 Q: Are there any other gates on Anchor Watch Drive?

9 A: Well, if you go to the very end of Anchor Watch
10 Drive at the opposite end, yes. There is --- It
11 ends at a fence that was put up before they started
12 running cattle and there is a gate at that location.

13 Q: Is the gate on Anchor Watch Drive or is it in that
14 little cul-de-sac?

15 A: The gate in on the Walpole property. The cul-de-sac
16 is an easement, I believe, still owned by the
17 Walpoles but they have claimed it an easement to the
18 Home Owner's Association property to use that as a
19 cul-de-sac or as a turn around.

20 Q: Do the Walpoles have an access code to the gate?

21 A: Not to my knowledge.

22 Q: I apologize I mean at gate near Maybank Highway?

23 A: Not to my knowledge.

24 Q: That is maintained by the association?

25 A: Yes.

1 Q: How do you pay for the maintenance of the gate?

2 A: Well, it's part of the assessment. It's part of the
3 budget. The gate can be quite expensive because it
4 has a circuit board and we've had frequent
5 lightening strikes to worry about having battery
6 backup system so a lot of them can be opened if the
7 electricity goes off as it does frequently and
8 sometimes the board gets fried. So, it's one of the
9 components of maintaining Anchorage Plantation.

10 Q: Between this area and the little bend in Anchor
11 Watch Drive over there are there any cuts to the
12 Walpole property on each side of that?

13 A: No, most of it is a drainage ditch with fencing on
14 the other side of the drainage ditch. So, it's
15 completely fenced during the entire length until you
16 get passed the entrance gate.

17 Q: Is that on both sides of the property?

18 A: No, such the large parcel.

19 Q: Do you know how the Walpoles access this property
20 right here today?

21 A: I really don't. I know that it does extend all the
22 way to Maybank Highway.

23 Q: And when I say this property, I just mean the
24 property I guess on this left or to the south of
25 Anchor Watch Drive.

1 A: Yes. They do --- the property runs all the way to
2 Maybank Highway. I don't know what the frontage in
3 on Maybank Highway but I've seen the plat and it
4 does run Maybank Highway, it curves.

5 Q: And this would be the space between Anchor Watch
6 Drive and the Walpoles property. That would be
7 owned by the Walpoles?

8 A: No, the space between Anchor Watch Drive and the
9 Fierson, which is the next property over is owned by
10 the Walpoles.

11 Ms. Coker: Your Honor, can I have permission to walk
12 over there so I can see?

13 The Court: Sure.

14 Q: So the Walpoles have access to Maybank Highway from
15 this property?

16 A: I believe they do. It is water along that area and
17 I don't know what the width is but the width is
18 certainly - I don't think you can access it with a
19 vehicle because it's grown up. If it were clear you
20 could. I have not personally measure the distance
21 but it would be on the plot.

22 Q: With respect to the balance of the parcel again that
23 touches Maybank Highway?

24 A: Yes, it does. And there is a gate I believe on
25 Maybank Highway that can be accessed.

1 Q: That goes to the Walpole property?

2 A: That's goes to the Walpole Property.

3 Q: Do you see people on this parcel at all anymore?

4 A: Well, there is a Berkeley Electric easement that
5 runs between our lot, I guess it would be lot 74 and
6 I think it may go all the way down to the road, I'm
7 not sure or it may go down to Boy Scout Road. So,
8 Berkeley has easement at that point. They also have
9 a easement through our front gate to get there. You
10 do see Berkeley workers accessing Anchorage. And
11 you can access lot 74 from Boy scout Road.

12 Q: Where would Boy scout Road be on this?

13 A: It's way south.

14 Q: All right. And lot 74 would be down here?

15 A: Yes, it would be the last one.

16 Q: Okay. This little strip here is that Anchor Line
17 Drive?

18 A: Yes.

19 Q: What does that currently look like?

20 A: Anchor Line Drive is a grass, I guess you would call
21 it a road because it would be a grass road that ends
22 at our property. There have been, since I've been
23 there, a line of three or four foot culverts that
24 prevent anybody from going beyond that point and
25 going off of that road and on the other side there

1 is a fence that contains the cows and there is a
2 gate at that point as well. That's Walpoles gate on
3 Walpoles property.

4 Q: Okay. As it currently exist without doing any
5 improvement or anything can you have vehicular
6 access down Anchor Line Drive on down to Walpole
7 property?

8 A: If it's dry. I mean it's not a road, it's just, you
9 know, land that has been grassed over and with
10 excess of traffic, it would be a mess.

11 Q: How often do you discuss the roadways and
12 maintenance to the roadways as a Board?

13 A: Almost constantly. Especially recently. We've been
14 doing a lot of repairs on the road. It wasn't a
15 very good road when they put it in. The culverts
16 have eroded almost every single place in which the
17 culvert crosses the road has collapsed and we've had
18 to rebuild it and repair it. The culvert cross the
19 road lead to drainage ditches that go down to the
20 creek. So, it's a constant battle for us keeping
21 the drainage ditches clear and keeping the roads
22 from here and we're in the process now of seal
23 coating the road at a great expense. And we get
24 periodic estimates on how much it would cause to
25 actually re-pave the roads because there are only

1 seventy-four properties but it's 2.7 miles of road
2 that we are responsible for and it's all private.
3 It is an expensive issue.

4 Q: What are the other primary issues the Board of
5 Directors discusses when they meet, typically?

6 A: Okay. Well, you know, in addition to the roads and
7 to the maintenance, one of the big issues we had for
8 a while was the building to the amenity center,
9 which we did do some expensive repairs to the boat
10 ramp. We have to do some additional repairs to the
11 boat ramp. We've done some repairs to the floating
12 dock itself. We have a lot of maintenance issues as
13 far as the company that maintains the grass common
14 area between the road and properties and the median
15 and either side of the entrance road. So we have a
16 contract with a landscaping company to do that. We
17 have recent issues with, we have a program to
18 maintain the trees that align both the entrance road
19 and the rest of Anchor Watch Drive because we do
20 have oak trees and magnolias along those roads and
21 it is a sizable expense. And, again, I should
22 mention another thing that we have frequent questions
23 about are compliance issues both with the
24 architectural review committee and with home owners
25 damaging property, wanting to do something ...

1 Mr. McQueeney: Your Honor, I'm going to object.
2 This is totally irrelevant to the issue of ...
3 The Court: What's the relevance?
4 Mr. Altman: Your Honor, I'm just going through what
5 is primarily discussed as a Board.
6 The Court: Let's move on. Thank you.
7 Mr. Altman: Yes, Your Honor.
8 Q: You as a Board discuss that the angle assessments
9 for the association?
10 A: Yes, we do.
11 Q: Do you discuss special angle assessments with the
12 Board?
13 A: Yes, we do.
14 Q: Has there ever been special assessments?
15 A: Yes, we do.
16 Q: Have there every been special assessments?
17 A: Yes, there have.
18 Q: What are those special assessments been for in the
19 past?
20 A: The special assessment that I remember was a
21 special assessment for the amenity center.
22 Q: Okay.
23 A: Which included paving the area up to the boat ramp
24 and paving the turn around at the boat ramp.
25 Installing parking places for both boats and for

1 cars.

2 Q: Where is the amenity center?

3 A: It is located at the boat ramp and the common dock,
4 I think. It's at that grey area.

5 Q: Right in here?

6 A: Yes.

7 Q: Is it on the same parcel as the boat ramp?

8 A: Yes.

9 Q: Is it on the same parcel as the access to the dock?

10 A: Yes.

11 Q: Do you have any mechanism of controlling access to
12 the amenity center versus the boat ramp and the
13 dock?

14 A: No, I don't

15 Q: It really the only access control from the gate?

16 A: Yes.

17 Q: How many apartment spots are there on this parcel?

18 A: There are approximately a dozen that would
19 accommodate a vehicle and a boat trailer and
20 probably a like number on the opposite side but
21 obviously the seventy-four owners who bought
22 property out there to access creek it's inadequate
23 for our uses. If you come down there, for example,
24 on the weekend you can't get into the parking lot
25 it's extremely difficult. We've also have to and

1 actually relevant to making rules and regulations to
2 help the community work smoothly we've had to
3 institute some rules about parking in the turnaround
4 about not leaving your boats and trailers parked in
5 that parking lot and not having people overnight
6 docking because we only had room for three or four
7 boats at the most at the dock. And, you know,
8 enforcing issues that were important to us. The
9 relevance that was asked of this question is, you
10 know, if people from the other side of Anchorage who
11 don't have, who aren't subject to the CCR's of
12 Anchorage, we have no recourse to use our own
13 property because other people would not be subject
14 to our rules and we have mechanisms to issue fines
15 if they don't comply, we wouldn't have that if
16 someone was coming in from outside. We've had that
17 problem before when people have come through the
18 gate and we don't know who they are and they trash
19 the place, trash the amenity center and we don't
20 have any control of that. We've talked about it and
21 we're concerned with the liability issues associated
22 with having the people who are not homeowner members
23 using our facilities.
24
25

1 Q: Does the Homeowner's Association maintain liability
2 insurance?

3 A: Yes, it does.

4 Q: Is that part of the assessments?

5 A: Yes, it is.

6 Q: What is that intended to cover?

7 A: Well, I think --- it is mainly, I guess, mainly for
8 liability and also we have insurance on the amenity
9 building itself. I mean, it's once again the amenity
10 center building has a mens/women bathroom, it has a
11 single toilet in each. It has three picnic tables.
12 It has a fireplace and it has two barbeques, and it
13 also has water accessible for washing down boats and
14 irrigation which means it runs through a system
15 where it collects the fresh water which you need to
16 both wash your boat and to irrigate. It collects
17 the fresh water and if you get too much usage of
18 that water which is near the boat ramp, you don't
19 have enough money for watering the plants. So, you
20 know, there are expenses of all sorts associated
21 with maintaining that area.

22 Q: Do you have a property management company?

23 A: Yes, we do.

24 Q: What does the property management company do?

25 A: The property management company does a great deal.

1 It maintains the insurance. It gets the vendors in
2 here. For example, the concrete, it gets the people
3 in here, they pave the roads. They keep us, you
4 know, they file whatever has to be filed for us.
5 They interact between us and all of the vendors
6 such as the landscaping.

7 Q: How do you pay the property owners management
8 association?

9 A: Pardon me?

10 Q: How do you pay the property owners management
11 association? Where does that money come from?

12 A: It comes from assessments, they charge us a certain
13 amount of money for all the services and in addition
14 to using that money to pay for the services and
15 expenses.

16 Q: Do you also use money to collect assessments from
17 owners?

18 A: Well, they send out the bills they have the system
19 set up. They have a web site set up for us with all
20 of the documents on it and so forth.

21 Q: Do y'all have a road reserve fund?

22 A: Yes.

23 Q: How much of your annual assessment goes into the
24 reserve fund?

25 A: It varies. It's at present under-insured. We've

1 just found out that to re-pave the road it's would
2 costs \$575,000.00. Currently a seal control road
3 and that's costly, that's about twenty to thirty
4 thousand. I think that would probably leave us
5 probably just at a hundred, hundred thousand dollars
6 in the reserve fund. The road is over ten years old.
7 The problem with the road is, the roads is derivable
8 pretty much because all we have the properties build
9 at this point in time but the main degradation of
10 the road comes from construction vehicles. And so
11 if we have a lot more construction, which the market
12 has been down as far as home building is concerned.
13 We have a lot more of that. The road will degrade
14 further. I would also be very worried that if the
15 road was used to convey construction vehicles for a
16 hundred and seven building lots it, you know, the
17 road would degrade much more quicker than that.

18 Q: Do you have any mechanisms assessments third party
19 property owners within the association.

20 A: We have no legal right to collect assessments from
21 anybody but the homeowner's association. We don't
22 have any mechanisms. Our homeowner's restrictions
23 allow us to on the properties of people that don't
24 pay their assessment. We have recourse. If anybody
25 was using out facilities from outside, you know, we

1 would have no recourse. If they damaged the road.
2 You know, if they decided they were going to have a
3 party down there would be no assess to any members
4 of the Plantation owners association and we would
5 not know what to do. There is no way we can prevent
6 them from using the amenity center. We don't have a
7 police force out there. So, it would be a real
8 problem. It has been a problem for us before
9 because until we got the gate situation
10 straightened out we use to have a lot of people who
11 somehow or another got gate codes into Anchorage,
12 you know, they would just come out there. We have a
13 very nice community. We have multi-million dollar
14 houses out there to more modesty hours. We have a
15 variety of people they all keep their property
16 looking very, very nicely. And periodically you get
17 some people who do not have assess, come in and do
18 not belong there. They end up having parties and
19 going down the road and throwing beer cans and
20 litter that we have to collect until we got the gate
21 straightened out. We had that problem. We finally
22 have all and now not as many people have access to
23 Anchorage Plantation. So several hundred people
24 have gate access and we have no control over that.
25 It would just be a constant nightmare. The main

1 highway, for example, which has trash on both sides
2 of the road. Despite the fact that people try and
3 clean it up all the time I'm afraid Anchorage
4 Plantation would look similar with cans and bottles
5 and trash.

6 Q: Did the Board discuss this pending litigation
7 against the Walpoles during your time?

8 A: Yes. We, you know, we, the first notice I got was,
9 you know just before I moved back to Charleston from
10 California. I had bought the property up there in
11 2001 with the intention of coming and building on
12 it. And when I got back was about shortly after the
13 time that it was discovered that this easement had
14 been granted, which had not be granted at the time I
15 bought my property. And, so, I was one of the ones
16 that, you know, talked on the Board, when I first
17 got on the Board to explore the possibility of what
18 to do about it. We were told by counsel ...

19 Mr. McQueeney: Don't say what your counsel told you.

20 A: Okay. Well, you know, the consensus of the Board
21 was this was not a valid easement. We also, I don't
22 know how to say it, were a participant in the Rose
23 Bank action that they took against having the
24 particular development that was at issue and were
25 also of the opinion or given the opinion that we had

1 some time to see how that ...

2 Mr. Altman: I'm going to object to this. This is
3 obviously hearsay.

4 The Court: Is there any exception?

5 Mr. Walker: I'll move on, Your Honor.

6 The Court: Let's move on.

7 A: If I can say ...

8 The Court: There's no question. There is no
9 question before you.

10 A Okay. I'm sorry.

11 The Court: That's okay.

12 Q: Let's fast forward to filing this lawsuit. Did the
13 Board discuss filing this lawsuit?

14 A: Yes. The Board discussed filing the lawsuit at the
15 appropriate time. When we first found out about the
16 easement we, at that time, the Homeowner's
17 Association was just getting underway, we didn't
18 have a large reserve fund. We didn't we were still
19 collecting dues and trying to get the association to
20 pay for the necessary expenses that we had. We had,
21 you know, we had decided at a later time that we had
22 enough money at the time that was left to us before
23 we could file a lawsuit, you know, was shortening
24 and that we better file and at that point we did do
25 it.

1 Q: The Board authorized the filing?

2 A: The Board authorized the filing. The Board reviewed
3 the Complaint before it was filed and approved it.

4 Q: Okay.

5 Mr. McQueeney: Thank you. If I may consult with
6 co-counsel, Your Honor?

7 The Court: You may.

8 Mr. McQueeney: No further questions, Your Honor.

9 Mr. Altman: Can we take a little break?

10 The Court: Do you need a break, Mr. Altman?

11 Mr. Altman: Please, ma'am.

12 The Court: Let me know when you're ready.

13 (There was a break in the proceeding at 4:14 p.m.)

14 (Back on)

15 The Court: Mr. Altman.

16 Mr. Altman: Thank you, Your Honor.

17 MR. BROSTOFF - CROSS BY MR. ALTMAN:

18 Q: First off, you testified that the Board approved
19 bringing this lawsuit?

20 A: Yes.

21 Q: When was that?

22 A: I believe it was in, I'd have to go back and check.
23 I believe it was in 2010.

24 Q: We have done an exhaustive review of your report and
25 we don't see it so I'd like to know exactly when it

1 was.

2 A: Okay. Yes, I think --- I have a file. Very often
3 we send out emails to various members of the Board
4 on various subjects. And the Board votes by email
5 and then we approve those email votes at the, at the
6 next Board meeting.

7 Q: Why isn't there any minutes of any Board meeting?

8 A: That's a good question. That was not the procedure
9 we used. I have a file with that. I thought I had
10 passed a lot of that over to Karen, but you know, I
11 was not asked for those email votes. The specific
12 minutes, I think you will see in the minutes it says
13 that the Board approves the email on some date.

14 Q: So, if I understand what you're telling me you were
15 asked to produce certain documents pursuant to
16 discovery and you haven't done that, is that
17 correct?

18 Mr. McQueeney: Objection, Your Honor. That's not
19 necessarily the case. I didn't know about the email
20 notes, but ...

21 The Court: Rephrase your question, Mr. Altman.

22 Q: Mr. Brostoff, you provided all documents requested
23 of the Homeowner's Association pursuant to
24 discovery?

25 A: Apparently not.

1 Mr. Altman: Your Honor, I'd ask that any reference
2 to any Board meetings or any meetings approving this
3 lawsuit by the Board be stricken from the record. We
4 can't pursue this because we don't have the documents ...

5 The Court: Where are the documents? Where is your
6 folder?

7 A: I have a folder at home and I it's mainly on the
8 emails.

9 The Court: So, you have the folder and you have
10 access to your emails, is that correct?

11 A: Yes.

12 The Court: Mr. Altman, if we break and let him go
13 and get you the emails and bring it back in the morning?

14 Mr. Altman: Your Honor, we'd ask for time to look at
15 them. I mean, there are other questions that I can ask
16 now.

17 The Court: Are the emails helpful to you?

18 Mr. Altman: Your Honor, I don't know what they say.

19 Mr. McQueeney: Your Honor, I think the question is
20 whether or not the Board authorized it and I don't think
21 we need a email showing that they authorized it in order
22 to show that they authorized. Mr. Brostoff testified that
23 the Board authorised it. I think that's enough. Whether
24 or not there are minutes of that doesn't matter because
25 there's no mistake, not to mention the fact they had the

1 opportunity to depose the Association and they didn't.

2 Mr. Brostoff testified ...

3 The Court: All right. Let's continue. Let me think
4 about that, Mr. Altman?

5 CONTINUED CROSS EXAMINATION BY MR. ALTMAN:

6 Q: When did you become aware of this easement?

7 A: I believe I received in May, before I moved back to
8 Charleston, I received a newsletter from the
9 Association that indicated there was a problem with
10 the easement.

11 Q: Indicating there was a problem with an easement?

12 A: Yes. That there was an issue with the easement.

13 Q: And that was May of what year?

14 A: Of 2004.

15 Q: Did there come a time when the Board took a position
16 with regard to the development of the Walpole
17 property and one of those issues was the access?

18 A: I'm not exactly sure what you're asking. The Board
19 was aware of the Walpoles property. They were aware
20 that they had applied for a subdivision and we were
21 aware after I moved back in the latter part of 2004,
22 I was shown the correspondence between the various
23 lawyers so I was aware at that point and time and the
24 rest of the Board members were as well.

25 Q: In 2005, did the Homeowner's Association take a

- 1 position with regard to --- before a public body,
2 with regard to access of the Walpoles through Anchor
3 Watch Drive?
- 4 A: Did we take a position, in what form?
- 5 Q: Yes, sir.
- 6 A: In what?
- 7 Q: Having your attorney write a letter?
- 8 A: Well, I was not party to those letters that were
9 written.
- 10 Q: You are on the Board today?
- 11 A: I am on the Board today, yes.
- 12 Q: And you are President of the Association?
- 13 A: Yes, sir.
- 14 Q: And I believe you said you were President at another
15 time?
- 16 A: I've been President since 2008.
- 17 Q: Were you on the Board prior to that?
- 18 A: I was on the Board in 2005 and 2006.
- 19 Q: I'm going to show you what has been marked as
20 Defendant's Exhibit 15 and ask if you've even seen
21 that before?
- 22 A: Yes.
- 23 Q: Was that a letter written to the Charleston County
24 Planning Board on behalf of the property owners
25 association?

- 1 A: Yes.
- 2 Q: By your then attorney Mr. Harper?
- 3 A: Yes.
- 4 Q: When was the first time you saw that letter?
- 5 A: I don't recall seeing it before.
- 6 Q: You were aware of it?
- 7 A: I was aware that we asked to join in as a party to
- 8 that judgment.
- 9 Q: Do you know Mr. David Sinclair?
- 10 A: Yes, I do.
- 11 Q: How do you know Mr. Sinclair.
- 12 A: How do I know Mr. Sinclair. Well, I know him from
- 13 Rose Bank Plantation from many years ago. I use to
- 14 have horses. Attended horse shows there. Kept a
- 15 mere that I winged, so I've, you know, I've known the
- 16 Sinclairs for awhile.
- 17 Q: Have you had discussions with Mr. Sinclair about the
- 18 development of the Walpole property?
- 19 A: No, I have not.
- 20 Q: You've never had any discussions with him?
- 21 A: The discussions I've had with him were after this, we
- 22 joined in that suit and they mainly consist of asking
- 23 what the progress was and him sending me some
- 24 documents about the appeals and stuff like that.
- 25 Q: When the Homeowner's Association joined in the suit

1 did the Homeowner's Association pay any legal fees
2 with regard to that suit that was instigated by Mr.
3 Sinclair?

4 A: I know we didn't.

5 Q: Who paid those fees?

6 A: I would assume Mr. Sinclair did, but I don't know
7 since I was not a party to that.

8 Q: Mr. Sinclair is an attorney is he not?

9 A: He is.

10 Q: Do you know if Mr. Sinclair is the same Mr. Sinclair
11 that your son use to work with?

12 A: No.

13 Q: You don't know or are you saying no that's it not?

14 A: I don't know.

15 Q: Were you told by Southern Lifestyles that it was
16 there ultimate contention to add the 700-plus acres
17 to the Anchorage development?

18 A: Yes.

19 Q: Were there supposed to be other amenities contained
20 on the residual property?

21 A: I was not told that.

22 Q: Did you see a development plan?

23 A: I seem to remember having seem some of the plots of
24 some land that were at the very end of Anchor Watch
25 Drive where it meets the residual property that were

1 sent to me like in October or something saying they
2 were thinking of doing it. They couldn't sell the
3 property but they wanted to show me some lots that I
4 might be interested in. This is when I was still in
5 California but I never ... it was something that was
6 sent to me but not something that I disclosed.

7 Q: October of what year?

8 A: October of, I think it was right after I bought my
9 property in October of 2001.

10 Q: But you never saw any total development plans for
11 this property?

12 A: No.

13 Q: Did you go onto the property before you bought it?

14 A: Go onto what property?

15 Q: The Anchorage Plantation property, did you physically
16 go onto the property before you purchased it.

17 A: Oh, yes. Yes, I did.

18 Q: Where did you enter from?

19 A: I entered from Maybank Drive.

20 Q: On Anchor Watch Drive?

21 A: On Anchor Watch Drive.

22

23 Q: Was there a gate there at the time?

24 A: I don't recall and if there were it would have been
25 open because we were driving down to Rockville. We

1 were on vacation in Charleston at the time and we
2 were specifically looking at it for property at the
3 time and we drove by and saw a sign that said lots
4 for sale on the water and we drove in.

5 Q: Were there any fences around any of the property at
6 the time?

7 A: Not that I recall, but, you know, that's not
8 something that I would have remembered.

9 Q: You drove down Anchor Watch Drive had it already been
10 prepared as a road?

11 A: Part of it was paved and part of it wasn't.

12 Q: Again, were there any fences along to the left hand
13 side of Anchor Watch Drive at the time?

14 A: I don't recall.

15 Q: Do you remember seeing any access to what we now call
16 the residual property on Anchor Watch?

17 A: I don't recall.

18 Q: Do you remember seeing Anchor Line Drive?

19 A: At that time I don't know if I would have noticed it.

20 Q: How far down Anchor Watch Drive did you go down that
21 day?

22 A: I think we went as far, approximately as the bend in
23 the road and back because we were mainly interested
24 at Bohangen Creek, we had a similar piece of property
25 and we were looking at that again. So, and we had

1 stopped obviously first at the office and they showed
2 us the lots that were available. They said most of
3 them were gone and the ones that remained were on the
4 Creek side and I think we came back that afternoon or
5 the next day after we showed an interest in, they
6 actually showed us what the property looked like from
7 the creek but that was pretty much what our visit
8 was.

9 Q: Did you ask the developer what was going to happen to
10 the residual property?

11 A: I don't recall having a discussion about that at that
12 time.

13 Q: Did you ever have a discussion with anybody about
14 what was happening with the balance of the property?

15 A: I think I might have over the phone after I got, you
16 know, the notice that they, you know, that they said
17 that they were going to develop that. But, if you
18 ask me details about that discussion, you know, other
19 than the fact that it was pretty --- I wasn't
20 particularly interested.

21 Q: You weren't interested in what was going to happen to
22 the property?

23 A: No, I wasn't interested in the purchasing a separate
24 lot.

25 Q: Weren't you interested in how your property was going

1 to be effected by the neighboring property?

2 A: Well, keep in mind that I knew it have covenants and
3 restrictions on it so I presumed that the covenants
4 and restrictions if they did access, you know, would
5 be part of the homeowners association.

6 Q: So you just assumed that this would be part of the
7 Homeowners Association?

8 A: No, I didn't say that, you know, they told --- my
9 understanding from them was that the deal had not
10 been done yet and at the time that I had talked to
11 them about it. So, I didn't know whether or not it
12 would be accessed or not but the only understanding I
13 had was if they had it would be added to Anchorage
14 Plantation as part of Anchorage Plantation.

15 Q: So, you knew that it could be part of the
16 development, correct?

17 A: It could possibly be, yes.

18 Q: When were the fences put up around the property, the
19 residual property?

20 A: I think when they started running cattle on it, you
21 know, I could go back and remember when they did it,
22 but I can't give you a specific date.

23 Q: Did you ever go onto the residual property?

24 A: No.

25 Q: Never?

1 A: I have never been on it.

2 Q: From the time you first saw the sign you've never
3 been
4 on their property?

5 A: No.

6 Q: Were you aware that prior to the fences being put
7 up that there were delivery trucks coming through
8 residual property for the truck to get the
9 construction materials to the homes?

10 A: No.

11 Mr. McQueeney: Objection. There is nothing in the
12 record about that.

13 Mr. Altman: I'm just trying to find out what he knew
14 about the property and how it was used.

15 The Court: He can answer.

16 A: No I was not aware of that.

17 Q: Describe the Amenity Center for me.

18 A: Okay. The Amenity Center is a pavilion type building
19 and it has a red metal roof. It is pretty much open
20 space with three picnic tables that are under cover
21 and a fireplace. There is an enclosed area. On one
22 side there is a mens bathroom with access to honor
23 system the and on the other side there is a womens
24 bathroom. Each has a single toilet.

25 Q: So, it's a open building?'

1 A: It is essentially an open building except for the
2 bathrooms.

3 Q: Where did the money come from to build it?

4 A: From the homeowner's. The homeowner's in this before
5 I moved back and was not involved. The Board at that
6 time did a deal with Southern Lifestyles, in which
7 Southern Lifestyles offered them, I think, in the
8 neighborhood of 350, 375,000 in lieu of having build
9 a much more elaborate set up which supposedly was to
10 include a swimming pool and tennis court as well as
11 interior space at the amenity center. They were
12 going out of business, they were having a hard time
13 apparently and that Board, it is my understanding
14 from discussions, you know, they thought they better
15 take what they could get, they agreed to take that
16 money in lieu of having Southern Lifestyle building
17 facility.

18 Q: The pavilion that you described, how much was built
19 to build that?

20 A: It was in excess of \$400,000 there had to be an
21 additional assessment placed with all homeowners.
22 Lot owners I should say.

23 Q: You describe the pavilion which is open except for
24 the two bathrooms. When was it built?

25 A: When was it built, 2008, I think it was.

1 Q: And you're saying it costs a little over \$400,000?

2 A: Yes. We were very surprised. It's a commercial
3 building. It required a certain amount of
4 landscaping, it required, you know, certain amount of
5 parking, you know, for handicapped people, you know
6 ramps. We looked at several different people and
7 actually this was the lowest, you know, one of the
8 lowest bids that we had. A commercial, we were told
9 commercial cost of construction complied with, you
10 know, commercial requirements was a lot greater than
11 building a house. It would have been a lot of money
12 for a single family house, a residential house. This
13 was considered a commercial building.

14 Q: Just an open building for \$400,000.

15 A: Well, it has some closed space.

16 Q: Two bathrooms?

17 A: Yes.

18 Mr. Altman: Your Honor, I object to this. I don't
19 know what this, I don't know what it has to do ...

20 The Court: I think he's moving on. I thinks he notes
21 your objection.

22 Q: You've indicated a complaint about the number of
23 people that use to come onto the property. Who
24 allowed them on?

25 A: They came through the gate. No one allowed them on.

1 Q: Were the Walpoles responsible for that?

2 A: I have no idea. I presume not.

3 Q: Presume not. But just people that came onto the
4 property, correct?

5 A: There was the initial gate code that was used and we
6 found it was being used and that was just pound
7 (#100) 100, very simple. We didn't realize it was
8 still in the gate code. I think it was actually
9 assigned to the McKees but everybody seem to know
10 that this was a gate code that you could use to get
11 access to Anchorage. You know word gets around, it's
12 a small community. We asked Mr. McKee to use a
13 different gate code she did, we shut off #1000.
14 Another gate code that was being used after that
15 quite a bit was the emergency code 9111, #9111,
16 which, you know, was supposed to allow emergency
17 vehicles in. It seems that everybody on Wadmaw
18 Island, every vendor, every contractor knows you can
19 get into a gated neighborhood try that or try 09. So,
20 we went to a great deal of pains to contact the
21 police chief, the fire department, get separate codes
22 for each of them which they agreed to do and so we
23 have largely solved the problem of access into the
24 community.

25 Q: Do have any indication that any of the problems with

1 the entrance issues in Anchorage was caused by the
2 Walpoles?

3 A: No.

4 Q: Just other people?

5 A: People.

6 Q: People. Who want to take advantage of something for
7 nothing, right?

8 A: That's right.

9 Q: When was the operation of the association turned over
10 to the property owners?

11 A: It is my understanding that the first annual meeting
12 when the homeowners took over was in November of 2002
13 and there was notice given, there was an election of
14 Board members in 2002. John Mayer was there was
15 elected President. They had a Board meeting in
16 December of 2002 and several more, I think, before
17 March of 2003. I recall seeing a newsletter
18 indicating that they were trying to get started,
19 trying to collect the dues for the new year trying to
20 get things going for the association. So, I believe
21 the date would have had to be by that end of the
22 year.

23 Q: Do you see any documents that were to give the
24 Walpoles any access to the amenity center itself.
25 I'm talking about the pavilion?

1 A: No.

2 Q: Okay. Under the easement we are here talking about,
3 they had access to the roads?

4 A: Yes.

5 Q: And the boating facility and that's it?

6 A: That's correct.

7 Q: When did you adopt the new codes so that the Walpoles
8 didn't have any access to Anchor Watch Drive and
9 Anchor Line Drive to the facility?

10 A: I didn't know that they had a code.

11 Q: When did you adopt the most recent system of
12 assigning codes?

13 A: Our codes have been there as long as I remember. We
14 have, periodically change codes for people when we
15 get unwanted access and we cannot identify who is
16 accessing in. In the beginning, and a lot of people
17 knew this as well. When they set up the codes, they
18 set up the code to get one zero plus the lot number
19 which was so obvious that people just started trying
20 a whole bunch of codes until they could get in. And,
21 so, I think this has been a evolving situation where
22 we see a need to eliminate gate codes, we eliminate
23 gate codes. This has been going on for several
24 years.

25 Q: You said you moved on the property in 2006?

1 A: Yes. And I should say that, you know, the Walpoles
2 don't need to use the gate at --- because they have a
3 gate which they control at the end of Anchor Watch
4 Drive. They've always had access if they wanted to
5 use that. I have no idea if they've used it.

6 Q: A gate they'd have control. Which end of Anchor
7 Watch Drive?

8 A: The other end.

9 Q: Excuse me.

10 A: The other end of Anchor Watch Drive.

11 Q: Up here (indicating)?

12 A: Yes.

13 Q: They have a gate up here?

14 A: They have a gate there.

15 Q: That they can use to get access to where?

16 A: Well, I'm saying they have a gate here. That gate is
17 between their property on their fence line and Anchor
18 Watch Drive.

19 Q: So they can access it from here is what you're
20 telling me, from the far end?

21 A: They could. I don't know if they ever have.

22 Q: Are you concerned about the Walpoles or whoever they
23 might sell to having access or the fact that they
24 don't pay enough money?

25 A: Absolutely.

1 Q: Which one are you more concerned with.

2 A: I'll tell you what. I am concerned with the amount
3 of money that we spend, which we have tried to hold
4 back the \$1,400 which we have collected this year but
5 we have done so because we cannot decide with the
6 seal coating we're not going to have quite as much
7 delivery service here. But we undoubtedly will have
8 to continue to pay or in access of \$1,400 in future
9 years. We are also equally, well, probably not as
10 equally concerned because this is a financial
11 incentive but the other issues also effect property
12 values and that is by having no control whatsoever of
13 people coming onto Anchorage from adjacent
14 properties using our facilities and using our roads
15 without any invested interest or us to have any
16 recourse to control their behavior once on Anchorage
17 or the ability to do whatever they want out there
18 including using the facilities and denying us those
19 facilities. Having all that there is a problem that
20 would lower property values and people would have
21 quite a bit of money invested in these properties.
22 And the third thing is the liability issues. So, you
23 know, the more people you have on there and non
24 property owners using our facilities the more
25 liability we have. So, all of those things are of

1 great concern to the Board.

2 Q: The expenses that have been concurred to date, the
3 need to fix the roads, none of that is attributable
4 to the Walpoles, is it?

5 A: At the present time, no. Not that I know of.

6 Q: So, the money that you will take to seal coat the
7 road, that is not the Walpoles issue. They didn't
8 cause that. They aren't using the road are they?

9 A: As far as I know they are not.

10 Q: That is something that the existing property owners
11 will have to deal with. They caused it because of
12 their use?

13 A: Yes. But, yes.

14 Mr. Altman: Bear with me one moment.

15 Q: Mr. Brostoff, how many houses are there at Anchorage
16 today?

17 A: Okay. In addition to the McKees there are about a
18 dozen but if you give me a chance to think about it,
19 an exact number. I'll give you I think maybe more
20 like fourteen.

21 Q: Are the assessments for the people who have homes at
22 Anchorage greater than for the assessments for people
23 who don't have homes?

24 A: At this point in time, no.

25 Q: They are all \$1,400?

1 A: Yes.

2 Q: Per year?

3 A: Yes.

4 Mr. Altman: Your Honor, I don't have anything more
5 right now but I really need to see those minutes or the
6 emails or whatever they used to approve this. I have some
7 serious questions about it and whether or not they have
8 complied with their own requirements.

9 Mr. Walker: Your Honor, I just have a suggestion.
10 I'm not going to exam the witness.

11 The Court: Go ahead.

12 Mr. Walker: As Mr. McQueeney said, we don't think
13 they are relevant. We have checked the discovery
14 responses. I think the witness is willing over the night
15 to look for them and what we'd suggest with the court's
16 permission we adjourn and he can see if he can find them.
17 Also, Mr. McQueeney and I can confer and maybe we can cut
18 down some proof on the remainder of our case overnight and
19 so I think we could accomplish several things if we could
20 do that.

21 The Court: That's an excellent idea.

22 Mr. Altman: We concur, Your Honor.

23 The Court: All right. We're going to break for the
24 evening. So, you're going to need to and Mr. McQueeney is
25 going to tell you what you need to produce. Ten o'clock,

1 will that give you time to get here, get the information
2 and get here and have that opportunity?

3 Mr. Altman: Your Honor, that would be perfect for
4 us. We'd ask for one questions how many more witnesses
5 the Plaintiff will have.

6 The Court: I think they are hoping over the evening,
7 get it down.

8 Mr. Walker: Exactly, we may even rest after this
9 witness. There is one we might call ...

10 The Court: You may step down, sir. All right. I'll
11 see you all at 10:00.

12 (End of today's hearing)

13 (Wednesday, February 27, 2013 Hearing Continued)

14 Bailiff: All rise.

15 The Court: Thank you. Be seated. Are we ready to get
16 started?

17 Mr. Altman: Yes ma'am. Before we do that, we have
18 engaged in some settlement discussions and have made some
19 offers that we think we are fairly close. The problem is
20 that the Home Owner's Association, Mr. Brostoff cannot
21 make the decision on his own.

22 The Court: Okay. So what can we do to facilitate
23 that?

24 Mr. Walker: Well, here's what we thought Your Honor.
25 Given the significance to the community, the community

1 needs to decide and also the provisions that are probably
2 triggered that require a special meeting. So what Mr.
3 Altman and I have talked about is getting back to the
4 Court in approximately forty days. We complete the trial
5 and then we will let you know ...

6 The Court: Well, let's not, let's not engage in any
7 more testimony if it's not needed.

8 Mr. Walker: Well, when we get back in forty days or
9 so.

10 The Court: Do we need to have, because we had
11 stopped to redirect or at least finish the testimony.

12 Mr. Walker: Well, we'd like to complete the trial.

13 The Court: Will that be the completion of the trial
14 for you?

15 Mr. Walker: Yeah.

16 The Court: Oh, okay.

17 Mr. Walker: I mean we have one more witness who will
18 be very short and that will be the presentation of our
19 case and I don't think the defense case is going to take
20 that long.

21 Mr. Altman: Your Honor, we would have two witnesses.

22 The Court: Alright, why can't we just, well I'll let
23 you finish your case, how about that? And then we'll, if
24 needed, then we'll hear defense? How about that?

25 Mr. Altman: Are you talking about at a later date?

1 Okay, Your Honor we just need to advise the Court this
2 that we're talking about forty to sixty five days.

3 Ms. Coker and I have a trial, a day certain trial in
4 ...

5 The Court: Why do we need forty to sixty days?

6 Mr. Altman: Because of the special meeting.

7 Mr. Walker: The association has

8 The Court: They have to have forty days notice of
9 thirty days notice?

10 Mr. McQueeney: Thirty days notice and we'd like to
11 work out the specific provisions ...

12 The Court: There wasn't a provision in there? I know
13 he said they voted by email.

14 Mr. McQueeney: That's for the record, Your Honor.

15 The Court: Oh, okay.

16 Mr. McQueeney: I think in order to convey a property
17 right, which is how we look at it, to convey a property
18 right to a third party by the Association. Or release a
19 property right or whatever you want to call it, they would
20 need the permission of the Association as a whole and not
21 just the Board of Directors. There is a thirty day notice
22 period for a special meeting of the Association as a
23 whole. Our intent would be, over the next five or six days
24 to work out a good, detailed, written, proposed agreement,
25 talk to the board of directors and get them behind the

1 agreement, or, or you know, if they don't want to, they
2 don't want to. And then meet with the homeowner's and
3 present that agreement, notice that agreement and discuss
4 it at the Home Owner's meeting.

5 Mr. Altman: Your Honor, I just want to say for
6 scheduling purposes, Ms. Coker and I have a day certain
7 trial in Berkeley County scheduled to start March 25th for
8 four weeks.

9 Ms. Coker: It's actually closer to six.

10 The Court: Six weeks?

11 Ms. Coker: It's the Daniel Island Oaks case that
12 you've done the scheduling orders for?

13 The Court: Before Judge Nicholson?

14 Ms. Coker: Yes.

15 The Court: I thought that was a three week case.
16 (Off the record in chambers meeting)

17 The Court: Please have a seat in the witness stand
18 and I remind you that you're still under oath. And Mr.
19 Altman what I recall is you had, in essence, finished your
20 questioning, but there was some concern about some emails
21 and so I, we adjourned. Have you had an opportunity to go
22 over those emails?

23 Mr. Altman: We, we have seen the emails, Your Honor,
24 and the limits that are related to those and I just have a
25 couple of questions for Mr. Brostoff.

1 (Off the record)

2 Mr. McQueeney: Your Honor, if I may approach?

3 The Court: Okay.

4 Mr. McQueeney: He's going to be discussing, Your
5 Honor.

6 The Court: Is this the original?

7 Mr. McQueeney: No, I didn't make copies of it; I put
8 the exhibit sticker on it when I got here, so ...

9 The Court: Okay.

10 Mr. McQueeney: ... three originals and I put the
11 original with the other exhibit or other exhibits.

12 The Court: Okay, okay.

13 Mr. Altman: Your Honor, you're holding exhibit
14 thirty two?

15 The Court: Yes.

16 Mr. Altman: Okay and I'm handing the witness a copy
17 of that.

18 CONTINUED EXAMINATION FROM 2-26-13 OF MR. BROSTOFF BY MR.

19 ALTMAN:

20 Q: Mr. Brostoff, have you reviewed those documents,
21 Plaintiff's exhibit thirty two?

22 A: I'm doing that right now.

23 Q: Please let me know when you've done so.

24 A: Yes sir.

25 Q: Mr. Brostoff, as I understand your testimony

1 yesterday was that the board by emails approved the
2 suit, is that correct?

3 A: Yes, filing the complaint and the complaint was sent
4 to all of the board members, the final version of the
5 complaint. There was some back and forth before then
6 with draft cuts and so forth.

7 Q: Okay, they approved the complaint?

8 A: Yes, filing the complaint.

9 Q: Was there a formal motion to approve the suit?

10 A: I don't recall if that were the case. We've had a lot
11 of discussions about how we should move forward
12 getting legal advice and to file the suit. I think
13 it really depended finally on whether or not we could
14 approve the complaint being filed. So there were
15 discussions. There may not, there may have been a
16 consensus with other, but.

17 Q: There are no board meeting minutes that say that the
18 Board approved the actions, right?

19 A: Right. I think at the annual meeting, a lot of the
20 annual meetings we gave the two kind of options that
21 we were considering, one or the other I think and one
22 said, I don't know if this is the Home Owners's
23 Association or not.

24 Q: Mr. Brostoff, do you believe that the, all of the
25 property owner's with the membership of the

1 association had to approve this suit?

2 A: No.

3 Q: You do not think so?

4 A: No.

5 Q: Okay, I'm going to ask you to refer to exhibit thirty
6 two please.

7 A: Okay.

8 Q: Plaintiff's exhibit thirty two, which is a, the
9 minutes of a Board of Directors meeting of Anchorage
10 Plantation Homeowner's Association, Inc., dated
11 August 3, 2009. Do you see that?

12 A: Which page?

13 Q: I'm just asking you to identify the document.

14 A: Yes.

15 Q: Okay, I'm going to ask you to turn to the second
16 page.

17 A: Okay.

18 Q: And in the, you see about two thirds of the way down
19 you see where it says legal update?

20 A: Oh, I'm sorry. Legal update.

21 Q: Legal update. Do you see that?

22 A: Uh-huh.

23 Q: Okay, I'm going to ask you to read the last sentence
24 of that paragraph that starts with the word Walpole.
25 Will you please read that to the Court?

1 A: The Association goes to ensure the interest to
2 Anchorage Plantation to protect and obtain membership
3 approval to allow the Board of Directors to proceed
4 with legal actions.

5 Q: But there was no vote by the members of the
6 Association to approve the suit was there?

7 A: I think the, the, this is the Anchorage Plantation
8 Homeowner's Association meeting and these minutes
9 were approved at the next meeting.

10 Q: Okay, I'm going to ask you again to please look at
11 the front page to Plaintiff's exhibit thirty two.

12 A: Yes.

13 Q: And it says at the top and correct me if I'm wrong
14 when I'm reading this. Anchorage Plantation
15 Homeowner's Association, Inc., Board of Director's
16 meeting Tuesday, August 3, 2009, five o'clock pm
17 Berkeley Electric, John's Island, South Carolina.

18 A: Yes.

19 Q: And you have, we just read from the second page of
20 that document?

21 A: Right.

22 Q: This was not a association meeting, this was a board
23 meeting?

24 A: That's right.

25 Q: Okay. Are there any minutes of any meeting of the

1 association or was there a meeting of the association
2 meeting to approve the suit?

3 A: I think there was information about the fact that we
4 were going to at one of the annual meeting and then,
5 I think those minutes were approved the following
6 year.

7 Q: Was there a vote to bring the suit?

8 A: By the association?

9 Q: Yes sir.

10 A: By the association as a whole at the annual meeting?
11 No there wasn't not.

12 Q: No there wasn't?

13 A: No.

14 Q: Okay. Do you believe that to be necessary?

15 A: I do not, I do not believe it to be necessary, no.

16 Q: Are you familiar with the covenants for Anchorage
17 Plantation?

18 A: Yes.

19 Q: Okay, I'm going to ask you to look at exhibit ten.

20 A: Yes.

21 Q: Section 14.4 of the covenants on page thirty eight.
22 Are you there?

23 A: Yes.

24 Q: Okay, do you see section 14.4?

25 A: I do.

1 Q: Reads no judicial or administrative proceeding,
2 including a mandatory procedure under section 14.3
3 above with or without controversy exceeding twenty
4 five thousand dollars will be commenced or prosecuted
5 by the Association unless seventy five percent or
6 more of the votes of the entire association by
7 referendum are by meeting of the members called for
8 that purpose of approving the proceeding. Do you see
9 that?

10 A: Yes.

11 Mr. Altman: Okay, nothing further.

12 CROSS EXAMINATION OF MR. BROSTOFF BY MR. MCQUEENEY:

13 Q: Mr. Brostoff, those emails do reflect that the board
14 voted to bring suit against the Walpoles ...

15 A: Yes.

16 Q: ... and form the complaint?

17 A: Yes.

18 Q: And the last page of those, or the second to last
19 page is exhibit thirty two, the board meeting minutes
20 from March 2, 2010.

21 A: Yes.

22 Q: That indicates that the board approved the email
23 correspondence and those took place prior to the
24 meeting?

25 A: Yes.

1 Q: And was there a meeting between this time, excuse me,
2 the time of those emails and this particular board
3 meeting?

4 A: No.

5 Q: The declaration you have in front of you.

6 A: Uh-huh.

7 Q: Let me make sure I have a copy real quick. Is that
8 ten?

9 Court Reporter: Yes, sir.

10 Q: Yes, that's correct, okay. The, if I could peer over
11 your shoulder a little bit.

12 Ms. Coker: Mr. McQueeney, I have an extra copy.

13 Mr. McQueeney: That would be great.

14 Q: Does that section contain any other provision with
15 respect to the Association's ability to bring suit?

16 A: Does the section, this is the Alternative Dispute
17 Resolution section?

18 Q: The section I believe it's after or right before the
19 Alternate Dispute Resolution.

20 A: Oh, okay. And what, tell me what you want?

21 Q: Does it have any other provision regarding the
22 procedure of bringing suits within the provision that
23 discusses suits above twenty five thousand dollars?

24 A: Not to my knowledge, accept in the Alternative
25 Dispute Resolution, which I believe ...

1 Q: What page

2 A: Okay, page thirty eight, which is the page he was
3 pointing out to me.

4 Q: Exhibit 14.2 or excuse me, article 14.2.

5 A: Uh-huh.

6 Q: What is the title of that article?

7 A: Article 14.2 says, that one?

8 Q: Correct.

9 A: Yes.

10 Q: Subsection B, can you read that please?

11 A: Any suit by the Association to obtain a temporary
12 restraining order and other relief the Court may deem
13 necessary in order to maintain the status quo to
14 reserve any enforcement power of the association here
15 under until the matter may be resolved on the merit
16 pursuant to section 14.3.

17 Q: Okay and excuse me. The, I apologize. I couldn't find
18 my highlighted copy. Okay, thank you. Okay, I
19 apologize. Section 14.4, which is at the top of page
20 thirty nine.

21 A: I have it continuing on the top.

22 Q: Correct. Right, it begins on page thirty eight and
23 runs to page thirty nine.

24 A: Yeah.

25 Q: I believe you read the first sentence of that section

1 through any such meeting. Can you please read, well,
2 can you please read the following sentence through
3 portion (a)?

4 A: Okay, starting with this section?

5 Q: Correct.

6 A: This section will not apply however to(a) actions
7 brought by the Association in the course of
8 provisions of this declaration, including, without
9 limitation the foreclosure of homes.

10 Q: Thank you. Has the Association paid legal fees to my
11 law firm to prosecute this case?

12 A: Yes, it has.

13 Q: Has it been paying them since 2010?

14 A: Yes it does.

15 Q: Has anyone on the board of association objected to
16 the payment of legal fees to my, to my firm?

17 A: No. They have not.

18 Q: Has anyone from the Association objected?

19 A: No, they have not.

20 Q: Okay, thank you. Have had an annual meeting since
21 2009?

22 A: Yes, we have.

23 Q: Have you discussed the Walpole suit since 2009?

24 A: Yes, we have.

25 Q: Has the board discussed the Walpole suit since 2009?

1 A: Yes.

2 Q: Have their been any objections to the continuation of
3 the suit?

4 A: No, there hasn't. Most people felt they were
5 necessary.

6 Q: Okay, thank you. Nothing further Your Honor.

7 The Court: Okay, you may step down. Thank you. Call
8 you next witness.

9 Mr. McQueeney: One moment, Your Honor.

10 The Court: Okay.

11 Mr. McQueeney: Your Honor we are, the Plaintiff is
12 going to rest at this time and further discussions that we
13 had we are going to adjourn and get back to the court to
14 determine whether it is necessary to proceed further.
15 Before we rest, I would like to move exhibit thirty two
16 into evidence.

17 The Court: Okay, is there any objections?

18 Mr. Altman: No objection Your Honor.

19 The Court: Thirty two into evidence without
20 objection.

21 Mr. McQueeney: Thank you, Your Honor. Now we rest.

22 The Court: Alright, should something arise, I'm sure
23 there will be no objection to allowing you to reopen your
24 case.

25 Mr. McQueeney: Alright, thank you Your Honor.

1 The Court: Is that a fair statement?

2 Mr. Altman: It's a fair statement Your Honor.

3 The Court: Thank you. You will let me know working
4 around the board scheduled to get the notice out in a
5 timely fashion and working around your six week case and
6 we will work you in to accommodate. I'm going to put a
7 note sixty days out so I will assume that I will hear from
8 you prior to that date. Alright?

9 Mr. Altman: We will make sure we report back to the
10 Court timely.

11 The Court: Okay, thank you.

12 Mr. McQueeney: Thank you Your Honor.

13 The Court: We will keep the exhibits?

14 Clerk: Yes, ma'am.

15 The Court: Please take your big photo, thank you.
16 Anything further?

17 Mr. McQueeney: Nothing further from the Plaintiff
18 Your Honor.

19 Mr. Altman: Thank you, Your Honor.

20 The Court: Okay, thank you.

21 (End of hearing)
22
23
24
25

CERTIFICATE

This is to certify that the motion transcript in the matter of Anchorage Plantation Home Owner's Association vs. John Walpole, et al., consisting of One Hundred Sixty-Two (162) pages is a true and correct transcript; said hearing was reported by the method of Stenomask with Backup.

I further certify that I am not employed by any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 25thth day of November, 2014.

Melissa R. Singletary
Certified Court Reporter

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF CHARLESTON) NINTH JUDICIAL CIRCUIT

ANCHORAGE PLANTATION)
HOMEOWNERS ASSOCIATION,)
Plaintiff,)
vs.) Case No.: 2010-CP-10-0482
JOHN B. WALPOLE and)
THEODORA W. WALPOLE,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS
CONTINUATION OF HEARING FROM FEBRUARY 26, 2013
HEARD BEFORE JUDGE KRISTI LEA HARRINGTON
ON JUNE 21, 2013

ROLAYNE M. VOLPE, CCR, RPR
Court Reporter for the State of South Carolina at Large
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A P P E A R A N C E S

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Reported By:
Rolayne M. Volpe, CCR, RPR
Official Court Reporter for the State of Carolina

2010-CP-10-0482
Anchorage HOA vs John and Theodora WalpoleI N D E X

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(Exhibits were returned to counsel.)

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2010-CP-10-0482
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1 The above-styled cause came on for hearing on
2 the 21st day of June, 2013, at 12:06 p.m., before Judge
3 Kristi Lea Harrington, Resident Judge, presiding over
4 the Court of Common Pleas for the County of Charleston,
5 when the following proceedings were had and entered of
6 record, to wit:

7 PROCEEDINGS

8 MR. WALKER: Counsel for the Plaintiff is
9 ready.

10 MS. COKER: Counsel for Defendants are ready.

11 MR. WALKER: Your Honor, when we adjourned back
12 in February, the Plaintiff was near the close of
13 Plaintiff's case, the Defense had just finished
14 cross-examining Steven Brostoff, and you were kind
15 enough to leave the record open. I've been speaking
16 with my opposing counsel, and we've reached an agreement
17 to admit into evidence Plaintiff's Exhibits 30 and 31
18 without objection.

19 Is that correct?

20 MS. COKER: That's correct.

21 MR. WALKER: So my partner is going to provide
22 those to the court reporter. So we move for their
23 admission.

24 (Plaintiff's Exhibit Nos. 30 and 31 are marked
25 into evidence.)

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1 MR. WALKER: Your Honor, when we adjourned last
2 time, one of the witnesses listed by the Defendants --
3 he's actually, is -- or was Neil Robinson, who was the
4 attorney for Southern Lifestyles. Mr. Robinson is an
5 attorney here who is very involved -- specifically, we
6 have learned, that we tried to get him for the
7 resumption of the trial today, that he's unavailable
8 because he's in Clemson, South Carolina. He is on the
9 Board of the Clemson Real Estate School, and he's the
10 incoming president, and he was unavailable. As a
11 result, he is not available for trial. He's not going
12 to be called by the Defendant. We don't know whether we
13 would like to call him in reply. We will get to that
14 question later at the conclusion of the Defense case.
15 but I just want to --

16 THE COURT: Will he appear today?

17 MR. WALKER: Excuse me?

18 THE COURT: Will he appear today?

19 MR. WALKER: No, because he's in Clemson at his
20 board meeting.

21 THE COURT: Then you won't be able to call him
22 in reply.

23 MR. WALKER: I understand.

24 THE COURT: All right.

25 MR. WALKER: We may ask the Court to leave the

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1 record open --

2 THE COURT: I'm not leaving -- we're resolving
3 this case today.

4 MR. WALKER: All right.

5 THE COURT: All right? Thank you.

6 MR. WALKER: Thank you, your Honor.

7 That concludes the Plaintiff's case, then, your
8 Honor.

9 (Plaintiff rests.)

10 THE COURT: Thank you.

11 MS. COKER: Your Honor, absent any procedural
12 issues that we need to address with regard to having put
13 this in abeyance for so many days, Defendants are ready
14 to call their first witness.

15 THE COURT: All right. Thank you.

16 MS. COKER: The Defendants call Karen Colie.

17 **KAREN COLIE,**

18 having been first duly sworn by the Courtroom Deputy
19 Clerk of the Court to tell the truth, the whole truth,
20 and nothing but the truth, was examined and testified
21 upon her oath as follows:

22 **DIRECT EXAMINATION**

23 **BY MS. COKER:**

24 Q Ms. Colie, you and I have met in the past. My
25 name is Meredith Coker. I'm here representing the

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1 Walpole family, and we have spoken briefly out in the
2 hall and so forth. But for the Court's purposes, could
3 you explain where you're employed?

4 A Yes. The Marshland Communities. It's a
5 community association management company.

6 Q And your company is the property manager for
7 Anchorage POA; is that correct?

8 A HOA, yes.

9 Q HOA. Excuse me.

10 And if I refer to the HOA today, we're
11 referring to this one.

12 A Yes.

13 Q Great. Ms. Colie, I just have a few brief
14 questions with regard to the current assessments and the
15 historical assessments at the HOA property. We just
16 admitted what has been previously marked as Plaintiff's
17 Exhibit 30 and 31. Do you have --

18 MS. COKER: Can I approach to hand her copies
19 of those?

20 (Documents are handed to the witness.)

21 Q (By Ms. Coker) Ms. Colie, do you recognize
22 those two documents?

23 A I do.

24 Q What is Exhibit 30?

25 A Exhibit 30 is the 2008 budget.

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1 Q And did you prepare that budget?

2 A I did.

3 Q And what was the purpose of your preparing this
4 budget?

5 A I am asked to, as part of my duties as the
6 manager, to provide a draft budget to the Board for
7 adoption.

8 Q And with regard to Exhibit 31, could you
9 describe that document?

10 A This is the 2010 budget.

11 Q And that Exhibit 31 also has the actual amount
12 spent in 2009?

13 A Yes.

14 Q And it also breaks down the proposed 2010
15 budget by owner; is that correct?

16 A Not by owner. Yes -- yes, it does.

17 Q Okay. And what was the -- in 2010, as an
18 example, what was the annual assessment per lot owner in
19 the HOA?

20 A \$1,400 per lot owner.

21 Q And do you have an idea of how much of that is
22 attributable to maintenance and repair of the roadways
23 and docks?

24 A 25,400. Or \$343 of the 1,400 for the -- for
25 that specific year.

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- 1 Q And do you manage properties other than the
2 Anchorage HOA?
- 3 A We do.
- 4 Q And are their assessments about in line with
5 other --
- 6 A Very individual. It has a lot to do with the
7 assets of the community, and, you know, the common
8 property that they own and have to maintain. So that's
9 a difficult question to really -- it's hard to compare.
- 10 Q Does it depend on the number of individual lot
11 owners or homeowners?
- 12 A Sure. You have certain expenses, and, you
13 know, you share that equally among lot owners.
- 14 Q So the more lot owners that would be in an HOA,
15 generally speaking, the lower their assessment?
- 16 A It can definitely impact. Also higher usage
17 can create more expenses. So certainly that would have
18 a possible impact.
- 19 Q Ms. Colie, the HOA was turned over from the
20 developer Southern Lifestyles to the individual lot
21 owners in 2002; is that correct?
- 22 A I don't know. That's before my time. I
23 believe it was between 2002 and 2004. I'm not certain.
- 24 Q But when did you all start managing the
25 property?

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1 A 2000- -- end of 2005.

2 Q And you were dealing, at that point, directly

3 with the lot owners?

4 A We were hired by the Board, yes.

5 Q And that was the Board of Directors, comprised

6 of the lot owners?

7 A Uh-huh.

8 Q Ms. Colie, I direct your attention back to

9 Exhibit 31 for just a moment. There are what appear to

10 be budget notes both in 2009 and 2010. Do you see

11 the -- the English writing, not the numbers?

12 A Yes.

13 Q Okay. And did you produce what those notes

14 were?

15 A Yes.

16 Q So someone could look at these exhibits and

17 determine what each of the operating expense accounts is

18 for; is that correct?

19 A Yes.

20 Q And with regard to management services, is that

21 your fee for managing the HOA?

22 A It is.

23 Q Does it entail any actual management of

24 the -- the dock itself or any of the common areas?

25 A We do not perform repairs. We will ensure that

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1 it is maintained.

2 Q And with regard to, also on the Exhibit 31, on
3 legal expenses, is that, in 2009, there was a \$10,000
4 charge for legal expenses. What was -- why was that
5 such a high figure?

6 A We --

7 MR. McQUEENEY: Objection, your Honor.

8 Objection to the inference that it's a high figure.

9 THE COURT: Overruled.

10 MS. COKER: I can rephrase, your Honor.

11 THE COURT: I overruled his objection. You may
12 continue.

13 Q (By Ms. Coker) Why was that -- excuse me.
14 Strike that.

15 Please answer the question, ma'am.

16 A It was in regard to a violation regarding
17 architectural control against an individual homeowner,
18 that we ended up going to court and prevailing.

19 Q So that \$10,000 figure is -- it's out of the
20 norm?

21 A Yes.

22 Q With regard to the current outstanding budget,
23 what's the current assessment per lot owner?

24 A The current assessment is 1,400.

25 Q And with regard to the operating expenses, I

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1 have the 2010 budget, that's when the suit commenced.
2 But with regard to these operating expenses, are these
3 substantially the same numbers that you have in the
4 current budget, or have there been any major changes?

5 A We've had to increase the road reserve
6 allocations. The road is starting to decline and
7 requires additional repairs. And we actually did some
8 major maintenance on it this year.

9 MS. COKER: Thank you, Ms. Colie. No further
10 questions for you.

11 **CROSS-EXAMINATION**

12 **BY MR. McQUEENEY:**

13 Q Ms. Colie, what -- I believe you testified the
14 current assessment for a member of the association is
15 \$1,400?

16 A Yes.

17 Q What's the current assessment for a member of
18 the association who only wants to use the roadways, boat
19 landing, and community dock?

20 A 1,400.

21 Q What's the current assessment for a member of
22 the association who doesn't want to pay expenses
23 associated to the architectural control?

24 MS. COKER: Objection to the form of that
25 question, your Honor.

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1 THE COURT: Overruled.

2 THE WITNESS: It is \$1,400.

3 Q (By Mr. McQueeney) What is the current
4 assessment for a member of the association who doesn't
5 want to use, for inference, the amenities?

6 A It will remain the same, \$1,400.

7 Q So it's all or nothing?

8 A Yes.

9 Q There's no exception to the \$1,400 annual
10 assessment?

11 A No.

12 Q Are members also subject to special
13 assessments?

14 A Yes.

15 Q As far as costs associated with the roadways,
16 boat dock, and boat landing, are those costs due -- do
17 the operating expenses of the association including, for
18 instance, property management fees, solely involve cost
19 associated with architectural control or collection of
20 assessments?

21 A No.

22 Q What other costs or items are involved in the
23 property management fee, for instance?

24 A Overseeing vendor contracts, performance, and
25 maintaining the property, long-term range planning, and

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1 financial planning to ensure that they have proper
2 funding for long-term repairs. It's quite extensive,
3 actually.

4 Q As far as preparing the budget, do you ever
5 have to get estimates of costs moving forward?

6 A Yes, we do that on a regular basis.

7 Q Do you ever have to address estimates of road
8 costs moving forward?

9 A We recently did that and found that we were
10 sorely underfunded.

11 Q Okay. So is part of your responsibility
12 to -- or, I guess, part of your job in compiling the
13 budget, to also assess cost associated with the road and
14 the community boat dock and the community boat landing?

15 A Yes.

16 Q As far as collection costs for assessments, did
17 those have any relationship to the community boat dock
18 or landing or roadways?

19 A Collection assessments?

20 Q Let me put it another way, if I may withdraw
21 the question.

22 Does the association engage in the collection
23 of assessments?

24 A Yes. We provide that service as part of our
25 management.

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1 Q Okay. And part of the assessments goes to pay
2 for the roadways, common dock -- or common boat landing
3 and community dock; correct?

4 A Yes. We call it a road allocation, into a
5 separate bank account.

6 Q Okay. Would it be fair to assume that part of
7 cost in collecting assessments involves collecting
8 assessments for the use and maintaining the roadways,
9 community dock, and boat landing?

10 A Definitely.

11 Q Are you familiar with the easement agreements
12 that are the subject of this lawsuit?

13 A Briefly, yes.

14 Q Okay. Do you have any idea what the proposed
15 assessments for each lot owner, for members, within that
16 Walpole property, conventional lot owners would be?

17 A Yes.

18 Q What would that be?

19 A \$100 annually.

20 Q Do you know if those people have to submit to
21 the architectural control of the association?

22 A No. That's a major concern.

23 Q Why is that a major concern?

24 A Anchorage is a beautiful community with high
25 standards and a stringent architectural review committee

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1 that's very active, and the possible impact that homes
2 that do not meet that standard could drastically change
3 the property values and impact the overall aesthetics of
4 the community.

5 Q How many access points are there currently to
6 the property you manage in Anchorage Plantation?

7 A One private, gated.

8 Q Have there been any difficulties in enforcing
9 or controlling the access point?

10 A There has. Each lot has its own gate code, and
11 we have to monitor it daily in our office. It's a very
12 time-consuming process. We keep -- we work hard to keep
13 it private.

14 Q Do you know if there's been any proposal to add
15 access points for Anchorage Plantation from anyone?

16 MS. COKER: Objection, your Honor, to the
17 extent that that goes to Rule 408, I don't believe she
18 can testify to it.

19 MR. McQUEENEY: No settlement, no discussion --

20 THE COURT: Would you like me to rule, or do
21 you want me to just go with her assessment?

22 MR. McQUEENEY: I apologize.

23 THE COURT: Sustained. Thank you.

24 Q (By Mr. McQueeney) With the exception of
25 anything you've heard with respect to settlement

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1 negotiations between the parties, has there been any
2 discussion of adding access points to Anchorage
3 Plantation?

4 A Yes.

5 Q Okay. Is the association currently prepared to
6 control those access points?

7 A Absolutely not.

8 Q Do you know the cost of controlling those
9 additional access points?

10 A It's a large part of our job as a management
11 firm in controlling the single access. I would imagine
12 that it will be staggering.

13 Q And, again, the -- is it your understanding
14 that the future lot owners of the Walpole property would
15 have to contribute to cost associated with, for
16 instance, architectural control within Anchorage
17 Plantation?

18 A Yes.

19 Q That they would or would not have to contribute
20 to those costs?

21 A For which property?

22 Q The Walpole property.

23 A Oh, no. It's my understanding that they are
24 not -- the -- their main documents in architectural
25 control standards do not apply to that land at all.

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1 Q Would they have to pay for the cost of the
2 collection with respect to the current Anchorage
3 community -- the -- collecting assessments, excuse me.

4 A No. You know, basically everything that's
5 currently a part of the Anchorage HOA does not apply to
6 them.

7 Q Okay. They wouldn't have to pay your property
8 management fees?

9 A No.

10 MR. McQUEENEY: Okay. No further questions.

11 THE COURT: Redirect?

12 MS. COKER: Short Redirect, your Honor.

13 **REDIRECT EXAMINATION**

14 **BY MS. COKER:**

15 Q Ms. Colie, I'm going to point out a few places
16 on this board as we've previously discussed about 90
17 days ago. This is an overhead view of the Walpole
18 property and the Anchorage Homeowners Association. I
19 will represent to you that it's been previously
20 discussed -- I believe you were present -- that the
21 yellow dots are each an individual lot in the HOA, and
22 then the --

23 I'm sorry. Can you see this?

24 A I can enough, I believe.

25 Q -- and each of the blue and yellow half dots

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1 are where there were homes built. Does that look
2 accurate to you?

3 A It does. It looks close.

4 Q The people that currently own lots that do not
5 own houses out there -- or not yet built their houses,
6 do they pay the same assessment as the folks that live
7 out there?

8 A They do.

9 Q So the folks that use the roads 365 days a year
10 pay the same as the people that may or may not ever come
11 out there?

12 A They do.

13 Q And when was the gate constructed?

14 A I don't know.

15 Q Was it before you became the management
16 company?

17 A Yes.

18 Q Do you know if it was prior to the turnover to
19 the individual homeowner board?

20 A I have no idea.

21 MS. COKER: Thank you, Ms. Colie. Nothing
22 further.

23 MR. McQUEENEY: No further questions.

24 THE COURT: You may step down. Call your next
25 witness.

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1 MS. COKER: Your Honor, the Defendants call
2 Billy Walpole to the stand.

3 THE COURT: Mr. Walpole.

4 (The oath is administered by the Deputy Clerk
5 of Court, and the witness answers as follows:)

6 THE WITNESS: Yes, ma'am.

7 THE COURTROOM DEPUTY CLERK: State your full
8 name and spell your last name.

9 THE WITNESS: My full name is John William
10 Edwards Walpole, Jr. I go by Billy.

11 THE COURT: Spell your last name.

12 THE DEFENDANT: Walpole, W-a-l-p-o-l-e.

13 THE COURT: Thank you.

14 **JOHN WILLIAM EDWARDS WALPOLE, JR.,**

15 having been first duly sworn by the Courtroom Deputy
16 Clerk of the Court to tell the truth, the whole truth,
17 and nothing but the truth, was examined and testified
18 upon his oath as follows:

19 **DIRECT EXAMINATION**

20 **BY MS. COKER:**

21 Q Mr. Walpole, what is your relationship with the
22 Defendants in this case, John and Theodora Walpole?

23 A My grandparents.

24 Q And you were appointed by consent of the
25 parties as the *guardian ad litem* in this case for

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- 1 Mr. John Walpole; is that correct?
- 2 A Yes.
- 3 Q How long have you known about the Anchorage
- 4 Plantation property?
- 5 A As long as I can remember.
- 6 Q You and your family discussed the property
- 7 often?
- 8 A Yes.
- 9 Q You've been out there several times?
- 10 A Yes.
- 11 Q Have you, yourself, participated in farming
- 12 operations on the property?
- 13 A Yes.
- 14 Q Have you participated in any of the ongoing
- 15 disputes related to the property?
- 16 A All. Yes.
- 17 Q And you've participated in prior discussions
- 18 with Southern Lifestyles?
- 19 A Yes. Not all, but some, yes.
- 20 Q I'm going to point you to this board -- and you
- 21 created this board; is that correct?
- 22 A Yes.
- 23 Q Prior to the purchase of what's Phase I and
- 24 Phase II of the Anchorage Plantation Subdivision
- 25 Homeowners Association and whatnot, what parcel did your

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1 family own?

2 A If you remove all the yellow dots, that entire
3 one thousand -- approximately 1,050-acre tract of land.

4 Q So for purposes of the record, from the red
5 lines around this board, around to the actual, I guess,
6 to the river?

7 A To the river, yes.

8 Q Was there a farm -- strike that.

9 Were you all using the entire tract of land for
10 farming operations?

11 A Yes.

12 Q And was there a farm road that generally ran
13 where Anchor Watch Drive is now?

14 A Approximately, yes.

15 Q And you all utilized that, how often?

16 A I would say every day it was used for
17 something.

18 Q Who put in the boat ramp?

19 A My grandfather did.

20 Q And for what purpose was the boat ramp
21 originally constructed?

22 A I don't know if there's any specific purpose,
23 other than to put the boat ramp in.

24 Q But did your family utilize the boat ramp?

25 A Yes. My uncle lives right next to that

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1 property where the HOA amenity center is, and he would
2 use that boat ramp to launch his boat. And there was
3 also a home at the northern end of the property, that's
4 actually still there, that another family member lived
5 in, and they would utilize the boat ramp as well.

6 Q Mr. Walpole, I'm going to discuss for a few
7 minutes what's been previously marked as Plaintiff's
8 Exhibit 5.

9 MS. COKER: May I approach, your Honor?

10 THE COURT: You may.

11 Q (By Ms. Coker) Mr. Walpole, I'm going to hand
12 you what has been marked as Plaintiff's Exhibit 5. Do
13 you recognize that document?

14 A Yes.

15 Q And that is the January, 2000, purchase
16 agreement for real estate between John and Teddie --
17 excuse me -- John and Theodora Walpole and Southern
18 Lifestyles; is that correct?

19 A Yes.

20 Q And refresh my memory. Southern Lifestyles was
21 the eventual developer of Phases I and II?

22 A Yes. They were the purchaser and ultimately
23 the developer.

24 Q Mr. Walpole, I'm going to ask you to turn to
25 page 8 of the agreement.

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1 A Okay.

2 Q Does Article 10.3 give John and Theodora
3 Walpole access to what later became known as Anchor
4 Watch Drive?

5 A Yes.

6 Q Does it give them the right to use any road
7 within the property?

8 A Yes.

9 MR. WALKER: Objection. The document speaks
10 for itself. He's asked -- the attorney is asking the
11 witness to interpret what is clear and unambiguous, and
12 we would object to the extent that he's trying to
13 interpret the document. The document says exactly
14 what it's grating. And I would say that's a
15 mischaracterization, because it says: The purchaser
16 agrees to provide seller access. The document itself
17 doesn't provide access. So I object to the form of the
18 question in that it's leading and misstates the
19 agreement.

20 THE COURT: Rephrase your question.

21 Q (By Ms. Coker) Mr. Walpole, could you please
22 read for -- to the Court the second sentence in
23 paragraph 10.3 that starts "seller"?

24 A Seller shall have the right to use any road
25 within the property and the option property for purposes

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1 of ingress and egress to properties owned or leased by
2 seller.

3 Q Now, "property" in that contract was Phases I
4 and II?

5 A Yes.

6 Q Okay. And the "option property" was basically
7 the property outlined here in red?

8 A Which was -- references Phase III.

9 Q Did Southern Lifestyles ever consummate the
10 transaction to purchase the option property?

11 A No.

12 Q Would your family have entered into this
13 contract to sell just the waterfront property without
14 the access?

15 A No.

16 Q Why did y'all want access across the property?

17 A Initially, Southern Lifestyles had a whole
18 purchase contract for 13.5 million. They came back to
19 the table to change, and at that point, the contract was
20 broken into a purchase of Phases I and II, with an
21 option on III. At that time, that forced us to protect
22 our interests in Phase III if they did not close on
23 Phase III and the value associated with that, and that
24 is why the easement was included in the negotiation of
25 that.

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1 Q And with regard to the use of the option
2 property, during this 2000-2001 time frame, were y'all
3 using the option property to farm still?

4 A That -- there was a period when we stopped
5 farming. And that time is vague because of the
6 seasonal, you know, aspect of produce, and it was either
7 2000 or 2001 when we stopped farming. I can't really
8 remember exactly. But it was somewhere in that time
9 frame, we stopped farming, but we were using it for
10 agricultural purposes.

11 Q Now, I find it easier to refer to the numbers
12 for everyone.

13 Exhibit 13.

14 (Document is handed to the witness.)

15 Q (By Ms. Coker) Mr. Walpole, I've handed you
16 what's previously been marked as Plaintiff's Exhibit 13.
17 Do you recognize that document?

18 A Yes.

19 Q And that document is an October, 2000,
20 contract?

21 A October is actually marked out, and December
22 was entered, I think, when it was executed, but. . .

23 Q December of 2000?

24 A Yeah, that's correct, 15th.

25 Q And what kind -- what did that contract

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1 contemplate?

2 A This is the purchase agreement for the real
3 estate referenced in Phase III, for the \$3.5 million.

4 Q And that is the 700 and approximately 80 acres?

5 A Yes, ma'am.

6 Q Was that contract ever consummated?

7 A This was not consummated.

8 Q So Southern Lifestyles never purchased the 780
9 acres from you?

10 A No.

11 Q Did there come a time in 2001 where your family
12 attempted to renegotiate the purchase -- or excuse me --
13 the sale of the 780 acres to Southern Lifestyles?

14 A Yes. Our intent all along was to sell it as
15 one parcel. So there was -- all efforts there to sell
16 to one person.

17 Q Was a condition of entering into that
18 subsequent contract that the easements agreed to, in
19 Exhibit 5, be recorded?

20 MR. WALKER: Objection. Leading.

21 THE COURT: Rephrase your question.

22 Q (By Ms. Coker) The -- John Walpole on one side
23 and Southern Lifestyles continued to negotiate for the
24 ultimate purchase and sale of the 780 acres; is that
25 correct?

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1 A Yes.

2 Q What was one of the conditions from your
3 family, of -- of continuing negotiating with Southern
4 Lifestyles in 2001?

5 A One condition would be that the easement
6 agreement that was a part of the original purchase
7 contract with the option -- I believe, the one in
8 January -- that that aspect of the purchase agreement,
9 that we're now referencing, that was agreed to in
10 December for the option property, bring forward that
11 easement language and protect that access.

12 Q So those -- the easement across the roadways in
13 Phase I and II was important to your family, wasn't it?

14 A Yes.

15 Q Was the access to the boat dock -- excuse me --
16 the boat ramp lot important to you?

17 A Yes.

18 Q And did you all make any concessions in the
19 2001 negotiation to ensure that those easements would be
20 recorded?

21 A Concessions?

22 Q At some point, did Southern Lifestyles pay your
23 family not to farm the option property?

24 A I believe that was part of the agreement. That
25 there was a -- a -- that that was -- again, this is a

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1 part that I was not necessarily involved in day-to-day.
2 But there was a point in which they had to -- there was
3 income generated from our farming operation, and if they
4 were going to have to forego that, there was an
5 agreement to pay them not to farm. Or that was part of
6 the -- one item in the agreement.

7 Q Would your family have continued negotiating
8 with Southern Lifestyles for the option property had
9 they not given you the easements?

10 A No. The easement was -- if there was anything
11 that was carried forward continually throughout every
12 step of the negotiations, it was the easement.

13 MS. COKER: Your Honor, may I approach to
14 retrieve those exhibits and give him two more?

15 THE COURT: You may.

16 Q (By Ms. Coker) Mr. Walpole, I'm going to show
17 you Exhibits 17 and 18 -- excuse me, what's been
18 previously marked as Plaintiff's 17 and 18.

19 (Documents are handed to the witness.)

20 Q Mr. Walpole, do you recognize those documents?

21 A Yes.

22 Q And Exhibit 17, when was that recorded in the
23 Charleston County RMC Office?

24 A I guess that would be on the last page here
25 where it says "filed." Register of Charleston County,

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1 2001, November the 8th, at 10:21 a.m.

2 Q And same question with regard to Exhibit 18,
3 the Amended Easement Agreement, does it say when that
4 was recorded?

5 A Yes. 2002, June, on the 17th of that month,
6 12:15 p.m.

7 Q Do you know when the Anchorage Plantation HOA
8 was turned over to the individual homeowners?

9 A I believe it was in some documents that were
10 dated around 2004, maybe -- 2003, I think.

11 Q Southern Lifestyles still -- Southern
12 Lifestyles was the grantor under those easements --

13 A Yes.

14 Q -- is that correct?

15 MS. COKER: May I approach, your Honor?

16 THE COURT: You may.

17 MS. COKER: Plaintiff's 20 and 22.

18 (Documents are handed to the witness.)

19 Q (By Ms. Coker) Mr. Walpole, I just handed you
20 what has been previously marked Plaintiff's Exhibit 20
21 and 22. I'll represent to you, just for purposes of
22 time, that those are the deeds conveying the roadways
23 and the docks to the homeowners association. Does that
24 appear to be correct?

25 A Yes.

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1 Q When was Exhibit 20 recorded in the Charleston
2 County RMC Office?

3 A January 13th, 2003.

4 Q And same question with Exhibit 22?

5 A July 29th, 2003.

6 Q So the two deeds that you have in your hand
7 conveying the roadways and the boat ramp lot, were
8 conveyed in 2003, over a year to a year and a half prior
9 -- excuse me, over a year after your easements were
10 recorded; is that correct?

11 A Yes.

12 MS. COKER: May I approach and retrieve?

13 (Documents are handed back to Ms. Coker.)

14 Q (By Ms. Coker) Changing focus. After 2003,
15 there came a time when the HOA began corresponding
16 related to the roadways; is that correct?

17 A Yes.

18 MS. COKER: Your Honor, as a procedural matter,
19 I'm seeking to admit Defendants' 1 through 4 that were
20 previously attached to Plaintiff's original Complaint.
21 I don't know if you want me to remark them or simply
22 publish to the Court's attention.

23 THE COURT: What's your position, Mr. Walker?

24 MR. WALKER: Your Honor, I believe that those
25 were admitted in the cross-examination of Ms. Settle or

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1 Mr. Brostoff, so I think they're in the record. We
2 certainly have no problem with admitting them. And we
3 would stipulate to the admission if there's any question
4 about it.

5 MS. COKER: I apologize. They have already
6 been admitted.

7 THE COURT: Thank you.

8 Q (By Ms. Coker) Mr. Walpole, I'm handing you
9 what's been previously marked as Defendants' Exhibits 1
10 through 4. Do you recognize those documents?

11 A Yes.

12 Q Do you know who Tom Harper is?

13 A I believe he was the attorney representing the
14 HOA early on in their existence.

15 Q What is the date of the letter marked as
16 Defendants' Exhibit 1?

17 A February 5th, 2004.

18 Q And that letter is addressed to Gerald Finkel.
19 Do you know who Gerald Finkel is?

20 A Yes.

21 Q Who is Mr. Finkel?

22 A Mr. Finkel was the attorney -- I believe
23 Mr. Altman was with Mr. Finkel in the same firm, and
24 that was who represented my grandparents.

25 Q So Mr. Harper, the HOA's attorney, and

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1 Mr. Finkel, the Walpoles' attorney, were communicating
2 back and forth via letters?

3 A Yes.

4 Q And I will give you a second to review those.
5 But do Defendants' Exhibits 1 through 4, the subject
6 matter of those letters, the roadways?

7 A Yes. There's access-to discussion in these
8 letters and use of those amenities.

9 Q Did there come a time in 2004 when the HOA and
10 Dana Sinkler sued your grandparents?

11 A Yes.

12 Q And what -- what was the basis of that suit, do
13 you recall?

14 A I believe that suit was the first one, which
15 was the PD -- zoning PD-96, I think, is what that was
16 referenced as. And we -- I mean, we did what the county
17 asked, and they sued us.

18 Q And, in fact, the Charleston County Planning
19 Commission was a defendant in that case, was it not?

20 A I -- I -- I believe so.

21 MS. COKER: Are you willing to stipulate that
22 they were a defendant?

23 MR. WALKER: We'll agree the defendant was
24 Charleston County. It was Charleston County and
25 Walpole. The Planning Commission was not part of it

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1 because they weren't involved.

2 MS. COKER: Okay. I misspoke. I apologize.

3 Q (By Mr. Coker) Now, Dana Sinkler is a neighbor
4 of this property; is that correct?

5 A Yes. To the north. All the property that
6 bounds from Maybank Highway out to the river on the
7 north side.

8 Q And Mr. Sinkler owns what is known as Rosebank
9 Plantation?

10 A Rosebank.

11 Q Just Rosebank?

12 A Yes.

13 Q Were you present in the courtroom when
14 Ms. Settle testified?

15 A Yes.

16 Q Is that the same Dana Sinkler that was her
17 former employer?

18 A I believe so.

19 Q And she spoke about playing as a child on
20 Rosebank?

21 A It had been right there about where your hand
22 is because that's the residential area for the Rosebank
23 Plantation.

24 Q With regard to the 2004 litigation, suing your
25 grandparents and Charleston County, regarding a plan

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1 development, that case was heard in Charleston County?

2 A (Moves head up and down.)

3 Q Was it then appealed?

4 A You know, I -- I -- y'all would know better
5 than me. Yeah, it just kept on going. So I guess
6 that's appealing and then, I guess. . .

7 Q And, in fact, oral arguments ultimately
8 were heard by the South Carolina Supreme Court on
9 January 1st, 2010; is that correct?

10 A Yes.

11 Q Do you know when the current suit, that we're
12 here about today, was filed?

13 A I believe it was January 21st, 2010.

14 (Ms. Coker speaks with Mr. Walker off the
15 record.)

16 MS. COKER: Stipulate to that?

17 MR. WALKER: Whatever it is. It was early
18 2010.

19 MS. COKER: Your Honor, I'd ask that you take
20 judicial notice of the fact that the suit that's
21 currently pending before you was filed on January 20th,
22 2010.

23 If I may approach, your Honor? I have a copy
24 of it.

25 THE COURT: Hard to take judicial notice

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1 without. . .

2 (Document is handed to the Judge.)

3 THE COURT: January 20th of 2010. Thank you.

4 Q (By Ms. Coker) Going back into history, in
5 2000- -- sometime in 2005, did your family decide to
6 subdivide the 780 acres?

7 A Yes.

8 Q And that subdivision was approved in 2005?

9 A Yes.

10 Q Did anyone appeal that subdivision?

11 A I don't -- I know there was discussions. I
12 don't know if there was actually an appeal. I
13 can't. . . Again, I can't remember.

14 Q Did you attend a hearing in April of 2005
15 related to the subdivision?

16 A Yes. Yes, I did.

17 Q And Mr. Sinkler had voiced an objection to the
18 subdivision; is that correct?

19 A Yes.

20 Q And are you aware whether or not Mr. Harper
21 alerted the county -- or excuse me -- Mr. Harper on
22 behalf of the HOA, wrote the county a letter objecting
23 to the subdivision?

24 A Yes, he did.

25 MS. COKER: Fifteen.

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1 (Document is shown to Mr. Walker.)

2 MS. COKER: May I approach, your Honor?

3 THE COURT: You may.

4 (Document is handed to the witness.)

5 Q (By Ms. Coker) Mr. Walpole, I've handed
6 you what's been previously identified as Defendants'
7 Exhibit 15. Do you recognize this letter?

8 A Yes. I believe this is the letter that
9 Mr. Harper wrote to the planning director.

10 Q And Mr. Harper was representing the HOA at the
11 time?

12 A Yes, ma'am.

13 Q And Mr. Harper, within that letter, refers to
14 the roadways in Anchorage I and II; is that correct?

15 A Yes.

16 Q What is the date of this letter?

17 A March 7th, 2005.

18 Q Okay. So, thereafter, in April of 2005, you
19 attended a Charleston County appellate hearing related
20 to the subdivision; is that correct?

21 A Yes, ma'am. I attended a meeting. I
22 can't -- guess that's the name of it. But there was
23 one --

24 Q I'm not worried about my commissions and
25 boards.

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1 A Yeah.

2 Q Was Mr. Harper at that meeting?

3 A No, I don't believe so.

4 Q Was Mr. Walker at that meeting?

5 A Yes.

6 Q Who was Mr. Walker representing at that
7 meeting?

8 A I think -- I believe Mr. Walker was
9 representing Mr. Sinkler.

10 Q Did Mr. Walker make any statements relating to
11 access to the roadways; that you remember?

12 A Yes. There's one that actually stood out, that
13 the -- the access -- because, you know, it was
14 subdivided into Lots 1, 2, 3, 4, 5, and 6, and that they
15 weren't actually -- he wasn't there objecting to access
16 to Lots 1, 2, and 3. It was the north end that they
17 were objecting to.

18 Q Did anyone at that hearing state that you could
19 not use the roadways outlined in blue?

20 MR. WALKER: Objection. Hearsay.

21 THE COURT: Rephrase your question.

22 Q (By Ms. Coker) Did anyone on the HOA -- did
23 anyone on behalf of the HOA, contest your use of the
24 roadways at that hearing?

25 A At the hearing, I -- again, Mr. Walker was

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1 there speaking on behalf of Mr. Sinkler, but there
2 wasn't anybody speaking out for the HOA. That I
3 remember.

4 Q After -- and as a result of that hearing, your
5 subdivision was upheld; is that correct?

6 A Yes.

7 Q Did Mr. Sinkler then file another lawsuit in
8 Charleston County Court of Common Pleas regarding the
9 subdivision?

10 A I believe so. And, again, forgive me, but
11 there's so many of them, I can't tell you exactly that,
12 yes, that was. But I know he sued -- or filed another
13 suit.

14 Q Do you know if the HOA was a party to that
15 suit?

16 A I don't know for sure if they were or not. I
17 think that would be a matter of record if you needed to
18 find it.

19 (Ms. Coker speaks with Mr. Walker off the
20 record.)

21 MS. COKER: Your Honor, by stipulation of the
22 parties, we've agreed that the Anchorage Plantation
23 Homeowners Association was not a Plaintiff in the 2005
24 suit for -- by Mr. Sinkler against the Walpoles.

25 THE COURT: All right. Thank you.

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1 MS. COKER: May I approach and retrieve that
2 exhibit?

3 Your Honor, if I may request the Court's
4 indulgence? May I take a few minutes to make sure I --

5 THE COURT: You may.

6 How many more witnesses?

7 MS. COKER: He is my last witness, your Honor.

8 THE COURT: All right. Thank you.

9 (Respite.)

10 MS. COKER: May I approach?

11 THE COURT: You may.

12 Q (By Ms. Coker) Mr. Walpole, I'm going to hand
13 you a document you've already looked at today. I
14 apologize. Exhibit 13. That was the December of 2000
15 purchase agreement for the 780 acres.

16 A Yes.

17 Q Oh, what page have I referred you to, I
18 apologize?

19 A Page 4.

20 Q On page -- I believe it's page 4. It's
21 certainly Article 4. There is a contingency built into
22 this contract; is that correct?

23 A Which one specifically are you referencing?

24 Q 4(1)(a) that starts: Purchaser obligation to
25 close is contingent upon. . .

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- 1 A Would you like me to read that?
- 2 Q Please read the first sentence.
- 3 A Purchaser obligation to close is contingent
4 upon seller obtaining approval from the Charleston
5 County Planning Commission for development of the
6 property providing for no less than 75 single-family
7 lots in a configuration to be approved by purchaser
8 prior to submission of the plan for approval.
- 9 Q That's enough. Thank you. So it was Southern
10 Lifestyles' intention to develop the option property?
- 11 A Yes.
- 12 Q And put at least 75 more houses on there?
- 13 A Yes.
- 14 Q And are you familiar with what Southern
15 Lifestyles plans for the development of the entire
16 parcel were?
- 17 A Yes. I've seen their land plans.
- 18 Q There were going to be certain amenities?
- 19 A There was going to be 107 to 115 units,
20 something to that nature, boat storage facility, there
21 were some future amenity areas not designated as
22 specific uses.
- 23 Q And I believe Mr. Brostoff testified to a
24 potential equestrian center?
- 25 A Again, there were some future amenity areas. I

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1 think at that time, maybe they -- I -- I don't want to
2 speculate. But, yes, they were going to be using them
3 for certain amenities.

4 Q But the intent in 2000 was to put at least 75
5 more houses in the option property?

6 A In this document, yes.

7 Q And do you recall what the number they were
8 seeking in actuality?

9 A It was more -- like I said, it was like 107 to
10 115. It was a -- it -- you know, what -- exactly what
11 the Charleston County Zoning and Land Development
12 Regulations would allow for, maybe minus a few lots.

13 Q And do you know whether or not -- do you know
14 whether Southern Lifestyles was marketing to future
15 buyers just the waterfront parcels or the idea of the
16 entire tract?

17 A At the time, they were marketing the full
18 development.

19 Q Prior to the institution of this most recent
20 lawsuit, have you ever attended any Anchorage Plantation
21 HOA meetings?

22 A There was one meeting in particular that I
23 attended, and I want to say it was in 2006 or -7. I
24 can't remember exactly the year. But the location was
25 at the Johns Island Library, and it was, again, during a

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1 summer month, I believe. That was one that I attended
2 at a time that I -- as they had their meeting, I --
3 after their meeting, I stood up and asked if there was
4 any report on the current litigation that the community
5 was involved in, and none of the property owners seemed
6 to be aware of it.

7 Q And has your family made attempts to
8 communicate with the Board and the individual homeowners
9 through the years?

10 A Yes.

11 Q And those attempts at communication -- how
12 would you characterize those attempts at communication?

13 A The result, we always -- my grandparents
14 originally in the beginning had -- would draft a letter.
15 All communication we did in a form of a letter, as well
16 as talking with -- I believe it was -- that John Mayer
17 maybe was the -- one of the first home purchasers in
18 there. And my grandparents had communication with him.
19 And were to have meetings with them, and the meetings,
20 it seems, as a pattern, it -- the meeting would be
21 cancelled and then a lawsuit would follow. And
22 then there was those letters back and forth with Harper
23 from Mr. Finkel. And at the end of that, we were to
24 have discussions and meet together. And then a lawsuit
25 followed.

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1 And then my grandparents' last effort was three
2 separate letters. And at that time, we decided that
3 maybe it was best to communicate with all property
4 owners, you know, since they were all neighbors of ours,
5 and possibly circumvent, you know, or maybe take a
6 chance of the communication not making it to the owners.
7 So we wrote directly to the property owners on three
8 separate occasions. We got a lot of phone calls back
9 interested in learning about what -- what litigation was
10 present.

11 Q And all of those attempts of communication were
12 prior to January 20th, 2010, when the suit was filed?

13 A Yes. Again, at that last time, those -- those
14 three letters then followed by a lawsuit.

15 MS. COKER: Thank you, Mr. Walpole. I have
16 nothing further. I do need to retrieve that exhibit.

17 THE WITNESS: Yes.

18 THE COURT: Mr. Walker.

19 MR. WALKER: Thank you, your Honor.

20 **CROSS-EXAMINATION**

21 **BY MR. WALKER:**

22 Q Mr. Walpole, would it be fair to say that you
23 have stayed informed about your grandparents' plans for
24 development of the Anchorage since they had the idea of
25 developing it and doing something other than farm?

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1 Haven't you been relatively aware of what was going on?

2 A I was aware for the most part that there was a
3 need to have collateral for the lending requirements
4 that we fell under from a farming standpoint.

5 Q Were you aware that back in 1997, that your
6 grandparents filed a plat that delineated Anchor Watch
7 Drive -- the first portion of Anchor Watch Drive -- and
8 dedicated it to the Anchorage Plantation Homeowners
9 Association?

10 A I had seen that document, and I believe that
11 was recorded to access Phase I.

12 MS. COKER: Your Honor, to the extent that
13 Mr. Walker is asking Mr. Walpole to characterize
14 documents that speak for themselves, I think it's only
15 fair that the documents speak for themselves.

16 THE COURT: Well, Mr. Walker, what are you
17 attempting to ask him? What do want him to say?

18 MR. WALKER: Well, I was asking him whether he
19 was aware that the plat that I'm talking about, that has
20 been admitted into evidence, specifically states -- and
21 this is a plat from 1997 -- that the portion of Anchor
22 Watch Drive delineated on it is dedicated to the
23 Anchorage Plantation Homeowners Association.

24 THE COURT: Why don't you have him read the
25 plat just like you required counsel to read -- to

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1 rephrase the question and read from the plat.

2 MR. WALKER: May I approach to get the plat?

3 THE COURT: You may.

4 Q (By Mr. Walker) Are you familiar with
5 Plaintiff's Exhibit 2, which is the plat that was
6 recorded back in 1997 to do the first phase?

7 A Yes.

8 Q And does that plat include, for the first time,
9 the delineation of Anchor Watch Drive?

10 A Yes.

11 Q All right. And does not that plat in the note
12 state that Anchor Watch Drive is dedicated to the
13 Anchorage Plantation Homeowners Association?

14 A Yes, I believe that was the requirement of the
15 county.

16 Q All right. And around this same time, were you
17 aware that your grandparents recorded a Declaration of
18 Covenants and Conditions for Anchorage Plantation
19 Homeowners Association?

20 A Again, yes, I believe that was a requirement of
21 the county.

22 Q Are you aware that all later plats that have
23 been recorded reflecting Anchor Watch Drive likewise
24 contained the note that it's dedicated to the Anchorage
25 Plantation Homeowners Association?

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1 A I would have to see specifically. But I
2 believe they do.

3 Q All right.

4 A Because it was a requirement of the county.

5 Q Okay. We heard your testimony about the first
6 purchase contract with Southern Lifestyles; it was
7 January, 2000. I think Exhibit 5. Were you part of the
8 negotiating team on that?

9 A No.

10 Q Was that negotiated by your grandfather
11 directly with Southern Lifestyles, to your knowledge,
12 for the most part?

13 A That was negotiated with Southern Lifestyles by
14 my grandfather, and my father, and my grandmother.

15 Q And do you still have Exhibit 5 in front of
16 you?

17 A No, I don't.

18 Q Let me take Exhibit 2 back so we don't get that
19 out of order and give you Exhibit 5, which you've been
20 asked about.

21 (Document is handed to the witness.)

22 Q You were asked some questions about Article 10,
23 which is the seller's right to use property, in
24 particular, Article 10.3. Now, at the time this
25 contract was entered, in January, 2000, Southern

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1 Lifestyles had not yet closed on the property; correct?

2 A Correct. This is a Contract to Purchase.

3 Q Exactly. And since it's a Contract to
4 Purchase, by definition, they didn't own the property at
5 the time they signed the contract; correct?

6 A They were not the owner at this period, per the
7 contract.

8 Q That's correct. So if they were not an owner
9 of the property, they didn't have any rights to grant us
10 to the property at the time they signed this contract;
11 did they?

12 A I believe that there was -- this is a
13 concession in the contract between the purchaser and the
14 seller.

15 Q That wasn't my question. My question was: If
16 they don't have any title or interest in the property
17 other than this contract, they can't grant rights of
18 access or uses to the property since they don't own it;
19 correct?

20 MS. COKER: Your Honor, I'm going to object to
21 the extent that Mr. Walker is attempting to get a legal
22 conclusion.

23 THE COURT: Sustained. Rephrase your question.

24 Q (By Mr. Walker) Would it be your
25 understanding, just as a layman, that somebody who

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1 doesn't own property can't grant rights to that
2 property?

3 MS. COKER: Same objection.

4 THE COURT: Sustained.

5 MR. WALKER: As a layman?

6 THE COURT: You're still giving -- you're still
7 asking him to make that -- a legal conclusion. All
8 right? You don't need him to say that; I'm going to
9 make that decision at some point, Mr. Walker. Thank
10 you. Move on.

11 Q (By Mr. Walker) And with respect to the first
12 sentence of 10.3 --

13 Do you have it in front of you?

14 A 10.3, yes.

15 Q Would you read the first sentence? You were
16 only asked to read the second sentence earlier.

17 Could you read it out loud, the first sentence?

18 A Yes. First sentence, 10.3: Purchaser
19 agrees to provide seller access to Bohicket Creek over
20 the community boat ramp and courtesy dock located in
21 Phase II until such time as purchaser closes on the
22 option -- I'm sorry -- closes on the purchase of the
23 option property.

24 Q So we can agree at this time, the purchaser was
25 agreeing to provide access; correct? In this sentence?

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1 A In this sentence, as part of a concession of
2 the contract, the purchaser was -- or was being asked to
3 agree to that -- what that sentence says.

4 Q There is no mention of the word "easement"
5 anywhere in this Article 10, is there?

6 A Article 10?

7 Q Sellers right -- "right to use property."
8 Nowhere in there do you see the use of the term
9 "easement," do you?

10 A After a quick scan, I don't see the specific
11 word "easement." It's "right to use."

12 Q And when we talk about the "right to use" the
13 boat ramp and courtesy dock, that the seller is agreeing
14 to provide, it does have a time limit on that, does it
15 not?

16 A Until -- well, it's the statement I read just
17 -- just now.

18 Q At sunset, at the time the purchaser closes on
19 the purchase of the option property; correct?

20 A That is the first statement stated correct
21 -- or what the first sentence states.

22 Q You're familiar, generally, that the closing
23 occurred for Southern Lifestyles' acquisition of the 270
24 or -80 acres in June of 2000?

25 A I have not seen the closing statement with a

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1 specific date. You may have that. I don't have that.

2 But I think. . .

3 Q I'm going to hand you two exhibits. The first
4 is Plaintiff's Exhibit 6 and ask you if you're familiar
5 with this plat that was recorded on or about June 16th,
6 2000?

7 (Document is handed to the witness.)

8 Q Does that appear to be the plat that created
9 the additional 60-something lots that constitute
10 Phase II?

11 A Yes. It's titled Conditional Plat to Anchorage
12 Phase II.

13 Q And does it appear to have been recorded
14 around, on or about, June 16th?

15 A That's the approved Conditional Plat by
16 William Miller, on June 16th, 2000.

17 Q All right. And Bill Miller was then the
18 planning director for Charleston County?

19 A Yes. Director of planning.

20 Q Now, I'm going to show you a deed that's been
21 marked as Plaintiff's Exhibit 7, which is entitled Real
22 Estate from John B. Walpole and Theodora W. Walpole for
23 -- in excess of \$10 million to Southern Lifestyles VIII.
24 And that is dated June 16th, 2000. Does that appear to
25 be the deed from what we've described as Phases I and

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1 II, from your grandparents?

2 A Yes. Yes, sir. It's entitled Real Estate and
3 it's \$10 million, and it's presented to my grandparents.

4 Q Now, I'd like you to take a minute and look
5 through that to see if anywhere in that deed of Phases I
6 and II, plus Anchor Watch Drive, there was any
7 reservation of an easement in favor of the sellers.

8 (Respite.)

9 A There was nothing in the entitled Real Estate
10 that references any easement that's on the back of
11 Exhibit A.

12 Q And does Exhibit A refer only to easements of
13 record that are specifically identified?

14 A It -- it refers to the exhibits that are
15 identified.

16 Q But just so we can all be clear, there is no
17 reservation of an easement in favor of the sellers
18 across the roads that were being conveyed, nor was there
19 reservation of easement to -- for the use of and to the
20 dock and boat landing; correct?

21 A There's no language in this.

22 Q Do you, yourself, partake in real estate
23 development? Have you developed other property?

24 A Yes.

25 Q And in the course of that development, have you

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1 been involved in closings, reviewed deeds, and that type
2 of thing?

3 A Yes.

4 Q You're aware that a seller can reserve an
5 easement with a consent of the purchaser, are you not?

6 A I believe so. I mean. . .

7 Q And that was not done in this case, was it? In
8 this deed, was it?

9 A In this particular deed, there's no reservation
10 for an easement. But this isn't the only tool in those
11 negotiations.

12 Q We'll talk about the next major instrument.

13 MR. WALKER: And if I might approach to get the
14 next exhibit?

15 THE COURT: You may.

16 (Respite.)

17 Q (By Mr. Walker) Are you aware that after
18 Southern Lifestyles closed within, say, about three
19 weeks, that Southern Lifestyles as declarant recorded a
20 Second Amendment To and Restatement of Declaration of
21 Covenants, Conditions, and Restrictions for the
22 Anchorage, that's been marked as Exhibit 10?

23 (Document is handed to the witness.)

24 A It looks as if they did record it.

25 Q So that we can get acquainted again with the

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1 history, your parents -- your grandparents, rather, put
2 the original declaration for the Anchorage Plantation
3 Homeowners Association back in 1997; correct?

4 A Yes.

5 Q Then after Southern Lifestyles closed, they
6 restated and amended the declaration; correct? And
7 that's what you have before you, correct, Exhibit 10?

8 A This title reads Second Amendment To and
9 Restatement of Declaration of CCRs.

10 Q All right. And, to your knowledge, these CCRs,
11 the covenants, conditions, and restrictions, apply to
12 Phases I and II as well as Anchor Watch Drive; correct?

13 MS. COKER: Objection, your Honor. To the
14 extent that the document speaks for itself, and that
15 Mr. Walker is asking for a legal conclusion from
16 Mr. Walpole, I object.

17 THE COURT: All right. Sustained. Rephrase
18 your question.

19 Q (By Mr. Walker) What is your understanding of
20 the land that was encumbered at the time by this second
21 declaration? The Amended To -- Amended and Restated
22 Declaration?

23 MS. COKER: Same objection, your Honor.

24 THE COURT: Overruled.

25 THE WITNESS: It says the Anchorage and --

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1 Q (By Mr. Walker) All right. I'll ask you to go
2 to page 50 of that document.

3 A Is that an exhibit page?

4 Q Exhibit A, yes, sir. It's the first exhibit.

5 A Exhibit A.

6 Q And do you see the property description there?

7 A Yes.

8 Q And if you would spend a minute taking a look
9 at it --

10 THE COURT: All right. Counsel, we're going to
11 take a short break. Let me see Counsel.

12 You may step down. Thank you.

13 COURT IN RECESS.

14 (After the recess, the case did not continue on
15 the record.)

16 (Exhibits retained by counsel.)

17 (The hearing of this cause concluded at
18 1:25 p.m., on June 21, 2013.)

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R E P O R T E R ' S C E R T I F I C A T E

STATE OF SOUTH CAROLINA)
) ss.
COUNTY OF BERKELEY)

I, **ROLAYNE M. VOLPE**, Certified Court Reporter, CCR,
and Registered Professional Reporter, RPR, do hereby
certify that the transcript of the foregoing proceedings
accurately reflects the events that occurred before me
to the best of my ability at the time and place set out
on the caption hereto, the witnesses having been duly
cautioned and sworn, or affirmed, to tell the truth, the
whole truth, and nothing but the truth.

I FURTHER CERTIFY that I am neither counsel for,
related to, nor employed by any of the parties to the
action in which these proceedings were taken or to any
attorney or counsel employed by the parties hereto, nor
financially interested, directly or indirectly, in the
outcome of this action.

CERTIFIED AND SIGNED on this 6th day of December,
2013.

ROLAYNE M. VOLPE, CCR, RPR
Certified Court Reporter and
Registered Professional Reporter
Commission Expires: 8/30/2021

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STATE OF SOUTH CAROLINA	)	COURT OF GENERAL SESSIONS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	
	)	
Anchorage Plantation	)	
Homeowners Association,	)	CASE NO. 2010-CP-10-0482
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	
	)	
John B. Walpole and	)	
Theodora W. Walpole,	)	
	)	
DEFENDANTS.	)	

August 21, 2015

Charleston, South Carolina

B E F O R E:

The Honorable R. Markley Dennis, Jr.

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

Trenholm Walker, Esquire
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Charles S. Altman, Esquire
For the Defense

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I N D E X

EXHIBIT LIST - For Today, 8/21/2015	03
TODAY'S PRECEEDING HEARD BY JUDGE DENNIS	04

RESUMPTION OF WITNESSES FROM PRIOR PROCEEDINGDEFENSE WITNESSES:William (Billy) Edings Walpole:

Resume Cross-Examination by Mr. Walker --	09
Redirect Examination by Ms. Coker --	27
Recross-Examination by Mr. Walker --	35

Neil Robinson:

Direct Examination by Mr. Altman --	37
Cross-Examination by Mr. Walker --	43
Redirect Examination by Mr. Altman --	50
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Closing Comments by Mr. Walker --	62
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<u>CERTIFICATION OF TRANSCRIPT</u> --	81

Look for an original signature in blue ink on the certification sheet to verify that the court reporter has certified the transcript you are viewing.

P L A I N T I F F ' S E X H I B I T S

(8/21/15)

<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARKED</u>	<u>ADMIT</u>
33	Letter 1/25/05 from Planning Dept	20	27
34	Plat	21	27

D E F E N D A N T ' S E X H I B I T S

(8/21/15)

<u>NO.</u>	<u>DESCRIPTION</u>	<u>MARKED</u>	<u>ADMIT</u>
16	August 27, 2001 Site Plan	34	35
17	Letter 10/30/01 to Robinson	39	39

1 THE COURT: First of all, just -- we have had a
2 discussion and we have had a status conference and you
3 provided with the transcript a copy of basically the order
4 that assigns us and says -- and I have done it before, I
5 think I mentioned, years ago as an administrative judge. I
6 am hearing this after the case has already been tried for
7 the most part really.

8 And reading through the witnesses I know there are a
9 couple of more you all have said you needed to present, and
10 that is fine; but everybody is in agreement with my
11 ultimately deciding this based on the records and arguments
12 and submissions; is that correct?

13 MR. WALKER: That is correct. The plaintiff ---

14 MR. ALTMAN: That is correct, Your Honor; ---

15 MR. WALKER: --- welcomes your involvement.

16 MR. ALTMAN: --- thank you.

17 THE COURT: Thank you very much. I appreciate it.

18 Okay. I will defer to you now. I am flexible.

19 However you want to proceed. Whatever you feel best.

20 MR. WALKER: Your Honor, Trentham Walker for the
21 plaintiff. With me is Steve Brostoff, president of the
22 Association.

23 THE COURT: Yes, sir.

24 MR. WALKER: I was just talking to Ms. Coker. We have
25 one or two things that we would like to take up, easy

1 housekeeping things ---

2 THE COURT: I like easy.

3 MR. WALKER: --- before we get going.

4 MS. COKER: Your Honor, just as in terms of the
5 transcript, Mr. Walpole who is behind me, when we last were
6 in recess was being cross-examined by Mr. Walker.

7 Mr. Walpole's name is misspelled in the transcript, so
8 I just wanted to verify with the court reporter. His middle
9 name is not Edwards; it is Edings, E-D-I-N-G-S.

10 THE COURT: Okay. So where ever it appears Edwards, it
11 is Edings.

12 MS. COKER: Also, Your Honor - and this was
13 discussed via email with your law clerk - we intend to
14 call Neil Robinson today. And as you know, Mr. Robinson
15 works for Nexsen Pruet; and he wanted to put something on
16 the record ---

17 THE COURT: Yeah, ---

18 MS. COKER: --- in regard to that.

19 THE COURT: You are aware of my position on Nexsen
20 Pruet. And basically Mr. Robinson has had no role advising
21 anyone in this case ---

22 MS. COKER: No, Your Honor.

23 THE COURT: --- in so far as legal positions?

24 MS. COKER: No, Your Honor.

25 THE COURT: He is going to be a witness, I assume; an

1 expert witness for some purpose, or just a witness?

2 MR. WALKER: Just a fact ---

3 THE COURT: A fact witness.

4 MR. WALKER: --- witness to provide background.

5 THE COURT: All right. The only issue that I have
6 concerning that is obviously I am sitting now as a judge of
7 the facts and the law. That means I have to judge the
8 credibility of witnesses. It probably would even be a
9 bigger reason if he were still an associate, but my son is a
10 partner with Nexsen Pruet. He assures me it does not change
11 his income, it just changes his status. And I don't know
12 anything about that, and I haven't inquired any further.
13 Mr. Robinson I think is a partner. I think his is a little
14 bit -- it is different than my son's partnership, but I
15 don't need to know about that either.

16 But that having been said, I need to allow you all if
17 you haven't already to talk - and I will be happy to leave
18 for you to accomplish this - to discuss with your clients as
19 to whether or not you have my -- any objection to my
20 continuing to hear this case or deciding, because I will
21 have to obviously consider and evaluate the credibility and
22 believability of Mr. Robinson's testimony.

23 MR. WALKER: The plaintiff has no objection.

24 THE COURT: Do you need me to leave though, because the
25 rule says I have to leave to do that. Let me just step out.

1 MR. WALKER: Okay.

2 THE COURT: And then y'all can discuss that. Because
3 that is -- I know we have talked about it through emails.
4 It is the first time face-to-face that I have done that, so
5 let me just comply with the Canons and I will step out. And
6 I will be right back in. Thank you.

7 (WHEREUPON, Judge Dennis exited the courtroom for counselors
8 to confer.)

9 (WHEREUPON, the hearing resumed.)

10 MR. WALKER: Again, Your Honor, we have no objection
11 from the plaintiff.

12 MS. COKER: Defendant has no objection.

13 THE COURT: Thank you very much. And I appreciate it.
14 Also for the purposes of this so that we don't have a Judge
15 Segars-Andrews situation, I have a standing rule of recusing
16 myself now in any case in which Nexsen Pruet is appearing.

17 I have never taken that position here, so I don't have
18 to -- that was the problem, there was a recusal and then she
19 took back over. But since I have never recused myself, no
20 reason to because there has been no involvement with Nexsen
21 Pruet, but that -- everybody agrees that does not apply in
22 this case; is that correct?

23 MR. WALKER: The plaintiff agrees it does not.

24 THE COURT: Okay. Thank you.

25 MS. COKER: And so does the defendant.

1 THE COURT: Thank you. Thank you very much. Okay.
2 Now anything else?
3 MR. WALKER: That is it from the plaintiff.
4 THE COURT: All right.
5 We are ready to go.
6 MR. WALKER: So we will resume the cross-examination of
7 Billy Walpole ---
8 THE COURT: That is fine.
9 MR. WALKER: --- two years and two months since we
10 adjourned it.
11 THE COURT: Well, I am sure that he remembers ---
12 MR. WALKER: He is not looking a day older.
13 THE COURT: I am sure he remembers vividly every bit
14 of it. Mr. Walpole, if you will resume. And why don't I
15 just do this so it is a continuation. We will do it just as
16 if -- I would remind you that you are still under oath in
17 this matter.
18 MR. WALPOLE: Yes, Your Honor.
19 THE COURT: Okay. With respect to your testimony
20 obviously.
21 MR. WALPOLE: Yes, Your Honor.
22 THE COURT: Okay. Thank you.
23 MR. WALKER: Before we get going, are the exhibits near
24 the witness anywhere?
25 (WHEREUPON, break was had to retrieve exhibits.)

1 MR. WALKER: We will principally be referring to a few
2 of our exhibits, the plaintiff's exhibits.

3 THE COURT: I will make sure I put them in numerical
4 order.

5 MR. WALKER: The first one is going to be Number 5.

6 THE COURT: Number 5 of plaintiff's exhibits?

7 MR. WALKER: Yes, sir.

8 THE COURT: Okay. All right.

9 MR. WALKER: That would be purchase agreement for real
10 estate.

11 THE COURT: I have it. You may proceed.

12 MR. WALKER: Would it be all right to use the notebook
13 with the witness?

14 THE COURT: That's fine with me. Any objection ---

15 MR. WALKER: Or do you want to hand the exhibit over to
16 the witness? Good.

17 THE COURT: Any objection, or do you want him to have
18 the original document -- I mean the actual exhibit? We can
19 have it. You have got it.

20 MR. WALKER: Well, thank you. We have the exhibit now.
21 Thank you.

22 THE COURT: Thank you.

23 **RESUME CROSS-EXAMINATION BY MR. WALKER OF WILLIAM (BILLY)**

24 **EDINGS WALPOLE:**

25 Q. Mr. Walpole, when we adjourned I had asked you a number

1 of questions about Plaintiff's Exhibit 5 which is the first
2 purchase agreement, the purchase agreement between Southern
3 Lifestyles and your grandparents.

4 We went over it, and I think we established a few
5 things. But I want to go back to that, not to plow the same
6 ground but to make -- or at least to examine as to another
7 provision.

8 If you would, sir, go to Page 8 of Exhibit 5. Do you
9 have that in front of you?

10 A. Yes, sir.

11 Q. And there has been a lot of discussion in this case
12 about Section 10.3 which is a provision where the purchaser
13 agreed to provide the seller access to Bohicket Creek over
14 the community boat ramp and courtesy dock. Do you see that?

15 A. Yes, sir.

16 Q. And in the next sentence it says seller shall have the
17 right to use any road within the property and the option
18 property for purposes of ingress and egress to properties
19 owned or leased by seller.

20 Now this contract was for Phases One and Two, One being
21 four or five lots on one end and then Phase Two being the
22 remainder of the lots; correct, ---

23 A. Yes.

24 Q. --- along the water? And the option property was this
25 780 roughly acres on the interior that is sometimes called

1 the residual property, correct?

2 A. Yes, sir.

3 Q. And that property is -- has not been sold, has it?

4 A. No, sir.

5 Q. All right. So we can agree I think that 10.3 creates
6 an obligation of some sort on behalf of the purchaser to
7 provide access as described therein to the seller; correct,
8 as best you understand it?

9 A. As best as -- from what it reads there, yes, sir.

10 Q. Now if this contract was in January of 2000 and then
11 June of 2000, June 16 to be exact, Southern Lifestyles
12 closed on this property, which is shown on the last page,
13 closed on the property and acquired legal title to it; did
14 it not, the sale closed?

15 A. I would assume, yes, sir. I know it did. I don't know
16 the exact date, but I have seen the document.

17 Q. Okay. Now if you would, if you will go down to Section
18 11.2 which is on that same page. Do you see that?

19 A. Yes.

20 Q. And if you would, this is what is called a survival
21 provision. Would you please read that survival provision
22 out loud.

23 A. Yes. Section 11.2. It is the express intention and
24 agreement of the parties to this agreement that all
25 covenants, agreements, statements, representations, and

1 warranties made by the seller to this agreement shall
2 survive this agreement, the delivery of the deed, and other
3 closing documents and the closing.

4 Q. So that survival provision refers to the covenant's
5 agreement, statements, representations, warranties, of the
6 seller, not the purchaser; correct?

7 MS. COKER: Objection, Your Honor. Calls for a legal
8 conclusion.

9 THE COURT: I sustain the objection. That is my
10 instruction. He doesn't need to tell me that.

11 MR. WALKER: All right.

12 THE COURT: That is part of the legal aspect of this
13 case.

14 BY MR. WALKER:

15 Q. Now let's go back to the second amendment to and
16 restatement of the declaration covenants and conditions and
17 restrictions for Anchorage and provide a little background
18 there.

19 When your grandparents first subdivided the first part
20 of Anchor Watch they in 1997 they dedicated the first part
21 of Anchor Watch - we have been over this - to the Anchorage
22 Plantation Homeowners Association, correct?

23 A. I believe it states that on the plat, but I couldn't
24 speak specifically to it though.

25 Q. And do you recall also that they filed the first set of

1 covenants on that land?

2 A. Again, I believe there is a document; but I could tell
3 you ---

4 Q. All right.

5 A. --- verify it if I could read it specifically.

6 Q. And then at closing there was a first amendment which
7 is Plaintiff's Exhibit 8 which encumbered all of the
8 property sold to Southern Lifestyles by the Declaration for
9 the Anchorage Plantation Homeowners Association, correct?

10 We have ---

11 A. If you have the document I will read it.

12 THE COURT: Again, that is -- I mean I appreciate you
13 doing that, but I am familiar with what has been done and it
14 is recorded. It speaks for itself really.

15 He doesn't have to agree or dis- -- if he disagrees,
16 that is his right to disagree. But the law is going to
17 control; whatever it is, it is, I think.

18 MR. WALKER: Well, Your Honor, in that event I might be
19 able to shorten my examination considerably.

20 THE COURT: I am not trying to interrupt you. I
21 understand this is an awkward little situation for all of
22 us; but seriously, in construing these documents and
23 construing the effect of these documents he can testify to
24 yeah they exist and that is what it says, but that is as far
25 as he is going to be able to testify; and I don't really

1 need him to do that because it speaks for itself. So I
2 believe.

3 MR. WALKER: In that event, Your Honor, I am going to
4 skip a number of questions ---

5 THE COURT: Okay.

6 MR. WALKER: --- I had related to the Declaration since
7 Your Honor and the lawyers can discuss that ---

8 THE COURT: Absolutely.

9 MS. COKER: --- and it is what it is.

10 THE COURT: Thank you, sir.

11 BY MR. WALKER:

12 Q. That amendment and restatement of the declaration was
13 done in July of -- July 21st of 2000; does that sound about
14 right?

15 A. I think so. Again, the date is on there.

16 Q. Well, jumping to the easement, the amended easement,
17 that are the focus of this case, those were entered after
18 this amended -- second amended and restatement of the
19 Declaration; correct? And I can refer you to Exhibit 17 and
20 Exhibit 18.

21 A. If you could -- if you have those, I can read those.

22 THE COURT: They are recorded -- it is a recorded
23 document, and they are dated; so it is what it is.

24 BY MR. WALKER:

25 Q. I believe you covered this with Ms. Coker, but those

1 easements were entered at a time when Southern Lifestyles
2 which had already closed on Phases One and Two had an option
3 to purchase the interior property; correct?

4 A. The easements were recorded during the time that they
5 still had the options, is that what your question is?

6 Q. Yes.

7 A. Again, that is the dates. And I don't -- I can't
8 remember all of these different dates. But I mean there
9 is -- it is documented.

10 Q. Well, wasn't the easement, one of the reasons that the
11 Walpole's wanted the easement, was because they were
12 concerned that Southern Lifestyles may not close on the
13 option property and they wanted to make sure that they
14 had -- they were trying to make sure that they had access to
15 the roads and to the boat landing and to the dock?

16 A. I believe in the purchase contract there was an item
17 there that states their interest in wanting the access.

18 Q. Were you involved at all in the determination of what
19 fee these 107 potential lot owners would pay to the
20 Anchorage Plantation Homeowners Association as stated in the
21 easement and the amended easement?

22 A. No.

23 Q. You are aware that the fee was set at \$50 a year to
24 increase to no more than \$100 per lot?

25 A. Yes.

1 Q. So you don't know how that fee was derived?

2 A. I know that it is on that paper. And I wasn't there
3 when it was determined.

4 Q. That is fine.

5 A. I mean ---

6 Q. You don't know; as I understand your testimony, you
7 just don't know how that number was arrived at, what if any
8 research or information was received to determine that
9 amount?

10 A. This was done before me.

11 Q. Okay.

12 A. And as you know, I have come in to represent my
13 grandfather. So I don't know what the thought process was
14 behind that.

15 Q. The next exhibit I am going to refer to is Plaintiff's
16 Exhibit 25. These are minutes from the board meeting of
17 Anchorage Plantation Homeowners Association June 23, 2007.
18 If that exhibit is available I would like to present it to
19 you.

20 (WHEREUPON, break to retrieve exhibits.)

21 BY MR. WALKER:

22 Q. Why don't you take a minute since it has probably been
23 a while since you have taken a look at that if you have
24 taken a look at it.

25 Again, those are some minutes from a meeting of the

1 Board at the county library on John's Island that you
2 attended.

3 A. I have never seen the minutes for this, but I do
4 remember the meeting.

5 Q. You do remember the meeting?

6 A. Vaguely. I remember being present at the meeting, and
7 I don't remember what they discussed.

8 Q. I would like you to go to Page 2 of the minutes where
9 there is a heading at the top where it says Walpole
10 property.

11 A. Yes.

12 Q. And since you do not remember having seen these or may
13 not have ever seen them could you take a moment to read down
14 through Paragraph Number 1.

15 A. Yes.

16 Q. You don't need to read it aloud.

17 THE COURT: No, because I have it. The court has it.

18 (WHEREUPON, break for witness to read the document.)

19 BY MR. WALKER:

20 Q. Have you had a chance to look at that?

21 Mr. Walpole, is it accurate that you indicated to the
22 Board at that meeting that the easement as amended was only
23 for when the land was being farmed and that he -- they, I
24 assume you are referring to your grandparents, were open to
25 negotiate a new arrangement as the land is developed?

1 A. You know, as I remember -- and these minutes are much
2 different than I remember that meeting going. The meeting
3 ended -- or was ending and I stood up and asked why there
4 was no discussion of any legal issues that were going on,
5 and there were property owners present that said they didn't
6 know anything about any legal proceedings.

7 This that is typed in here, we -- there was discussion
8 of things that I was aware of, but as far as statements that
9 I made about only being for farm amenities I wasn't there to
10 discuss that; I was there to find out if they were aware of
11 the legal proceedings.

12 This is -- and this is the first time that I have seen
13 these minutes. Because I couldn't get the minutes off of
14 the website. It became locked down soon after we made this
15 statement.

16 Q. Mr. Walpole, do I understand your testimony to be then
17 that you deny that you indicated at this meeting that the
18 amended easement was only for when the land was being
19 farmed?

20 A. I don't agree that I said this. I believe that what I
21 stated was taken out of context and misstated on this paper.
22 And I don't remember anyone actively taking notes there at
23 that meeting. I believe this was possibly after the fact.

24 Q. It is true, is it not, that under the AG15 zoning that
25 you now have, up to 107 lots can be subdivided out of the

1 residual property that is still with your family?

2 A. Per the county guidelines I believe it will allow up to
3 107 units.

4 Q. In 2005 your family obtained approval for a subdivision
5 plat, did it not, that divided this residual acreage into
6 six different TMS parcels; do you remember that?

7 A. Yes.

8 Q. Were you a part of that process?

9 A. Yes.

10 Q. And because of the nature of that subdivision because
11 it was of the number of lots, it was not required to go
12 automatically to the planning commission; it could be
13 approved by staff, correct?

14 A. I believe at the time anything less than ten, right.

15 Q. And in that process there was some back and forth
16 between the Planning Department and your engineer and your
17 family about what was going to be required on that
18 subdivision plat that was going to take this 780 acres and
19 divide it into six tax map parcels, correct?

20 A. I believe we worked with the County mainly.

21 Q. Right, the County planning staff?

22 A. Yes.

23 MR. WALKER: I think we are at 33.

24 THE COURT: Plaintiff's Exhibit 33. Okay.

25 (WHEREUPON, Plaintiff's Exhibit 33, letter 1/25/05 from the

1 Planning Department, was marked for identification.)

2 BY MR. WALKER:

3 Q. If you would, Mr. Walpole, would you take a look at
4 Plaintiff's 33 which is a letter dated January 25, 2005,
5 from the Planning Department.

6 (WHEREUPON, pause for review of document.)

7 Q. Do you recognize this Exhibit 33 now as correspondence
8 from John B. Waring of the Planning Department commenting on
9 the changes that would need to be made to the proposed
10 subdivision plat?

11 A. Yes, sir.

12 Q. One of the County requirements for a subdivision was
13 that each of the six separate parcels had to have their own
14 ingress and egress, correct?

15 A. Yes, sir.

16 Q. So one of the things that the plat you submitted did
17 was to show what that access was going to be for those six
18 very large lots, correct?

19 A. Yes.

20 Q. In this letter there is a little mark on four, on the
21 first page; and that says that the owner or I guess the
22 owner's engineers to receive a new non duplicate street or
23 road name for the private ingress egress easement which dead
24 ends into Lot 35. Do you see that?

25 A. Yes.

1 Q. And now what I am going to do so that we can all look
2 at Lot 35 is give you the plat that we are talking about
3 that was ultimately approved.

4 A. Okay.

5 MR. WALKER: This would be 34.

6 THE COURT: Okay.

7 (WHEREUPON, Plaintiff's Exhibit Number 34, plat, was marked
8 for identification.)

9 BY MR. WALKER:

10 Q. And if you would, you will see there are sheet numbers.
11 at the bottom right corner. It says Sheet 1 of 9 or 2 of 9
12 right down here (motioning). If you would go to Sheet 3 of
13 9. Do you have that?

14 A. Yes.

15 Q. And if we look at Sheet 3 of 9 we can see that Lot 35
16 is this lot right here (pointing), the farthest lot;
17 correct?

18 A. Yes.

19 Q. And what this comment we are looking at on Plaintiff's
20 Exhibit 34 is about was that there was an ingress that
21 dead-ended right there by Lot 35, correct? And I can show
22 you that. If you go to Page 9 you will actually see that.

23 A. Sheet 9 of 9?

24 Q. Sheet 9 of 9. Okay, I have a larger version of that.
25 Because it is hard to see. Before I ask you specifically

1 about this if you would go back to Page -- excuse me,
2 Plaintiff's Exhibit 33, the letter from Mr. Waring, and go
3 to Page 3 of the letter from Mr. Waring to the last page.

4 A. Okay.

5 Q. And comment four on the last page is label all roads as
6 private, drop Anchor Lane and Anchor Line Drive. Do you see
7 that?

8 A. Yes, sir.

9 Q. So one of the things the County was focusing on were
10 these access roads to the six parcels, right?

11 A. Yes.

12 Q. Okay. And if I might just use this.

13 MS. COKER: Your Honor, may I approach so I can see?

14 THE COURT: Sure. Absolutely.

15 MR. WALKER: You are welcome to come up here.

16 THE COURT: Y'all have freedom to move about without
17 even asking. Thank you.

18 MS. COKER: Thank you, Your Honor.

19 BY MR. WALKER:

20 Q. And you can look at either what you have in front of
21 you, Mr. Walpole, or the larger one. So that we look at the
22 bottom and we see a portion of the Phase One and Two
23 Development of Southern Lifestyles. That is where those
24 small lots are, correct?

25 A. Yes.

1 Q. All right. And above that we have the residual
2 property and we have Lot One towards Maybank, Lot Two, Lot
3 Three, Lot Four, Lot Five, and Lot Six. Those are the six
4 lots, correct?

5 A. Yes.

6 Q. The road that was the subject of the comment that we
7 read on the first page is 'this private 50' marked ingress
8 egress that comes down from by Rosebank and then makes a
9 turn or two and ultimately dead-ends at Lot 35, correct?

10 A. That road there was a road that had existed -- and I
11 would have to read the easement, but I believe that road
12 existed well before. Because there used to be residences on
13 the Point before we subdivided it. That is not the ingress
14 egress hookup into Lot 35.

15 Q. I know it doesn't hook up Lot 35. It is the ingress
16 for Lots Five and Six ---

17 A. No.

18 Q. --- that is referred to in the Planning Commission
19 letter?

20 A. I don't believe so. That is Salt Bottom Road.

21 Q. Right.

22 A. And this (pointing) is the label all roads as private,
23 drop Anchor Lane and Anchor Line Drive ---

24 Q. Yeah.

25 A. --- that is not -- there was a different time that that

1 road had to be recorded that way, and I can't remember why;
2 but it wasn't at this time.

3 MS. COKER: Your Honor, I am going to object to this
4 line of questioning. The subdivision is not at issue in
5 this case; the easement with regard to the road -- the 2001,
6 2002 easements. And this was a subdivision that occurred in
7 2005 and is a valid subdivision and not in front of this
8 court today.

9 THE COURT: I appreciate it. Your objection is noted
10 and overruled. Continue your examination.

11 BY MR. WALKER:

12 Q. So after -- Southern Lifestyles dropped out of the
13 picture when it didn't exercise its option; so they were
14 gone by 2002, 2003; correct?

15 A. No, they were gone like four -- 2004, 2005, I think.

16 Q. Okay. But they were gone before this subdivision plat
17 was submitted, because this was the family's proposal for
18 the subdivision of the property; correct, the first proposal
19 for the subdivision of the property?

20 A. Yes.

21 Q. And that proposal did not show the access to Lot Five
22 as being at the end of Anchor Watch Drive; instead it showed
23 it as being Salt Bottom Drive, correct?

24 A. No. That's what I'm saying. That road pre-existed
25 before this.

1 Q. I am not saying it was created for this plat. I am
2 saying that the subdivision plat showed this as an access to
3 Lot Five.

4 A. No. In -- no. The access to Lot Five was through the
5 end of the cul-de-sac on Page 3 of 9, Sheet 3, 9, where it
6 states temporary cul-de-sac easement at the end of Anchor
7 Watch Drive. It was specifically stated temporary because
8 of the intent of the developer to continue through that.

9 Q. What page is that you are referring to?

10 A. Three of nine.

11 Q. All right. Three of nine?

12 A. Three of nine, yes, sir. In fine print I believe it is
13 above Lot 36 you will see the verbiage there. It says
14 temporary cul-de-sac easement, which was I think ---

15 Q. Oh, I see the notation there. You are saying that that
16 was the access to Lot Five and not what was shown on the
17 plat, Salt Bottom Drive?

18 A. Salt -- again, Salt Bottom Drive was a road that had
19 been there. And I don't remember when that -- I mean it had
20 been there for before my grandparents owned the property.

21 We had to rename it because of some fire department
22 thing or some confusion or something with safety officials.
23 But it had nothing to do with the access to Lot Five. Lot
24 Five access was through Anchor -- Anchor Watch Drive.

25 Q. The residual property is not of these -- this 780 acres

1 has not been brought into the Anchorage Plantation

2 Homeowners Association, has it?

3 A. No.

4 Q. And since it has not been brought into the Anchorage

5 Plantation Homeowners Association if and when lots are

6 developed in the residual property they will not pay

7 assessments into the assessments; not fees, assessments into

8 the Anchorage Plantation Homeowners Association will they?

9 A. At this time there is no assessment that we would be
10 subject to.

11 Q. And under your position in this case those folks would
12 have access to the roads; they would have access to the dock
13 and the boat landing without having to pay assessments; all
14 they would pay is a simple fee of between 50 and \$100;
15 correct?

16 A. Just as the easement states.

17 MR. WALKER: One momentum, Your Honor.

18 THE COURT: Certainly.

19 MR. WALKER: Thank you, Mr. Walpole. She may have some
20 questions.

21 MR. WALPOLE: Oh. Sorry.

22 THE COURT: Redirect, Ms. Coker?

23 MS. COKER: Yes, Your Honor. Thank you.

24 THE COURT: Uh-huh.

25 Excuse me, just for purposes of the record did you want

1 33 and 34 to be admitted?

2 MR. WALKER: Thank you. We move for the admission of
3 33 and 34.

4 MS. COKER: We have no objection.

5 THE COURT: Without objection they are admitted.

6 (WHEREUPON, Plaintiff Exhibit Number 33 was admitted into
7 evidence.)

8 (WHEREUPON, Plaintiff Exhibit Number 34 was admitted into
9 evidence.)

10 MS. COKER: Your Honor, just briefly can I move the
11 podium as well?

12 THE COURT: You can do anything you need with it.
13 Thank you.

14 **REDIRECT EXAMINATION BY MS. COKER OF WILLIAM (BILLY)**

15 **WALPOLE:**

16 Q. Mr. Walpole, I would just like to clarify a few things
17 that you discussed with Mr. Walker in terms of I believe it
18 is Plaintiff's 5, the original purchase contract. Do you
19 have that in front of you?

20 A. Yes.

21 Q. Now that contract was for the purchase of Phase One and
22 Phase Two. Would you do me a favor and just for the court's
23 knowledge can you tell me on this map where Phase One and
24 Phase Two were located. Can you see that?

25 A. Phase One and Two is everything that has a yellow dot

- 1 or yellow blue dot on it. Those are all lots.
- 2 Q. So outside of the red tape ---
- 3 A. Yes.
- 4 Q. --- going toward the water? With regard to the option
5 property that is referred to in Exhibit 5 what is the option
6 property on this map?
- 7 A. Everything inside the red line.
- 8 Q. So Exhibit 5 was for the actual purchase of Phases One
9 and Two with an option to purchase Phase Three?
- 10 A. Yes, and this is the -- the initial purchase which was
11 the entire property, ---
- 12 Q. Correct.
- 13 A. --- and then there was an amended contract.
- 14 Q. I am asking you specifically about Exhibit 5. Do you
15 still have that in front of you?
- 16 A. Yes, I have got it in front of me.
- 17 Q. Okay. Now there came a time -- do you have Plaintiff's
18 13 in front of you also?
- 19 A. No.
- 20 (WHEREUPON, exhibit was provided to the witness.)
- 21 Q. And let me go back to Exhibit 5 very quickly to ask you
22 one single question. With regard to the much talked about
23 Section 10-3 which is on Page 8 of Exhibit 5 ---
- 24 A. Yes.
- 25 Q. --- it says that that right -- the rights to use an

1 access, the boat ramp, the community dock, and the roads
2 throughout Phases One and Two existed until the closing on
3 the option property; is that correct?

4 A. Yes.

5 Q. The option property again being Phase Three?

6 A. Yes.

7 Q. Thank you. With regard to Exhibit 13 could you please
8 turn to Page 7.

9 A. Okay.

10 Q. I apologize. I have lost my place. I'm sorry, it is
11 on Page 8.

12 A. Yes.

13 Q. Article 10-13.

14 A. Yes.

15 Q. And you have read this numerous times, but with regard
16 to Article 10 that is referenced in 10-13 that is the same
17 Article 10 in Exhibit 5, correct?

18 THE COURT: Again, Ms. Coker, we are asking him to
19 construe something. What he says doesn't matter.

20 MS. COKER: Okay.

21 THE COURT: That is a matter for me. Thank you.

22 BY MS. COKER:

23 Q. Mr. Walpole, with regard to Anchor Watch Drive, which
24 is in blue on this map I believe, ---

25 A. Yes.

1 Q. --- the entrance to Anchor Watch Drive is gated at some
2 point at the bottom of this map; correct?

3 A. Where Anchor Watch Drive nears Maybank Highway,
4 probably 500 feet from Maybank Highway I guess. It's pretty
5 close.

6 Q. There is a gate that is operated by the Homeowners
7 Association ---

8 A. Yes.

9 Q. --- on the Maybank Highway side of Anchor Watch?

10 A. Yes.

11 Q. What is at the other final terminus end of Anchor Watch
12 Drive?

13 A. The asphalt ends. And like I said, there is this as it
14 refers to in that plat a temporary cul-de-sac. It is a rock
15 cul-de-sac. I don't believe that it has been paved. I
16 personally haven't ridden there in quite a while.

17 Q. And that cul-de-sac is on your family property?

18 A. There are survey stakes out there, and I am pretty
19 certain that the lot line runs across the end -- right at
20 the end where the asphalt ends. And that may be why it
21 didn't get paved.

22 Q. And is there a gate or other means of access at the
23 cul-de-sac end of Anchor Watch?

24 A. We have a gate. Our -- it is a farm gate. We have a
25 perimeter fence around the farm, and there is a gate there.

1 Q. So the HOA has not attempted to prohibit your access to
2 Anchor Watch Drive from that end, the cul-de-sac end?

3 A. They planted trees at one point to block ingress and
4 egress, but that was on our property.

5 Q. But the gate itself you have a key ---

6 A. The gate itself we have a key, yes.

7 Q. Let me grab those exhibits from you. Mr. Walpole, I
8 will refer you back to Plaintiff's 33 -- excuse me, 32, I
9 believe, the Homeowners' minutes.

10 A. Twenty-five.

11 Q. Twenty-five. I'm sorry. With regard to your family's
12 willingness to discuss the monetary portion of the easement,
13 in other words the amount you would pay for the use -- not
14 you but anybody buying would pay to the HOA, are you still
15 willing to discuss that number?

16 A. Yes, I mean a discussion is always available. And we
17 had made attempt in the past. In this case it was merely a
18 statement looking forward to discussion.

19 MS. COKER: One moment, Your Honor.

20 THE COURT: Okay.

21 BY MS. COKER:

22 Q. Mr. Walpole, we have discussed what the parties' intent
23 was with regard to the contracts and the easement and what
24 was actually supposed to happen in Phases One, Two, and
25 Three, both with you and with plaintiff's witnesses.

1 At the time your family were granted the easements from
2 Southern Lifestyles Southern Lifestyles stilled owned Anchor
3 Watch Drive and the community boat ramp and dock, correct?

4 A. Yes.

5 Q. And it was only after those easements were recorded
6 that at some point thereafter those TMS numbers were deeded
7 to the HOA?

8 A. From what I understand, yes, with -- there's dates for
9 that too.

10 Q. At the time Southern Lifestyles entered into the
11 purchase and sale contract for this thousand acre parcel or
12 pieces that comprise a thousand-acre parcel they intended to
13 develop the whole thing, didn't they?

14 A. Our intent was to sell it as one parcel. Their intent
15 was to develop one parcel.

16 Q. And in fact they came up with site plans showing what
17 that development would be, didn't they?

18 A. Yes.

19 Q. And I am first going to show you what has not been
20 marked as an exhibit yet to see if you have seen this
21 before.

22 THE COURT: Is there a smaller version of that?

23 MS. COKER: Yes, sir, I have a not-on-pressboard
24 version.

25 THE COURT: Let's please let's use the smaller one ---

1 MS. COKER: Okay. Yes, sir.

2 THE COURT: --- for storage purposes. Thank you.

3 I mean it is helpful to me because I can't -- I was
4 reading the small one, but I have a magnifying glass in my
5 office. The page is a bear.

6 MS. COKER: Your Honor, I apologize; I only have a
7 large one today, but I can get you ---

8 THE COURT: That is all right. For the purposes of
9 this proceeding this is all what was planned, and I would
10 mention what you mentioned about the plans that they had
11 after the fact of what they were going to do in developing
12 the lots.

13 What's -- so what. I mean if they planned to do
14 something, I mean, they planned to do something. But that
15 doesn't change anything, does it, for what we are dealing
16 with -- so I really don't know what -- just as you said, I
17 will allow you to do it for whatever purpose is relevant
18 for -- is significant for whatever purpose it may have. But
19 I don't know what it really has. But maybe you are going to
20 enlighten me.

21 MS. COKER: I can respond to that, Your Honor.

22 THE COURT: Well, you just go ahead; put it in. I
23 just -- go ahead. I am not -- I am surely not objecting to
24 it. I try not to do that anymore. I will let y'all do
25 that.

1 I think one of the statements I heard one of my fellow
2 older judges say, I will let it in for what it is worth so.

3 MS. COKER: Thank you. My paralegal collated all of
4 the different maps instead of putting them all together.

5 THE COURT: Well, I understand you can't get good help
6 anymore.

7 MS. COKER: It probably was a much better way to do it
8 than what was in my brain.

9 THE COURT: This will be Defendant's Exhibit ...?

10 THE COURT REPORTER: Sixteen.

11 THE COURT: Sixteen

12 (WHEREUPON, Defendant's Exhibit Number 16, August 27, 2001,
13 site plan, was marked for identification.)

14 BY MS. COKER:

15 Q. Mr. Walpole, for what -- for identification
16 purposes only can you please read what has been marked as
17 Plaintiff's -- excuse me, Defendant's Exhibit 16 on the
18 bottom right.

19 A. Conceptual Site Plan, the Anchorage Plantation Three,
20 Wadmalaw Island, Charleston County, South Carolina.

21 Q. And could you read the date on that, please.

22 A. August 27th, 2001.

23 Q. And are you aware of who came up with this conceptual
24 site plan?

25 A. If I were to -- it states Southern Lifestyles, owned by

1 Southern Lifestyles. And it looks like Stan Tech Consulting
2 Services.

3 Q. And Southern Lifestyles was the owner at that point of
4 Phases One and Two, correct?

5 A. I believe, yes, they at that time had owned an option
6 on Phase Three.

7 Q. So at the time they granted your family the easement it
8 appears that they had designs for the development of Phase
9 Three?

10 A. Yes.

11 MS. COKER: Your Honor, at this time I would move for
12 the admission of Defendant's Exhibit 16.

13 THE COURT: Any ---

14 MR. WALKER: No objection, Your Honor.

15 THE COURT: Without objection it is admitted.

16 (WHEREUPON, Defendant's Exhibit 16 was admitted into
17 evidence.)

18 MS. COKER: Your Honor, I have no further questions of
19 Mr. Walpole at this time.

20 THE COURT: Recross?

21 **RECROSS-EXAMINATION BY MR. WALKER OF WILLIAM (BILLY)**

22 **WALPOLE:**

23 Q. Mr. Walpole, looking at this last exhibit, Defendant's
24 Exhibit 16, the whole idea was if Southern Lifestyles
25 purchased and developed Phase Three they were going to file

1 a supplemental declaration and bring that property into the
2 Anchorage Plantation Homeowners Association, correct?
3 A. I can't speak to what they were going to do or what a
4 homeowner -- or developer would do.
5 Q. Well, isn't it true that you didn't know they were
6 planning to develop it as one -- I thought you knew they
7 were planning it as one community?
8 A. Yeah, the intent is one community; yes. So as far --
9 but your question ---
10 Q. My question is since it was going to be one community
11 you knew their intent was if they closed and they proceeded
12 with a development plan like this the plan was to bring this
13 additional property into the Association, was it not?
14 A. I can't speak to their plans.
15 Q. All right. Thank you.
16 THE COURT: All right, sir.
17 MR. WALKER: No further questions.
18 THE COURT: You may come down, sir. Thank you.
19 Okay. Call your next witness, please, Mr. Altman.
20 MR. ALTMAN: I call Neil Robinson.
21 THE COURT: Okay.
22 (WHEREUPON, the witness was duly sworn.)
23 THE CLERK: Sir, for the record if you will state your
24 name spelling your last name.
25 MR. ROBINSON: Neil Robinson, R-O-B-I-N-S-O-N:

1 **DIRECT EXAMINATION MR. ALTMAN OF NEIL ROBINSON:**

2 Q. Neil, you are a licensed attorney in the State of South
3 Carolina?

4 A. Still licensed, yes.

5 Q. How long have you been licensed?

6 A. Since 1974.

7 Q. And you are with the law firm of Nexen Pruet, correct?

8 A. I am.

9 Q. What is your area of practice?

10 A. Real estate development.

11 Q. In the year 2000 were you representing Southern
12 Lifestyles?

13 A. Yes, I was.

14 Q. Did you represent them with regard to their purchase
15 and the contracts, negotiations, for the purchase of the
16 Anchorage Plantation property?

17 A. I did.

18 Q. Were you involved in the drafting of the contracts?

19 A. I was.

20 Q. Okay. You are familiar with the fact that there
21 were -- was an initial contract in January of 2000?

22 A. Yes.

23 Q. Okay. I believe that is Exhibit -- I believe that was
24 Exhibit 5, Plaintiff's Exhibit 5?

25 A. Yes, that is it.

1 Q. And then there was an amendment to the contract in
2 December of 2000 which is Plaintiff's Exhibit 13?

3 A. Well ---

4 MR. WALKER: Your Honor, I ---

5 A. There are two separate contracts.

6 MR. WALKER: Yes.

7 A. One is for the purchase of the waterfront property and
8 the other is for the purchase of the balance of the
9 property. Together about a thousand acres. And so there
10 are two separate contracts.

11 Q. During the planning were you involved also in getting
12 the surveys, plats, approved for the development?

13 A. I assumed that I was, yes.

14 Q. Okay. You don't specifically remember that?

15 A. I don't, no.

16 Q. Did there come a time after the December 2000 contract,
17 Plaintiff's Exhibit 13, that it looked like Southern
18 Lifestyles was not going to be able to proceed with the
19 option property or the Anchorage Three property?

20 A. That is correct.

21 Q. And were there further discussions with the Walpole's
22 about dealing with that purchase?

23 A. There were, yes.

24 (WHEREUPON, Defendant's Exhibit 17, letter dated 10/30/01 to
25 Robinson, was marked for identification.)

1 BY MR. ALTMAN:

2 Q. I am going to show you a copy of a letter that is
3 addressed to you from me dated in October 30th, 2001, and
4 ask if you recognize it.

5 A. Yes.

6 MR. ALTMAN: Do you have any objection?

7 MR. WALKER: I don't know. Can I -- have I seen this
8 before? I don't remember having this letter. Was it
9 produced?

10 MS. COKER: It was -- it was definitely in the
11 documents that were inspected by Chip originally, and Chip
12 got a copy of it at some point. Y'all got a copy of it at
13 some point during the trial because I had it remarked.

14 MR. WALKER: Well, no objection, Your Honor.

15 THE COURT: Go ahead.

16 MR. WALKER: Plaintiff's Exhibits ---

17 THE COURT: No, ---

18 MR. ALTMAN: Plaintiff's Exhibits -- Defendant's
19 Exhibit 17.

20 THE COURT: Defendant's 17 without objection.

21 (WHEREUPON, Defendant's Exhibit 17 was admitted into
22 evidence.)

23 BY MR. ALTMAN:

24 Q. That letter, the one we are referring to as Defendant's
25 Exhibit 17, is that letter as a result of correspondence

1 from you to me dealing with whether or not -- or how
2 Southern Lifestyles would proceed with the Anchorage Three
3 purchase; is that correct?

4 A. Yes, I think there was I think quite a bit of
5 back-and-forth throughout this whole development as a
6 result of the way that it was structured.

7 And the relationship between my client and the
8 Walpole's was a good one, but they both had separate
9 objectives in the sale. Because the Walpole's were looking
10 to -- they wanted to sell it all, and we were trying to
11 assure that we had a structure that would allow that to
12 happen.

13 But circumstances changed, as you know, in our economy
14 and the real estate market; and they weren't able to fulfill
15 all of that. So this was in the middle of that.

16 Q. So there were some concerns as to whether or not
17 Southern Lifestyle was going to be able to purchase
18 Anchorage Three, correct?

19 A. That is right, the final phase; yes.

20 Q. And I apologize because we do not have a purely clean
21 copy. There is some highlighting that got copied. But I am
22 going to where the -- I am going to call it highlighted
23 portion was is if you can read into the record that
24 second -- that third paragraph.

25 A. Yes.

1 (WHEREUPON, witness reading as follows:)

2 A. When the Walpole's first reviewed your letter their
3 first reaction was that since the contract was not accepted
4 as drafted I should notify you there was no longer any
5 reason to discuss the matter further; however, after
6 considering the situation overnight the Walpole's saw the
7 logic in having one developer for the property.

8 As a result they have instructed me to advise you they
9 are willing to further negotiate the terms of the contract
10 but only after receipt and recording of the access and boat
11 ramp and dock easement previously sent to you.

12 They feel this sign of good faith on the part of
13 Southern Lifestyles is absolutely necessary to show their
14 sincerity in moving forward.

15 Q. And did that result in the easement for the use of
16 Anchor Watch Drive and the boat ramp ---

17 A. Yes.

18 Q. And subsequently the amendment to that easement?

19 A. Yes.

20 MR. ALTMAN: I am not sure if -- those items are
21 exhibits, so I am or not going to go into that

22 THE COURT: What, the easements? They are.

23 MR. ALTMAN: The easements are a part of the record.

24 THE COURT: They are.

25 BY MR. ALTMAN:

1 Q. Neil, you participated in the negotiation of the
2 execution of what became the easements; correct?

3 MR. WALKER: Objection. Leading.

4 THE COURT: Rephrase it.

5 MR. WALKER: You are suggesting that he participated in
6 the negotiation. I ---

7 THE COURT: Rephrase your question. Sustained.

8 BY MR. ALTMAN:

9 Q. Did you -- did you participate in the negotiation ---

10 A. If you want to call it a negotiation. I participated
11 in the execution of the easement.

12 Q. Did you believe that your client had the right to give
13 the easement, grant the easement?

14 MR. WALKER: Objection.

15 THE COURT: What is your basis?

16 MR. WALKER: He is rendering an opinion. He is not
17 listed as an expert witness.

18 THE COURT: I will allow it.

19 A. Do you want to restate that?

20 Q. Certainly. Did you believe your client had the right
21 to grant the easement for the use of Anchor Watch Drive and
22 the boat ramp?

23 A. They certainly had the right to, yes.

24 Q. Would you have told your client not to execute it if
25 you believed they didn't have the right to do so?

1 A. Yes.

2 MR. ALTMAN: I have nothing further, Your Honor.

3 THE COURT: You may cross-examine.

4 **CROSS-EXAMINATION BY MR. WALKER OF NEIL ROBINSON:**

5 Q. Mr. Robinson, that easement was not drafted by you; was
6 it?

7 A. No.

8 Q. That was drafted by Mr. Altman, correct?

9 A. It was.

10 Q. And you didn't have any changes to that easement, did
11 you; that -- they ended up signing what was put in front of
12 them; correct?

13 A. Correct.

14 Q. And basically it was take it or leave it on that,
15 wasn't it?

16 A. At the time, yes. But there were things that my client
17 wanted that they got in exchange for it.

18 Q. And the main thing that they wanted was the ability to
19 continue to negotiate the contract to acquire the residual
20 acres, correct?

21 A. They wanted to keep the deal alive, yes.

22 Q. Because Mr. Altman's letter says the Walpole's are
23 going to stop negotiating unless Southern Lifestyles through
24 Steve Lewis signed that easement that he prepared, correct?

25 A. I think the letter speaks for itself.

1 Q. And didn't the Southern Lifestyles -- didn't Southern
2 Lifestyles express to you that they had some concerns about
3 that?

4 A. Yes.

5 Q. And did you talk to them about your concerns about the
6 way that was worded with only a \$50 fee, no more than a \$100
7 fee?

8 A. We discussed it at some length. The -- as you know I
9 am sure being involved in real estate development yourself,
10 the access to water is prime in this area and it adds value
11 to all properties.

12 So they were not overly concerned about the need or the
13 desire to maintain access to water, but they felt that it
14 would be best if the property were part of the regime as
15 opposed to being separately under just an agreement like
16 that.

17 But at the time they still intended to acquire the
18 property, and I advised them that if they were to acquire
19 the property they could then bring the property within the
20 regime because it hasn't been deeded to the Property Owners
21 Association at that time and then they could make them in
22 like kind with the existing property owners.

23 Q. It was your view that the safest thing was if the
24 contribution of these property owners on the Walpole
25 property if they were not in the Association be empowered to

1 sue with the persons in the Homeowners Association, correct?

2 A. That was the word I was about to use, yes.

3 Q. But instead, the way that easement was drafted by Mr.
4 Altman on behalf the Walpole's there was just a fixed fee
5 with a not-to-exceed amount?

6 A. I think the amended easement put a cap on it. But it
7 was felt at the time, quite honestly, that it was really
8 only for access to the boat ramp so people could bring a
9 boat down and put it in the water, that it wouldn't really
10 be used very much.

11 So at the end of the day they felt the \$50 that would,
12 you know, rise over time paid by a number of lot owners
13 would be sufficient to defray that limited use.

14 Q. And didn't you tell them that someone down the road
15 might contest the terms of the easement?

16 A. We had discussions about all of the potential things
17 that could happen. I am sure that was part of that
18 discussion.

19 Q. The actual terms of the easement specifically say in
20 the last paragraph - and I can show it to you - that if
21 Southern Lifestyles were to acquire the benefited parcel
22 that they could cancel that easement?

23 A. Yes.

24 Q. And that was the plan at the time; they were still in
25 the game trying to close on that parcel, right?

1 A. Oh, yes. Sure.

2 Q. And was it your understanding if they did close that
3 they would have cancelled that easement so they weren't that
4 concerned about it?

5 A. Correct.

6 Q. You said this, but I just want to make sure that we
7 have got it, and that is that we were looking at this
8 subdivision plan that is a concept plan. It is Plaintiff's
9 Exhibit I think it is 16. It was done by Southern
10 Lifestyles that shows a lot arrangement for the residual
11 property. It was their intent if they closed to bring in
12 this property to the Homeowners Associations through a
13 supplemental declaration, correct, as additional property,
14 correct?

15 A. That's right.

16 Q. Yes?

17 A. Yes.

18 Q. So they would have been paying assessments under
19 Southern Lifestyles plan with the other property owners?

20 A. Correct.

21 Q. You said that in response to Mr. Altman's question that
22 you believe they have the authority to sign the easement.
23 But would you agree that the legal documents of record
24 leading up to that execution could perhaps have limited the
25 authority, in particular the declaration and its provisions

1 on what the rights of the declarant were?

2 A. I think I understand what you're asking. I felt that
3 they had the full right to grant an easement just as they do
4 grant easements for power lines, utilities, cable-TV, and
5 all of that, that they didn't need the approval of anybody
6 else in order to grant a non-exclusive easement. Because
7 the individual property owners under the Declaration only
8 get a non-exclusive easement.

9 MR. WALKER: Could we have Plaintiff Exhibit 10,
10 please.

11 THE COURT: All right. And you referenced Plaintiff's
12 16 is that plat. I think it is Plaintiff's 14.

13 MR. WALKER: I mean, yeah, it is Defen- -- yeah, my
14 apologies -- I think ---

15 THE COURT: And for purposes of the record the
16 easements that we have been referencing the easement is
17 Plaintiff's Exhibit 17, and the amended easement is
18 Plaintiff's Exhibit 18.

19 MR. WALKER: Your Honor, and I confused defendant and
20 plaintiff. The exhibit that I was referring to as 16 was
21 Defendant's Exhibit ---

22 THE COURT: Defendant's 16.

23 MR. WALKER: --- 16.

24 THE COURT: Okay. What plaintiff's exhibit do you
25 need?

1 MR. WALKER: It would be Plaintiff's Exhibit 10 which
2 would be the amended and restatement of the Declaration.

3 THE COURT: Okay.
4 (WHEREUPON, exhibit provided.)

5 BY MR. WALKER:

6 Q. Plaintiff's Exhibit 10 is a copy of the second amended
7 and restatement of the covenants, conditions, and
8 restrictions. I believe it contained a footer for Nexsen
9 Pruet.

10 A. It does.

11 Q. Was it your firm that prepared these?

12 A. Yes.

13 Q. If you would go to Page 17, please. Do you see
14 Article 6 that is titled property rights?

15 A. Yes.

16 Q. Is this the section that set forth the property rights
17 of the parties?

18 A. Yes.

19 Q. And if we go to Page 20, please, to Section 6.5, we
20 have a provision, easements for the Declarant. Do you see
21 that?

22 A. Yes.

23 Q. And 6.5 talks about ---

24 MR. ALTMAN: Your Honor, we would object to this. The
25 document speaks for itself.

1 THE COURT: Well, I appreciate it; but you asked him
2 questions about whether he had authority. I am going to
3 allow the same leeway with that. Thank you. Based on your
4 opening the door, sir.

5 THE COURT: Thank you.

6 MR. ALTMAN: Okay.

7 BY MR. WALKER:

8 Q. Do you see 6.5?

9 A. I do.

10 Q. All right. And 6.5 speaks in terms of during the
11 period that the declarant owns any of the property for sale.
12 the declarant will have an alienable and transferrable right
13 and an easement on, over, through, under and across the
14 common areas for the purpose of constructing improvements in
15 and to the lots and for installing, maintaining, repairing
16 and replacing other improvements for the property
17 contemplated by this Declaration or as declarant desires in
18 its sole discretion including without limitation any
19 improvements or changes permitted and described by Article 2
20 and for the purpose of doing all things reasonably necessary
21 and proper in connection therewith provided; in no event
22 will declarant have the obligation to do any of the
23 foregoing.

24 So this easement speaks in terms of the declarant's
25 easement involving the common areas to construct

1 improvements and towards the full development of the
2 property, correct?

3 A. Correct.

4 Q. And at 6.5.1 is the declarant's easements for any
5 additional property. And that would apply if they brought
6 in additional property as we talked about earlier; correct?

7 A. Correct.

8 Q. This declaration does not reserve to the declarant the
9 right to grant easements to third parties who are not
10 members, does it?

11 A. I don't think it addresses it in any fashion, no.

12 Q. So if it doesn't address it, it doesn't specifically
13 grant that right; does it?

14 A. Not as declarant.

15 Q. That is all at this time. Thank you.

16 THE COURT: Okay. Any additional questions? Redirect?

17 MR. ALTMAN: Yes, Your Honor.

18 **REDIRECT EXAMINATION BY MR. ALTMAN OF NEIL ROBINSON:**

19 Q. Neil, there is no prohibition contained in these
20 covenants with regard to the declarant?

21 A. No. And just for purposes of clarification if I might,
22 it has been our feeling that the easement granted to the
23 Walpole's for access to the water basically by use of the
24 roads was granted as the property owner, not as the
25 declarant.

1 That is typically -- to be quite honest, had I
2 represented the seller I would have reserved the easement in
3 the deed so that when I deeded the waterfront property I
4 would have reserved an easement for access for the balance
5 of the property subject to being eliminated if that property
6 were acquired by the buyer.

7 That wasn't done in this case. And it wasn't done I
8 think because it was pretty clear at the time they intended
9 to acquire that property. So it was in the contract but it
10 wasn't in the deed.

11 When it became apparent that they weren't going to
12 acquire it, the easement in essence provided the Walpole's
13 the protection that would have ordinarily been reserved in
14 the deed.

15 So that's -- that is the way I viewed it, and that is
16 the way I view it today.

17 Q. Let me refer you very briefly. If you would look at
18 Page 6 of Exhibit 10 ---

19 A. Are we still on this Exhibit 10?

20 Q. Yes.

21 A. Okay.

22 Q. And I understand your testimony that we took the
23 conveyance as being that by the property owner. But I am
24 going to ask you to look specifically at Section 2.3(B).

25 A. Okay.

1 Q. Two point three talks about the conveyance of the
2 common areas ---

3 A. Right.

4 Q. --- to the Property Owners Association. And 2.3(B)
5 would you please read that.

6 A. The right of access of the declarant, its successors
7 and assigns, over and across such property.

8 Q. And it says the conveyance of the common areas will be
9 subject to that in the ---

10 A. Correct.

11 Q. --- other paren portion of that. And let me ask you to
12 look at on Page 17.

13 A. All right.

14 Q. Section 6.242.

15 A. Yes.

16 Q. Can you please read that.

17 (WHEREUPON, witness reads as follows:)

18 A. Declarant's reserved rights and easements. The rights
19 and easements specifically reserved to declarant in this
20 declaration.

21 Q. And that -- that would be part of 2.2?

22 A. That would refer back to 2.2, yes.

23 MR. ALTMAN: Nothing further, Your Honor.

24 THE COURT: Okay. Recross.

25 **RECROSS-EXAMINATION BY MR. WALKER OF NEIL ROBINSON:**

1 Q. Two point three (B) is not an easement; it says a right
2 of access; correct, not an easement?

3 A. I guess the right to be whatever that right was, yes.

4 Q. Well, obviously there's a difference between a right --
5 an easement and a right don't necessarily mean the same
6 thing; in fact the provision we were looking at, Article 6,
7 says the rights and easements of the Declarant; correct?

8 A. Correct.

9 Q. And so if there was an intent that 2.3(B) be an
10 easement it would have said an easement, correct?

11 A. It could have said an easement, yes.

12 Q. And this is for purposes of what -- of the deed of that
13 common area to the Association, correct?

14 A. Restate that, please.

15 Q. Two point three deals with the conditions associated
16 with the deed or reservations in the deed of common areas to
17 the Association?

18 A. Yes.

19 Q. Now if we go to Page 40, please. Well, wait. Before I
20 get there -- I'm sorry, Mr. Robinson.

21 You mentioned that one way that an easement could have been
22 assured was if the Walpole's had reserved an easement in
23 their deed to Southern Lifestyles, eight; correct?

24 A. Correct.

25 Q. And they didn't do that, did they?

- 1 A. They did not.
- 2 Q. Another way would be if this declaration had reserved
- 3 to them an easement like it did to the McKee's, correct?
- 4 A. I haven't seen that. I assume that that is correct.
- 5 Q. You are aware that -- if you would go to Page 19 of
- 6 Exhibit 10 at the bottom, McKee tract easement.
- 7 A. Yes.
- 8 Q. McKee track was sold before -- or the McKee's were
- 9 there before the sale to Southern Lifestyles, correct?
- 10 A. Mr. Walker, if you say so, I believe you, yes.
- 11 Q. Well, I will represent to you that both this
- 12 declaration and an earlier one reserved to them a right to
- 13 go down Anchor Watch Drive to their property.
- 14 A. Yes.
- 15 Q. And so another way would have been for the Walpole's --
- 16 or this easement could have been drafted to reserve to the
- 17 Walpole's just like the McKee's an easement to ---
- 18 A. It could have been more specific like that, yes.
- 19 Q. There could have been a specific grant ---
- 20 A. Yes.
- 21 Q. --- within the declaration? Now I want to go over to
- 22 Page 40 which I directed to you too prematurely; but I am
- 23 ready to go there now.
- 24 A. Okay.
- 25 Q. And that is 15.4, consents required, constituent

1 document changes. Now it specifically says notwithstanding
2 any lower requirement permitted by the constituent documents
3 or the Nonprofit Corporation Act no amendment of any
4 material provision of the constituent documents by the
5 owners described in this Section 15.4 may be effective
6 without the vote of 67 percent or more of the votes of the
7 entire Association. Do you see that?

8 A. I do.

9 Q. And among those that are required to amend the
10 Declaration by 67 percent in sub-F is the right to use
11 common areas and limit common areas, right?

12 A. Yes.

13 Q. So in this instance since the Declaration was not
14 amended, that provision doesn't apply; but it does indicate
15 that the use of the common areas is fairly sacrosanct to the
16 Association, correct, requiring ---

17 A. Yes, if it is association related that is correct.
18 That is what the covenants are for.

19 Q. And then if we go to the next page, Page 44 at 15.5 ---

20 A. Do you mean page 41?

21 Q. Forty-one. I'm sorry, 15.5, again there is a section
22 talking about certain actions. And it says notwithstanding
23 any lower requirement permitted by the constituent documents
24 or the Nonprofit Corporation Act the Association may not
25 take any of the following actions without approval of at

1 least 51 percent of the eligible mortgagees for such higher
2 percentage as set forth herein. And in F if you go to sub-F
3 that refers to the granting of easements, leases, licenses
4 and concessions through or over the common areas excluding
5 utilities; ---

6 A. Yes.

7 Q. --- correct?

8 A. Yes.

9 Q. So again we see how significant any grant of right is
10 to with respect to the common areas.

11 A. That's right. I think any change to the easement would
12 require that approval.

13 Q. And then in the last provision that I am going to ask
14 you about is on Page 46.

15 A. Okay.

16 Q. And do you see a Paragraph 16.12, rights of third
17 parties?

18 A. Yes.

19 Q. And it specifically says, does it not, this Declaration
20 will be filed of record for the benefit of declarant, the
21 owners, and their mortgagees, as herein provided and by such
22 recording no adjoining property owner or a third-party will
23 have any right, title or interest whatsoever in the
24 development except as provided herein; and then it goes on?

25 A. That is correct. Yes.

1 MR. WALKER: Just a moment, Your Honor.

2 THE COURT: All right.

3 MR. WALKER: Thank you, Your Honor. That is it.

4 THE COURT: Okay. That is it. Come down, Mr.

5 Robinson.

6 MR. ROBINSON: Thank you.

7 THE COURT: All right. Any additional witnesses?

8 MR. ALTMAN: None, Your Honor.

9 THE COURT: Okay. Any reply testimony?

10 MR. WALKER: No reply testimony.

11 THE COURT: Very good. Then do y'all wish to make
12 closing remarks; do you want to do it that way or however
13 you wish to proceed.

14 MR. ALTMAN: Your Honor, I would like to make a few
15 remarks.

16 THE COURT: All right.

17 MR. ALTMAN: I am always mindful though of my listener
18 and if my listener -- I don't know ---

19 THE COURT: Well, I am going to hear from you. But one
20 of the things that I was thinking about that Professor --
21 you don't have to stand up.

22 Professor Ledbetter use to say and was telling - yeah,
23 we are on the record. I guess we have to be because it
24 shows my thought process what little thought I have - what
25 is the state of the title. And that in connection with the

1 rule against -- some life in being with -- in 21 years it
2 has got to be best, where is the title to this property.

3 Obviously when the Walpole's conveyed it -- conveyed
4 it to the corporation it was vested in the corporation. The
5 corporation then conveyed it to each individual lot owner,
6 so the title to their properties vested there. And then the
7 Declaration they conveyed it to the home ownership all of
8 the basic what common areas. So that title to the common
9 area is now vested in the homeowners, correct?

10 MR. ALTMAN: Not until after the easement ---

11 THE COURT: Hold on.

12 MR. ALTMAN: --- is granted.

13 THE COURT: I am not talking about when you are
14 talking -- I am talking about the vesting of title. Once
15 that deed -- the declaration -- once the deed is recorded,
16 obviously title vests. And we are a recording state, so it
17 has got to be date of deed and recordation of the deed;
18 correct?

19 MR. ALTMAN: Correct.

20 THE COURT: Once the Declaration is recorded it vests,
21 correct?

22 MR. WALKER: We believe ---

23 MR. ALTMAN: Through Southern Lifestyles.

24 THE COURT: Southern Lifestyles -- it is vested in
25 Southern Lifestyles the day the deed is recorded. Southern

1 Lifestyles then in turn -- the declarations -- I mean these
2 are not just restrictive covenants; these are dealing with
3 how this is going to function.

4 Southern Lifestyles is now going to function -- really
5 the homeownership, the Homeowners Association functions now.
6 And that's why the property -- the title to the property is
7 passed by that Declaration, by that language, does it not,
8 to the common areas; or is it still vested in Southern
9 Lifestyles?

10 MS. COKER: The ownership rights of the property, the
11 record owner was Southern Lifestyles until it conveyed those
12 TMS numbers to the HOA ---

13 THE COURT: Precisely.

14 MS. COKER: Right. They have contractual rights,
15 however ---

16 THE COURT: I am just -- I am just getting -- wrapping
17 my mind -- the one thing we didn't have, we didn't study
18 about homeowners association. They didn't have any of those
19 when I -- in 1971 or '70 when I was in law school taking
20 Property 101. That has been a lovely invention. They also
21 changed the probate code and changed all the law we studied
22 and learned in law school. But that is an aside.

23 But clearly title has to be vested somewhere. We all
24 agree with that. And it went from Walpole, Southern
25 Lifestyle, and ultimately in the Homeowners Association.

1 And of course the persons that have purchased had
2 obtained because there is -- I looked at some deeds. There
3 are deeds for specific lots from Southern lifestyles. So
4 they deeded -- and at the point this -- the declaration is
5 filed they have -- and I am asking. I haven't checked the
6 title. But all lots have conveyed?

7 MR. WALKER: Your Honor, the sequences is that ---

8 THE COURT: Help me with that so I can wrap ---

9 MR. WALKER: Right. And I am just going to back up one
10 step. In 1997 the Walpole's filed the first plat for Anchor
11 Watch and said the road was dedicated to the ---

12 THE COURT: Correct.

13 MR. WALKER: --- to the Property Owners Association.

14 THE COURT: And I know the significance of that.

15 MR. WALKER: Then at the time of closing, the Southern
16 Lifestyles they conveyed all of the last two miles or so of
17 Anchor Watch plus the development property that is lots to
18 Southern Lifestyles and they amended their declaration to
19 cover that land. So it is covered.

20 And then before they conveyed any lots -- before they
21 conveyed any lots, about a month later they imposed the
22 second amended and restated; which it is a restriction and
23 encumbrance in all titles including, as it says in the
24 beginning, wherefore, the recital at the bottom of the first
25 page, wherefore all of the entire property is subject to and

1 anybody that holds it, transfers it, or conveys any interest
2 subject to the Declaration.

3 THE COURT: Okay. The persons -- the property owners
4 was -- do they have a deed for their lot?

5 MR. WALKER: There were probably five to six
6 conveyances between the time that the Second Amended and
7 Restated Declaration was of record and when the easements
8 were granted.

9 So they conveyed say five lots including Mr. Brostoff's
10 lot. And then they purported to grant the easement and then
11 they conveyed the rest of the lots.

12 And then along the way roughly about two-and-a-half to
13 three years after closing they conveyed legal title to the
14 Association.

15 But as you were saying, that property was encumbered.
16 And even though they didn't convey legal title the property
17 was fully restricted and the Association had an equitable
18 right to it.

19 THE COURT: All I am trying to understand is the legal
20 title at the time the easements were granted the question is
21 whether or not this agreement controls. But legal title was
22 vested at that point in Southern Lifestyles?

23 MR. WALKER: That's correct.

24 THE COURT: Okay.

25 MR. WALKER: Of record the title was in Southern

1 Lifestyles ---

2 THE COURT: Well, that's -- that is what -- that helps
3 me. Okay. Thank you very much. And I appreciate it.
4 Now -- now I will be happy to hear from you.

5 MR. WALKER: Your Honor, I am not going to spend a
6 tremendous amount of time; but I do want to talk about this
7 very critical issue. Because it is -- I saw Your Honor nod
8 his head -- your head when Mr. Robinson said that the deed
9 was not as declarant but as Southern Lifestyles' owner.

10 And that really gets to the heart of the matter. We
11 have alternative theories for why that easement is
12 ineffective; but the core reason, Your Honor, is that once
13 the Declaration is imposed on the property the declarant
14 has limited his right, and the Association has rights, and
15 the owners have rights, and the declarant cannot just
16 willy-nilly grant to third parties.

17 Now there is no distinction between a declarant -- a
18 deed doesn't have to say as declarant we grant this. They
19 just granted it. But they are the declarant in the matter
20 of law and that land is restricted as a matter of law.

21 And I submitted to the court and I will submit a hard
22 copy of the -- a decision we found -- the closest one we
23 could find, in Texas, Raman Chandler Properties, LLC, where
24 this same question came up in this sequence that we have in
25 this case where the covenants were put on the property, the

1 developer conveyed an easement and then the developer
2 conveyed the common area.

3 And the developer said that is a valid easement because
4 we didn't convey legal title -- or we had legal title at the
5 time to the common properties and that legal title basically
6 gives us the right to grant an easement and it doesn't
7 matter what the Declaration says because we were granting it
8 as owner.

9 And the court answered the question specifically saying
10 that under these facts the actual legal ownership of the
11 common areas is irrelevant. That is legal title. The
12 primary issue is whether the developer in 1999 retained
13 the right to unilaterally amend the plat or create and
14 burden the common areas for the benefit of a different
15 association - here it was a different association, another
16 third-party as an adjoining property - by granting it an
17 easement. The answer is no. And that is what we have here.

18 If -- if the Declaration allowed the declarant to grant
19 a right to a third-party who is not a member then the
20 easement would have been valid. But the authority to grant
21 easements is determined by the Declaration, and the
22 provisions in the Declaration do not grant that right.

23 There was some discussion about a right of access of
24 the declarant across the common properties. And if we go --
25 the right of access is different from an easement. And if

1 we go to the section on property rights we get very
2 specific - I am not going to use all of these.

3 THE COURT: Thank you.

4 MR. WALKER: In fact I probably don't need to use very
5 many. But when you get to Article Six it says declarants,
6 reserve rights and easements, the rights and easements
7 specifically reserved to declarant in this Declaration.

8 THE COURT: Correct.

9 MR. WALKER: And if you go through that -- and I am not
10 going to go through all of them. Mr. Robinson read one of
11 them. And it includes the right for utilities.

12 It says they can do all kinds of things to build the
13 infrastructure. They can build the common area amenities.
14 But it also says that that right expires once they no longer
15 own any property.

16 Because the declarant's interest is in creating value,
17 building these improvements; and then once it has sold the
18 property it no longer has a real estate interest in the
19 property.

20 And recent cases of our Supreme Court has talked about
21 that, that if the restriction is to be enforced by say a
22 declarant or by the original developer it still has to have
23 an interest in the real property. It just can't be out
24 there and have a random right.

25 And so when we go through Article 6 and we look at all

1 the declarant's rights there is nothing that says that they
2 can grant an easement to somebody else without going through
3 the process that I went over at the very end with Mr.
4 Robinson.

5 And that really is the nut here, Your Honor. If we
6 look at it and we look at the way that easements are granted
7 this declaration was comprehensive.

8 The McKee's are an in holding in this property, and the
9 declaration specifically said to the McKee's you can have a
10 right for \$100 a year to come in.

11 The McKee's are right down at the bottom here
12 (pointing), Your Honor. And so for \$100 a year or whatever
13 the amount is they can come in and they can go to their
14 property. They don't have use of the boat ramp or anything
15 like that.

16 THE COURT: Just as an aside, they were there so that
17 it really just eliminated the easement of necessity
18 argument.

19 MR. WALKER: Right. And it was some -- they worked it
20 out and the Walpole's negotiated that when they put the
21 first Declaration on ---

22 THE COURT: Correct.

23 MR. WALKER: --- and 1997 just carried it forward.
24 Makes sense.

25 But there was nothing like that in favor of the

1 Walpole's in the Declaration. As Mr. Robinson said, they
2 could have reserved an easement in the deed which would have
3 been the way to do it. The Declaration could have been
4 specifically worded as it was with the McKee's to reserve an
5 easement. But it was not.

6 And here we say that because they don't have the
7 authority, specific authority, to grant these easements and
8 there are no rights in third parties, that they didn't have
9 the authority.

10 With all due deference to Mr. Robinson, who is a superb
11 lawyer, we are just coming back to what the documents say.
12 We also would point out, Your Honor, that in addition to
13 whether that authority is restricted - and we say it is, and
14 we will go into it in our proposed order - but we had really
15 what amounts to an inequitable arrangement.

16 The developer was under pressure, and the letter Mr.
17 Altman put in from him to Neil Robinson basically said
18 either you sign this or we are not going to be continuing
19 our negotiations; and they signed it.

20 And Mr. Robinson knew -- or told them it could be
21 challenged. They knew it might be challenged. But for them
22 they were hoping that they were going to get the property.
23 They closed. They make the residual property a part of the
24 Association. They pay assessments on a pro-rata basis, and
25 they cancel the easement.

1 And that is what they talked about: We don't need to
2 worry about that easement, we grant it because we still want
3 to close.

4 Well, the problem is that they didn't close and that
5 easement is still out there. And really what it is, it was
6 just a Hail Mary pass at the end of the day where the
7 Walpole's saw Southern Lifestyles was going down.

8 Nobody had anticipated that Southern Lifestyles was not
9 going to be able to purchase the residual properties. The
10 Walpole's wanted to sell the whole thing. Nobody blames
11 them.

12 But Southern Lifestyles couldn't take it down in one
13 parcel. So they took down the waterfront first for ten
14 million, and they had an option for three-and-a-half on the
15 interior and they really intended to do it; so nobody was
16 making arrangements to grant an easement in those documents.

17 And so after the thing was -- all the documents were
18 put of record they said oh my God, what if Southern
19 Lifestyles doesn't close, we need this right.

20 And if you look at it, that's -- and you look at the
21 letter, that is exactly what happened. We would also point
22 out with respect to the easement that on the dock it just
23 talks about a right of use, and we believe that both in the
24 purchase contract and also in that purported easement that
25 that is basically a license that is personal to the

1 Walpole's to use it and not an easement that runs with the
2 land.

3 Of course Southern Lifestyles also had fiduciary duties
4 to the Association. And we don't think the court needs to
5 get there, but we would assert that the giving of this
6 easement to the entire 107 lots who only pay \$100 - and
7 the record is that today these property owners are paying
8 \$1,400 - to maintain the common areas a big chunk of that is
9 the roads and the dock and the boat landing that that is
10 inequitable and a burden on the Homeowners Association.

11 We cite from the restatement where there is a specific
12 provision on the restatement of servitude that allows the
13 invalidation of a contract that is entered by the declarant
14 that it is unduly burdensome on the Association. And we
15 believe it is a matter of equity that it would be set aside
16 too under that doctrine as well as being a breach of
17 fiduciary duty.

18 But the primary reason it is not valid is because the
19 declarant did not reserve the authority to grant that
20 easement.

21 And in fact we have people like Mr. Brostoff who took
22 title to his lot looking at the Declaration and thinking
23 that defined the rights and then they later grant this
24 easement to somebody else.

25 We will address the remaining arguments that we have in

1 our proposed order.

2 THE COURT: All right.

3 MR. WALKER: I just wanted to get out our feature
4 presentation ---

5 THE COURT: All right. Thank you.

6 MR. WALKER: --- and not wear you out.

7 THE COURT: Thank you, sir.

8 Mr. Altman, Ms. Coker.

9 While you are coming let me just ask this question. I
10 mean it seems so simple, and you may say well of course you
11 can.

12 At the time they first made the purchase, the first
13 deed, Southern Lifestyles, before any declarations were
14 created, they had the property free and clear as I read the
15 deed basically because the granting clause gave fee simple.
16 And I was always told you can add to but you can't cut down,
17 reduce the granting clause. So in the addendum. So it
18 really everything else is superfluous after that.

19 They now have title to the property; they now have the
20 right to encumber or do whatever they want to; correct?

21 MS. COKER: Correct.

22 THE COURT: The Declaration is something they had a
23 right to do when they -- when they -- the first one, the
24 first set. Would everybody -- I mean there is no argument
25 about that; they had authority to do that?

1 MS. COKER: Yes, Your Honor.

2 THE COURT: And once they did that they have created an
3 encumbrance on the title, correct?

4 MS. COKER: Correct.

5 THE COURT: Okay. I will be happy to hear from you.

6 MS. COKER: Thank you, Your Honor. And I will be brief
7 and more general. I don't have any pressboards with
8 specific ---

9 THE COURT: That's all right.

10 MS. COKER: --- terms in them today.

11 THE COURT: I am from Berkeley County. I can handle
12 that one. But the general stuff.

13 MS. COKER: Your Honor, I just wanted to briefly and
14 generally address some points made by Mr. Walker.

15 THE COURT: Sure.

16 MS. COKER: Because of course these are the main points
17 that the court will have to address.

18 Mr. Walker stated both with Mr. Robinson and in his
19 closing multiple ways things could have happened. And with
20 all due respect to Mr. Walker, that is the reverse way of
21 looking at it.

22 In terms of declarations of covenants this state
23 requires a strict construction. Basically you can do what
24 you want to with your land and if the covenants and
25 restrictions are set on that the courts are going to

1 strictly construe those to the benefit of the property owner
2 to do what they wish with their own property.

3 So the question is not whether or not there was a
4 specific reservation made; the question is is that whether
5 or not there was an explicit, unambiguous limitation that
6 prohibited a property owner - in this case Southern
7 Lifestyles - from granting the easements in question.

8 Furthermore, there has been some discussion with regard
9 to burdens on different estates and what the burden is on
10 the Homeowners Association.

11 Your Honor asked me earlier this morning why we were
12 getting into what the intent was. The original intent of
13 this development and the means by which the Declarations are
14 if there is an ambiguity they are to be construed as to the
15 original intent.

16 Everybody who was buying in here thought that there was
17 going to be additional development in the interior 700
18 acres. And as of -- everybody thought that all of those 72
19 waterfront lots, or Anchor Watch Drive lots, would be fully
20 developed. Those still haven't been fully developed.

21 So what everyone's intent was at the time of the
22 granting of certain rights is what the court needs to look
23 at. Now that leads me to when those -- when those intents
24 and when those actions occur.

25 The Declaration -- it is my understanding from

1 listening to Mr. Walker this after- -- morning still, that
2 the purported invalidity of the easement is due to a breach
3 of the covenants.

4 If that is the case -- and we disagree with that. We
5 believe them to be valid. The covenants -- we are talking
6 about things that happened 15 years ago.

7 The original contracts between the Walpole's and
8 Southern Lifestyles were in 2000. The deed to Southern
9 Lifestyles was in 2000. The easement and the amenities that
10 were granted in November of 2001 and June 2002. The HOA was
11 turned over to the homeowners I believe at the end of 2002.
12 The deeds conveying the two TMS numbers that we are talking
13 about, Anchor Watch Drive and the boat dock parcel, those
14 were conveyed by deed from Southern Lifestyles to the
15 Homeowners Association in January and July of 2003.

16 THE COURT: Correct.

17 MS. COKER: Which is in the chain of title after the
18 easement. And certainly the homeowners would have had
19 constructive knowledge at that point of any easements in the
20 chain of title to a conveyance they were granted.

21 THE COURT: But clearly you would agree with me that
22 there was a declaration filed prior to the easement?

23 MS. COKER: Yes, Your Honor, that granted certain ---

24 THE COURT: And it was of record?

25 MS. COKER: Yes, Your Honor.

1 THE COURT: Okay.

2 MS. COKER: That granted certain contractual ---

3 THE COURT: No, ---

4 MS. COKER: --- limitations and obligations.

5 THE COURT: --- the Declaration that applied to this
6 property.

7 MS. COKER: Yes, Your Honor.

8 THE COURT: Okay.

9 MS. COKER: Now testimony you did not hear, Your Honor,
10 but was I believe proffered by Mr. Brostoff in February or
11 June of ---

12 THE COURT: I have read ---

13 MS. COKER: --- several years ago.

14 THE COURT: Read a lot of the testimony.

15 MS. COKER: There were some letters from Tom Harper
16 dated 2004 on behalf of the HOA to I believe Jerry Finkle
17 contesting the validity of those easements and saying that
18 they were a breach.

19 THE COURT: Okay.

20 MS. COKER: Moreover, there was in the original planned
21 development, which I believe Your Honor years ago handled
22 the circuit court appeal for, ---

23 THE COURT: I think I did.

24 MS. COKER: --- that lawsuit was filed back in 2003,
25 2004.

1 THE COURT: That was the Sinkler lawsuit?

2 MS. COKER: It was Sinkler and the HMO.

3 THE COURT: Yeah. Yeah.

4 MS. COKER: And that -- nothing in that appeal had
5 anything to do with the rights to the road. But certainly
6 in 2004 the HOA knew the Walpole's were looking to use the
7 road and thought that -- and well thought that they had the
8 right to do so. This suit was filed in January 2010.

9 THE COURT: Okay.

10 MS. COKER: And so clearly if any invalidity spurs from
11 a breach of the covenants they are far outside of the
12 statute of limitations on that issue.

13 And that is -- Your Honor, as an aside, that is not
14 only my position; the HOA has taken that position in a
15 different ongoing lawsuit in Charleston County right now.

16 They have made as an affirmative defense, the statute
17 of limitations, the three-year statute of limitations, and
18 have moved for summary judgment on that issue.

19 THE COURT: Okay.

20 MS. COKER: Finally, Your Honor, with regard to the
21 scope of the easement we will admit - because we have to -
22 that the scope of an easement is basically to be heard in
23 equity.

24 So while we certainly believe in the validity of the
25 easement because it is valid, that any invalidity -- any

1 objection to any invalidity ran seven or eight years before
2 filing.

3 The other option that this Honor -- Your Honor has is
4 to look at the \$100 eventual fee and see if in fact that is
5 equitable.

6 If their main contention is that the easement is
7 invalid because the money number isn't fair, that is
8 certainly within the court's purview to look at the equity
9 of that number.

10 THE COURT: So what am I going to do, determine what is
11 a fair figure?

12 MS. COKER: Well, Your Honor, there was prior testimony
13 from Mr. Brostoff ---

14 THE COURT: Let me just tell you, Ms. Coker, I
15 appreciate all of those arguments, and now you're getting
16 into the area -- and I am going to decide this case. I am
17 not going to tell you you have got to go mediate it again.
18 But I am going to tell you this, this is where -- it is
19 going to happen.

20 And we don't have -- if we had law in this similar to
21 the Texas case we probably wouldn't be here today. But we
22 are going to have some law because I am going to rule. And
23 once it rules it changes the dynamics of this relationship,
24 and everybody knows that.

25 So I am just telling you I am going to take this under

1 advisement. I want you to give me proposed orders that you
2 think you can -- that will support -- you can support it and
3 the Supreme -- let's take it -- because ultimately that is
4 the final say so, that you feel comfortable with supporting
5 your positions. You -- put every ground you want in them
6 and every basis.

7 Because I learned with Brickyard I think it was, even
8 if it wasn't something that was a legitimate they said okay
9 that is okay we can have that as a basis to sustain it.

10 I want you to draw it how you want it. But be
11 mindful of something. It is kind of what happens with some
12 of the -- and I am not being critical of defense trial
13 lawyers in insurance cases, but sometimes there are gray
14 areas that help us as lawyers and judges and when we define
15 those gray area we create nightmares for ongoing situations.
16 Keep that in mind too.

17 Listen. I am preaching to the choir. I understand
18 what happened. I agree with Mr. Robinson, nobody in this
19 room thought we were going to face what we faced in 2008.

20 The president of the United States didn't think it was
21 going to face what we faced in 2008. Bankers didn't think
22 they were going to face what we -- we were riding along --
23 we were riding on the bubble, and it burst. And now we are
24 back to reality.

25 There is no question it benefits this Homeowners

1 Association to do what they originally wanted. No question
2 it benefits the Walpole's. There is no question. I
3 understand what they -- I don't want to get into the
4 development business. I want to develop -- I want to
5 maximize my dollar, but I don't want the expense and
6 headache associated with that. And it is one.

7 I had that first-hand knowledge. My uncle and my
8 father did some piecemeal development in Moncks Corner for
9 Ferilon (ph) Barron and I saw some headaches coming out of
10 that thing.

11 But anyway, be that as it may, I understand. I just
12 urge you guys -- you are still at a point there is going
13 to be some decision made. And what it is, I don't know
14 yet. But you may have a feeling. But whatever it is y'all
15 might want to talk some more before I do. But give me your
16 order.

17 I didn't mean to cut you off. Is there anything
18 else -- I understand what it is. I really do. I told my
19 law clerk after I read it I said I get this. And I am sorry
20 it has taken -- I am sorry for y'all that it has taken this
21 long. I apologize to you.

22 We just -- this is a case that just it begs a decision
23 and we have got -- you have got to rule.

24 And last night I was talking to -- I was talking to Tom
25 Wills at a function I attended, and he was talking about

1 mediation versus what we do. He said I don't have to make
2 the call, all I do is talk about it and try to bring you to
3 a point; you have got to make the call. And I said yeah.

4 But, you know, that is what -- that is what I'm -- that
5 is what I am supposed to do. So sometimes I get it right;
6 sometimes I get it wrong. But I will make it. I promise
7 you.

8 Okay. All right. Thank you.

9 Please if there is something else you want to stress,
10 feel free to. But I think we can do it in an order.

11 MS. COKER: That was going to be my final point anyway,
12 Your Honor.

13 THE COURT: Thank you so much, Ms. Coker. And please
14 forgive me for interrupting you. I apologize. That was
15 rude.

16 MS. COKER: I am fine. Thank you.

17 THE COURT: Okay. Thank you so much and thank y'all.
18 I appreciate that as well. And I meant what I said, I am
19 sorry for the delay for y'all. I really am.

20 MR. WALKER: Your Honor, we really appreciate your
21 stepping into the breach here.

22 THE COURT: Glad to be of ---

23 MR. WALKER: Both sides worked very hard, and obviously
24 we were unable to resolve it.

25 THE COURT: Well ---

1 MR. WALKER: But to be able to finally conclude it ---

2 THE COURT: It is done now.

3 MR. WALKER: --- is huge.

4 THE COURT: It is done now.

5 MR. WALKER: And for everybody.

6 THE COURT: For sure.

7 MS. COKER: And with regard to concluding it, when
8 would you like proposed orders and what form ---

9 THE COURT: Whenever y'all want. And I would ask you
10 to send them -- we are off the record now.

11 (WHEREUPON, discussions regarding sending proposed orders
12 was had.)

13 THE COURT: The arguments are solely for my
14 edification, not for preserving record preservation. You
15 have in the record all of your objections you have made, and
16 they -- those stand.

17 All the evidence is there; and the orders that I am
18 asking is supported by the law, the law that either --
19 either is law of this state or other states, persuasive law,
20 and just the law of the land and that everybody -- you
21 didn't have to specifically state it here ---

22 MR. WALKER: Okay.

23 THE COURT: --- to protect and preserve your right to
24 submit that as a basis for my decision. I think they covers
25 that.

1 MR. WALKER: Thank you, Your Honor.
2 MS. COKER: Thank you.
3 MR. ALTMAN: Thank you, Your Honor.
4 THE COURT: You bet. You bet. Thank you.
5 (WHEREUPON, the proceeding concluded 11:45 a.m.)

(NOTE: A transcript which has been certified by the court reporter will bear an original signature on the below certification sheet. Please contact the court reporter for additional certified transcripts.)

CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the captioned case, relative to appeal, in the Court for Charleston County, South Carolina, on August 21, 2015.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

PHYLLIS NORTON, CVR
(Signature in blue ink.)

Date: March 3, 2016

Certified Transcript Provided For: _____
Certification Reference # _____