

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas
Letitia H. Verdin, Circuit Court Judge

Appellate Case No. 2015-000107

Woodruff Road SC, LLC, ... Appellant,

v.

SC Greenville Hwy 146, LLC, ... Respondent.

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

C.A. No. 2013-CP-23-3989

Woodruff Road SC, LLC

Plaintiff,

v.

SC Greenville Hwy 146, LLC.

Defendant.

ORDER

This matter came before the Court for a non-jury trial on November 4, 2014.

BACKGROUND

This case involves two tracts of land located at the intersection of I-85 and Woodruff Road in Greenville, South Carolina. Tract A is owned by the Defendant in this action, who currently leases its premises to three tenants (Zoe's Kitchen, Mattress King, and Starbucks). Tract B is owned by the Plaintiff and currently is leased to two tenants (Trader Joe's and Academy Sports).

An easement is located over Tract B in favor of the owners, lessees, and invitees of Tract A for the purpose of ingress and egress to their businesses. (Pl. Ex. 1.) This easement is comprised of a 45 ft. wide portion which connects directly to Woodruff Road and a 25 ft. wide portion which abuts the back of Tract A. The 25 ft. portion of the easement is directly adjacent to the rear of the building located on Tract A. The building has rear doors for all three of the businesses which open to the easement. (Pl. Ex. 4, 5.) Recently, the Defendants repaved the portion of the 25 ft. wide easement that is directly adjacent to the building; the repaving appears to provide a distinct lane for traffic. This newly-paved area is used by business invitees to access a drive-through window installed by Starbucks. The drive-through window is located on the side

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of the building, squarely on Tract A. (Pl. Ex. 3.) Testimony at trial demonstrated that motor vehicles queue and idle on the newly-paved portion of the easement to access the drive-through.

The parties do not dispute the existence of the easement in question. Their only dispute concerns the scope of the easement. Particularly, the parties desire the Court to determine whether the construction of a paved portion of the easement, for the purpose of accessing the Starbucks drive-through window, falls within the scope of the easement's intended use.

ANALYSIS

The determination of the existence of an easement is a legal question. Murrels Inlet Corp. v. Ward, 378 S.C. 225, 231, 662 S.E.2d 452, 454 (Ct. App. 2008). However, the determination of the extent or scope of an easement is a question in equity. Id. at 231, 662 S.E.2d at 455; see also Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. S. Island Pub. Serv. Dist., 355 S.C. 529, 532, 586 S.E.2d 146, 147 (Ct. App. 2003).

An easement is a right to use certain property owned by another for a specific purpose. Steele v. Williams, 204 S.C. 124, 132, 28 S.E.2d 644, 647 (1944). Easements may arise by express grant, implication, necessity, prior use, or prescription. Boyd v. Bellsouth Tel. Tel. Co., 369 S.C. 410, 416, 633 S.E.2d 136, 139 (2006). Easements for ingress and egress are frequently granted by an adjoining property owner, for the purpose of accessing the grantee's real property. Ingress is defined as the act of entering, or the right or ability to enter or access. Black's Law Dictionary 9th Ed. (2009). Egress is the act of going out of leaving, or the right or ability to leave, or a way of exit. Id.

To identify the scope of an easement, courts look first to the plain language of the grant. Id. at 534, 586 S.E.2d at 148. The character of an express easement is determined by the nature of the right and the intention of the parties creating it. Plott v. Justin Enterprises, 374 S.C. 504,



513-14, 649 S.E.2d 92, 96 (Ct. App. 2007). Then, if necessary, courts may look to the demonstrated intentions of the parties for further clarify the scope of the easement. Lighthouse Tennis Club, at 534, 586 S.E.2d at 148.

The determination of whether an easement is appurtenant or in gross is a question in equity. Windham v. Riddle, 370 S.C. 415, 418, 635 S.E.2d 558, 559 (Ct. App. 2006), aff'd, 381 S.C. 192, 672 S.E.2d 578 (2009). Once an easement is referenced in a plat, the easement is considered appurtenant and is dedicated to the use of the owners of the lots, their successors in interest, and to the public. Ward v. Evans, 387 S.C. 401, 409-10, 693 S.E.2d 7, 11 (Ct. App. 2010). When recorded, easements are valid to subsequent purchasers without notice. Id.

The owner of an easement cannot materially increase the burden of the servient estate, as established by an express easement. Clemson Univ. v. First Provident Corp., 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973). Nor can the owner of the easement impose a new and additional burden onto the servient estate. Id. Rather, an easement can be used "only for the purposes of that tenement . . . [it] cannot be used, even by the dominant owner, for any purpose unconnected with the enjoyment of his estate." Rhett v. Gray, 401 S.C. 478, 493, 736 S.E.2d 873, 881 (Ct. App. 2012). Where such activities occur, the owner of the servient estate is entitled to equitable relief. Clemson Univ., 269 S.C. at 651, 197 S.E.2d at 919.

South Carolina law provides several examples of inappropriate overburdening of appurtenant easements. For instance, an easement created to enable its holder to access one piece of property could not unilaterally be enlarged to also enable access to other adjoining tracts of land. Cf. Rhett v. Gray, 401 S.C. at 493, 736 S.E.2d at 881. Similarly, an easement created for the operation of water and sewer systems could not also be used for the installation and maintenance of telecommunications equipment without the servient estate owner's approval.



Lighthouse Tennis Club, 355 S.C. at 534–35, 586 S.E.2d at 148. Finally, the construction of parking spaces on a portion of an easement, where the easement was established for ingress and egress, was beyond the easement's scope and constituted overburdening. Xanadu Horizontal Prop. Regime v. Ocean Walk Horizontal Prop. Regime, 306 S.C. 170, 172, 410 S.E.2d 580, 581 (Ct. App. 1991).

The owner of an easement may make reasonable improvements to it, for the purposes of increasing its utility and benefit. See 28A C.J.S. Easements § 231 (West 2014). Such improvements certainly include an improvement of the surface of the easement, so long as the improvement is reasonably related to the original purpose of the easement. E.g., Hayes v. Aquia Marina, Inc., 414 S.E.2d 820, 823 (Va. 1992).

The Plaintiff orally moved for a declaratory judgment pursuant to S.C. Code Ann. § 15-53-30 (2014). This Court makes findings of fact and finds as follows.

The parties agree that an easement exists in favor of the owners, lessees, invitees and occupants of Tract A for the purpose of ingress and egress. The parties also agree that the easement is recorded in the Register of Deeds at Book 1268, Page 152–63. (Pl. Ex. 1.) The parties only disagree as to the scope of the easement.

The easement has been recorded in the County's public records and referenced in plats, as contemplated in Ward v. Evans, 387 S.C. at 409–10, 693 S.E.2d at 11. Accordingly, this Court finds that easement in question is an appurtenant easement, because it is designed to run with the land and to benefit all subsequent owners, lessees, invitees and occupants of the dominant estate.

This court further finds that the scope of the easement, as articulated in the original conveyance, is to provide a right of way for motor vehicles to travel onto or over the designated



portion of Tract B, for the purpose of accessing Tract A from Woodruff Road. The granting document explicitly states, "[s]aid right of way shall be for the benefit of the fee owner, any tenant, or licensee of Tract A or any part thereof." (Pl. Ex. 1, ¶1.) In the realm of commercial properties, the principal benefit of such an easement is clearly to provide access to the businesses located upon the property in question.

At trial, the parties focused their arguments on the question of whether the above-referenced language supported the maintenance of a drive-through window on the Tract A buildings, where business invitees used the easement to access the window. The easement was created for the purpose of enabling the owners and tenants of Tract A to access the property. The representation of the easement in County records and on plats further enables the public, as business invitees, to use the easement to access the businesses located on Tract A. Therefore, this Court finds that the operation of a drive-through window using a portion of the easement in question falls within the scope of the easement's intended use.

This Court also finds, based on the evidence presented at trial, that the current tenants of Tract A have not overburdened the easement through their operations because there does not appear to be any obstruction to the business operations of the tenants of Tract B. Prior cases that have found an easement's scope to be exceeded all involve physical barriers or permanent structures. In this case, the owners and tenants of Tract A have merely improved the property by leveling and paving it. There is no physical obstruction, such as a gate, which prevents the owners or tenants of Tract B from accessing that portion of the property in question. Furthermore, the fact that vehicles may sit idling for a period up to ten minutes does not constitute such a permanent obstruction that overburdens the easement, or too far removes the easement from its intended use.



In equity, this Court notes that there may be times where the operation of the drive-through extends beyond the parameters of the 25 ft. portion of the easement and into the 45 ft. portion. In order to avoid the possibility of future overburdening, this Court orders that the owners or tenants of Tract A may not use this easement to impede the flow of traffic on the 45 ft. portion of the easement. However, nothing in this Order should be construed to affect the right of the tenants of Tract A to use the easement to access their properties.

Therefore, based on the foregoing, it is ordered that:

- (1) The easement in question is appurtenant, and runs with the land;
- (2) The easement in question is designed to provide access to the businesses located on Tract A by way of ingress and egress;
- (3) The tenants of the Defendant, the owner of Tract A, are permitted to operate a drive-through lane on the paved portion of the 25 ft. easement; and
- (4) The Defendant may not increase the use of its easement to such an extent that traffic is impeded on the 45 ft. portion.

IT IS SO ORDERED.

December 8, 2014



Letitia H. Verdin
Circuit Court Judge
Thirteenth Judicial Circuit

A Certified Copy
Paul B. Wickens
Clerk of Court C.P. & G.S.
Greenville County, SC
Dated 12/16/14



STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)
CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

Woodruff Road SC, LLC, 2013 SEP 30 P 2:43 C.A. NO.: 2013-CP-23-3989

Plaintiff,

-vs-

SC Greenville Hwy 146, LLC,

Defendant.

**ORDER DENYING
TEMPORARY INJUNCTION**

This matter came before the Court on September 11, 2013, upon Plaintiff's Motion for Preliminary Injunction filed pursuant to Rule 65 of the South Carolina Rules of Civil Procedure. A hearing was held in open court with counsel and the parties all present. Present and appearing on behalf of the Plaintiff was Bernie W. Ellis of McNair Law Firm, P.A. Present and appearing on behalf of the Defendant was James H. Cassidy of Roe Cassidy Coates & Price, P.A.

This case involves a dispute over Defendant's use of an easement. According to the Complaint and the evidence presently before the Court, Defendant holds an easement on property owned by Plaintiff. Defendant is in the process of using that easement to install a drive-through lane for a Starbucks store on Defendant's property. This contemplated drive-through is a use which has not previously been made. Plaintiff claims that Defendant's proposed use will exceed the rights granted to Defendant under the easement.

To obtain a temporary injunction, the moving party must establish that: (1) it will suffer immediate, irreparable harm without the injunction; (2) it has a likelihood of success on the merits; and (3) it has no adequate remedy at law. The granting or the denial of a motion for a temporary injunction is within the discretion of the Court. Based upon the testimony and the

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evidence presented to the Court, for the reasons set forth below, the undersigned concludes that the motion should be denied.

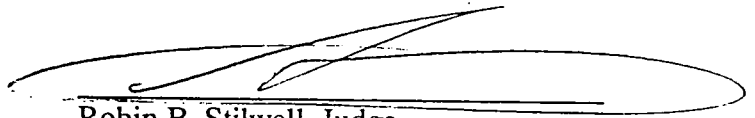
1. The evidence presented fails to establish that the Plaintiff will suffer immediate, irreparable harm without the injunction. The evidence suggests that the Plaintiff may suffer harm; however, that evidence is far from conclusive and, at this point, amounts to speculation. Furthermore, at a subsequent hearing on the merits the court may remediate, or repair, any harm through an award of injunctive relief, greater definition of the easement, refinement of the Defendant's use of that easement, or monetary damages.
2. In reviewing the likelihood of success on the merits, the Court is not to consider the merits of the case except insofar as they may enable the Court to determine whether a *prima facie* showing has been made. *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 365, 709 S.E.2d 639, 641 (2011). "When seeking a preliminary injunction, the plaintiff need not prove an absolute legal right; the plaintiff need only present 'a fair question to raise as to the existence of such a right.'" *Peek v. Spartanburg Regional Healthcare System*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 (Ct. App. 2007). In this case, the Plaintiff is clearly entitled to ask a Court to determine if Defendant's use of an easement exceeds the scope of that easement, and, if so, Plaintiff will likely be entitled to injunctive relief. *See, Lighthouse Tennis Club Village Horizontal Property Regime LXVI v. South Island Public Service District*, 355 S.C. 529, 586 S.E.2d 146 (Ct. App. 2003) (enjoining the use of an easement that exceeded the easement's scope). At this time, the Court is not called upon to make and is not presently making a determination as to whether the Defendant's proposed use of the easement would be a non-permitted use. The question to be considered is whether the Plaintiff has made the requisite *prima facie*

showing. Given the evidence presented, this Court finds that Plaintiff has not. While the Court takes no position on the merits of the Plaintiff's ultimate case, there is currently insufficient evidence to opine regarding the Plaintiff's likely success.

3. In a final hearing on the merits, remedies at law are available.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED
THAT the Motion for Preliminary Injunction is DENIED.

IT IS SO ORDERED.



Robin B. Stilwell, Judge

September 26, 2013
Greenville, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN CIVIL CASE

CASE NO. 2013 CP-23-3989

WOODRUFF ROAD SC, LLC

SC GREENVILLE HWY 146, LLC

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for : ☐ Plaintiff ☐ Defendant
or
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court: This matter came before the Court on Plaintiff's Motion to Alter or Amend Judgment. Plaintiff's Motion is hereby DENIED.

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk :

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge

Judge Code

Date

For Clerk of Court Office Use Only

This judgment was entered on the 12th day of JAN, 20 15 and a copy mailed first class or placed in the appropriate attorney's box on this 12th day of JAN, 20 15 to attorneys of record or to parties (when appearing pro se) as follows:

BERNIE ELLIS

ATTORNEY(S) FOR THE PLAINTIFF(S)

JAMES H. CASSIDY
JOSHUA J. HUDSON

ATTORNEY(S) FOR THE DEFENDANT(S)

CLERK OF COURT

Court Reporter:

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

) CASE NO.: 2013-CP-23-03989

Woodruff Road SC, LLC,

Plaintiff,

v.

SC Greenville Hwy 146, LLC,

Defendant.

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF ITS MOTION FOR
TEMPORARY INJUNCTION**

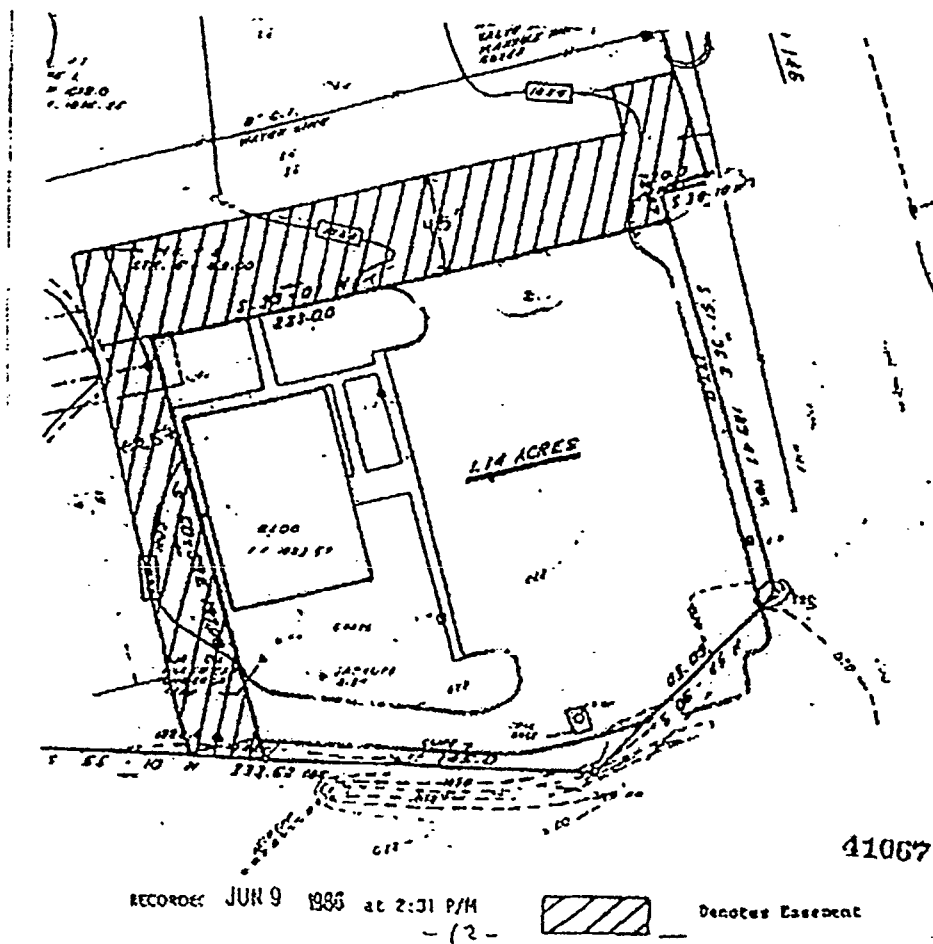
INTRODUCTION

This matter involves a dispute over a right of way in a busy shopping center on Woodruff Road. Plaintiff and Defendant are both owners of commercial retail properties and have equal rights to use a non-exclusive right-of-way easement that serves retailers located on both the Plaintiff's and Defendant's tracts. The right of way is specifically designated in the Agreement that created it as being for motor vehicles to travel onto and over the asphalt parking lot on Tract B (owned by Plaintiff), for ingress and egress to Tract A (owned by Defendant) from Woodruff Road. Both Plaintiff and Defendant, as well as their respective tenants and licensees, have the right to use the right of way.

Defendant has, however, recently announced its plans to use a portion of the right of way as part of a drive-through lane for a new Starbucks being built on Tract A. This will obviously interfere with Plaintiff and its tenants and customers' equal right to use the right of way. As the harm from the obstruction of this right of way will be immediate, this matter cannot wait to run its ordinary course, and Plaintiff seeks a temporary injunction to prevent the clear harm that will come if Defendant begins to use the right of way as planned.

FACTS

This shopping center is located at the corner of I-85 and Woodruff Road where Trader Joe's and Academy Sports are located. It involves two tracts of land. Tract B is owned by the Plaintiff, and is the larger parcel of land on which Trader Joes's and Academy Sports are located. Tract A is a smaller parcel and was recently acquired by Defendant. Both parcels are served by a right of way easement as shown below. The tract within the easement area, 1.14 acres, is Tract A owned by Defendant. Obviously, the easement itself is on Tract B owned by Plaintiff.



As shown above, the portion of the right of way as is connects to Woodruff Road is 45 feet in width. Then, along the rear property line of Tract A, it is 25 feet in width. The portion of the Agreement that creates this easement reads as follows:

Subject to the limitations set forth in paragraph 3 below, [Defendant] and all tenants and licensees of Tract A or any part thereof and their business invitees, licensees and employees shall have a right of way at all times, in common with the owner of Tract B [i.e. Plaintiff] and all tenants and licensees of Tract B or any part thereof, for motor vehicles to travel onto and over the asphalt parking area of Tract B as shown on the plat attached hereto on Exhibit "C", for the purpose of ingress and egress to Tract A from Woodruff Road (SC Hwy. 146). Said right of way shall be for the benefit of the fee owner, any tenant, or licensee of Tract A or any part thereof. (emphasis added).¹

Two things are perfectly clear about the right of way:

1. The Plaintiff and Defendant have equal rights to use the right of way.
2. Defendant's right in the right-of-way portion of the easement is exclusively for motor vehicular traffic to travel onto and over the asphalt parking area of Tract B for the purpose of ingress and egress to Tract A from Woodruff Road. The easement does not contemplate a drive-through lane for a business.

Nevertheless, Defendant has announced to Plaintiff that Defendant plans to place a menu board for a drive-through lane for a new Starbucks facility being built on Tract A. The proposed location of the menu board will be on Tract A next to the 25' portion of the easement, so that cars will stop for the drivers to place their orders while sitting on the easement.

DISCUSSION

"The grant of an easement does not create a complete and absolute estate." *Lighthouse Tennis Club Village Horizontal Property Regime LXVI v. South Island Public Service District*, 355 S.C. 529, 533, 586 S.E.2d 146, 148 (Ct. App. 2003). "Rather '[a]n easement is a right which one person has to use the land of another for a *specific purpose*.'" *Id.* (internal citation omitted) (emphasis in original). "To determine the purpose of the easement, we must evaluate the intention of the parties when the easement was granted. In doing so, the '[c]lear and

¹ A copy of the Agreement and the relevant exhibits specifically showing the right of way easement are attached to the Affidavit of Levie Johnson which is served herewith.

unambiguous language in grants of easement[s] must be construed according to terms which parties have used, taken and understood in their plain, ordinary and popular sense.” *Id.* at 534, 586 S.E.2d at 148. (Internal citation omitted) . “[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden.” *Rhett v. Gray*, 401 S.C. 478, 493, 736 S.E.2d 873, 881 (Ct. App. 2013) (quoting *Clemson Univ. v. First Provident Corp.*, 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973)). “It is generally held that the owner of a servient estate will be given equitable relief where the owner of the easement makes an unauthorized or excessive use thereof.” *Clemson Univ.*, 260 S.C. at 651, 197 S.E.2d at 919. .

Lighthouse Tennis Club cited above is particularly helpful here. In that case, the South Island Public Service District had an easement in connection with the operation of a water and sewer system. The easement owner, South Island Public Service District, then leased its easement to a telecommunications company for the unrelated activity of installing and maintaining telecommunications equipment. The court held in favor of the property owner that the purpose of the easement is determined by the grantor, and the owner of the dominant estate does not have the right to use it for any other purpose other than that set forth in the easement. *Lighthouse Tennis Club*, 355 S.C. at 534-35, 586 S.E.2d at 148.

In the case now before the Court, the easement was created for a specific purpose - that is for motor vehicles to travel over the easement for ingress and egress from Woodruff Road. The easement is for the common use of the owners, tenants and licensees of Tract A and Tract B. Neither side has a right to make use of it other than for ingress and egress or that otherwise interferes with the other property owner’s use of the easement. There is no reasonable way for Defendant to argue that the use of a portion of the easement as part of a drive-through lane for a

Starbucks will not materially increase the burden upon the servient estate or that it does not interfere with the use of the Plaintiff, its tenants and licensees.

Attached hereto is the Affidavit of Levie Johnson setting forth some of the anticipated problems if Defendant is allowed to go through with its plan. In sum, Plaintiff asserts that traffic congestion on the right of way would be unavoidable and would certainly and materially interfere with the right of Plaintiff's tenants and licensees to use the right of way unobstructed. Apart from the Affidavit, it is simply not possible that using part of a right of way for a drive through lane for a Starbucks will not change the flow of traffic on the right of way.

STANDARDS FOR PRELIMINARY INJUNCTION

"The purpose of a preliminary injunction is to preserve the status quo and prevent irreparable harm to the party requesting it." *Compton v. S.C. Dept. of Corrections*, 392 S.C. 361, 366, 709 S.E.2d 639, 642 (2011) (citing *Powell v. Immanuel Baptist Church*, 261 S.C. 219, 221, 199 S.E.2d 60, 61 (1973)). To obtain a preliminary injunction, the moving party must allege sufficient facts to state a cause of action for injunction and demonstrate that this relief is reasonably necessary to preserve the rights of the parties during the litigation. *Id.* (citing *County of Richland v. Simpkins*, 348 S.C. 664, 669, 560 S.E.2d 902, 904 (Ct.App. 2002)). Accordingly, Plaintiff must establish that (1) it will suffer immediate, irreparable harm without the injunction; (2) it has a likelihood of success on the merits; and (3) it has no adequate remedy at law. *Id.* (citing *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 908 (2004)). In evaluating whether Plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether Plaintiff has made a sufficient prima facie showing of entitlement to relief. *Id.*

I. Plaintiff Is Likely To Succeed On The Merits

In evaluating whether Plaintiff is entitled to a preliminary injunction, the court must examine the merits of the underlying case only to the extent necessary to determine whether Plaintiff has made a sufficient prima facie showing of entitlement to relief. *Compton*, 392 S.C. at 365, 709 S.E.2d at 641. Plaintiff pled the tort of trespass based upon the principle that if the owner of an easement exceeds his rights either in the manner or extent of use of the easement, he becomes a trespasser to the extent of the unauthorized use. *Clemson University*, 260 S.C. at 650, 197 S.E.2d at 919. It is extremely clear that either party has the right to ask the Court to determine whether a new use of an easement violates the Agreement granting the easement; therefore, Plaintiff clearly meets this requirement.

II. Plaintiff Will Suffer Irreparable Harm

Plaintiff's showing of irreparable harm is set forth in the Affidavit of Levie Johnson. Simply put, Plaintiff's tenants are retailers in a competitive marketplace who are dependent upon vehicles being able to get to and from their stores conveniently. Those vehicles sometimes carry customers, and sometimes carry goods to be sold to those customers. Stores that are hard to get to seldom thrive. Further, as pointed out in Mr. Johnson's Affidavit, Plaintiff's leases with its tenants require, as any commercial lease would, that the lessor provide ingress and egress to the tenants' places of business. That is why this case is not appropriate for waiting and seeing how it turns out. This is not merely a case of trying to force compliance with the terms of an agreement for its own sake. The harm caused to Plaintiff's commercial property as a place to shop will be irreparable. *See Peek v. Spartanburg Regional Healthcare System*, 367 S.C. 450, 456, 626 S.E.2d 34, 37 n.2 (noting that loss of business goodwill or loss that is not easily

calculable in pecuniary terms is sufficient to show irreparable injury for purposes of obtaining a temporary injunction).

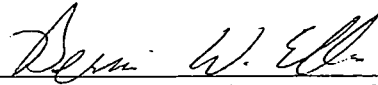
III. Plaintiff Has No Adequate Remedy At Law

Many of the same reasons evidencing that Plaintiff will suffer irreparable harm also indicate that Plaintiff has no adequate remedy at law. The South Carolina Court of Appeals has explained that in cases where monetary damages are not the only available remedy, an injunction is preferred because it prevents and/or minimizes the injury instead of attempting to compensate the plaintiff for the damages after the fact. *Peek*, 367 S.C. at 457, 626 S.E.2d at 38 (Ct.App. 2007) (explaining that an inadequate remedy at law exists when “monetary damages are not the only option, and injunctive relief is a better remedy....”) In this case, injunctive relief is a better remedy. Monetary damages will be difficult to calculate are clearly avoidable by simply requiring the Defendant to abide by the terms of the easement. Accordingly, Plaintiff has an inadequate remedy at law, and injunctive relief is warranted.

CONCLUSION

As stated above, using a portion of the right of way for a drive through has to change the way the right of way is used. For the reasons, set forth above, Plaintiff prays that this Court enjoin the Defendant from using a portion of the right of way in connection with a drive-through lane or for any other purpose that interferes with the right of Plaintiff as well as its tenants and licensees to have full use of the right of way.

Respectfully submitted,



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Greenville, South Carolina
September 9, 2013

Attorney for Plaintiff

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

) CASE NO.: 2013-CP-23-03989

Woodruff Road SC, LLC,

Plaintiff,

v.

SC Greenville Hwy 146, LLC,

Defendant.

) AFFIDAVIT OF LEVIE JOHNSON

STATE OF NORTH CAROLINA

COUNTY OF MECKLENBURG

Personally appeared before me, Levie Johnson, who, first being duly sworn, deposes and states as follows:

1. I am over the age of 21. I am an employee of Kimco Realty Corporation, which owns Woodruff Road SC, LLC (hereinafter, "Plaintiff"), and I have personal knowledge of the matters set forth herein.
2. As described in the Complaint and Motion filed in this case, Plaintiff and Defendant share a common right of way on commercial property owned by Plaintiff. The property owned by Defendant which is served by the right of way is described in the Agreement creating the right of way as "Tract A." The property owned by Plaintiff upon which the right of way sits is referred to as "Tract B." The tenants and licensees of Tract A and Tract B also have rights in the right of way. A copy of the Agreement establishing the right of way is attached hereto as Exhibit A.

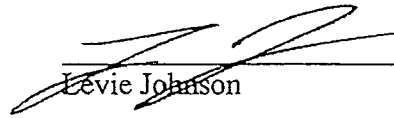
3. The right of way is for "motor vehicles to travel onto and over the asphalt parking area of Tract B for the purpose of ingress and egress to Tract A from Woodruff Road (S.C. Hwy. 146)."
4. Consistent with the description in Exhibit A, hereto, the tenants and licensees of the Tract B, including Trader Joe's and Academy Sports, have the right to and do use the right of way for ingress and egress, as have the tenants and licensees of Tract A.
5. Defendant is currently in the process of building a Starbucks location on Tract A. Defendant has stated that it intends to post a menu for the drive-through lane at Starbucks such that persons ordering from the drive-through window will stop in the above-described right of way to place orders. A copy of a portion of Defendant's Site Development Plans showing the location of the menu for the drive-through lane is attached hereto as Exhibit B.
6. In Plaintiff's discussions with Defendant concerning this matter, Defendant has not disputed that the location of the menu for the drive-through lane for Starbucks will cause drivers to stop in the right of way while ordering.
7. Cars stopping in the right of way to order, particularly numerous cars during peak times, will unduly interfere with the right of Plaintiff, its tenants, customers, and invitees to use the right of way because of the resulting traffic congestion. It will interfere with the free flow of vehicular traffic from Woodruff Road to the retailers on Tract B and create an unsafe condition in this narrow easement area.
8. Deliveries to stores on Tract A are expected to be made through the rear of the building on Defendant's property, which is within the same twenty-five foot portion of the right of way as the proposed Starbucks lane, exasperating the traffic and safety problems as

customers of businesses located on Tract A will likely need to go around the delivery vehicles which are parked and unloaded in the right of way area.

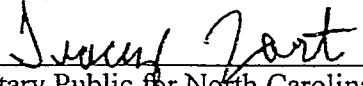
9. The twenty-five foot portion of the right of way is in close proximity to Trader Joe's and Academy Sports on Tract B whose tractor trailer trucks need to use the right of way for their deliveries. During peak hours, standing vehicles in the Starbucks lane (Starbucks customers and delivery trucks) are expected to block these tractor trailer deliveries.
10. Plaintiff believes that the interference with the use of the right of way by tenants and licensees of Tract B will result in irreparable harm to Plaintiff. Commercial retailers to whom Plaintiff leases space depend upon reliable access to their stores by customers and by delivery trucks in order to prosper.
11. An owner of commercial property, like Plaintiff, depends on the availability and use of established rights of way to maintain the commercial viability of the property as well as being able to honor its lease commitments to its tenants.
12. The Agreement expressly states that use of Defendant's right of way is to be used in common with the owner of Tract B and all tenants and licensees of Tract B or any part thereof. The construction of the proposed Starbucks lane would be tantamount to an exclusive easement, which was not contemplated by the Agreement.
13. The months of October through December make up the peak holiday shopping season for the shopping center. If construction of the Starbucks lane continues, or the right of way is utilized as a Starbucks drive through lane during this approaching peak holiday shopping season, deliveries and customer access to retailers on Tract B will be materially and adversely affected, causing irreparable harm to the retailers on Tract B who depend on holiday sales generating a significant percentage of their annual sales.

14. Plaintiff's leases with its tenants include the right to make full use the right of way that is the subject of this action. Excerpts of some of these leases are attached hereto as Exhibit C. If Defendant is allowed to alter the use of the right of way as planned, Plaintiff could be defaulted by its tenants under their leases and face economic consequences for failure to provide the tenants with clear ingress and egress to the tenants' places of business.

FURTHER AFFIANT SAYETH NOT.


Levie Johnson

Sworn to and subscribed before me
This 9th day of September, 2013.


Notary Public for North Carolina

My commission expires 9/27/2017



**Exhibit A to Affidavit of Levie Johnson
("Plaintiff's Memorandum In Support of Its Motion for Temporary Injunction")**

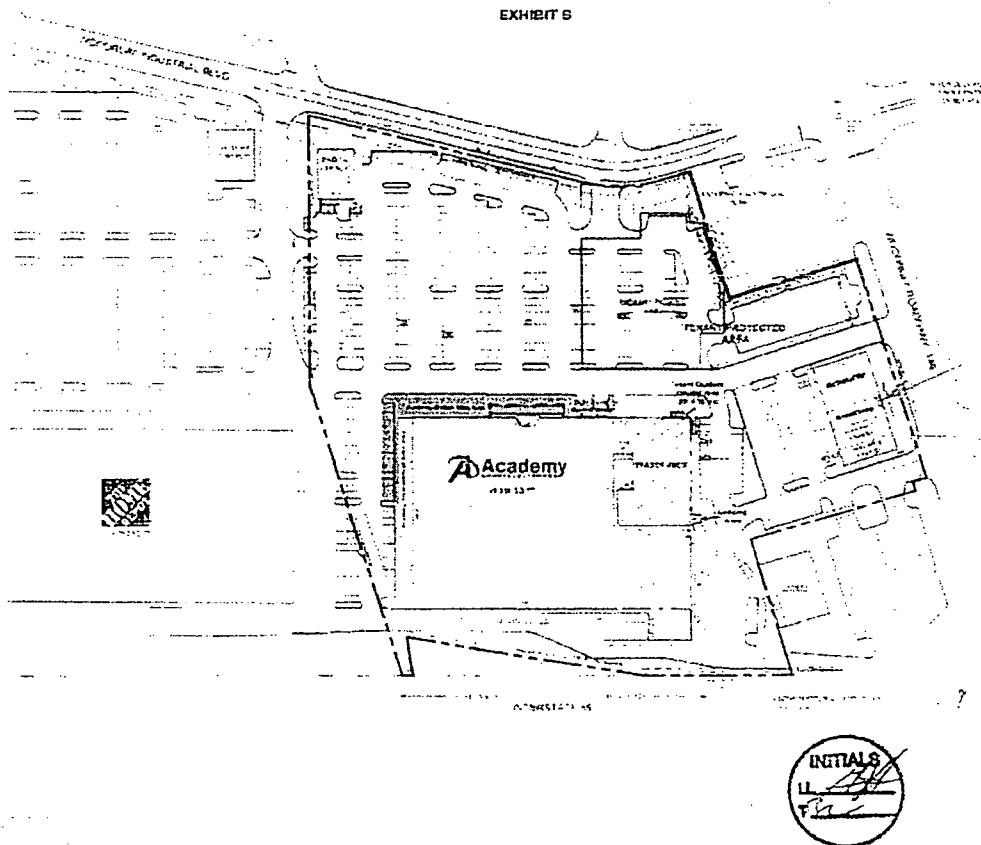
**This Exhibit is a duplicate of Plaintiff's Trial Exhibit 1.
It appears at R. 0221-0232**

Exhibit B

Exhibit C

Trader Joe's

EXHIBIT 5



9. **COMMON AREA**

9.1 The Common Areas of the Shopping Center shall consist of all portions of the Shopping Center that shall not be occupied by buildings leased or held for lease, as more specifically depicted on Exhibit B. The general term "Common Areas" includes all parking areas, aisles, driveways, entrances, exits, walkways, sidewalks, roadways, loading areas (other than loading docks and adjacent areas used exclusively by an occupant of the Shopping Center), service roads, lighting facilities (if used to illuminate the Common Areas), surface drainage facilities, traffic control signs and fences.

9.2 Landlord hereby gives and grants to Tenant during the term of this Lease, for the benefit of Tenant and Tenant's subtenants, licensees and concessionaires, and their respective employees, contractors, customers, invitees and deliverymen, the right to use all of the Common Areas, in common with Landlord and all other tenants and occupants of the Shopping Center and the Home Depot Parcel (as defined and provided in the REA) and their respective employees, contractors, assigns, customers, invitees and deliverymen. Landlord hereby further grants to Tenant for the benefit of Tenant and Tenant's subtenants, licensees and concessionaires, and their respective employees, contractors, customers, invitees and deliverymen, the right to use all parking and driveways and other common areas and facilities located on the Home Depot Parcel as provided in the REA. The rights hereby granted with respect to the Common Areas shall run with and bind the Shopping Center and the land on which it is located, shall be binding upon Landlord and Landlord's successors in title to all or any part of the Shopping Center, and shall constitute an irrevocable, nonexclusive easement appurtenant to the Premises for the benefit of, and shall be enforceable by, Tenant and its successors and assigns throughout the term of this Lease. Notwithstanding the foregoing, Tenant shall have the exclusive right to use and occupy (including the right to fence, enclose and cover), at no extra charge, the portion of the Common Areas depicted as the "Outside Sales Area" on Exhibit B. Tenant shall bear all additional costs of the use of the Outside Sales Area (including, without limitation, additional maintenance costs caused by such use) and Tenant shall indemnify, defend and hold Landlord harmless with respect to any claim for personal injury or property damage arising out of such use in such area unless caused by Landlord's negligence or willful misconduct.

9.3 Landlord shall not alter the size or location of curb cuts or private drives that provide access to the Shopping Center, as shown on Exhibit B, without the prior written consent of Tenant. Landlord may (and shall upon Tenant's request) designate portions of the Common Areas as parking spaces for employees of occupants of the Shopping Center, subject to the prior written approval of Tenant, which shall not be unreasonably withheld.

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Woodruff Road SC, LLC,

Plaintiff,

v.

SC Greenville Hwy 146, LLC,

Defendant.

) IN THE COURT OF COMMON PLEAS

) CASE NO.: 2013-CP-23-03989

) AMENDED COMPLAINT

) (Declaratory Relief)

) (Non-Jury)

2013 NOV 13 AM 8 51

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

The Plaintiff, complaining against the Defendant, alleges and shows as follows:

NATURE OF THE ACTION

1. This is an action for a declaratory judgment pursuant to S.C. Code Ann. § 15-53-10, et seq. and for equitable relief.

JURISDICTION AND VENUE

2. Plaintiff is a South Carolina limited liability company doing business in Greenville County, South Carolina.

3. Defendant is a South Carolina limited liability company doing business in Greenville County, South Carolina.

4. In this action, Plaintiff seeks the construction of a written instrument creating an easement so as to determine if Defendant's use of that easement is within the scope of the easement as created. Therefore, jurisdiction and venue are proper in this Court under S.C. Code Ann. § 15-53-10, et seq.

FACTS

5. Plaintiff is the owner of certain real property described in Exhibit A hereto.

6. Defendant is the owner of certain real property described in Exhibit B hereto.

7. Both properties are commercial properties located near the intersection of Woodruff Road and Interstate 85 in Greenville County.

8. Defendant, as the owner of the property described in Exhibit B, has a non-exclusive easement across property owned by Plaintiff for ingress and egress to Defendant's property from Woodruff Road (hereinafter, the "Easement"). The specific terms of the Easement are set forth in Exhibit C.

9. Defendant has built a Starbucks store on its property. In order to serve that Starbucks store, Defendant, over the objection of Plaintiff, has undertaken to install a drive-through lane for the newly-built Starbucks store in a portion of the Easement.

10. Plaintiff respectfully submits that using a portion of the Easement as a drive-through lane for a Starbucks store exceeds the scope of the Easement because such use is not for ingress and egress to Defendant's property from Woodruff Road, and such use limits the ability of Plaintiff as well as its tenants and licensees to make full use of the Easement to which Plaintiff and its tenants and licensees are entitled. Furthermore, Plaintiff respectfully submits that deliberately increasing the number of cars stopping in the Easement will materially increase the burden on the Easement beyond what was intended when the Easement was granted and will materially increase risk of accidents occurring in the Easement.

FOR A FIRST CAUSE OF ACTION (Declaratory Judgment)

11. The foregoing paragraphs of this Amended Complaint are incorporated herein.

12. The Easement was created by written instrument, a copy of which is attached hereto as Exhibit C, and is limited to the scope set forth therein.

13. The Easement was created to allow for ingress and egress to Defendant's property from Woodruff Road. Use of the Easement as a drive-through lane for a Starbucks store exceeds the scope of the Easement and is inconsistent with the intent of the parties to the Easement when the Easement was established by written agreement.

14. The use of the Easement as a drive-through for a Starbucks store also interferes with Plaintiff's right to use the Easement on an equal basis with Defendant, which right was preserved by that written agreement, and will likely cause a safety risk.

15. Therefore, Plaintiff seeks a judgment from this Court that Defendant may not use the Easement or any portion thereof as a drive-through lane for a Starbucks store.

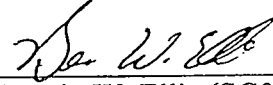
WHEREFORE, having fully set forth its Amended Complaint, Plaintiff prays for a declaratory judgment that the use of the Easement or any portion thereof as a drive-through lane for a Starbucks store exceeds the scope of the Easement, that Defendant be enjoined from using the Easement except as described therein, for the costs of this action, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,

Dated: November 8, 2013

MCNAIR LAW FIRM, P.A.

By



Bernie W. Ellis (SC064841)

bellis@mcnair.net

Post Office Box 447

Greenville, SC 29602

864.271.4940

864.271.4015

Attorneys for Plaintiff

**Limited Warranty Deed
("Exhibit A to Amended Complaint")**

**This Exhibit is a duplicate of Plaintiff's Trial Exhibit 1B.
It appears at R. 0237-0244**

Deed
("Exhibit B to Amended Complaint")

This Exhibit is a duplicate of Plaintiff's Trial Exhibit 1A.
It appears at R. 0233-0236

**Agreement
("Exhibit C to Amended Complaint")**

**This Exhibit is a duplicate of Plaintiff's Trial Exhibit 1.
It appears at R. 0221-0232**

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
Woodruff Road SC, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
SC Greenville Hwy 146, LLC,	)	C.A. No.: 2013-CP-23-3989
	)	
Defendant.	)	
	)	

ANSWER AND COUNTERCLAIM

Defendant, SC Greenville Hwy 146, LLC, answering the Complaint of Plaintiff would respectfully show the Court as follows:

FOR A FIRST DEFENSE
GENERAL DENIAL

1. Defendant admits the allegations of Paragraph 1.
2. Defendant admits the allegations of Paragraph 2.
3. Defendant admits the allegations of Paragraph 3.
4. Defendant admits the allegations of Paragraph 4.
5. Defendant admits the allegations of Paragraph 5 upon information and belief.
6. Defendant admits the allegations of Paragraph 6.
7. Defendant admits the allegations of Paragraph 7.
8. Defendant admits so much of the allegations of Paragraph 8 as allege that Defendant has an easement for ingress, egress, and parking as described in Exhibit C but denies the remaining allegations of Paragraph 8.

9. Defendant admits so much of the allegations of Paragraph 9 as allege that a Starbucks store has been constructed on a portion of the property owned by the Defendant.

10. Defendant denies the allegations of Paragraph 10.

11. Defendant reaffirms the responses set forth in Paragraphs 1-10 as to the allegations of Paragraph 11.

12. Defendant admits the allegations of Paragraph 12.

13. Defendant admits so much of the allegations of Paragraph 13 as allege that a non-exclusive easement has been created which is set forth in Exhibit C. The remaining allegations of Paragraph 13 are denied.

14. Defendant denies the allegations of Paragraphs 14.

15. Defendant admits the allegations of Paragraph 15.

16. Defendant denies each and every allegation not admitted modified or explained.

FOR A SECOND DEFENSE

16. The Complaint fails to set forth claims upon which relief can be granted.

FOR A THIRD DEFENSE

17. The Complaint is barred, in whole or in part, by the defense of the doctrine of Estoppel.

FOR A FOURTH DEFENSE

18. The Complaint is barred, in whole or in part, by waiver.

FOR A FIFTH DEFENSE

19. The Complaint is barred, in whole or in part, by Plaintiff's unclean hands.

FOR A SIXTH DEFENSE

20. The Complaint is barred, in whole or in part, by laches.

FOR AN SEVENTH DEFENSE

21. The Complaint is barred, in whole or in part, by the statute of frauds.

FOR AN EIGHTH DEFENSE

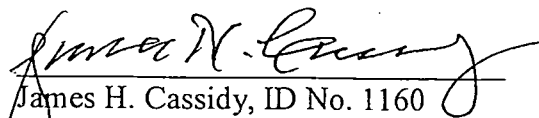
22. Plaintiff raises each and every affirmative defense which is required to be set forth in the Defendants' Answer pursuant to SCRCP 8(c), reserving unto themselves the right to amend its pleadings to set forth with specificity the basis for such defenses which may appear appropriate as a result of the evidence and legal principals involved which show the same to be applicable. Plaintiff has insufficient knowledge and information upon which to form a belief as to whether it may have additional, as yet unstated, separate defenses available. Plaintiff reserves the right to assert further defenses in the event that it determine that such defenses are appropriate.

**FOR A NINTH RESPONSE AND COUNTERCLAIM
DECLARATORY JUDGMENT**

23. Defendant is entitled to a declaration that the easement in question is valid and enforceable and Defendants have a right to access to said easement for the intended purpose of vehicular ingress and egress.

WHEREFORE, having fully replied to the Amended Complaint of the Defendant the Plaintiff prays for the following relief:

- (a) That Complaint be dismissed with prejudice;
- (b) A declaration that the easement in question is valid and enforceable and Defendants have a right to access to said easement for the intended purpose of vehicular ingress and egress.
- (c) That this Honorable Court awards such other and further relief as it may deem just and proper.



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Roe Cassidy Coates & Price, P.A.

Attorneys for Defendants

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Greenville, South Carolina

December 11, 2013

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

) IN THE COURT OF COMMON PLEAS

) CASE NO.: 2013-CP-23-03989

Woodruff Road SC, LLC,

Plaintiff,

v.

SC Greenville Hwy 146, LLC,

Defendant.

PLAINTIFF'S REPLY TO
COUNTERCLAIM

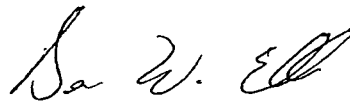
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GREENVILLE CO., S.C.
PAUL B. WICKENS, CLERK
2014 JAN 3 AM 10:20

Plaintiff, by and through its undersigned counsel, hereby replies to the Counterclaim of the Defendant. Any allegation of the Counterclaim not admitted is denied, and strict proof is demanded thereof.

1. Paragraph 23 is denied.

WHEREFORE, having fully replied to the Counterclaim, Plaintiff prays that it be dismissed with costs awarded to Plaintiff, that the relief prayed for in the Amended Complaint be granted, and for such other and further relief as this Court deems just and proper.

Respectfully submitted,



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Greenville, South Carolina
December 31, 2013

Attorney for Plaintiff

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)

Woodruff Road SC, LLC,)
)
Plaintiff,)

vs.)

SC Greenville Hwy 146, LLC,)
)
Defendant.)

C.A. No.: 2013-CP-23-3989

ENTERED COMPUTER
PRE-TRIAL BRIEF

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMMER
2014 OCT 31 PM 4 38

SC Greenville Hwy 146, LLC files its Pre-Trial Brief as follows:

FACTS

Plaintiff owns certain commercial real property located in Greenville County which is identified as Exhibit A to Plaintiff's Complaint, a copy of which is attached hereto. Defendant owns certain commercial real property located in Greenville County, which is identified as Exhibit B to Plaintiff's Complaint, a copy of which is attached hereto. Said properties are adjacent to one another. Defendant has an easement that runs with the land on Plaintiff's property, conveyed by virtue of a properly recorded Agreement (hereinafter "Agreement"), a copy of which is attached hereto. The Agreement granted "a right of way at all times ... for motor vehicles to travel onto and over the asphalt parking."¹ The Agreement further stipulated:

[T]he right of way hereby granted shall be easements, restrictions, rights of way and covenants running with the land and shall inure to the benefit of, and be binding upon, the parties hereto and their respective heirs, successors and assigns, including, but without limitation all subsequent owners of [the properties] and all persons claiming under them.²

¹ ¶ 1.

² ¶ 7.

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LEGAL ISSUES

The Plaintiff originally sought temporary injunctive relief prohibiting Defendant from the use of the easement for intended purpose. Pursuant to the Order of Judge Stillwell temporary relief was denied. (See attached Order filed September 30, 2013). Plaintiff is seeking a permanent injunction preventing the Defendant from utilizing a valid and enforceable easement. The Plaintiff admits that the Defendant has an easement, both in its Complaint³ and in its Motion, attaching the Agreement as Exhibits to each. Further, Plaintiff's leases are subject to the easement. Therefore, an analysis as to whether or not a valid and enforceable easement exists is unnecessary. The question then becomes whether the Defendant has somehow misused the right of way and burdened the Plaintiff's property, causing immediate and irreparable harm to the Plaintiff.

The South Carolina Supreme Court, in *Murrells Inlet Corp. v. Ward*, heard a case where "the existence of an easement is **NOT** an issue in this case. Only, the extent and scope of the easement is contested" 378 S.C. 225, 235, 662 S.E.2d 452, 457 (Ct. App. 2008). It therefore held: "Subsequent purchasers are entitled to rely on recorded deeds and plats to determine their rights in respect to property" *Id.* In *Rhett v. Gray*, the South Carolina Supreme Court stated that "to the extent of the easement, the rights of the easement owner are paramount to those of the landowner" 401 S.C. 478, 493, 736 S.E.2d 873, 881 (Ct. App. 2012), reh'g denied (Jan. 25, 2013). Further, "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" *Id.* at 496 and 882

³ ¶ 8.

(quoting *Adams v. Winnett*, 25 Tenn.App. 276, 156 S.W.2d 353, 357 (1941) (quotation marks omitted)).

Defendant will present testimony and evidence that it has restored the easement to its original location and uses the easement for vehicular traffic for the benefit of its tenants as anticipated in the easement. Defendant will further present evidence that the use of the easement does not burden the Plaintiff's property.

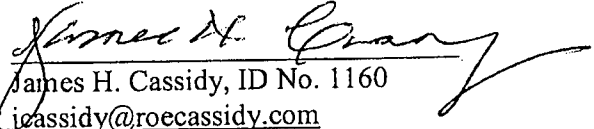
Defendant will present testimony from an engineer who worked with representatives of Plaintiff to develop a plan for traffic flow. He will testify that that use of the easement by the Defendant will cause no material impact on ingress or egress to or from Woodruff Road nor will it obstruct delivery trucks from accessing the loading docks of Plaintiff's tenants as originally alleged by the Plaintiff. Plaintiff will further present evidence that the Defendant has been using the easement for the benefit of its property since completion of the construction since January 2014 and the use by Defendant has caused no burden to the Plaintiff or its tenants.

If Defendant is denied the use of the easement as contemplated in the Agreement it will suffer irreparable harm. Defendant is obligated to deliver the Starbucks's building to the tenant with access from the rear of the building. If the use of the easement is denied and Starbucks terminates the lease, Defendant will suffer loss of income in excess of Two Hundred Thousand and 00/100 Dollars (\$200,000.00). If the injunction is denied, the Plaintiff will suffer no hardship or damage. In fact Plaintiff has benefited from the improvements made by Defendant to the subject property. Defendant's property was formerly owned by and or operated as a Capri's Restaurant. Defendant's property is now occupied by a Zoe's Restaurant, Starbucks, and Mattress King.

CONCLUSION

Defendant would submit to the Court that it will be undisputed that Defendant has a valid and enforceable easement, properly recorded, with a right to access of said easement for vehicular traffic. Trial in this matter should not take longer than half a day to a day. I intend to call no more than three witnesses all of whose testimony should be brief.

Respectfully submitted,


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Roe Cassidy Coates & Price, P.A.
Attorneys for Plaintiff
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(864) 349-2602

Greenville, South Carolina

October 30, 2014

**Limited Warranty Deed
("Defendant's Pre-Trial Brief")**

**This Exhibit is a duplicate of Plaintiff's Trial Exhibit 1B.
It appears at R. 0237-0244**

Deed
("Defendant's Pre-Trial Brief")

This Exhibit is a duplicate of Plaintiff's Trial Exhibit 1A.
It appears at R. 0233-0236

**September 30, 2013 Order
("Defendant's Pre-Trial Brief")**

**This Exhibit is a duplicate.
It appears at R. 0007-0009**

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
FILED-CLERK OF COURT)
GREENVILLE CO. S.C.)
COUNTY OF GREENVILLE) CASE NO.: 2013-CP-23-03989
PAUL B. WICKENS, CLERK)

Woodruff Road SC, LLC, 2014 OCT 31 AM 11:14)
)
Plaintiff,) PLAINTIFF'S AMENDED PRE-TRIAL
) BRIEF
v.)
)
SC Greenville Hwy 146, LLC,)
)
Defendant.)
)
_____)

INTRODUCTION

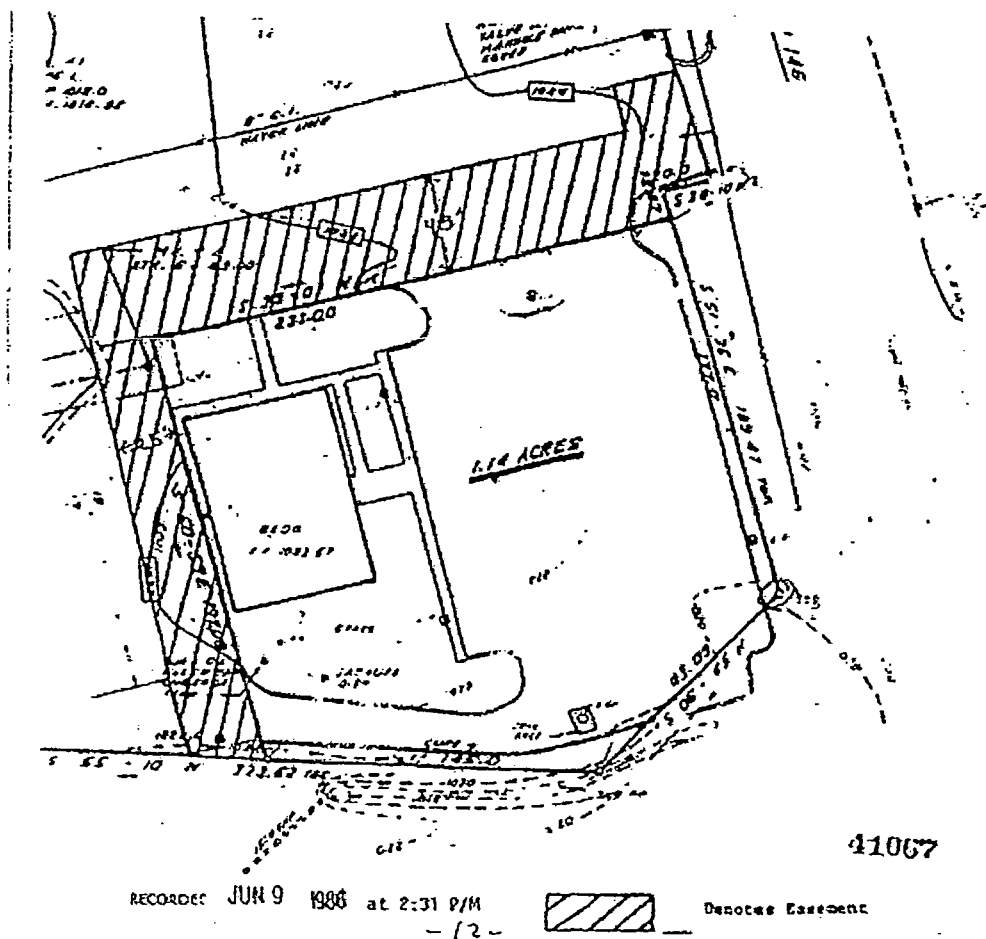
This matter involves a dispute over the use of an easement in a shopping center on Woodruff Road. Plaintiff and Defendant are both owners of commercial retail properties and have equal rights to use a non-exclusive right of way easement that serves retailers on both the Plaintiff's and Defendant's tracts. The right of way is specifically designated in the Agreement that created it as being for motor vehicles to travel onto and over the asphalt parking lot on Tract B (owned by Plaintiff), for ingress and egress to Tract A (owned by Defendant) from Woodruff Road. Both Plaintiff and Defendant, as well as their respective tenants and licensees, have an equal right to use the right of way. A copy of the Agreement creating the easement is attached hereto. The parties hereto are the successors-in-interest to that Agreement.

The action that prompted this lawsuit was that, over the objection of Plaintiff, Defendant constructed a Starbucks drive-through lane in a portion of the easement for a new Starbucks that Defendant built on Tract A. Plaintiff objected because installing a drive-through lane for the benefit of one of Defendant's tenants exceeds the scope of the easement and interferes with the right of Plaintiff, its tenants and licensees to have equal access to the easement. Therefore,

Plaintiff seeks an order of this Court that Defendant may not use a portion of the easement as a drive-through lane.

FACTS

This shopping center is located at the corner of I-85 and Woodruff Road where Trader Joe's and Academy Sports are located. It involves two tracts of land. Tract B is owned by the Plaintiff, and is the larger parcel on which Trader Joe's and Academy Sports are located. Tract A is a smaller parcel and was acquired by Defendant shortly before this lawsuit began. Both parcels are served by a right of way easement as shown below. The tract burdening the easement area, 1.14 acres, is Tract A owned by Defendant. The easement itself is on the servient estate, Tract B, which is owned by Plaintiff.



As shown above, the portion of the right of way as it connects to Woodruff Road is 45 feet along the westernmost property line of Tract A and is 25 feet along the rear property line of Tract A. The portion of the Agreement that creates this easement reads as follows:

Subject to the limitations set forth in paragraph 3 below, [Defendant] and all tenants and licensees of Tract A or any part thereof and their business invitees, licensees and employees shall have a right of way at all times, in common with the owner of Tract B [i.e. Plaintiff] and all tenants and licensees of Tract B or any part thereof, for motor vehicles to travel onto and over the asphalt parking area of Tract B as shown on the plat attached hereto on Exhibit "C", for the purpose of ingress and egress to Tract A from Woodruff Road (SC Hwy. 146). Said right of way shall be for the benefit of the fee owner, any tenant, or licensee of Tract A or any part thereof. (emphasis added).

Therefore, under the terms of the easement, Plaintiff and Defendant have equal rights to use the right of way, and that right is exclusively for motor vehicular traffic to travel onto and over the asphalt parking area of Tract B for the purpose of ingress and egress to Tract A from Woodruff Road. The easement does not contemplate a dedicated drive-through lane for a specific business in which cars are expected to be sitting in the easement for a period of time.

The pre-menu board and the menu board for the drive-through window are adjacent to the 25' portion of the easement so that drivers stop to place their orders while sitting on the easement. Of course, any cars waiting behind the ordering customers sit in the easement as well. Therefore, for all practical purposes, Defendant has taken a portion of a non-exclusive easement and made it exclusive to one of its tenants.

Plaintiff's position is that such use exceeds the grant of the easement and is improper.

APPLICABLE LAW

"The grant of an easement does not create a complete and absolute estate." *Lighthouse Tennis Club Village Horizontal Property Regime LXVI v. South Island Public Service District*, 355 S.C. 529, 533, 586 S.E.2d 146, 148 (Ct. App. 2003). "Rather '[a]n easement is a right which

one person has to use the land of another for a *specific purpose*.” *Id.* (internal citation omitted) (emphasis in original). “To determine the purpose of the easement, we must evaluate the intention of the parties when the easement was granted. In doing so, the ‘[c]lear and unambiguous language in grants of easement[s] must be construed according to terms which parties have used, taken and understood in their plain, ordinary and popular sense.” *Id.* at 534, 586 S.E.2d at 148. (Internal citation omitted). “[T]he owner of the easement cannot materially increase the burden of the servient estate or impose thereon a new and additional burden.” *Rhett v. Gray*, 401 S.C. 478, 493, 736 S.E.2d 873, 881 (Ct. App. 2013) (quoting *Clemson Univ. v. First Provident Corp.*, 260 S.C. 640, 650, 197 S.E.2d 914, 919 (1973)). “It is generally held that the owner of a servient estate will be given equitable relief where the owner of the easement makes an unauthorized or excessive use thereof.” *Clemson Univ.*, 260 S.C. at 651, 197 S.E.2d at 919.

Lighthouse Tennis Club cited above is particularly helpful here. In that case, the South Island Public Service District had an easement in connection with the operation of a water and sewer system. The easement owner, South Island Public Service District, then leased its easement to a telecommunications company for the unrelated activity of installing and maintaining telecommunications equipment. The court held in favor of the property owner that the purpose of the easement is determined by the grantor, and the owner of the dominant estate does not have the right to use it for any other purpose other than that set forth in the easement. *Lighthouse Tennis Club*, 355 S.C. at 534-35, 586 S.E.2d at 148.

In the case now before the Court, the easement was created for a specific purpose - that is for motor vehicles to travel over the easement for ingress and egress from Woodruff Road. The easement is for the common use of the owners, tenants and licensees of Tract A and Tract B. Neither side has a right to make use of it other than for ingress and egress or that otherwise

interferes with the other property owner's use of the easement. There is no reasonable way for Defendant to argue that the use of a portion of the easement as part of a drive-through lane for a Starbucks is not a new and additional burden upon the servient estate or that it does not interfere with the right of Plaintiff, its tenants and licensees to use that portion of the easement. Furthermore, Defendant cannot reasonably argue that the use of a portion of the easement as a drive-through lane was within "the intention of the parties when the easement was granted." *Lighthouse Tennis Club* 355 S.C. at 534, 586 S.E.2d at 148.

ANTICIPATED WITNESSES

1. Levie Johnson – Mr. Johnson will testify as to the location of the easement and the location of the Starbucks Drive-through lane in relation thereto.
2. Lewis P. Kelly - Mr. Kelly will testify about the nature of the leases between Plaintiff and its tenants and how they are affected by the Starbucks drive-through lane.
3. Cathy Prince-Magill – Ms. Magill took digital footage of cars sitting in the drive-through lane waiting to be served.
4. Gregory Ix. – Mr. Ix will testify about discussions he had on behalf of the Plaintiff with representatives of the Defendant.
5. William Runge - Mr. Runge is a representative of Defendant who is expected to testify about the Starbucks lease and the location and operation of the Starbucks drive-through lane.
6. Greg Carter – Mr. Carter is a representative of Defendant who is expected to testify about the Starbucks lease and the location and operation of the Starbucks drive-through lane.

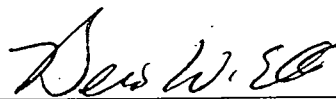
EXHIBITS

1. Agreement creating the easement.
2. Starbucks lease.
3. Excerpts from Trader Joe's and Academy Sports leases showing their right to use easements.
4. Diagrams showing the location of the easement.
5. Photographs showing the easement and the location of the Starbucks menu boards.
6. Footage of cars in the easement.
7. Emails or other correspondence between the parties.

CONCLUSION

As stated above, using a portion of the right of way as a dedicated drive-through lane for a specific business rather than as space that is equally available to both parties constitutes a new, material burden to the easement. For the reasons, set forth above, Plaintiff prays that this Court enjoin the Defendant from using a portion of the right of way in connection with a drive-through lane or for any other purpose that interferes with the right of Plaintiff as well as its tenants and licensees to have full use of the right of way.

Respectfully submitted,



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Attorney for Plaintiff

Greenville, South Carolina
October 30, 2014

**Agreement
("Plaintiff's Amended Pre-Trial Brief")**

**This Exhibit is a duplicate of Plaintiff's Trial Exhibit 1.
It appears at R. 0221-0232**

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

FILED-CLERK OF COURT
GREENVILLE, SC
CASE NO.: 2013-CP-23-03989
PAUL B. WILKINSON JR.

Woodruff Road SC, LLC,

Plaintiff,

v.

SC Greenville Hwy 146, LLC,

Defendant.

2014 DEC 23 AM 10 51

PLAINTIFF'S MOTION TO ALTER OR
AMEND THE JUDGMENT

Pursuant to Rule 52(b) and Rule 59(e) of the South Carolina Rules of Civil Procedure, Plaintiff respectfully moves the Court to alter or amend its judgment in this matter entered on December 16, 2014.¹ For the reasons set forth below, Plaintiff moves that this Court find in favor of Plaintiff and hold that Defendants may not use a portion of the non-exclusive right-of-way easement at issue in this case for a restaurant drive-through lane or, in the alternative, that the Court rule upon matters presented to the Court but not addressed in the judgment.

A. Plaintiff and Its Tenants and Licensees Have An Equal Right with Defendant and Its Tenants and Licensees to Use the Right-of-Way Easement.

As an initial matter, the judgment fails to address the point raised at trial and in Plaintiff's pre-trial brief, that the right-of-way easement that is the subject of this action is a non-exclusive easement which Plaintiff, as the owner of Tract B, and its tenants and licensees, have an equal right to use along with Defendant, as the owner of Tract A along with Defendant's tenants and

¹ Plaintiff received written notice of the entry of the order on December 18, 2014. The tenth (10th) day following December 18, 2014 was Sunday, December 28, 2014. Therefore, the time period for serving this motion extends through December 29, 2014.

licensees. The judgment makes it appear that the easement is only for the use and benefit of Defendant, its tenants and licensees, and fails to address Plaintiff's argument that Defendant's co-opting part of the 25-foot portion of the easement, in a manner that goes against the regular flow of traffic, deprives Plaintiff, its tenants and licensees to have equal use of the easement and, therefore, exceeds Defendant's rights under the easement.

Respectfully, the Court's treatment of this issue runs contrary to the policies behind the recording of easements. The Court correctly notes that the easement in question is a recorded easement, citing *Ward v. Evans*, 387 S.C. 401, 639 S.E.2d 7 (Ct. App. 2010). Further citing *Ward*, the Order notes that when recorded, easements are valid to subsequent purchasers without notice. The Court of Appeals in *Ward* actually goes a step further, stating, "The purpose of the recording statute is to protect a subsequent buyer without notice." *Id.* at 409-10, 639 S.E.2d at 11. In other words, with respect to this case, a subsequent purchaser of Tract B is entitled to know, by reviewing the recorded easement, what rights the owner of Tract A has to use Tract B.

However, by allowing Defendant to take a portion of the shared easement for its own use (and as discussed below, to expand that use beyond ingress and egress), subsequent buyers of Plaintiff's property are not protected. The recorded easement states that Plaintiff, its tenants and licensees have the same rights in the easement as Defendant, but under the Court's Order, a substantial portion of the 25-foot portion of the easement is not usable by the owners of Tract B on an equal footing with the owners of Tract A. Therefore, the Court's Order removes some of the protection to subsequent purchasers that the recording of an easement is intended to provide.

B. Defendant's Use of the Easement Exceeds the Rights Granted by the Easement.

Turning to another issue, the judgment incorrectly finds that cars merely use the drive-through lane to access the drive-through window on Tract A. That finding is incorrect and does

not address the evidence presented by Plaintiff, and certainly not denied by Defendant, that the pre-menu board and menu board for the drive-through window are located such that cars must stop in the right-of-way easement for drivers to place their orders. Therefore, the tenant with the drive-through window (Starbucks) and the drivers are actually stopping ingress and egress and are transacting business in the drive-through lane. That activity exceeds the scope of the right granted by the easement.

Respectfully, the Court's only focus is on whether Defendant's use of the easement is currently overburdening the easement and causing a problem for the owner and tenants of Tract B. That analysis only half correct. Not only can Defendant not overburden the easement, Defendant also may not use the easement, which is an express easement, for activities not specifically granted by the easement. *Lighthouse Tennis Club Village Horizontal Property Regime LXVI v. South Island Public Service District*, 355 S.C. 529, 533, 586 S.E.2d 146, 148 (Ct. App. 2003).

In *Lighthouse*, the Court of Appeals never mentioned or even implied that the reason that South Island could not change the use of an easement was because the change would overburden or even increase the burden on the easement. In fact, in that case, it appears that the new use of the easement would not have materially increased the burden or even changed it much at all. The new users, described in the opinion as "Telecom" were going to use the easement strictly to travel across the servient estate to reach the telecommunications equipment installed on a water tower - which could clearly be accessed by the easement so long as the access was for the purpose of servicing the water or sewer system. *Id.* at 531-32. 586 S.E.2d at 147.

It is clear from the opinion in *Lighthouse* that the easement was still going to be used to access the water tower on South Island's property. *Id.* Nonetheless, the Court of Appeals affirmed

the trial court's finding that using the easement to access the water tower for the purpose of servicing the water system did not include the right to use the easement to access the water tower to service the telecommunications equipment located on the water tower. *Id.* at 534-35, 586 S.E.2d at 148. The reason was strictly that the express easement allowed one use, but not the other. *Id.*

In this case, the easement at issue is a right-of-way easement that allows travel for ingress and egress for owners of both Tract A and Tract B. The ordinary and popular meaning of those words is that drivers may drive across the easement in an ordinary flow of traffic to get to and from a specific location. Those words do not include taking a portion of the easement and effectively reserving it for the use of tenants and licensees of Tract A to transact business in the easement against the regular flow of traffic.

As the Court correctly notes, the definition of ingress is the act of entering or the right or ability to enter or access, and the definition of egress is the act of going out or leaving or the right or ability to leave, or a way of exit. *Black's Law Dictionary* 9th Ed. (2009). Further, the definition of an ingress-and-egress easement is "[t]he right to use land to enter and leave another's property." *Black's Law Dictionary* 10th Ed. (2014). Those words do not include causing cars to stop in the easement and order food and beverage, and they do not include creating a situation in which cars will necessarily be stacked in the easement for a period of time.

Lighthouse Tennis Club Village makes it clear that Plaintiff does not have to show direct harm or an increase burden on the easement. Plaintiff only has to show, as it did at trial, that the easement is now being used for a purpose beyond what was expressed in the language of the easement.

Further, the Court's focus on whether the easement is being overburdened only focusses on whether there is an immediate problem with Defendant's use. However, Defendant's

exceeding the grant of the easement creates problems for Plaintiff down the road as well. As discussed above, the recorded easement tells a subsequent purchaser of Tract B that there is a 25-foot portion of an easement for ingress and egress to which the subsequent purchaser will have full and equal use with the owner of Tract A. Under the Court's Order, that recorded easement is not correct.

Therefore, whether there is an immediate problem with Defendant's use of the easement or not, by allowing the Defendant both to take a portion of the easement for its own use (or at least its control) and by allowing Defendant to use the easement for the transaction of business and for the stacking of cars waiting to transact business, the Court's order not only interferes with the purposes of the recording statute, as a practical matter it at least creates an ambiguity as to what the owner of Tract B has available to sell.

C. Defendant's Use Does Overburden the Easement.

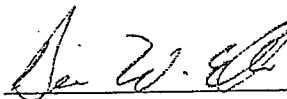
Finally, Plaintiff disputes the Court's finding that creating a new use for the easement which contemplates cars sitting in the easement does not materially increase the burden on the servient estate and respectfully asks that the Court reconsider the facts. This is not a situation in which there may be excess traffic in the area from time to time as cars travel to and from Woodruff Road. The drive-through lane at issue in this case, like virtually any drive-through lane, is designed to have cars sitting in it on a daily basis as a matter of course as the drivers wait to order food and beverages. The right-of-way easement, however, only grants to the owners of Tract A a license for vehicles to travel onto and over Tract B for ingress and egress to Tract A from Woodruff Road in addition to a non-exclusive parking easement. The easement does not grant the owner of Tract A the right to take a portion of the easement to use for the stacking of cars and the transacting of business.

Again, the overburdening of the easement is not just an immediate overburdening. The Court's Order actually expands Defendant's rights under a recorded easement which Plaintiff respectfully submits is not only not legally correct as a technical matter, that expansion interferes with the rights of subsequent buyers and sellers to rely on a recorded document.

CONCLUSION

Based upon the foregoing, Plaintiff respectfully moves the Court to alter or amend its judgment and grant the declaratory and injunctive relief sought by Plaintiff², or, in the alternative to rule on the issues set forth above.

Respectfully submitted,



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Greenville, South Carolina
December 29, 2014

² The Court's Order refers to Plaintiff's having orally moved for a declaratory judgment pursuant to S.C. Code Ann. § 15-53-30 (2014). Plaintiff notes that the relief it sought in its pleadings and at trial was both declaratory and injunctive relief. *See Clemson University v. First Provident Corp.* 260 S.C. 640, 654, 197 S.E.2d 914,921 (1973) "It is generally held that the owner of a servient estate will be given equitable relief where the owner of the easement makes an unauthorized or excessive use thereof. 28 C.J.S. Easements § 107, at page 797."

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Woodruff Road SC, LLC,)

Plaintiff,)

vs.)

SC Greenville Hwy 146, LLC,)

Defendant.)

C.A. No.: 2013-CP-23-3989

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER
2015 JAN 8 PM 4 06

RETURN TO MOTION TO RECONSIDER

SC Greenville Hwy 146, LLC files its return to Plaintiff's Motion To Reconsider as follows:

The decision reached by the Court is well reasoned and support by the facts and law in this case. There were virtually no disputed facts presented. The easement in question was entered into on May 5, 1986 and was of record prior to either party taking ownership of its respective parcels.¹ It is undisputed that both parties purchased the respective parcels subject to the easement. As a result there was no dispute as to the existence of the easement. The Court correctly held that "while the determination of the existence of an easement is a question of fact in a law action, the question of the extent of the easement is an action in equity". *Murrels Inlet Crop. v. Ward*, 378 S.C. 225, 231; 662 S.E.2d. 452, 454 (Ct. App. 2008), *Lighthouse Tennis Club Village Horizontal Prop. Regime LXVI v. S. Island Pub. Serv. Dist.*, 355 S.C. 529, 532, S.E.2d. 146, 147 (CT. App.2003). The Court also correctly held that the character of an express easement is determined by the nature of the right and the intention of the parties creating it. From a review of the easement and the evidence and testimony presented the Court correctly

¹ The easement was recorded on June 9, 1986 in the RMC Office for Greenville County.

found that it is clear that the easement was intended to provide a right of way for motor vehicles to travel onto the property of the Plaintiff for the purpose of providing access to the property of the Defendant. Plaintiff harps on the use of the easement as a "Drive-thru". However, no matter how you characterize the use of the easement, it remains that the Plaintiff's tenants are using the easement in accordance with the grant allowing them vehicular access around the building.

[Defendant] and all tenants and licensees of [Defendant] or any part thereof shall have a right of way **at all times**, in common with the owner of [Plaintiff] and all tenants and licensees of [Plaintiff] or any part thereof, for motor vehicles to travel onto and over the asphalt parking area of [Plaintiff] . . . **for the purpose of ingress and egress to [Defendant] from Woodruff Road 9sc hwy. 1460. Said right of way shall be for the benefit of the fee owner, and any tenant, of license [Defendant] or any part thereof.**

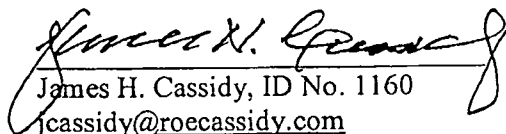
The plain meaning of the easement was to allow customers of the Defendant to circulate around the rear of its property via their vehicles. The Plaintiff argues that it has been denied the use of the easement but offers no factual proof to support its allegations. At no time has the Defendant attempted to block Plaintiff's access or use of the easement area. Plaintiff failed to offer any evidence that the use of the easement has created a burden as to its property. The testimony of Plaintiff's own witnesses reaffirmed the fact that they have not been deny the use of the easement or that the use of the easement caused them any harm. In fact the easement has been in place for more than a year including two holiday season and Plaintiff's own witnesses acknowledged that Defendant's use of the easement has not cause any interruption to the flow of traffic to the Plaintiff's property or its tenants. No testimony was presented by Plaintiff's tenants that the use of the easement was improper or that had any adverse impact on its tenancies.

In *Lighthouse* the facts are clearly distinguishable. The easement granted in *Lighthouse* was specific in that the original water company was granted an easement to access its water tower with the specific purpose to operate and maintain the water and sewer system for the

benefit of the condominium owners. The Court in *Lighthouse* correctly held that to grant a Telecom company the use of the easement so that it could operate its telecom business was totally different from the water and sewer business was a total violation of the spirit and intent of the easement. In this case the evidence clearly showed that the Defendant is properly using the easement for vehicular traffic to access it property.

For the reasons stated, Defendant submits that the Court's applied the common law of South Carolina to the facts submitted for review and properly ruled in favor of the Defendant.

Respectfully submitted,



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January 5, 2015

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	Case No(s) : 2013CP2303989
	)	
Woodruff Road SC, LLC,	)	
	)	
Plaintiff,	)	
	)	
-VS-	)	TRANSCRIPT OF RECORD
	)	
SC Greenville Hwy 146, LLC,	)	
	)	
Defendant.	)	

November 4, 2014
Greenville, South Carolina

B E F O R E:

HONORABLE LETITIA H. VERDIN, Judge.

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

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Attorneys for the Plaintiff

JAMES H. CASSIDY, Esquire
Attorney for the Defendant

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Certified Verbatim Reporter
P.O. Box 2812
Greenville, S.C. 29602

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I N D E X

DIRECT CROSS REDIRECT RECROSS

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Pat Kelly

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Cathy Prince-McGill

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P R O C E E D I N G S

(WHEREUPON, the proceedings begin on the 4th day of November,, 2014 at approximately 9:42 a.m.)

THE COURT: All right. Woodruff Road LLC versus SC Greenville Highway 146.

MR. ELLIS: Good morning, Your Honor.

THE COURT: Good morning. All right. I will tell you in this case I have had an opportunity to look at, I believe, most of the things that have been submitted, if that helps anybody to streamline anything. If you would like to make any kind of brief opening statements, I will be happy to hear that. Otherwise, we can just go right into whatever your first witness would be.

MR. ELLIS: Thank you, Your Honor. May it please the court. I am Burney Ellis for the plaintiff. I would like to hand up -- go ahead and have marked three documents that we have stipulated to. I don't think there is going to be a lot of dispute about the documents in this case generally. Mr. Cassidy and I agreed that we would go ahead and stipulate to the easement agreement that is the subject of this action. It is a valid easement agreement. Also, I

1 don't know if the court would like to have this
2 for the record or not, but these are the deeds
3 that actually show that our clients are the
4 respective owners of the two tracks at issue in
5 this case.

6 **THE COURT:** All right.

7 **(WHEREUPON, Plaintiff's Exhibits 1, 1A, and 1B are**
8 **marked for identification purposes.)**

9 **MR. ELLIS:** That way, it just creates a
10 complete record.

11 **THE COURT:** Any objection?

12 **MR. CASSIDY:** No objection, Your Honor.

13 **THE COURT:** All right. Very well.

14 **MR. CASSIDY:** Your Honor, I would note for
15 the record, obviously the deed reflects that
16 they purchased the property subject to those
17 easements.

18 **THE COURT:** Yes, sir. Certainly. All
19 right. So you have got Plaintiff's 1A, 1B and
20 Plaintiff's 1, just for the record.

21 All right. Yes, sir.

22 **MR. ELLIS:** Your Honor, just by way of
23 opening statements, I am sure Your Honor is
24 familiar with this. This is a dispute over the
25 use of an easement at the shopping center at

1 the corner of Woodruff Road and I-85 where
2 Trader Joe's and Academy Sports are located.
3 My client owns the track which is Track B which
4 is where the Trader Joe's and Academy Sports
5 are. The company is known as South Carolina
6 Greenville Highway 146. The defendants
7 purchased a track of land that is adjacent.
8 The dispute involves an easement that serves
9 both pieces of property.

10 This is showing the back of the easement
11 agreement that we just submitted. Basically,
12 this is Woodruff Road. As you come in, there
13 is a 45-foot easement as you come up. And then
14 a 25-foot easement around the back of the
15 building. The defendants have constructed a
16 Starbucks that you can see right in here.

17 **THE COURT:** And I will tell you, I am
18 familiar with the location, much to my chagrin
19 sometimes due to the traffic on Woodruff Road.
20 But yes, I am familiar with the location. But
21 you certainly can show me anything because my
22 memory may not -- may not be 100 percent.

23 **MR. ELLIS:** It is one thing to essentially
24 tell somebody about this. They know what you
25 are talking about.

1 **THE COURT:** Right.

2 **MR. ELLIS:** What has happened is this is
3 an easement that is a common right of way
4 between Track A and Track B. The easement
5 agreement states that it is for the common use
6 to serve tenants of both tracks. Well, there
7 is a dispute over those. We're going to go
8 into a little bit more detail.

9 When the defendants purchased their track
10 of land, they put in a drive-through lane for a
11 Starbucks in the easement. It is our position
12 that based on the wording of the easement, that
13 is an improper use. That exceeds the scope of
14 the license granted by the easement. I think I
15 can show you this. This is an older picture.
16 I wanted to get a newer picture showing
17 Starbucks. This is before it was constructed.
18 The easement, 45-foot portion, comes in from
19 Woodruff Road this way.

20 **THE COURT:** Okay.

21 **MR. ELLIS:** And then the 25-foot portion,
22 it is 25 feet in width, comes down behind the
23 buildings. As we say, this is supposed to be
24 for the use of both properties. The drive-
25 through lane comes in here and then wraps

1 around. The drive-through lane leaves the
2 easement at this point.

3 **THE COURT:** Okay.

4 **MR. ELLIS:** Our position today, what we
5 would like to show the court is that by putting
6 a drive-through lane in the easement, they were
7 exceeding the scope of the easement as set
8 forth in the document that has been marked as
9 Exhibit 1. It is no longer mutual. It is no
10 longer common. They have taken it and assigned
11 it to a particular tenant for use. It
12 restricts our ability to use it should we
13 choose to do so and that we have the right to
14 do so.

15 We're going to ask the court for a
16 declaratory judgment to construe the easement
17 to say that one cannot use the easement for the
18 benefit of a particular tenant and especially
19 for the exclusion of other tenant which is
20 essentially what this is done. Our position is
21 it really doesn't matter for purposes of an
22 easement whether or not we are immediately
23 being harmed by it. The law is that an
24 easement is a license to use the land of
25 another for a specific purpose. You don't get

1 to use somebody else's land for anything you
2 want to long as you're not bothering them at
3 the moment.

4 Our position is, our position will be, and
5 we were trying to show the court that by
6 putting a drive-through lane, they have
7 actually changed the scope of the license that
8 was granted to them. They should not be
9 allowed to do that. We would ask the court for
10 an order saying that the drive-through lane
11 cannot be placed there in the easement. It
12 needs to be removed.

13 **THE COURT:** All right. All right. Thank
14 you.

15 Yes, sir.

16 **MR. CASSIDY:** May it please the court.
17 Jim Cassidy for the defendants. There isn't
18 much that I disagree with what Bernie says
19 except his interpretation of the easement. It
20 is an easement for ingress and egress for the
21 benefit of my clients property. The easement
22 is pretty clear about that. This is a right-
23 of-way that should be for the benefit of the
24 owner, the tenants, the licensees of Track A,
25 which we are Track A. They really don't have

1 any reason to use this easement.

2 In fact, the pictures that Mr. Ellis just
3 illustrated to you, you can see that prior to
4 our reestablishing the easement, it was just a
5 dirt path where there were some dumpsters that
6 were placed on it in the easement where they
7 should not have been. There is nothing in the
8 easement that says you can't use it for a
9 drive-through. In fact, they say it is for
10 vehicular traffic for ingress and egress. We
11 are going to demonstrate to you that is all
12 that it is being used for.

13 The fact that Starbucks as a drive-up
14 window on the property that they have released
15 does not violate the easement or the terms of
16 it in any way, shape or form. They won't be
17 able to make any showing that the use of the
18 easement that we are utilizing burdens their
19 property in any way. They would use, they
20 never use this property. They never would have
21 used this property. If they want to drive
22 through the easement, nobody is stopping them
23 from doing that.

24 The easement, as it was established in
25 1986, has been the same easement. We have not

1 changed at all. They bought this property
2 subject to that. We will demonstrate that
3 there has been no harm.

4 **THE COURT:** All right. Thank you, sir.
5 Yes, sir.

6 **MR. ELLIS:** Thank you, Your Honor. If we
7 may, if you are ready for us to proceed, the
8 plaintiff will call Mr. Levi Johnson.

9 **THE COURT:** All right.

10 **LEVI JOHNSON**

11 having first been duly sworn, testifies as follows:

12 **DIRECT EXAMINATION**

13 **BY MR. ELLIS:**

14 **Q** Would you state your name for the record
15 please?

16 **A** Levi Johnson.

17 **Q** Mr. Johnson, where are you employed?

18 **A** Kimco Corporation.

19 **Q** What is your relationship to the property
20 that we are talking about with Trader Joe's and
21 Academy Sports is located?

22 **A** I used to be the property manager for that
23 property.

24 **Q** The owner of that property is, the official
25 name of that is Woodruff Road SC, LLC?

1 **A** Yes.

2 **Q** So you managed the property on their
3 behalf?

4 **A** Yes, sir.

5 **Q** You heard us earlier that we introduced an
6 exhibit that is an easement agreement. Are you
7 familiar with the easement agreement?

8 **A** Yes, I am.

9 **Q** I'm just going to ask you to take a look at
10 that. Could you tell the court why are we here
11 today? Why did we bring an action on behalf of
12 Woodruff Road SC, LLC against the owners of the
13 adjacent track?

14 **A** The reason we bought this is because we
15 believe that the easement is not being used for its
16 intended purpose.

17 **Q** Okay. What do you understand the intended
18 purpose of the easement to be?

19 **A** To be for the mutual use of both parties.

20 **Q** Let me ask you this for the record. Please
21 look at paragraph one on Plaintiff Exhibit 1 at the
22 bottom of the page.

23 **A** Okay.

24 **Q** Okay. I would just ask, if you will, just
25 read that into the record.

1 **A** Right-of-way. Subject to the limitations
2 set forth in paragraph three below, all tenants and
3 licensees of Track A or any part thereof and their
4 business invitees, licensees and employees shall have
5 the right-of-way at all times in common with the
6 owner of Track B and all tenants and licensees of
7 Track B or any part thereof for motor vehicles to
8 travel onto and over the asphalt parking area of
9 Track B as shown on the track attached hereto on
10 Exhibit C for the purpose of ingress and egress to
11 Track A from Woodruff Road SC Highway 146. Said
12 right-of-way should be for the benefit of the fee
13 owner, any tenant or licensee of Track A or any part
14 thereof.

15 **Q** Okay. When you look at paragraph one, it
16 says that the purpose is for vehicles to travel onto
17 and over the asphalt parking area. What purpose did
18 it say it is for?

19 **A** It is for ingress and egress.

20 **Q** And paragraph two also provides that there
21 is a parking easement, correct?

22 **A** Yes.

23 **Q** If you will look at paragraph three when it
24 says the limits of the right-of-way, take a look at
25 that quickly.

1 A Okay.

2 Q Now, do you understand what the scope of
3 the easement is as set forth in the document?

4 A Yes.

5 Q How does it describe the easement in
6 paragraph three?

7 A The entryway off of Woodruff Road, the 45
8 feet is part of the easement. 25 feet adjacent
9 behind Track A is part of the easement.

10 Q Okay. I would like to ask you, if you
11 will, turn please to Exhibit D of this document.
12 Which is the last page. Do you recognize that
13 drawing?

14 A Yes.

15 Q Okay. What is that drawing?

16 A It is a drawing showing the easement area.

17 Q And the easement area -- I'm sorry, Exhibit
18 D is what is referenced in paragraph three that we
19 just read, right?

20 A That is correct.

21 Q Okay. I'm going to show you this blowup
22 picture of Exhibit D so that we can all perhaps get a
23 look at it. Where is the Starbucks that have been
24 built by the defendants on here, do you know?

25 A The Starbucks is in this area here.

1 Q Okay. So it is adjacent to what portion of
2 the easement?

3 A Adjacent to the 25-foot portion.

4 Q What did they do that upset the plaintiff
5 in this case, Woodruff Road?

6 A They put a drive-through.

7 Q Okay. Can you describe the drive-through
8 for me?

9 A The drive-through comes off of the 45-foot
10 easement area and runs along the rear.

11 Q Okay. Why is that a problem?

12 A If it is supposed to be exclusive use, they
13 are using it particularly for Starbucks drive-
14 through, vehicles can't really flow behind the
15 building.

16 Q Okay. Tell us a little bit about the
17 history of this. How did this come about?

18 A I was actually doing a routine property
19 inspection when I noticed there was construction.
20 They were doing construction in the front of the
21 building but they were tearing up the rear at the
22 time.

23 Q By they, you mean the owners of the Track
24 A?

25 A Track A.

1 Q Okay.

2 A Tearing up the back of the building. I
3 bought it to their attention just to make sure I
4 didn't miss anything. I guess we attempted to get
5 this work stopped, There were stops to try to make
6 an agreement to try to make it mutually exclusive so
7 that everyone could use this. Obviously, that
8 failed. We attempted to get it stopped and that was
9 denied. I guess we did not show that it was going to
10 cause harm.

11 Q Let me ask you a question just to be sure
12 this is understood. Up to this point, have we had
13 traffic snarls back there and that sort of thing that
14 we know of?

15 A No traffic issues at all.

16 Q Okay. What is the problem then? Why do we
17 care if they are using the easement for drive-through
18 lane as opposed to just ingress and egress?

19 A They are using the easement for their
20 exclusive use. That is not what it is for.

21 Q I'm going to show you some -- I'm going to
22 show you some pictures that were produced to me by
23 the defendant. I ask if you recognize these. You
24 recognize what has been marked as Exhibit 2?

25 A Yes.

1 Q Okay. What is that?

2 A That is the drive-through.

3 MR. ELLIS: I would like to offer this in
4 as Plaintiff's Exhibit 2.

5 MR. CASSIDY: May I see it?

6 MR. ELLIS: Yes.

7 (WHEREUPON, there is a pause.)

8 MR. CASSIDY: Okay.

9 THE COURT: No objection?

10 MR. CASSIDY: No objection.

11 THE COURT: All right. And that's?

12 MR. ELLIS: That's 2.

13 THE COURT: Plaintiff's Number 2.

14 (WHEREUPON, Plaintiff's Exhibit 2 is marked for
15 identification and admitted into the record.)

16 BY MR. ELLIS:

17 Q Okay. You have identified Exhibit 2 is the
18 drive-through lane. Let me show you this to you. To
19 your knowledge, is that sitting in the 25-foot
20 portion of the easement?

21 A Yes, it is.

22 Q Okay. Let me ask you if you recognize what
23 is been previously marked as Exhibit 3.

24 A Yes, I do.

25 Q What is that?

1 **A** That is the menu board for the Starbucks.

2 **MR. ELLIS:** Okay. I would like to offer
3 this as Exhibit 3 please.

4 **MR. CASSIDY:** No objection, Your Honor.

5 **THE COURT:** All right. Without objection,
6 it is admitted.

7 **(WHEREUPON, Plaintiff's Exhibit 3 is marked for**
8 **identification and admitted into the record.)**

9 **BY MR. ELLIS:**

10 **Q** Now, looking at Exhibit 3, what portion of
11 this is this picture showing the easement?

12 **A** It is in the -- well, it is adjacent to the
13 easement area. It is in the back of the building.

14 **Q** The menu board is adjacent to the easement?

15 **A** Yes, it is.

16 **Q** Do you see over here to the left, the far
17 left? There is another board. Do you know what that
18 is?

19 **A** I believe that is also a menu board for
20 Starbucks.

21 **Q** Okay. Where the truck is located in this
22 picture, that is not?

23 **A** No, it is not.

24 **Q** In order to order coffee here, somebody
25 stops in the easement in order to place an order?

1 **A** Yes.

2 **Q** Let me show you a document marked as
3 Exhibit 4. Do you see that?

4 **A** Yes.

5 **Q** Okay. What is that?

6 **A** That is the drive-through.

7 **Q** Just a different view of it, correct?

8 **A** Yes.

9 **THE COURT:** Any objection?

10 **MR. CASSIDY:** No objection, Your Honor.

11 **THE COURT:** All right. It is so admitted.

12 (WHEREUPON, Plaintiff's Exhibit 4 is marked for
13 identification and admitted into the record.)

14 **BY MR. ELLIS:**

15 **Q** And Exhibit 4 is this, this is just looking
16 away from where Exhibit 3 was, is that correct?

17 **A** Yes.

18 **Q** Okay. You are driving down the easement
19 and you get to the menu board, correct?

20 **A** That is correct.

21 **Q** Okay. Finally, I'm going to ask if you
22 recognize this.

23 **A** Yes.

24 **Q** Okay. What is that?

25 **A** That is the back of the building showing

1 the drive-through.

2 MR. ELLIS: Okay. I would like to offer
3 this as Exhibit 5.

4 MR. CASSIDY: No objection, Your Honor

5 THE COURT: All right. So admitted.

6 (WHEREUPON, Plaintiff's Exhibit 5 is marked for
7 identification and admitted into the record.)

8 BY MR. ELLIS:

9 Q Exhibit 5 is, we might say a panoramic view
10 of the easement, is that correct?

11 A Yes.

12 Q Do you see the cars over to the right?

13 A Yes, I do.

14 Q Those cars are stopped in front of the menu
15 board. Can you tell whether or not that is in the
16 easement?

17 A When you said panoramic view of the cars, I
18 could not see. Yes, that appears to be in the
19 easement area.

20 Q Okay. Very good. And this lane up in
21 here, can you identify that?

22 A That is the drive-through going through the
23 easement area.

24 Q Okay. Just another question for you, I
25 just want to go back over this again. The easement

1 agreement allows for ingress and egress, correct?

2 A Yes.

3 Q Okay. What is the plaintiff's position
4 with respect to the drive-through? Is that allowing
5 cars to be in the drive-through, do we consider that
6 to be ingress and egress?

7 A No. Being a drive-through is going to be
8 exclusive use.

9 Q Okay. It is going to be exclusive use.
10 Also, does it require cars to stop and place an
11 order, correct?

12 A Yes, it does.

13 Q Are we aware of any place in the easement
14 agreement that anticipates that a drive-through would
15 be installed for the exclusive use of the tenant?

16 A No, I am not.

17 Q I don't believe I have any further
18 questions for you at this time, Mr. Johnson. Please
19 answer any questions Mr. Cassidy has.

20 THE COURT: Mr. Cassidy?

21 CROSS-EXAMINATION

22 BY MR. CASSIDY:

23 Q Good morning, Mr. Johnson. I believe we
24 met the last time.

25 A Yes.

1 Q You were the property manager of this
2 property?

3 A Yes, I was.

4 Q You wouldn't disagree with me then that
5 when your clients bought this property, they bought
6 it subject to the easement?

7 A Yes, that is correct.

8 Q In fact, the easement has been on the
9 record since 1986, long before your clients bought
10 this property?

11 A Yes.

12 Q So they knew or should have known that the
13 easement was in place and it was for the benefit of
14 the Capri's property.

15 MR. CASSIDY: Your Honor, I'm going to call
16 Track A the Capri's property so you can orient
17 better.

18 THE COURT: All right.

19 BY MR. CASSIDY:

20 Q It is the old Capri's restaurant. Isn't
21 that right?

22 A Well, based on what I read.

23 Q You did a good job reading it. I'd like
24 you to read the last sentence in paragraph one again.

25 A Said right-of-way shall be for the benefit

1 of the fee owner, any tenant or licensee of Track A
2 or any part thereof.

3 Q And they are referring to the Capri's
4 property, isn't that right?

5 A Yes.

6 Q You say that the easement doesn't provide
7 for a drive-through. Is that correct?

8 A Correct.

9 Q So does it say it can't be used as a drive-
10 through?

11 A No, it does not.

12 Q It says it is for vehicular traffic, isn't
13 that true?

14 A Yes.

15 Q They're using it for vehicular traffic,
16 isn't that true?

17 A Yes, they are.

18 Q Not only Starbucks, but the other two
19 tenants can access the building along that easement,
20 isn't that true?

21 A They do have their doors back there, yes.

22 Q They can go around the building and access
23 that property, isn't that true?

24 A Yes.

25 Q The picture you showed us, your folks never

1 use that area, isn't that true?

2 MR. ELLIS: Objection. Relevance.

3 MR. CASSIDY: I think it is very relevant.

4 THE COURT: Okay. Overruled. I will
5 allow that question.

6 THE WITNESS: The area where the drive-
7 through is?

8 BY MR. CASSIDY:

9 Q Where the 25-foot easement is, your folks
10 never use the area, isn't that true?

11 A Not to my knowledge.

12 Q There is no problem with the 45-foot strip,
13 isn't that right?

14 A Not to my knowledge.

15 Q Free flow of traffic?

16 A Yes.

17 Q My clients aren't stopping anybody from
18 going to your Trader Joe's or to the Academy Sports,
19 isn't that true?

20 A No.

21 Q So the only particular you are complaining
22 about is the 25 feet in the back of the building,
23 isn't that right?

24 A Yes.

25 Q And that was done to allow the Capri's

1 folks to have access to the rear of the building and
2 have deliveries made and et cetera, isn't that true?

3 **MR. ELLIS:** I'm going to object on
4 relevance too just because the scope of the
5 easement speaks for itself.

6 **THE COURT:** I'm going to allow that
7 question. We might be getting a little far
8 afield but go ahead.

9 **THE WITNESS:** Can you repeat the question?

10 **BY MR. CASSIDY:**

11 **Q** Yes. The 25-foot strip was put in place so
12 that the Capri's folks could access the rear of the
13 building and go around the building, isn't that true?

14 **A** Yes.

15 **Q** Your owners or tenants would have
16 absolutely no reason to use that 25-foot strip, would
17 they?

18 **A** Not that I'm aware of.

19 **Q** So is that the bottom line in this case
20 that you are a little bit concerned that one of your
21 tenants might have a technical objection to the use
22 of the easement?

23 **A** That is one of my concerns.

24 **Q** You want to get a court order to say it is
25 okay for them to use the easement the way they are

1 describing it, isn't that true? You want to get the
2 court to say what they had done is okay that it is in
3 the scope of the easement, isn't that true?

4 **A** What who did is okay?

5 **Q** My clients when they built, they restored
6 the easement so they could go behind the building,
7 paved it.

8 **A** If I think I am understanding your
9 question, you are saying that we are looking for the
10 court to say it is okay for the drive-through to be
11 there?

12 **Q** That the use of the easement is improper?

13 **A** That is incorrect.

14 **Q** What are you looking for in this particular
15 case?

16 **A** That currently because there is a drive-
17 through there, now it is not mutually beneficial for
18 both tracks. If it is going to be for ingress,
19 egress, traffic cannot free flow behind that
20 building.

21 **Q** When you say traffic is not free flow
22 behind that building, is there any reason that an
23 invitee to Trader Joe's or Academy Sports would want
24 to go in the back of that building?

25 **A** Dumpsters are on that side of the building,

1 also the loading dock for Trader Joe's.

2 Q Is behind their building? Trader Joe's has
3 complete access to their loading docks, do they not?

4 A Yes, they do.

5 Q And nothing -- that is access to the 45-
6 foot easement, is that right?

7 A Well, there is also a drive-through lane
8 after the 25-foot easement.

9 Q The loading trucks or the delivery trucks
10 never go in the 25-foot strip, isn't that true?

11 A That is true.

12 Q So your complaint is that it is being used
13 as a drive-through.

14 A It is being used as a drive-through. It is
15 not ingress/egress.

16 Q Have any of your owners or invitees been
17 denied the right to drive around the back of that
18 building?

19 A Not the right to drive but the right to
20 work.

21 Q Pardon me?

22 A Not the right to drive behind the building,
23 but we did have work issues there.

24 Q Well, that is long gone. The easement has
25 been restored, isn't that true?

1 **A** What do you mean the easement has been
2 restored?

3 **Q** The 25-foot strip is paved now where before
4 it was grass, isn't that true?

5 **A** That is correct.

6 **Q** Has any of your owners or invitees been
7 denied the right to use that?

8 **A** To use the paved area?

9 **Q** Yes.

10 **A** No.

11 **Q** If I come around in the opposite direction
12 from Woodruff Road side, you can get around the
13 building through the easement, could you not?

14 **A** If we were coming from Woodruff Road down
15 the 45-foot to the 25-foot?

16 **Q** No. When you are in the parking area in
17 front of the Starbucks, the Sleepy's and Zoe's
18 property, somebody could come around that side to the
19 Starbucks, could they not?

20 **A** I believe that is a one-way now. I believe
21 it was changed to a one-way.

22 **Q** But there is no prohibition for anybody to
23 go that way. There is plenty of room, isn't that
24 true?

25 **A** Yes.

1 Q Now, you had some testimony about the menu
2 boards, they are all located on my client's property,
3 isn't that true?

4 A That is correct.

5 Q They aren't the easement?

6 A Not to my knowledge, no.

7 Q And even when people were accessing your
8 property through the 45-foot easement, they can stop
9 if they wanted to and decide which shop they would
10 like to go to?

11 A Yes.

12 Q There is nothing that prohibits them from
13 doing that, is there?

14 A No.

15 Q I think you testified that there has been
16 no complaints about the way my clients are using the
17 easement, is that true?

18 A No traffic complaints.

19 Q Say what?

20 A No traffic complaints.

21 Q Have you had any complaints?

22 A Yes, I have.

23 Q From who?

24 A From my contractors when we were attempting
25 to pave our road.

1 Q Okay. When you were resurfacing the road,
2 you blocked off the access, isn't that true?

3 A That is incorrect. I did not block of
4 access to the building. We had our back area on the
5 side of Trader Joe's was being sealed. They had
6 complete access to the front of their building.

7 Q Okay. So that was a one-day situation when
8 you were trying to resurface and there was a little
9 dispute about whether or not it was blocked off,
10 isn't that true?

11 A It was multiple days, but yes.

12 Q What I am saying is nobody has complained
13 about the use of the drive-through impeding access to
14 your property.

15 A Correct.

16 MR. CASSIDY: Excuse me one second. I have
17 no further questions, Your Honor.

18 THE COURT: All right. Yes, sir.

19 REDIRECT EXAMINATION

20 BY MR. ELLIS:

21 Q Mr. Johnson, do you know if Trader Joe's
22 will always be the tenants on that property?

23 A No, I do not.

24 Q In fact, would the property owner of
25 Woodruff Road perhaps want to use the property for

1 some other purpose at some point?

2 A Yes.

3 Q Might it matter at that point whether or
4 not there was full access to the 25-foot easement?

5 A Yes.

6 Q Okay. If you have an easement that is for
7 mutual right-of-way and equal use by all tenant and
8 then one of the tenants take it away and says it is
9 only going to be used exclusively for a drive-
10 through, could that affect the value of the property
11 if you ever go to sell it?

12 A Yes.

13 Q Okay. Would it affect positively or
14 negatively?

15 A Negatively.

16 Q Okay. As far as anybody else going back
17 behind, going back and using the area, you have seen
18 the easement. You have seen it in action, correct?
19 You have seen the drive-through in action, correct?

20 A Yes, I have.

21 Q Okay. Does the drive-through indicate that
22 anybody may use that road any time they want to?

23 A No, it does not.

24 Q Does it indicate whether or not it is an
25 exclusive Starbucks drive-through?

1 **A** There are signs that says drive-through.

2 **Q** Okay. Does the pavement appear to be the
3 same or different than the rest?

4 **A** The pavement is different from the rest of
5 the pavement.

6 **Q** No further questions.

7 **RECROSS EXAMINATION**

8 **BY MR. CASSIDY:**

9 **Q** Mr. Johnson, the pavement is different
10 because the city required it to being --

11 **A** I am unaware of why the pavement is
12 different.

13 **Q** Okay. The fact is that it is paved, isn't
14 that correct?

15 **A** That is correct.

16 **Q** It was the day before?

17 **A** No, it was not.

18 **Q** Your invitees access the 45-foot easement,
19 does it say only the exclusive use for Trader Joe's
20 and Academy Sports?

21 **A** No, it does not.

22 **Q** And neither does the access in the back of
23 our property?

24 **A** There is a sign that says drive-through and
25 an arrow pointing.

1 **Q** But it doesn't say you can't enter here,
2 does it?

3 **A** No, it does not.

4 **MR. CASSIDY:** No further questions.

5 **THE COURT:** Anything else, Mr. Ellis?

6 **MR. ELLIS:** I have nothing else. Thank
7 you.

8 **THE COURT:** Sir, you can step down. Is
9 that an exhibit? If you will, just leave it
10 right there.

11 **MR. ELLIS:** Your Honor, the plaintiff
12 calls Pat Kelly.

13 **THE COURT:** Wait just one moment. (Pause.)

14 Mr. Kelly, can we wait just a moment?
15 Let's take a brief break. I need to work in
16 this emergency hearing.

17 **(WHEREUPON, a short recess is taken.)**

18 **THE COURT:** All right. Thank y'all so
19 much. If you are ready to resume, I am sorry
20 about that.

21 **MR. ELLIS:** That is perfectly fine, Your
22 Honor. The plaintiff would like to call Pat
23 Kelly.

24 **THE COURT:** All right.

25 **PAT KELLY**

1 having first been duly sworn, testifies as follows:

2 **DIRECT EXAMINATION**

3 **BY MR. ELLIS:**

4 **Q** Would you state your name for the record,
5 please?

6 **A** Pat Kelly.

7 **Q** Mr. Kelly, who are you employed by?

8 **A** Kimco Realty Corporation.

9 **Q** Would you tell the court what relationship
10 Kimco Realty is to Woodruff Road SC LLC?

11 **A** It is a subsidiary of Kimco Realty.

12 **Q** Okay. So what is your employment with
13 Kimco? What do you do?

14 **A** I am the director of leasing.

15 **Q** As the director of leasing, do you review
16 leases and have anything to do with leases such as
17 the one with this property?

18 **A** Yes.

19 **Q** Okay. Are you generally familiar with the
20 leases of the tenants there?

21 **A** Generally, yes.

22 **Q** Okay. Who are the tenants on the property
23 that is owned by Woodruff Road SC LLC?

24 **A** Trader Joe's and Academy Sports.

25 **Q** Okay. Could you tell the court what the

1 relationship of those leases is to the dispute we
2 have in this case?

3 **A** There is language in both leases that
4 allows them to use all of the common areas of the
5 shopping center which includes easements, driveways,
6 parking areas, landscaping, anything on the property
7 outside of the tenants' premises.

8 **Q** Okay. In your experience as director of
9 leasing, what is the concern when somebody changes an
10 easement within a property like this?

11 **A** Some leases, such as the Trader Joe's
12 lease, has language that if any changes are made to
13 these areas or easements without their consent, it
14 can put the landlord in default of the lease.

15 **Q** Okay. Let me show you a document and ask
16 if you recognize this.

17 **A** Yes. Trader Joe's lease.

18 **Q** Now, that is not the entire lease?

19 **A** No, it is just a few pages.

20 **MR. ELLIS:** Your Honor, I would like to
21 offer this into evidence as Plaintiff's Exhibit
22 6.

23 **THE COURT:** Any objection?

24 **MR. CASSIDY:** Your Honor, I don't have any
25 objection. I don't know the relevance to it but

1 I don't have any objection. It is subject to
2 the easement that was already in place in 1986.

3 THE COURT: All right. All right, I will
4 admit it then.

5 (WHEREUPON, Plaintiff's Exhibit 6 and 6A is
6 marked for identification and admitted into the
7 record.)

8 BY MR. ELLIS:

9 Q Just to clarify, this is subject to the --
10 Trader Joe's lease is subject to the easement that
11 was already in place, correct?

12 A Correct.

13 Q It was entered into, in fact, in June 2010,
14 right? I'm sorry. Let me show you.

15 A Yeah, June 15th.

16 Q Let me ask you, if you will, turn to
17 actually the third page of the document, the first
18 page of the lease itself.

19 A Yeah.

20 Q Do you see the place where it says right to
21 use common area?

22 A Yes.

23 Q Let me direct your attention just to the
24 first sentence under paragraph 1(d). Landlord hereby
25 grants the tenant the nonexclusive right to use --

1 skipping down to 2, all easements or other rights-of-
2 way under any instrument creating covenants,
3 conditions, easements, restrictions or other rights
4 with respect to any portion of the shopping center,
5 right?

6 **A** Correct.

7 **Q** Let me again direct you back to Exhibit 1
8 which was offered into evidence earlier. There is a
9 right-of-way for ingress and egress that is shared
10 between the two parties today, right?

11 **A** Correct.

12 **Q** So how would you then interpret Trader
13 Joe's rights with respect to the easement?

14 **A** If they ever decide that they need to use
15 the area that is in dispute, they have got a right to
16 do so.

17 **Q** Okay. If they decide for some reason they
18 need to have traffic going the opposite way of the
19 drive-through?

20 **A** It would appear so, yes.

21 **Q** Let me ask you to turn to Page 29. The
22 lower right-hand corner.

23 **A** Yeah.

24 **Q** Actually, let me ask you to start Page 28
25 where it says common areas in the definition. Do you

1 see where it says subject to the requirements of
2 governmental authorities having jurisdiction over the
3 shopping center, landlord agrees to provide or
4 maintain during the term of the lease the common
5 areas of the shopping center substantially shown on
6 the site plan is Exhibit B hereto.

7 A Uh-huh.

8 Q Let me ask you to turn to the back of
9 Exhibit B. The last page.

10 A I see it.

11 Q Does Exhibit B show the area that we are
12 talking about today where the Capri's is located?

13 A It does.

14 Q This is what it basically look like when it
15 was leased?

16 A When it was leased to Trader Joe's, yeah.

17 Q This is the area that was changed by the
18 defendant?

19 A Yes.

20 Q It was not done without consent, correct?

21 A No, it was not.

22 Q And not with Woodruff Road's consent?

23 A No.

24 Q Let me ask you to look at paragraph B where
25 it says changes to common area. This is on Page 29.

1 Subject to applicable laws, plaintiff would represent
2 the covenants and agrees that the shopping center
3 layout on Exhibit B that we just looked at would be
4 materially and substantially adhered to during the
5 term so as to substantially maintain the positions of
6 the buildings, the parking areas, the traffic
7 patterns and roadways. Again, would you please tell
8 the court what the problem from a leasing perspective
9 we have with respect to someone just changing an
10 easement that is supposed to be shared between two
11 parties?

12 A If we -- if the common area is altered from
13 what is on the plan on this lease, they could -- they
14 are not in agreement with it, it could put us in
15 default with the lease for making changes without
16 their consent without them agreeing to it in advance.

17 Q I ask you to take a look at what we
18 previously marked as Exhibit 7. Do you recognize
19 this?

20 A Yes.

21 Q What is that?

22 A It is a portion of the Academy Sports
23 lease.

24 MR. ELLIS: Your Honor, I would like to
25 offer that into evidence as Exhibit 7.

1 **MR. CASSIDY:** Your Honor, no object -- the
2 only objection I have is relevance because it
3 was subject to the easement that was in place
4 since 1986.

5 **THE COURT:** All right. I'm going to allow
6 it.

7 **(WHEREUPON, Plaintiff's Exhibit 7 is marked for**
8 **identification and admitted into the record.)**

9 **BY MR. ELLIS:**

10 **Q** Does Exhibit 7 have somewhat similar
11 preventatives?

12 **A** It does.

13 **Q** Let me just ask you to turn to Page 15.

14 That is the second page of the exhibit. Under
15 subparagraph nine, Common Area, does Academy Sports
16 have the right to use all common areas along with
17 every other tenant?

18 **A** It does.

19 **Q** And Mr. Cassidy mentioned before that this
20 easement was on record at the time the lease was
21 signed, correct?

22 **A** Correct.

23 **Q** So it was on record at the time they signed
24 this lease but that was the availability to use in
25 common with the owners of the Capri's property this

1 easement then?

2 A Yes.

3 Q Is there a concern that by taking a portion
4 of the easement and essentially dedicating it to
5 Starbucks that there was some concern with Academy
6 Sports' lease?

7 A Yes.

8 Q What is that concern?

9 A The concern is that Academy could see that
10 and feel that some of the rights have been given up
11 in the common areas and it had been given to someone
12 else.

13 Q Okay.

14 A They might not be able to use that area.

15 Q Now, let's be completely fair about this.
16 Has Academy Sports come to you and complained about
17 this?

18 A Not that I am aware of.

19 Q Okay. Has Trader Joe's complained about
20 it?

21 A Not that I am aware of.

22 Q Okay. Will Academy Sports always be the
23 tenant there?

24 A I would bet probably one day they won't be.

25 Q Okay. Will Trader Joe's always be the

1 tenant where they are located?

2 A Not always.

3 Q So the fact is if they came to you in two
4 or three years and said we would like to have a
5 roadway back through there so we can run delivery
6 trucks, is there a problem with there being a
7 Starbucks drive-through right there?

8 A It could be if that roadway interfered and
9 the drive-through was there.

10 Q Let me show you too, will you look at
11 Exhibit B to the back of Academy Sports lease. This
12 actually also shows the layout of the property at the
13 time Academy Sports leased the property, right?

14 A It does.

15 Q It actually shows some parking areas where
16 the 25-foot portion --

17 A Yes. There were a few parking spaces
18 there.

19 Q Okay. This is something that again Academy
20 Sports has the right to complain if you change the
21 layout of the property?

22 A They could. The property has been
23 modified.

24 Q Okay. Let me show you this exhibit that we
25 marked. Well, we have not marked it yet. But I will

1 show it to you. I think I will offer this into
2 evidence, probably a smaller --

3 THE COURT: Yeah. If you had a smaller of
4 it -- it is perfect for right now's purposes.

5 MR. CASSIDY: I think I gave that to Bernie
6 but I have plenty copies of it.

7 THE COURT: Oh, okay. Great. Yes, sir.
8 If you do have a smaller, we can just substitute
9 it or whatever.

10 MR. ELLIS: Okay. Actually, I have gotten
11 it premarked as 8. Can I have this marked as 9?

12 THE COURT: Sure.

13 (WHEREUPON, Plaintiff's Exhibit 9 is marked for
14 identification purposes.)

15 BY MR. ELLIS:

16 Q This is what the property looked like prior
17 to the defendants coming in and changing the
18 property, right?

19 A Yes.

20 Q Do you see this little area right here
21 above Capri's property?

22 A I do.

23 Q And that was -- what was that?

24 A Those were parking spaces.

25 Q Okay. Was some portion of that within the

1 easement?

2 A A very minor part right in the top corner.

3 Q But some portion of this easement was in
4 use for some portion of this parking lot?

5 A Yes, it was.

6 Q Was an opportunity given to the defendants
7 to try to get consent from Trader Joe's and Academy
8 Sports?

9 A It had been discussed.

10 Q Okay. Did the defendants, to your
11 knowledge, seek to give their consent?

12 A Not to my knowledge. I don't know if they
13 reached out to the tenants or not.

14 Q Okay. Thank you very much. I don't have
15 anything further at this time.

16 THE COURT: All right. Yes, sir.

17 CROSS-EXAMINATION

18 BY MR. CASSIDY:

19 Q I don't remember if you were at the last
20 hearing or not. If not, I am Jim Cassidy. You are
21 the leasing manager, is that correct?

22 A Yes, sir.

23 Q So you negotiated the lease with Academy
24 Sports?

25 A No, I did not.

1 Q Who did it?

2 A I don't know. We bought the property and
3 the leases were already in place.

4 Q They were already in place?

5 A Yes.

6 Q So you didn't prepare the lease -- your
7 company did not prepare the lease?

8 A No. They were already in place when we
9 bought it.

10 Q This exhibit that you are referring to that
11 defines the common areas as you call it, you didn't
12 prepare it?

13 A No.

14 Q My client didn't prepare it?

15 A The prior owner prepared it.

16 Q It doesn't even show the easement on there,
17 does it?

18 A It doesn't show it as a highlighted area,
19 no, it doesn't.

20 Q So it didn't identify the easement?

21 A No.

22 Q So it is inaccurate, isn't that true?

23 A If the easement should have been on there
24 and it is not on there, by definition.

25 Q Well, you are defining common area

1 including the easement. But that exhibit doesn't
2 show an easement, does it?

3 A Not on this page, no.

4 Q And it doesn't show it on Trader Joe's
5 lease?

6 A It doesn't define it on there.

7 Q So wouldn't you say this document is
8 inaccurate?

9 A Inaccurate in that it didn't show the
10 easement.

11 Q The easement has been on there since 1986.
12 You are saying that they could come and complain that
13 somehow there is a violation because the easement
14 isn't reflected on the document?

15 A They could.

16 MR. ELLIS: Objection, Your Honor. I
17 think they mischaracterized the testimony.

18 MR. CASSIDY: The judge can make that
19 determination.

20 THE COURT: All right. Go ahead.

21 BY MR. CASSIDY:

22 Q You entered in the evidence a portion of
23 the lease. Why didn't you enter the whole lease?

24 A I didn't enter these documents.

25 Q It's your exhibit.

1 **A** I mean, the information that was entered is
2 the pertinent information about common areas, rights
3 to those common areas, changes to those areas that
4 required these tenants' consent prior to making
5 changes.

6 **Q** But you indicated that it would be a
7 default if Trader Joe's or Academy Sports said the
8 easements are not being used properly?

9 **A** If they -- they could, they could come to
10 us and say they have knowledge of the easement which
11 they probably do. They probably have copies of the
12 easement area, it is just not attached to this
13 portion.

14 **Q** But that is the document they have to rely
15 on.

16 **A** I didn't -- like I said, I didn't do the
17 leases. They may have had the easement delivered to
18 them in a separate document when the lease was
19 executed and I don't know what happened.

20 **Q** But you are here today complaining about
21 something that my clients did that isn't even shown
22 on this lease.

23 **A** Not on these exhibits.

24 **Q** That is the lease.

25 **A** It is a portion of the lease, yes.

1 Q No other exhibits?

2 A Like I said, exhibits get sent post-
3 execution to tenants. It could have been in a
4 different document.

5 Q This is your day in court. It is your
6 exhibit. There are no other exhibits on that lease,
7 are there?

8 A Sure.

9 Q And isn't it true that if Trader Joe's or
10 Academy Sports was going to use that as a way of
11 getting out of the lease, doesn't the lease say that
12 it has to be a material change to the common areas?

13 A It says material or adverse change.

14 Q You, as the leasing agent, negotiated
15 hundreds of leases, right?

16 A Yes, I have.

17 Q Would you construe the use of that 25-foot
18 easement for ingress and egress as a material change?

19 A That's what we -- I mean, one side would
20 say it is not. One side would say it is.

21 Q I am asking what you would say.

22 A I think it is fairly material. Absolutely.

23 Q All right. So nobody from Trader Joe's or
24 Academy Sports or your owners ever use that portion
25 of the property, did they?

1 A Not that I am aware of.

2 Q In fact, there would be no reason for you
3 to use that portion of the property.

4 A Not in the past. We are more concerned
5 with what could happen in the future.

6 Q It is reserved for 25 feet. You go behind
7 the building for ingress and egress to that property,
8 isn't that true?

9 A The tenants could decide one day that they
10 need to use that area for their use, whether they
11 have in the past or not.

12 Q To access our client's property?

13 A To access their property.

14 Q How would they access their property?

15 A We can think of all kinds of ways that one
16 day they might need the ingress and egress through
17 the easement to get to the property.

18 Q We are focusing on that 25-foot strip.

19 A There are situations where they could be
20 numerous trucks back there and the only way to get to
21 the back of the Academy Sports is to go through the
22 easement area. Whether there is an easement there
23 now or an egress here as it was in the past.

24 Q If their trucks wanted to go 25 feet behind
25 this building, they could not do it?

1 **A** No, they would want to have the right to do
2 it.

3 **Q** Has anybody stopped them from doing it?

4 **A** Not that I am aware of.

5 **Q** Is there any barrier that prevents them
6 from doing that?

7 **A** Probably not for a truck, no.

8 **Q** For anything. Anybody can go through the
9 easement, can they not?

10 **A** Sure, yes.

11 **Q** Excuse me one second.

12 **THE COURT:** Sure.

13 **THE WITNESS:** I mean provided there's not
14 anything blocking it.

15 **BY MR. CASSIDY:**

16 **Q** Is there anything blocking the easement?

17 **A** I said provided there is nothing blocking
18 someone's ability to get through it like a lot of
19 cars or things of that nature.

20 **Q** That easement that is in existence right
21 now is not blocking anything, is it?

22 **A** I mean, I don't know. Not right now.

23 **MR. CASSIDY:** No further questions, Your
24 Honor.

25 **THE COURT:** Mr. Ellis?

1 **MR. ELLIS:** Thank you, Your Honor.
2 Since Mr. Cassidy brought up the complete
3 leases, I would like to offer into evidence a
4 full copy of Trader Joe's lease.

5 **MR. CASSIDY:** May I see it?

6 **MR. ELLIS:** Sure.

7 (WHEREUPON, there is a pause.)

8 **MR. ELLIS:** Your Honor, I would like to
9 offer this. I will offer this as Exhibit 7 --
10 I'm sorry, 6A. It is the complete lease.

11 **MR. CASSIDY:** No objection over my original
12 objection to relevance, Your Honor.

13 **THE COURT:** All right. It is so admitted.

14 **MR. CASSIDY:** Bernie, just go ahead and put
15 the whole thing in.

16 **MR. ELLIS:** Okay.

17 (WHEREUPON, Plaintiff's Exhibit 6A is admitted
18 into the record.)

19 **REDIRECT EXAMINATION**

20 **BY MR. ELLIS:**

21 **Q** Let me ask you to look at -- this is the
22 Trader Joe's lease -- Exhibit 6A, this is Exhibit H,
23 Existing Exclusive Uses and Exceptions. Can you see
24 paragraph 12?

25 **A** Yep.

1 Q What does it say?

2 A Terms and conditions of agreements between
3 Mid-South Development Company Inc and Greenville
4 Associates Limited dated May 5th 1986 and appearing
5 of record in deed book 1268, Page 152 aforesaid
6 reference.

7 Q Okay. If you will look at Exhibit 1, that
8 is an agreement between Mid-South and Greenville
9 1268, 152. So the specific easement does appear in
10 the Trader Joe's lease, correct?

11 A Correct.

12 Q In their lease, it says they have a right
13 to use all easements, correct?

14 A Correct.

15 Q Just because they have not complained about
16 the use at this time, is there anything that prevents
17 them from complaining in the future?

18 A Nothing.

19 Q We talked before about what has been marked
20 as Exhibit 9. There was actually some parking here
21 in the easement area at one point, right?

22 A Correct.

23 MR. CASSIDY: Judge, would you like this
24 picture?

25 THE COURT: That would be great, if you

1 don't mind.

2 **MR. ELLIS:** It is actually a little
3 different, but it is close enough, I think.

4 **BY MR. ELLIS:**

5 **Q** Paragraph 2 of the easement, it says
6 parking easement to Mid-South. This is part of the
7 overall easement. Subject to limitation set forth in
8 paragraph 3, Mid-South and all tenants and licensees
9 of Track A or any part thereof and their business
10 invitees, licensees and employees shall have the
11 right to use free of charge the asphalt parking area
12 of Track B as shown on the track attached hereto as
13 Exhibit C in common with Greenville and all tenants
14 and licensees of Track B or part thereof. It was
15 actually for parking, correct?

16 **A** Yes.

17 **Q** Paragraph 3, it actually talks about that
18 the easement is as illustrated by Exhibit D, right?
19 Exhibit D that we talked about before is the back
20 page that shows the easement, right?

21 **A** Yeah.

22 **Q** So the way this agreement actually reads,
23 when you look at Exhibit 9, these parking places that
24 are here, can you see that? I'm sorry. It is right
25 here. This is Woodruff Road as you come in. The

1 parking places that are here, are those in the 45-
2 foot portion of the easement?

3 A Yes.

4 Q The reason they are they are is because the
5 easement area is actually defined as off of the cross
6 section, right?

7 A Yes.

8 Q So the easement is for ingress, ingress and
9 parking, right?

10 A Yes.

11 Q So what if Trader Joe's comes to you and
12 says we would like to have some parking.

13 A I would try to accommodate them.

14 Q Okay. Because that is what the easement
15 says?

16 A Sure.

17 Q In your experience as a director of
18 leasing, all of the easement is shown on a site plan?

19 A Not always. This is typically a site plan
20 that is for informational purposes because of
21 easement or other documents that are mentioned
22 typically as a separate document.

23 Q While the separate document in this
24 particular situation is actually a very important --

25 A Yeah. This is a site plan. This is the

1 kind of stuff you would show to prospects.

2 Q So you are not going to have cross-action
3 all over?

4 A No.

5 Q Just to go back over this, if you have a
6 contractual right to make all easements available to
7 all tenants, if you do not make all easements
8 available in common to all tenants, do tenants
9 sometimes consider that a breach of the contract?

10 A Yes, they do.

11 Q It is a breach of the lease if you don't
12 make available to them what you have contracted to
13 make available, right?

14 A Yes.

15 Q Under that circumstance, they legally have
16 the right to default the lease, right?

17 A They could, yes.

18 Q Okay. Nothing further. Thank you.

19 **RECROSS EXAMINATION**

20 **BY MR. CASSIDY:**

21 Q Hold on there. I've got a couple of
22 questions for you. Are you familiar with the history
23 of this property?

24 A Somewhat, yes.

25 Q Do you know who owned it in 1986 when

1 this --

2 **A** I don't.

3 **Q** Do you know about the predecessors and
4 title?

5 **A** I do not.

6 **Q** Would it surprise you to know that in 1986,
7 the building that you are leasing right now didn't
8 even exist?

9 **MR. ELLIS:** Your Honor, I would object on
10 relevance now.

11 **MR. CASSIDY:** Well, it is very relevant,
12 Your Honor.

13 **THE COURT:** I'm going to allow it.

14 **BY MR. CASSIDY:**

15 **Q** A lot of buildings didn't exist in this
16 part of town.

17 **A** That's right.

18 **Q** In fact, there was a Home Depot building on
19 that property at one time, wasn't there?

20 **A** There is a Home Depot there now.

21 **Q** Not on your property.

22 **A** Not on -- well, adjacent to it. Yes.

23 **Q** Previously, that property was occupied by a
24 Home Depot.

25 **A** Okay.

1 Q Home Depot faced Woodruff Road, isn't that
2 true?

3 A Like I said, I don't have knowledge of
4 that.

5 Q When this easement was in place, that is
6 when the configuration for the easement was
7 negotiated, wasn't it?

8 A Yes. 1986, I guess so.

9 Q And this lease that you are -- that you put
10 into evidence, my clients aren't a party to it, are
11 they?

12 A In terms of --

13 Q This lease is between your owners and
14 Academy Sports and your owners and Trader Joe's.

15 A I mean they are part of the easement. They
16 are connected to the easement.

17 Q They don't have any contractual obligation
18 to this lease, do they?

19 A They are contractual to the easement
20 agreement, but I would say not that lease.

21 Q So they are not contractually obligated on
22 the lease. They didn't prepare it.

23 A I don't know who prepared it.

24 Q Clearly, my clients didn't prepare it.

25 A I will agree with you.

1 Q So all of the exhibits that you have
2 attached are either done by your folks or somebody
3 other than my client.

4 A I know we didn't prepare it because we
5 bought the property and the lease was already --

6 Q So whoever prepared the lease could have
7 made a mistake on how they identify common area,
8 couldn't they?

9 A It's possible.

10 Q And you don't know one way or the other?

11 A I don't know.

12 Q But the easement clearly is not identified
13 on your exhibit to the lease?

14 A Not on these exhibits, no.

15 Q You have got the whole lease now. Do you
16 want to look through it and see?

17 A No. Like I said, it is not shown on this
18 exhibit.

19 Q And there are no other exhibits that would
20 reflect this?

21 A Let me look through here. (Reviewing.)

22 Only the mentioning of the easement in that
23 exhibit.

24 Q Right. It refers to the --

25 A There is no visual showing of the easement.

1 Q It just refers to the recorded document
2 which controls.

3 A Yes.

4 Q Not your lease, the easement controls.

5 A Uh-huh.

6 Q Thank you.

7 MR. CASSIDY: No further questions, Your
8 Honor.

9 MR. ELLIS: Nothing further from this
10 witness.

11 THE COURT: All right. Sir, you can step
12 down.

13 MR. ELLIS: Your Honor, I would like to
14 call Ms. Cathy Prince-McGill please.

15 THE COURT: Okay.

16 CATHY PRINCE-McGILL

17 having first been duly sworn, testifies as follows:

18 DIRECT EXAMINATION

19 BY MR. ELLIS:

20 Q Would you state your name for the record
21 please.

22 A Cathy Prince-McGill.

23 Q Ms. McGill -- Ms. Prince-McGill, where are
24 you employed?

25 A At McNair Law Firm.

1 Q Have you and I ever met?

2 A Yes.

3 Q We have. What is your relationship to me?

4 A I'm your legal assistant.

5 Q Did I ask you to do anything in connection
6 with this case?

7 A You did ask that I go to -- yes, you did.

8 Q Okay. What did I ask you to do?

9 A That I go to Starbucks and take either
10 photographs or a video of the drive-through area.

11 Q Did you do that?

12 A I did.

13 Q Do you have that here today?

14 A Yes, I do.

15 Q What I would like to do is show you what we
16 have and ask if you recognize this. Does this look
17 like what you took?

18 A Yes.

19 Q Okay. What day is this?

20 A I believe it was last Wednesday.

21 Q I would ask, if it is okay, if we just play
22 it. Just watch it and identify it for us please.

23 A Sure.

24 MR. CASSIDY: I have no --

25 THE COURT: You don't have any objection?

1 **MR. CASSIDY:** Bernie has shared that with
2 us.

3 **THE COURT:** All right. Very well then.

4 **BY MR. ELLIS:**

5 **Q** Do you recall about what time of day it
6 was?

7 **A** It was about 8:15 a.m.

8 **Q** 8:15?

9 **A** (Nods head.)

10 **Q** Okay. Where are you looking?

11 **A** It is towards Woodruff Road.

12 **Q** Okay. And then there is a second video
13 that you took, correct?

14 **A** That is correct.

15 **Q** This was the same day, about the same time,
16 right?

17 **A** Yes. Maybe 10 -- maybe 15 minutes later.

18 **Q** There are several cars stacked in the
19 drive-through area at that point, right?

20 **A** Right.

21 **Q** Were they sitting there like that for a
22 period of time?

23 **A** Yes. I was there between 20 and 30
24 minutes. That is pretty much typical.

25 **Q** Okay. There were several cars sitting in

1 the area.

2 A Yes.

3 Q As cars pulled in, they crossed immediately
4 over to the far left of the area, right?

5 A Right.

6 MR. ELLIS: I would like to offer this is
7 Plaintiff's Exhibit 10.

8 THE COURT: Any objection?

9 MR. CASSIDY: No objection, Your Honor.

10 THE COURT: All right.

11 MR. ELLIS: I will just get a disc. Can
12 she hand the disc to you?

13 THE COURT: That will be fine. That will
14 be fine.

15 BY MR. ELLIS:

16 Q Ms. Prince McGill, is that the only day you
17 went out to look at the drive-through?

18 A No, it is not. I drove over there two
19 other days. Once on Sunday and once on Monday.
20 Different times of the day.

21 Q This past Sunday and past Monday?

22 A That's right.

23 Q What did you observe than?

24 A Pretty much the same thing. Cars lined up
25 in the drive-through.

1 Q They were placing orders sitting in the
2 lane that we saw?

3 A Yes.

4 Q Now, you have been through other drive-
5 throughs in your life, Chick-fil-A and McDonald's and
6 places like that, right?

7 A Yes.

8 Q How did this compare to those in your
9 experience?

10 A Similar.

11 Q Okay. This is a typical drive-through,
12 right?

13 A Yes.

14 Q Where cars stop -- cars have to stop in the
15 drive-through for a period of time to order, right?

16 A Yes.

17 Q Then they go up to a drive-through window
18 to get their products, right?

19 A Yes.

20 Q Did it look like an exclusive drive-through
21 lane?

22 A It appeared that way to me.

23 Q Okay. It didn't look like you can drive
24 through it, the other way?

25 A I wouldn't.

1 Q Okay. Thank you.

2 MR. ELLIS: Pardon me just a moment.

3 THE COURT: Certainly.

4 MR. ELLIS: I don't have anything further
5 for her at this time.

6 THE COURT: All right. Any questions for
7 this witness?

8 CROSS-EXAMINATION

9 BY MR. CASSIDY:

10 Q Ms. Prince McGill, you are employed by
11 Burney?

12 A I'm employed by McNair Law Firm.

13 Q I'm sorry. And you went out there on three
14 occasions?

15 A I did.

16 Q And on one occasion, you took video?

17 A Yes.

18 Q Any particular reason why you did not take
19 any on the other two occasions?

20 A I happen to be in the area on Sunday and
21 did not have a video camera with me.

22 Q Did you go through the drive-through?

23 A On Sunday?

24 Q At any time.

25 A On the day that I took videos, I did. Yes.

1 Q How long did you wait in line to get your
2 order filled?

3 A I would say 10 minutes.

4 Q 10 minutes?

5 A Longer than you would usually wait for fast
6 food.

7 Q Okay. Is there any reason why you
8 stationed yourself exactly where that picture was
9 taken from?

10 A There was a parking space there. There was
11 a grassy area against the building where I could
12 stand.

13 Q But you didn't go around to the far end of
14 the building and take a picture of the easement on
15 the right-hand side of the rear of the building, did
16 you?

17 A I didn't. I drove through that way but I
18 did not take a picture.

19 Q And there is plenty of room to pass around
20 the corner, isn't there? If somebody wanted to come
21 around the opposite direction, they could definitely
22 get around there, couldn't they?

23 A You mean coming into where people are going
24 out?

25 Q Yes.

1 A I don't recall there being plenty of room.
2 I would not consider it myself. You wouldn't
3 consider it because it was against the flow of the
4 traffic?

5 A Exactly.

6 Q There would be no reason for you to come
7 out that way, isn't that true? I mean, if you were
8 visiting the Zoe's restaurant there or the Sleepy
9 Time mattress place or Starbucks for that matter,
10 there would be no reason for you to come out behind
11 that building in that direction, would it?

12 A Leaving or coming in?

13 Q Leaving.

14 A Leaving. If I were to part about where I
15 was parked, I could possibly go that way.

16 Q There is really no practical reason to do
17 that?

18 A There is no practical reason, no.

19 Q No further questions.

20 REDIRECT EXAMINATION

21 BY MR. ELLIS:

22 Q Ms. Prince-McGill, the way the drive-
23 through is laid out though, do you think it would be
24 okay with Starbucks the way they presented it if you
25 decided to come down the drive-through the opposite

1 way?

2 **MR. CASSIDY:** I object to the form of the
3 question.

4 **THE COURT:** All right. I will ask you to
5 rephrase that.

6 **BY MR. ELLIS:**

7 **Q** Did it appear to you that it would be
8 acceptable to use the drive-through, to use the
9 drive-through lane going in the opposite direction?

10 **A** No.

11 **Q** Okay. Thank you.

12 **MR. CASSIDY:** Nothing further.

13 **THE COURT:** Anything else?

14 Ma'am, you can step down.

15 **MR. ELLIS:** I would like to call Bill
16 Runge please.

17 **THE COURT:** Let me just put on the record
18 that I know Ms. Prince McGill. I know her
19 because she used to work at Nelson Mullins where
20 my husband is an attorney. We haven't seen each
21 other in a while but I certainly don't feel like
22 I have any conflict. If anybody had any
23 concern, I just thought about that as she was
24 stepping down that I might better put that on
25 the record.

1 MR. CASSIDY: No problem, Your Honor.

2 MR. ELLIS: Certainly not here.

3 **BILL RUNGE**

4 having first been duly sworn, testifies as follows:

5 **DIRECT EXAMINATION**

6 **BY MR. ELLIS:**

7 Q Would you state your name for the record,
8 sir?

9 A Uh, yes. Bill Runge.

10 Q Mr. Runge, what's your position with South
11 Carolina Greenville Highway 146 LLC?

12 A I am a member.

13 Q And you are personally familiar with the
14 issues we have been discussing, right?

15 A Yes.

16 Q You were directly involved in the decision
17 to construct the Starbucks drive-through lane in the
18 easement, right?

19 A Yes.

20 Q Uh, you agree also that a portion -- that
21 the drive-through lane for the Starbucks sits in a
22 portion of the easement, right?

23 A There is a 25-foot easement used for
24 ingress and egress.

25 Q Uh-huh. And the drive-through lane sits in

1 that, right?

2 A It is for the benefit of the tenants.

3 Q I need you to answer my question.

4 A Okay.

5 Q And then we can follow up. I am just
6 trying to clarify where the pavement is located.

7 A Okay.

8 Q Where the pavement is located is the
9 easement that we just saw on the video ---

10 A Correct.

11 Q --- and that we have seen in the pictures
12 that show a paved area for the Starbucks drive-
13 through, that is within the 25-foot easement, right?

14 A Yes.

15 Q All right. It takes up a portion of the
16 easement?

17 A Yes.

18 Q Okay. Uh, do you agree with me that the
19 actual real estate -- if this gets into being a legal
20 question, I apologize and rephrase. But would you
21 agree with me that the actual real estate on which
22 the easement sits is on by Woodruff Road SC LLC?

23 A Subject to it being interpreted legally
24 different, yes.

25 Q Okay.

1 A Okay. I understand what you are saying, so
2 yes.

3 Q And the right that your company has to use
4 any portion of both the 45-foot easement and the 25-
5 foot easement is derived from this document that is
6 marked as Exhibit 1, correct?

7 A Yes.

8 Q So there is not -- just to be sure that we
9 are clear, there is not some other right you would
10 claim. If this document allows you to put in a
11 drive-through, that is fine. If it doesn't, you
12 don't have any other right?

13 A Again, we are governed by this document.

14 Q That's right. Thank you. I just wanted to
15 clarify there is not another agreement, there is not
16 another license out there somewhere.

17 A Not that I am aware of, no.

18 Q So Exhibit 1 is what we're talking about.

19 A Okay.

20 Q Would you show me in Exhibit 1 where your
21 company believes gives them the right to put in a
22 drive-through to serve a specific tenant?

23 A Under Article 1, Right-of-way, Midsouth,
24 last sentence it says said right-of-way shall be for
25 the benefit of the fee owner, any tenant or licensee

1 of Track A or any part thereof.

2 Q There are sentences prior to the last
3 sentence on paragraph one, aren't there?

4 A Yes.

5 Q Okay. What the sentences prior to that say
6 is that Midsouth -- which is your client is standing
7 in the shoes of Midsouth, is that right?

8 A Yes. The owner of Track A.

9 Q The owner of Track A. Midsouth and all
10 tenants and licensees of Track A or any part thereof
11 and their business invitees or licensees and
12 employees shall have a right of way at all times in
13 common with the owner of Track B and all tenants and
14 licensees of Track B or any part thereof for motor
15 vehicles to travel onto and over the asphalt parking
16 area of Track B as shown on the plat attached hereto
17 on Exhibit C for the purpose of ingress and egress to
18 Track A from Woodruff Road. So it says that what the
19 purpose is -- first of all, it says that you hold
20 this in common with the owners of Track B, right?
21 They have the same right to use it as you do, isn't
22 that what the agreement says?

23 A Well, I'm not sure it exactly says that.
24 It refers to Exhibit C.

25 Q Right. That shows the entire area, right?

1 **A** Right.

2 **Q** Okay.

3 **A** But it also references coming off from
4 Woodruff Road.

5 **Q** When you get on down into further paragraph
6 two, it says subject to the limitations set forth in
7 paragraph three, Midsouth and all tenants and
8 licensees of Track A or any part thereof and their
9 business invitees, licensees and employees shall have
10 the right to use free of charge the asphalt parking
11 area of Track B as shown on the plat attached hereto
12 as Exhibit C in common with Greenville, that is our
13 client, and all tenants and licensees of Track B or
14 any part thereof and their business invitees,
15 licensees and employees. Paragraph three tells you
16 what the portion it is that it is talking about,
17 correct?

18 **A** That is Exhibit D. That is not Exhibit C.

19 **Q** Okay. Let's talk about Exhibit D. Let's
20 talk about paragraph three. Paragraph three says the
21 right-of-way or parking easement described in
22 paragraphs one and two above and illustrated on
23 Exhibit D as easement shall be an easement pertinent
24 to a covenant running with the land. The easement is
25 to be within the existing driveway and parking area

1 on Track B as illustrated on Exhibit D shall be 25
2 feet along the rear property line of Track A and 45
3 feet along the westernmost property line of Track A.
4 Would you agree with me then that this is Exhibit D.

5 A Correct.

6 Q And these other portions, paragraph one and
7 paragraph two that are numbered, those state that
8 these easements are subject to paragraph three.

9 A Well, paragraph three further defines what
10 was stated in one and two.

11 Q That's right. But the point is paragraph
12 three tells you what the easement is.

13 A It further defines it.

14 Q Okay. It makes it more specific.

15 A Okay.

16 Q Is that correct?

17 A Yes.

18 Q Okay. Let me narrow down what we are
19 talking about here. What is going on right now that
20 brings us here today is the 25-foot portion behind
21 your building, right?

22 A Right.

23 Q We both agree that that is an easement that
24 is defined by Exhibit 1, right?

25 A Yes.

1 Q We agree that it says it's for ingress,
2 vehicular traffic ingress and egress, right?

3 A Uh-huh.

4 Q We also agree that it says Midsouth and its
5 tenants and licensees of Track A or any part thereof
6 or any business invitees licensees and employees
7 shall have a right of way at all times in common with
8 the owner of Track B and all tenants and licensees of
9 Track B or any part thereof for motor vehicles to
10 travel onto and over the asphalt parking area of
11 Track B as shown on the attached plat as Exhibit C.
12 Tell me what importance you're attaching to Exhibit
13 C.

14 A It is referencing Exhibit C and that is
15 Exhibit D. It is two different exhibits.

16 Q Do you think that there is a different
17 easement than what is on here?

18 A No, I'm just -- you asked for my
19 interpretation of that article one and two, that is
20 what I have done. Referenced exactly what it said,
21 Exhibit C.

22 Q Correct. Paragraph three goes on down and
23 says that the portion that is actually being
24 discussed is what is on Exhibit D, correct?

25 A Yes.

1 Q Let me ask the question this way. Do you
2 agree with me that paragraph one states that the two
3 parties have a right in common to use this easement?

4 A Yes. I would agree with that.

5 Q Okay. And just so that we are clear, this
6 easement, this is the 45-foot easement. This is most
7 of the entryway into the entire shopping center,
8 right?

9 A That is the access easement commencing at
10 Woodruff Road running south down the property line.

11 Q Right. So both parties have the right to
12 use the 45-foot and both parties have the right to
13 use the 25-foot easement, right?

14 A Yes.

15 Q Okay. Now you just saw the video that we
16 saw earlier and you have seen the pictures.
17 Obviously, you are familiar with this.

18 A Uh-huh.

19 Q You would agree with me, wouldn't you, that
20 by putting in a drive-through lane for a Starbucks,
21 you are taking a portion of the 25-foot easement and
22 dedicating it to the use of a single tenant?

23 A No.

24 Q How come?

25 A Well, first of all, we are restoring the

1 easement to its original intent which was for ingress
2 and egress. We simply improved the 25 feet that was
3 previously curb and gutter, grass, a dumpster pad
4 back to its intended use which was as stated in
5 article one for ingress and egress.

6 Q Okay. Do you think putting a drive-through
7 lane and having your car stop and order coffee here,
8 you think that meets the definition of ingress and
9 egress?

10 A The easement is 25 feet. How wide is a
11 car?

12 Q I'm not really allowed to answer questions
13 but I will stipulate that they are not 25 feet.

14 A In the video, you saw two lanes of traffic,
15 correct?

16 THE COURT: Again, he can't answer any
17 questions.

18 THE WITNESS: Okay.

19 BY MR. ELLIS:

20 Q I get to ask you questions.

21 A I'm sorry.

22 Q That's all right.

23 A Article 1 states, excuse me, Article 1,
24 yes, states that the easement is for ingress and
25 egress and is to the benefit of the owner, the

1 property owner, the tenant, invitees or licensees for
2 Track A, which is us. By virtue of us improving the
3 easement for the benefit of a tenant that we have is
4 what we did.

5 Q Would you agree with me though that --
6 let's suppose my client was to go out there tomorrow
7 and pave it all and run traffic lanes through it so
8 that cars exiting the area going down the right-hand
9 side and cars coming in going down the left-hand
10 side, would you object to that?

11 A No.

12 Q So if we take out the drive-through lane
13 tomorrow and put in other lanes, you will be fine
14 with that?

15 A If the intent of the easement is to provide
16 access to Track A, that is what would remain, that is
17 fine.

18 Q This really though is the rub here, right?
19 The way this easement reads is you have a common
20 right with the owner of Track B.

21 A Again article one refers to Exhibit C.
22 Exhibit D is right there. We're talking about your
23 assumption that there is a dedicated drive-through in
24 Exhibit D. We have improved at 25 feet and restored
25 it back to its original intent which was for

1 vehicular ingress and egress access to our building
2 to benefit our tenants.

3 Q The reasons I am going over this is you
4 lost me a little bit ago.

5 A Okay.

6 Q Here is the whole document. It has got
7 Exhibit C on here. Would you explain to me what it
8 is that you believe about Exhibit C that changes its
9 analysis?

10 A Exhibit C is a site plan showing
11 collectively Track A to Track B.

12 Q Right.

13 A Exhibit D has a cross section showing an
14 easement that runs from Woodruff Road back to the
15 southwest corner of the easement and then it runs
16 east along the back of the property 25 feet.

17 Q Here is my question. I am not sure if we
18 disagree or not. Do you think that Woodruff Road,
19 the company Woodruff Road SC LLC, do you think that
20 they not have an equal right to use the 25-foot
21 easement here?

22 A They do.

23 Q Do you not agree that putting in a
24 Starbucks drive-through lane where cars sit and order
25 coffee diminishes anybody else's right -- ability to

1 use that as they want to?

2 **A** No.

3 **Q** Why not?

4 **A** Again, it is 25 feet. You clearly saw on
5 the video that you have complete ingress and egress
6 access. Logic would tell you that the flow of
7 traffic runs as the easement runs from west to east.

8 **Q** Right.

9 **A** But there is nothing to prohibit anybody
10 from Track A to run south down the western or eastern
11 property line to access Track B. So you have flow.
12 It is not logical for that flow but you have to know.
13 Nothing is impeding the ability of Track B, its
14 owners, tenants, licensees, customers to utilize that
15 existing easement drive.

16 **Q** Do you think though that having cars stop
17 and stack as we saw in the video -- do you think
18 having those cars stopped and stacked in the drive-
19 through and ordering coffee, do you think that meets
20 the definition of ingress and egress for the purpose
21 of vehicular traffic onto the parking areas?

22 **A** We have provided ingress and egress as it
23 stated in the easement.

24 **Q** How so?

25 **A** Well, by virtue of the video. By virtue of

1 what you have seen, by virtue of Article 1 within the
2 easement agreement and how it states.

3 Q All right. I'm going to show you a portion
4 of your lease from Starbucks. I have that the entire
5 lease if anybody wants to see it. I just put in
6 portions because it is a confidential document and I
7 want to respect that.

8 A Okay.

9 Q Do you recognize that document?

10 A I mean, it is the lease between South
11 Carolina Greenville Highway 146 and Starbucks
12 Corporation.

13 Q It is excerpts of a lease then with
14 Starbucks, right?

15 A Okay.

16 MR. ELLIS: And I would like to mark that
17 -- that's actually Plaintiff's Exhibit 8.

18 THE COURT: All right. Any objection?

19 MR. CASSIDY: No objection, Your Honor.

20 THE COURT: All right. It is so admitted.

21 (WHEREUPON, Plaintiff's Exhibit 8 is marked for
22 identification and admitted into the record.)

23 BY MR. ELLIS:

24 Q Uh, on the first page of this, this states
25 that, under premises, tenant hereby leases from

1 landlord for the term below those certain premises
2 with a fully entitled drive-through in the building
3 containing approximately 1790 square feet. Then on
4 down, it says, in addition -- I have highlighted
5 this. In addition, tenant shall have the right to
6 operate a drive-through facility containing one
7 drive-through lane as shown on Exhibit B-1, a pass-
8 through lane as required by any applicable laws,
9 rules, regulations and install a clearance bar in a
10 location to be determined by tenant at his sole
11 discretion at the rear of the building, right?

12 A Uh-huh.

13 Q So contractually, you are obligated to
14 provide a drive-through lane for Starbucks, right?

15 A As part of the lease.

16 Q Right. And again, I ask the question you
17 disagree with me that having a portion of the
18 easement dedicated for the use of one tenant, you
19 don't think that violates paragraph one of the
20 easement agreement?

21 A No.

22 Q Okay. You would agree with me though that
23 the intent is that Starbucks is the only tenant that
24 was supposed to be using that portion of the
25 easement, right?

1 **A** Not necessarily. The easement is provided
2 there for access to Zoe's as well as Sleepy's because
3 they all have rear doors.

4 **Q** The drive-through?

5 **A** First of all, it is a 25-foot easement
6 area.

7 **Q** I understand but --

8 **MR. CASSIDY:** Let him answer the question
9 please.

10 **MR. ELLIS:** Well, I don't think he is
11 answering my question.

12 **THE WITNESS:** Okay.

13 **THE COURT:** All right. Ask your question
14 again.

15 And if you will, answer his question.

16 And please allow him to finish his answer.

17 All right.

18 **BY MR. ELLIS:**

19 **Q** My question is that the intent of the
20 parties is to have that area dedicated as a drive-
21 through lane for Starbucks, correct?

22 **A** The Starbucks has a window on the eastern
23 side of their property which is our property. Okay?
24 Traffic flows along the easement as it does the 25
25 feet that is improved. So there is multiple uses for

1 that easement. It is for vehicular ingress and
2 egress as well as access to the rear of the building
3 for the benefit of our tenants.

4 Q So it is your expectation, despite the fact
5 that it says drive-through lane and if there is a
6 pre-ordering menu and an ordering menu in the
7 easement, your position is cars will still be going
8 around that for other purposes other than ordering
9 coffee?

10 A They do, yes.

11 Q Okay. How about the right of -- what do
12 you think about the right of Trader Joe's, Academy
13 Sports and Woodruff Road SC LLC generally to use that
14 drive-through lane?

15 A It is within their prescribed right to use
16 it.

17 Q So if they go out there tomorrow then and
18 repave it and put down lanes so that it is mutually
19 usable by everybody, you'll be fine with that?

20 A Yes.

21 Q If they take away the drive-through lane,
22 you will be fine with that?

23 A As long as they provide the intent of the
24 easement in its current form as stated in Article 1,
25 2 and 3, why wouldn't we be fine with it?

1 Q Let me continue on with the easement, I
2 mean with the Starbucks lease. Paragraph two, the
3 time of this is for 10 years?

4 A Uh-huh.

5 Q Okay. So basically, you're talking about
6 having the configuration you have now for a 10-year
7 period?

8 A The lease is for 10 years.

9 Q Okay. Let me ask you to go back and look
10 at -- this is a map of the back that says SP-13.

11 A Uh-huh.

12 Q And this is a map that was prepared by your
13 engineers, right?

14 A I believe so, yes.

15 Q Okay. This actually shows cars -- let me
16 -- the left side of this shows cars stacked in the
17 drive-through, right?

18 A It shows three representations of vehicles,
19 yes.

20 Q Okay. This first car coming up here to the
21 window, that is actually leaving the easement
22 portion, right?

23 A Yes.

24 Q Okay.

25 A Excuse me. You are referring to this car

1 here?

2 Q Yeah.

3 A Okay. Yeah.

4 Q When you get to the drive-through window,
5 you're on the easement, right?

6 A Right.

7 Q The cars we saw before in Ms. Prince-
8 McGill's video, those cars that we saw before, those
9 are actually sitting in the easement, right?

10 A Yes.

11 Q And they are sitting there for a period of
12 time waiting to order something from Starbucks?

13 A That is the assumption, yes.

14 Q Okay. Would you go to the last page of the
15 exhibit? That has the paving requirements there at
16 the time, right?

17 A Yes, it does refer to the concrete and
18 other areas, yes.

19 Q Okay. You have to put a particular type of
20 paving down to satisfy Starbucks?

21 A I think in conjunction with Greenville
22 County, yes.

23 Q And those are requirements to have the
24 drive-through Lane, right?

25 A They are requirements of their lease.

1 Again, they are requirements of the county.

2 Q Okay. Why do you have to have impervious
3 pavement there?

4 A I'm not an engineer so I don't know.

5 Q My question to you is, is it just required
6 by the lease because it is a lease requirement or is
7 it legally required?

8 A I don't know.

9 Q So you also don't know if there weren't a
10 drive-through lane there, they might not be required
11 any special paving for it?

12 A Again, the area that is improved was
13 required impervious asphalt or impervious concrete
14 and it is required by the county.

15 Q Okay. Let me go back to this. This might
16 be another whole matter. Your belief is that setting
17 up a drive-through lane with a sign which was the
18 entire 25 feet of easement area, right?

19 A Again, the 25-foot easement area is paved.
20 It is there for the benefit of ingress and egress.
21 You keep referring to it as the drive-through lane.
22 It is the 25-foot area that runs basically from west
23 to east along the back of the building.

24 Q But I get to ask questions.

25 A I know. I'm sorry. I'm sorry. I'm sorry.

1 I'm sorry.

2 Q And I need to get you to answer my
3 questions.

4 A Sorry.

5 Q The drive-through lane for Starbucks runs
6 the entire length of the 25-foot portion of the
7 easement, is that right?

8 A No.

9 Q Where does it stop?

10 A There is a drive-through window right here.

11 Q Right. Okay. Where are cars sitting?

12 A There are cars in the easement -- there are
13 cars in the easement area.

14 Q Okay. That are sitting waiting to be
15 served, right?

16 A Well, they may be waiting to be served,
17 they may be there for other reasons.

18 Q They are there to order coffee also, right?

19 A They can be, yes.

20 Q Your belief is that using the drive-
21 through, using the drive-through lane, using a
22 portion of the easement as a drive-through lane where
23 people actually stop and look at a menu board,
24 actually stop and order coffee, actually sit and wait
25 to be served satisfies the definition of paragraph

1 one of the easement that that is ingress and egress
2 of the vehicular traffic over the asphalt to get to
3 the parking lot of your --

4 **A** It also says that said right-of-way shall
5 be for the benefit of the fee owner, any tenant or
6 licensee of Track A or any part thereof.

7 **Q** Let's be clear though. You think that
8 gives you a superior right then to use the property
9 to my client's right, is that what you believe?

10 **A** I am just stating what the document says.

11 **Q** The reason I ask is have you seen that type
12 of language before?

13 **A** You only dealing with this document.

14 **Q** Do you know what an appurtenant easement
15 is?

16 **A** I would have to probably have to have --
17 refresh my memory.

18 **Q** Do you know what an appurtenant easement is
19 as opposed to an easement in gross?

20 **A** No.

21 **Q** Do you think that language might have
22 something to do with the finding as an easement
23 appurtenant or easement in gross?

24 **A** I don't know.

25 **Q** Okay. Just to go back, the definition of

1 what you are allowed to do is ingress and egress as
2 defined in this document and you share it in common
3 with my client and its tenants in your belief is that
4 what is being done by having the Starbucks drive-
5 through lane there, that that does not in any way
6 hinder my client's use of the same area?

7 A No, I don't.

8 Q So if Trader Joe's needs to drive a truck
9 over to where the drive-through lane is now, you are
10 fine with that?

11 A Legally, if that's the right, yes.

12 Q Okay. You believe that you are meeting the
13 definition of ingress and egress in this document?

14 A Yes.

15 Q That you are not restricting my client or
16 its tenants from using the 25-foot, the entire 25-
17 foot area anymore than you are restricting anyone
18 else?

19 A Correct.

20 Q Okay. Nothing else. Thank you.

21 THE COURT: Yes, sir.

22 CROSS-EXAMINATION

23 BY MR. CASSIDY:

24 Q Mr. Runge, do you ever prevent anyone from
25 Academy Sports to Trader Joe's from using that

1 easement?

2 **A** No.

3 **MR. CASSIDY:** No further questions.

4 **THE COURT:** All right. Anything else, Mr.
5 Ellis?

6 **MR. ELLIS:** I'm sorry. Nothing further.

7 **THE COURT:** Okay. Sir, you can step down.

8 **MR. ELLIS:** Your Honor, that's all we
9 have.

10 **THE COURT:** All right. Thank you very
11 much.

12 Anything at this time?

13 **MR. CASSIDY:** Your Honor, I have got some
14 witnesses.

15 **THE COURT:** All right.

16 **MR. CASSIDY:** I would like to call Greg
17 Carter.

18 **GREG CARTER**

19 having first been duly sworn, testifies as follows:

20 **DIRECT EXAMINATION**

21 **BY MR. CASSIDY:**

22 **Q** Mr. Carter, with whom are you employed?

23 **A** Self-employed, but with Collett Real
24 Estate.

25 **Q** Can you give the court just a brief history

1 of your employment history as it relates to
2 commercial real estate?

3 **A** After college, I was with the Furman
4 Company, now CBRE, and their commercial leasing and
5 brokerage on the retail side. After eight years, I
6 left and started the retail division with four others
7 for Earl Furman and Associates. After two and a half
8 years, was asked to go with Hughes Commercial and
9 participate in commercial development, retail sales
10 and brokerage. After 12 and a half years there,
11 myself and two other partners opened the South
12 Carolina office for Collett.

13 **Q** And would you say your field of expertise
14 in the real estate business is commercial real estate
15 and leasing?

16 **A** Yes, it is.

17 **Q** Just for the Court's edification, let's
18 talk about the property that's been the subject
19 matter of this litigation. The building that
20 currently exists on the property that's occupied by
21 Trader Joe's and Academy Sports, is that the building
22 that was on the property when this easement was
23 created?

24 **A** No, it is not.

25 **Q** What was on that property?

1 **A** SuperSaver, which my understanding is that
2 was also Hechingers at a later date. And then prior
3 to being demolished, it was Home Depot.

4 **Q** I'm going to show you a copy of a
5 historical aerial photograph dated 1997 and ask you
6 if you've ever seen that before.

7 **A** Yes, I have.

8 **Q** What does that depict?

9 **A** This is the originally billing from 1986
10 when the easement was put in place. My opinion would
11 be based upon what's in the parking lot that this
12 building is occupied by Home Depot at the time.

13 **Q** And the small building that's at the top of
14 the photo, that's the Capri's property?

15 **A** Yes, it is.

16 **MR. CASSIDY:** Your Honor, we'd like to
17 offer this into evidence.

18 **THE COURT:** Any objection?

19 **MR. ELLIS:** My only objection is
20 relevance.

21 **MR. CASSIDY:** I'm just trying to give you
22 a picture, Your Honor.

23 **THE COURT:** All right. All right. That
24 will be Defendant's number 1?

25 **(WHEREUPON,** Defendant's Exhibit 1 is marked for

1 identification purposes.)

2 **MR. CASSIDY:** Your Honor, I have another
3 copy. I'm going to let Mr. Carter look at while
4 I'm talking to him about it.

5 **THE COURT:** All right.

6 **BY MR. CASSIDY:**

7 **Q** Now, the big building on there, it's your
8 opinion that's the old Home Depot building?

9 **A** It is.

10 **Q** And what was the orientation of that
11 building?

12 **A** It faced north towards Woodruff Road.

13 **Q** And the building that is the subject matter
14 of the discussion today, what direction does it face?

15 **A** It faces west.

16 **Q** So when this easement was put in place, all
17 the parking for Home Depot was out front, wasn't that
18 true?

19 **A** Correct.

20 **Q** And the little building that we see in the
21 upper portion of the picture, that's the Capri's
22 property?

23 **A** That's correct.

24 **Q** And there was parking all behind the Home
25 Depot building, isn't that true, in this area here?

1 **A** Yes.

2 **Q** But the easement that we're talking about
3 ran down the entranceway from Woodruff Road and
4 behind the building to Capri's?

5 **A** Correct.

6 **Q** Now, I think you said that the Home Depot
7 building was demolished at some point and this
8 building was constructed, is that correct?

9 **A** Yes.

10 **Q** I'm going to show you a historic aerial
11 photograph done in 2010 and ask if you can identify
12 it.

13 **A** That is the Academy and Trader Joe's.

14 **Q** And the whole parking area has been changed
15 dramatically, has it not?

16 **A** Yes.

17 **Q** And that would have affected the common
18 area. Isn't that true?

19 **A** Correct.

20 **MR. CASSIDY:** Your Honor, we'd like to
21 offer this as Exhibit 2.

22 **MR. ELLIS:** No objection.

23 **THE COURT:** All right.

24 **(WHEREUPON, Defendant's Exhibit 2 is marked for**
25 **identification and admitted into the record.)**

1 BY MR. CASSIDY:

2 Q So when that easement was drawn up, there
3 was a whole different configuration of the common
4 area, wasn't there?

5 A Yes, it did change.

6 Q The building moved backwards, isn't that
7 true?

8 A Correct.

9 Q Now, you said you worked for Jackson Hughes
10 at one point, is that right?

11 A I did.

12 Q And in the course of your employment with
13 Mr. Hughes, was that the company that negotiated the
14 current lease with Academy Sports and Trader Joe's?

15 A It was.

16 Q Was there ever an issue about the 45-foot,
17 25-foot easement behind the Capri's building during
18 those negotiations?

19 A Not to my knowledge, no.

20 Q Now, you are one of the owners of that
21 Capri's building, right?

22 A I am.

23 MR. CASSIDY: Your Honor, I just keep
24 calling it the Capri's building because that's
25 what I remember.

1 **THE COURT:** Sure.

2 **BY MR. CASSIDY:**

3 **Q** Now, since the various changes in ownership
4 of that building and when I'm talking about that
5 building, I'm talking about the Academy Sports,
6 Trader Joe's building, the old Home Depot building,
7 was the easement ever modified?

8 **A** No, it was not.

9 **Q** So it's always been 45 feet from Woodruff
10 Road and 25 feet behind Capri's?

11 **A** Correct.

12 **Q** So when you bought the Capri's property,
13 you were aware of the easement around the building,
14 is that correct?

15 **A** Yes.

16 **Q** Now you've made some improvements to that
17 Capri's building, isn't that true?

18 **A** We have.

19 **Q** You added another bay where Zoe's sits and
20 you added another bay where Starbucks sits?

21 **A** Yes.

22 **Q** Uh, and there's been a lot of discussion
23 about the Starbucks' lease and the drive-through
24 area. Did you get an opinion from attorneys about how
25 you could use that easement?

1 **A** Twice.

2 **Q** And what did they tell you?

3 **A** That we were within the intent of the
4 easement to allow 25 feet of paved ingress and egress
5 access across the rear of the building.

6 **Q** And just so the judge knows. That wasn't an
7 opinion I gave you. You had independent counsel,
8 isn't that true?

9 **A** Correct.

10 **MR. ELLIS:** Your Honor, I just want to
11 note an objection to relevance. Our Supreme
12 Court has basically said a lawyer cannot
13 instruct the judge as to what the law is. I
14 know you are aware of that. It is up to the
15 court to reach that conclusion.

16 **THE COURT:** I understand. I understand.
17 I will allow the testimony just for what it is
18 worth.

19 **MR. CASSIDY:** Thank you, Your Honor.

20 **BY MR. CASSIDY:**

21 **Q** Now, when you purchased the Capri's
22 property, what was the condition of the easement?

23 **A** A combination of a dumpster enclosure, a
24 dumpster, portions of 2 to 3 parking spaces, some
25 sidewalk, concrete and grass.

1 **MR. CASSIDY:** Okay. I don't think you
2 offered this into evidence.

3 **MR. ELLIS:** We did.

4 **MR. CASSIDY:** You did? I'm sorry.

5 **BY MR. CASSIDY:**

6 **Q** This is Exhibit 9. So that the judge can
7 see, identify where that 25-foot easement is located.

8 **A** The building basically sits on the property
9 line. The 25 feet would start here and move in this
10 direction for 25 feet. It runs from this corner
11 across to this property line.

12 **Q** Did Academy Sports or Trader Joe's have any
13 use for this area?

14 **A** No.

15 **Q** When I say that, obviously they had a right
16 to use the easement. But it was not being utilized
17 for ingress or egress for anybody, isn't that true?

18 **A** No.

19 **Q** But Capri's used it when they were running
20 their restaurant business?

21 **A** Right. They had various things in that
22 area, yes.

23 **Q** So when you decided on when you entered
24 into the lease agreement with Starbucks, what, if
25 anything, did you do to just try to -- did you have

1 any discussion with anybody at Kimco or the owners of
2 Academy Sports, Trader Joe's property about what your
3 intentions of the property use was?

4 **A** We had several different -- on several
5 different occasions, we had several different
6 discussions with Kimco for various reasons with
7 regard to the development, what we were doing as a
8 courtesy with it being in front of their development,
9 who our tenants were, what our plans were. We even
10 discussed the possibility of them purchasing it upon
11 completion as part of their own property.

12 **Q** In fact, you gave them a complete plan of
13 what you intended to do with the property.

14 **A** We did.

15 **Q** You told them what tenants were going in
16 there.

17 **A** We did.

18 **Q** And showed them a layout of how you were
19 going to use the property?

20 **A** We did.

21 **Q** Gave them the lease rates?

22 **A** At one point, yes. We did send them that.

23 **Q** They decided at that time that they were
24 not interested in buying the property, is that right?

25 **A** That's correct.

1 Q The construction went along to put the
2 easement in or to restore the easement?

3 A Correct.

4 Q I think the record reflects that there were
5 three tenants on the property?

6 A Sleepy's, Zoe's and Starbucks.

7 Q Do all of those tenants have the right to
8 use the 25-foot easement?

9 A They do.

10 Q Don't any customers of Academy Sports or
11 Trader Joe's have the same right to use that
12 easement?

13 A Yes.

14 Q Have you ever prevented them from using
15 that easement?

16 A Not to my knowledge.

17 Q The focus seems to be on the 25 feet, but
18 there is no controversy about the 45 feet, is there?

19 A I don't believe so.

20 Q That has been the entranceway from Woodruff
21 Road since the original construction, isn't that
22 true?

23 A That is correct.

24 Q So when you -- when Kimco or its affiliate
25 decided that it wanted to buy the property, what

1 happened?

2 **A** We proceeded with construction. I believe
3 that was around May 2013.

4 **Q** And a legal action was commenced to stop
5 you from moving forward?

6 **A** That's correct.

7 **Q** The court allowed you to go forward to
8 complete construction, isn't that true?

9 **A** Yes.

10 **MR. ELLIS:** I'm going to object to the
11 form of that question.

12 **THE COURT:** You are objecting to leading,
13 is that right?

14 **MR. ELLIS:** Yes.

15 **THE COURT:** All right. Sustained.

16 **BY MR. CASSIDY:**

17 **Q** Does the use of the easement have any
18 adverse impact on Trader Joe's or Academy Sports the
19 way it is configured?

20 **A** Not to my knowledge.

21 **MR. ELLIS:** Objection.

22 **THE COURT:** Overruled. I will allow him.
23 Go ahead. I did not get to hear his
24 answer. I'm sorry. Do you mind just repeating
25 your question and let me hear his answer?

1 BY MR. CASSIDY:

2 Q Does the use of the easement have any
3 adverse impact on Trader Joe's or Academy Sports'
4 property?

5 A No.

6 Q Now when there was some discussion about
7 the construction of the drive-through area, what was
8 the concern that Kimco or its affiliate had
9 concerning that?

10 MR. ELLIS: Relevance objection.

11 THE COURT: Let me hear his answer and
12 then I will rule on your objection.

13 THE WITNESS: Would you state the question
14 again?

15 BY MR. CASSIDY:

16 Q Did Kimco or the owners of the property
17 express any concerns to you about the use of the
18 easement?

19 A Yes, they did.

20 Q And what were they?

21 A That there was a potential in their own
22 opinion for stacking of cars that would leave the 25-
23 foot area and go into the 45-foot area which could
24 potentially cause some impact to deliveries with
25 Trader Joe's.

1 **THE COURT:** Overruled. I will allow it.

2 **MR. CASSIDY:** I'm sorry, Your Honor.

3 **THE COURT:** I had just taken his objection

4 under advisement until I heard the answer and

5 overruled his objection.

6 **MR. CASSIDY:** Okay.

7 **BY MR. CASSIDY:**

8 **Q** So did you retain the services of an

9 engineer to help you lay out the site plan for the

10 improvements to the Capri's building and the

11 easement?

12 **A** We do.

13 **Q** Who is that?

14 **A** Bluewater Civil Design.

15 **Q** Who in particular at Bluewater?

16 **A** Chris Price.

17 **Q** And did you work in conjunction with Mr.

18 Price to lay out --

19 **A** We did.

20 **Q** Did you share those potential layouts with

21 Kimco or its affiliate?

22 **A** We did.

23 **Q** Approximately how many iterations of the

24 easements or drawings were done prior to the final

25 drawing?

1 **A** Overall or with Kimco?

2 **Q** With Kimco?

3 **A** Probably 6 to 8.

4 **Q** Were you trying to address their concerns
5 about the stacking?

6 **MR. ELLIS:** Your Honor, objection before
7 he goes into that. That is -- this -- these
8 discussions were in the nature of somewhat
9 settlement discussions when the lawsuit was
10 filed. If the court believes it would be in
11 your interest to hear that, I do want to point
12 out that there were lots of discussions early on
13 about trying to resolve the matter and
14 settlement discussions of a pending lawsuit --

15 **THE COURT:** Did you say it was pending or
16 impending? I'm sorry.

17 **MR. ELLIS:** Pending. These discussions
18 happened after we filed the suit. If he is not
19 talking about that --

20 **BY MR. CASSIDY:**

21 **Q** Were these discussions with Kimco before
22 this lawsuit or not?

23 **A** We had before and after.

24 **Q** Okay.

25 **A** And during.

1 **MR. CASSIDY:** Judge, I would just say that
2 they opened the door when they said did you have
3 any discussions with Kimco or with our folks
4 about the drive-through.

5 **THE COURT:** I'll tell you what I'm going
6 to do. I'm going to allow it. I want to be
7 clear about what was before and after so that I
8 can take that into consideration. I wanted to
9 be clear about what was before and after, if he
10 knows.

11 **MR. CASSIDY:** Again, I have another witness
12 who is going to clarify that for you. I am not
13 trying to cloud the record, Your Honor. I am
14 just trying to give you the lay of the land.

15 **THE COURT:** All right.

16 **BY MR. CASSIDY:**

17 **Q** So you had discussions and you worked
18 cooperatively with them to tell them what you were
19 doing and give them various options of how it could
20 be addressed?

21 **A** Yes.

22 **Q** And that was before the lawsuit, isn't that
23 true?

24 **A** I'm not aware of the exact dates, but based
25 upon when those started, yes.

1 Q Okay. And the final easement that's on the
2 ground today, is it within that 25-foot, 45-foot,
3 footprint?

4 A Yes, it is.

5 Q It doesn't encroach on any other portion of
6 the Kimco or Kimco's affiliate's property, isn't that
7 true?

8 A No, it does not.

9 Q It exists the way the easement that was put
10 in place in 1986 recites?

11 A 25 feet, yes.

12 Q Have you taken steps to monitor the
13 stacking issue?

14 A We have.

15 Q I'd like to show you kind of a summary
16 sheet of paper and ask you if you can identify it.

17 A This is a list of various dates and times
18 that either myself or others within our office have
19 gone on-site and counted the cars that are in the
20 drive-through area.

21 Q And this is part of your business records?

22 A Correct.

23 MR. CASSIDY: Your Honor, we'd like to
24 offer this as Exhibit number 3.

25 THE COURT: Any objection?

1 **MR. ELLIS:** No objection, Your Honor.

2 **THE COURT:** All right then. I'll admit it.

3 (WHEREUPON, Defendant's Exhibit 3 is marked for
4 identification and admitted into the record.)

5 **BY MR. CASSIDY:**

6 **Q** And you, uh, went on various times, various
7 dates throughout April and May?

8 **A** Yes.

9 **Q** Have you ever had any complaints from
10 Academy Sports, Trader Joe's that they hadn't been
11 able to get any delivery trucks into the property or
12 any complaints that you are holding up traffic on the
13 45-foot easement?

14 **A** No, I have not.

15 **Q** Have you had any complaints at all?

16 **A** No, I have not.

17 **Q** Now, the portion of the building, the rear
18 of the Capri's building is the side of the Trader
19 Joe's property, isn't that true?

20 **A** Meaning they face one another?

21 **Q** Yes.

22 **A** Yes, they do.

23 **MR. CASSIDY:** Did you put this one in?

24 **MR. ELLIS:** I did not.

25 **BY MR. CASSIDY:**

1 Q Just by way of illustration, Your Honor.

2 Uh, show the court how the trucks -- where
3 did the delivery trucks load and unload for Trader
4 Joe's?

5 A Trader Joe's is here.

6 Q And that's their loading area?

7 A Yes, it is.

8 Q And how do the trucks come in for their
9 deliveries?

10 A They come off of Woodruff Road, come down
11 the 45-foot driveway, they turn east towards 85 and
12 back up and unload.

13 Q Do they ever go in the 25-foot area?

14 A No. When they leave, they circulate around.

15 Q In fact, before you restored these, there
16 would have been no way for them to get on the 25-foot
17 easement, isn't that true?

18 A That's correct.

19 Q And you have in no way inhibited their
20 ability to make their deliveries.

21 MR. ELLIS: Got to object on leading at
22 this point.

23 THE COURT: Sustained.

24 BY MR. CASSIDY:

25 Q Have you had any complaints from Trader

1 Joe's that they haven't been able to get their
2 delivery trucks in there?

3 A No, we have not.

4 Q Does that easement benefit the Capri's
5 property?

6 A Yes, it does.

7 Q Tell the court why and how it benefits the
8 property.

9 A As it states, it is for vehicular ingress
10 and egress from Woodruff Road to Track A.

11 Q And Mr. Ellis is making a big point about
12 it's a drive-through. Isn't that easement used for
13 the deliveries to the rear of those buildings?

14 A That is correct.

15 MR. ELLIS: Leading.

16 THE COURT: I will allow it. If you would,
17 be careful about the leading.

18 BY MR. CASSIDY:

19 Q Does the use of that easement in any way
20 burden the Kimco property?

21 A No, it does not.

22 Q The fact that you converted that Capri's
23 building into some other tenants, does that benefit
24 the Kimco property in your opinion?

25 A In my opinion, it does.

1 Q In what way?

2 A You have three national corporate leases in
3 a new building versus what was there previously.

4 Q Okay. Does the use of the easement affect
5 the flow of traffic around any of the properties?

6 A No, it does not.

7 Q Now, if the court were to grant you an
8 injunction to prohibit you from using this easement,
9 would that cause you damage?

10 A Yes, it --

11 MR. ELLIS: Your Honor, I must object on
12 relevance grounds. It's either have the right to
13 -- they either have the right to use the
14 easement or they don't. An adverse ruling always
15 affects everybody.

16 THE COURT: All right. I see your point on
17 that. I'm going to allow a little bit of this
18 testimony.

19 BY MR. CASSIDY:

20 Q Why would it have adversely impacted you?

21 A Starbucks does require a drive-through for
22 their business.

23 MR. CASSIDY: No further questions, Your
24 Honor.

25 THE COURT: All right. Yes, sir.

1 MR. ELLIS: Thank you.

2 CROSS-EXAMINATION

3 BY MR. ELLIS:

4 Q Mr. Carter, we're in agreement that the
5 only rights that your client, SC Highway -- SC
6 Greenville Highway 146 has to do anything with
7 respect to this drive-through is this agreement,
8 right?

9 A That's correct.

10 Q Without this agreement, you don't have a
11 right to put anything where the drive-through is
12 located, right?

13 A This agreement gives us ingress and
14 egresses.

15 Q You would agree with me also that this
16 agreement limits what you can do in that easement,
17 right? For example, you can't put a Christmas tree
18 lot in the easement even though -- even if that were
19 to benefit the tenants of Track A?

20 A I'm not going to give my opinion on that.
21 That agreement gives us the right for vehicular
22 ingress and egress.

23 Q To be fair, you gave opinions on other
24 things. I mean, I'm asking you, this limits your
25 ability to do certain things in the easement, right?

1 You can't -- you could not open up a Christmas tree
2 lot in the -- do you understand reading this easement
3 agreement that you could open up a Christmas tree lot
4 sitting in the easement?

5 A I would not make that interpretation.

6 Q Okay. You couldn't put up some barrier that
7 prevented -- a physical barrier that prevents
8 somebody else to use it, right?

9 A My opinion would be no. We could not put up
10 a barrier.

11 Q But your belief is that you can create a
12 station for people to stop and order coffee and other
13 products from Starbucks in the easement.

14 A We have the right for our tenants to use
15 that. We have a tenant that has a drive-through
16 window on our property.

17 Q Let me focus on my -- I want to focus on my
18 question though. I do think it's very clear. I
19 understand the hesitancy to give an opinion. It is
20 very clear that you could not go out into that
21 easement and sell Christmas trees or sell items
22 sitting in the easement, right? Because the easement
23 is for vehicular ingress and egress as set forth in
24 this agreement.

25 A It does say vehicular ingress and egress.

1 Q But your view is it is okay to have a menu
2 ordering board so that cars stop in the easement to
3 order coffee?

4 A They are vehicular in nature when they are
5 ordering their coffee. It's not a permanent barrier
6 or impediment as your Christmas trees would be.

7 Q But your view is that even though there is
8 a sign up that says Starbucks drive-through, there is
9 a pre-order menu board, there is a menu ordering
10 board, cars are expected to stop and stack in the
11 drive-through lane waiting to order that everybody
12 else in the shopping center has the same right to use
13 -- the same right and ability to use that drive-
14 through as Starbucks does?

15 A For my own clarification, I've heard this
16 several times. What sign are you referring to? You
17 asked with Mr. Runge and now with me where it says
18 there is a sign that says drive-through.

19 Q Isn't there a drive-through sign at the
20 corner of the 45-foot and 25-foot easement?

21 A Show me where you're talking about.

22 Q Right up in here. Is there not one?

23 A I believe there is one on our building.

24 Q Okay.

25 A And it's directing you as there are other

1 wayfinder signs within this parking lot directing you
2 to Academy Sports, Trader Joe's. We may even have
3 signs that say for delivery. Those cars, those
4 vehicles may need to use that ingress and egress to
5 get to there. In my opinion, that is not saying that
6 that is solely a Starbucks drive-through.

7 Q Okay. The sign that says it's a Starbucks'
8 drive-through that a premenu board, a menu board is
9 not indicating that it is solely a Starbucks' drive-
10 through?

11 A No, not in any way, shape.

12 Q Okay. Uh, there's been a good bit of
13 discussion in this case about the fact that there was
14 other things there besides a driveway when you guys
15 bought the property, right?

16 A Right.

17 Q There was actually grass and that kind of
18 stuff. That would not expand your rights under this
19 easement though, would it?

20 A I'm not sure I understand your question.

21 Q The fact, the fact that this easement may
22 or may not have been used for its proper purpose
23 before Woodruff Road bought the property or your
24 company bought the property, that doesn't expand any
25 rights under this, does it?

1 A The rights there are what they are.

2 Q The rights here are what they are. And it
3 is ingress and egress for motor vehicles to travel
4 onto an asphalt parking area, Track B and so forth,
5 right?

6 A You are reading from what?

7 Q I'm reading from paragraph 1.

8 A The purpose of ingress and egress to Track
9 A from Woodruff Road.

10 Q Okay. You have that in common, it's a
11 common easement. You represent it's a common easement
12 with the owners of the adjacent property, my clients,
13 right?

14 A It is common for vehicular traffic from
15 Woodruff Road to Track A.

16 Q Okay. You were asked before if it benefits
17 the Kimco property, if your drive-through benefits
18 the Kimco property, right?

19 A I don't believe that was the question. My
20 understanding was does our development benefit the
21 Kimco property.

22 Q Okay. But my question to you, that's really
23 for Kimco to say, right?

24 A Not necessarily.

25 Q You get to make an opinion as to whether or

1 not Kimco would find that it's beneficial to their
2 property?

3 **A** I didn't say Kimco would agree with me. But
4 in my professional opinion, without a doubt.

5 **Q** Let me make a note too on this document
6 that was offered before the drive times that you
7 have, you don't have any one later than May 13th,
8 right?

9 **A** We don't have any of those listed but we
10 have been back out there. We did not put them on
11 paper.

12 **Q** Right. But the one that you presented to
13 the court today just stops in May of this year,
14 correct?

15 **A** That's correct.

16 **Q** Okay. You didn't note in there how long
17 cars were sitting in the easement then, did you?

18 **A** No, we did not note the time that they were
19 sitting there.

20 **Q** You would also agree with me, wouldn't you,
21 that however this property is configured now, what it
22 may be in the future, we don't know what people are
23 going to use the property for in the future, right?

24 **A** No.

25 **Q** I mean, five years from now, another

1 building might be torn down and have another building
2 put up that actually needs to use the full easement,
3 right?

4 A And they will be able to.

5 Q How will they be able to do that without
6 taking out the Starbucks' drive-through lane?

7 A It's for vehicular ingress and egress from
8 Woodruff Road to Track A. If you are going from
9 Woodruff Road to Track A, you're going to be
10 traveling down and east. I think if you're implying
11 that if a delivery truck needs to leave and go back
12 against the flow of traffic and that's not what the
13 agreement says. When you come from Woodruff Road, you
14 turn left, go behind the building. Then you go left
15 again north and access Track A. Now, if a Kimco
16 invitee, tenant, et cetera wants to get in the
17 easement and travel from Woodruff Road to Track A, in
18 my opinion, they are able to do that.

19 Q Let me be sure I understand. We're still in
20 agreement, aren't we, that both parties have equal
21 rights to use this.

22 A Correct.

23 Q Okay. And what I'm -- I keep hearing you
24 guys that having a Starbucks' drive-through lane
25 where people stop and order coffee and, in fact, the

1 cars would be going against the normal flow of
2 traffic if there were a normal flow of traffic is
3 sharing and sharing alike with all the other tenants.
4 That's you guys' position, right?

5 **A** Not sure I understand your question. Say it
6 again please.

7 **Q** Having a drive-through lane with a sign on
8 your building saying it's a drive-through lane, order
9 board, menu board, where cars stack, where cars stop
10 and order coffee, that that is using the area and
11 sharing it equally with the other tenants of the
12 property.

13 **A** I can't make a determination on equally. It
14 says it's for our use and benefit, for our tenants
15 and our invitees. So if those cars have to stop for
16 any period of time, it's no different than if a
17 Trader Joe's truck is stopped in the 45-foot
18 easement. My tenants, my invitees have to deal with
19 that whether there is a delivery sign posted there
20 pointed towards their dock.

21 **MR. ELLIS:** Okay. Uh, beg the court's
22 indulgence for just a moment, Your Honor.
23 (Pause.)

24 I have no further questions. Thank you.

25 **THE COURT:** All right.

1 **MR. CASSIDY:** No questions, Your Honor.
2 **THE COURT:** All right. Sir, you can step
3 down.
4 **MR. CASSIDY:** One more witness, Your Honor.
5 **THE COURT:** Certainly.
6 **MR. CASSIDY:** Mr. Price.
7 **CHRISTOPHER PRICE**
8 having first been duly sworn, testifies as follows:
9 **DIRECT EXAMINATION**
10 **BY MR. CASSIDY:**
11 **Q** Would you state your name for the record
12 please.
13 **A** Christopher Lee Price.
14 **Q** Would you give the court your back -- your
15 educational background since college? I won't make
16 you go back to your grammar school and high school
17 days.
18 **A** I'm a graduate of Clemson University. I
19 have four years of engineering training under a
20 professional licensed engineer.
21 **Q** And what type of engineering do you do?
22 **A** I'm a civil engineer, more specifically
23 site development.
24 **Q** And with whom are you currently employed?
25 **A** I'm a partner of Bluewater Civil Design.

1 Q And I think you said your field of
2 expertise is site development?

3 A Yes, sir.

4 Q Were you employed when SC Greenville
5 Highway 146 performed services related to that
6 Capri's property that we've been talking about?

7 A Yes, sir, in a way. I was originally
8 employed by Bill and Greg and then subsequently SC
9 Greenville.

10 Q And did you formulate the site plan for the
11 Capri's property?

12 A I did, yes.

13 Q So these pictures or these drawings that
14 we've been looking at that have the SP1500 or
15 whatever, those are your drawings?

16 A Yes, sir.

17 Q So you are familiar with the property?

18 A Yes.

19 Q On occasions, do you also do work for
20 Kimco?

21 A Our firm does, yes.

22 Q What, if anything, did Greg and Bill Runge
23 ask you to do with regards to the Capri's property?

24 A In normal development, we do research of
25 zoning laws, of different available easements and

1 title items that attorneys find to develop the best
2 plan to make the property as usable as possible.

3 Q Are you aware of the easement that's been
4 talked about pretty extensively today?

5 A Uh, yes, sir.

6 Q And you know where the location of easement
7 is?

8 A Yes, sir.

9 Q And did you take that into consideration
10 when you did your site planning?

11 A Yes, sir. Originally, there were 30 plus
12 renderings of what to do with this site. Ultimately,
13 they involved the use of that easement.

14 Q What is the existing use of that easement?

15 A The current use is a 25-foot drive. And
16 it's being used to access the property. Most notably,
17 to access the Starbucks drive-through window.

18 Q And there's been some discussion about the
19 impervious pavement. Is that something that Starbucks
20 required?

21 A No, that was a county requirement since, I
22 believe, the BJ's development. They turned that area
23 into grass. To put it back into asphalt, the county
24 required it to be impervious which would not increase
25 the storm water runoff.

1 Q And that's the purpose of it, to help the
2 storm water runoff?

3 A That's the sole purpose, yes.

4 Q It has nothing to do with the Starbucks
5 lease?

6 A No.

7 Q Now, did you have any discussions with
8 Kimco or their affiliate about the use of this
9 easement?

10 A I did.

11 Q Did you share with them, and this is prior
12 to the litigation, various iterations of the site
13 drawings?

14 A I did. I shared probably around 10 drawings
15 with them. They had some markups and I changed it. We
16 ultimately settled on putting the easement back to
17 what it was before, the 25-foot.

18 Q Is that easement located as it is described
19 on the ground -- is it on the ground as it is
20 described in the easement?

21 A Yes.

22 Q There's no variation?

23 A No.

24 Q It doesn't encroach on the Kimco affiliates
25 property?

1 **A** No, our instructions on our plans was to
2 specifically stay outside of the easement.

3 **Q** In your opinion, does the use of that
4 easement burden the, uh, Kimco property?

5 **A** No, and as paramount, my duty is to look
6 out for the safety and welfare of the public. I
7 didn't see a safety or public hazard with that
8 access.

9 **Q** And does it benefit the South Carolina
10 Highway 146?

11 **A** Yes. There was no other way to access the
12 property legally.

13 **MR. CASSIDY:** No further questions, Your
14 Honor.

15 **THE COURT:** All right.

16 **CROSS-EXAMINATION**

17 **BY MR. ELLIS:**

18 **Q** Just briefly. You talked earlier about
19 discussions with representing Kimco?

20 **A** Yes.

21 **Q** Kimco, at no point though, or Woodruff Road
22 agreed with you, agreed at some point to say we're
23 fine with this?

24 **A** That is not true.

25 **Q** Okay. But you don't have anything in

1 writing?

2 A I do.

3 Q What do you have in writing?

4 A I have an email from Lee Johnson.

5 Q Okay. Who is Lee Johnson?

6 A He was employed with Kimco.

7 Q Okay. What I'm trying to figure out is we
8 don't have any -- there's never been an allegation or
9 pleading set forth that this easement is not
10 controlling or that permission was given to bury the
11 easement.

12 A I'm not sure.

13 Q Okay.

14 A I wouldn't know anything about that.

15 Q Do you know who Lee Johnson is?

16 A Yes, he is an employee of Kimco.

17 Q Do you know what he does?

18 A He is, I believe, involved with their
19 construction.

20 Q Okay. I mean, you are aware of the fact
21 that as soon as anything got under way with respect
22 to this Woodruff Road, which is owned by Kimco,
23 immediately filed the lawsuit to stop it, right?

24 A I am aware. I was actually here.

25 Q Okay. And since that period of time, a

1 lawsuit has continued and has never -- Kimco has
2 asserted at all times that the easement has to be
3 enforced, right?

4 A My understanding is that the easement is at
5 stake here in the legal proceedings.

6 Q Okay. Thank you. Nothing further.

7 THE COURT: Okay. Anything else for this
8 witness?

9 MR. CASSIDY: One second, Your Honor.

10 THE COURT: Sure.

11 (WHEREUPON, there is a pause.)

12 MR. CASSIDY: Nothing further, Your Honor.

13 THE COURT: All right, sir. You can step
14 down.

15 All right. Anything else from the
16 defendant?

17 MR. CASSIDY: No, ma'am.

18 THE COURT: All right then. Any reply
19 testimony?

20 MR. ELLIS: Beg the Court's indulgence
21 just a moment.

22 THE COURT: Certainly.

23 (WHEREUPON, there is a pause.)

24 MR. ELLIS: Your Honor, I would like to
25 call Mr. Greg Ix.

1 **THE COURT:** All right. Sir, come forward
2 and be sworn.

3 And his testimony is directly in reply to
4 defendant's testimony?

5 **MR. ELLIS:** I apologize.

6 **THE COURT:** That's okay. And his testimony
7 is going to be directly in reply to some
8 testimony that we heard from the defendant?

9 **MR. ELLIS:** Yes.

10 **THE COURT:** All right.

11 **GREG IX**

12 having first been duly sworn, testifies as follows:

13 **DIRECT EXAMINATION**

14 **BY MR. ELLIS:**

15 **Q** Would you state your state your name for
16 the record please.

17 **A** Gregory Ix.

18 **Q** Mr. Ix, who are you employed by?

19 **A** Kimco Realty Corporation.

20 **Q** Mr. Ix, did you have any discussions with
21 any of the witnesses we had today about possible
22 drawings for the drive-through?

23 **A** Yes, I did.

24 **Q** Okay. Tell us about those.

25 **A** At the time, Bill Runge and Greg Carter

1 were employed by Hughes, who we had bought the
2 property from, they were also our listing, uh,
3 leasing agents on the property at the time. They
4 requested a meeting with me in Charlotte that they
5 were under contract to buy the Capri building as it
6 has been referred to. They were looking forward to
7 working with them and looking for our consent to
8 agree to put in a Starbucks drive-through on their
9 property or within the easement.

10 Q What ultimately became of that?

11 A We, as Kimco, agreed to work with them
12 subject to developing a plan that was from the safety
13 standpoint and honoring the rights of our tenants who
14 we had in the leases, coming to an agreeable plan
15 that both companies could live with. Then it was
16 subject to us going to our anchor tenants to get
17 approval.

18 Q Was this final plan ever finally agreed on?

19 A No, sir.

20 Q Kimco was served at the -- what is Kimco's
21 view of the status of the easement right now?

22 A That the owner of the Capri building
23 extended additional rights of the easement,
24 specifically to a tenant giving them exclusive --
25 some exclusivity to that easement.

1 Q And when you say the owner of the Capri
2 building, you are talking about the defendant here
3 today?

4 A Yes.

5 Q That they've exceeded the scope of the
6 easement.

7 A Yes.

8 Q Okay. I don't think I have any further
9 questions.

10 THE COURT: All right. Any questions for
11 this witness?

12 CROSS-EXAMINATION

13 BY MR. CASSIDY:

14 Q Mr. Ix, again, tell me how they've exceeded
15 the use of that easement.

16 A The easement is for the common use of both
17 of the property owners. And by entering into a lease
18 with Starbucks where it specifically says in the
19 Starbucks lease that Starbucks will have a drive-
20 through, basically in our opinion or my opinion, uh,
21 extends Starbucks premises, lease premises to that
22 drive-through. They are contractually obligated to
23 supply them a drive-through but that is an area
24 that's supposed to be in common between Track A --
25 excuse me -- Track A and Track B.

1 Q The easement gives you folks the right to
2 access the Capri's property through that easement,
3 isn't that true?

4 A Yes.

5 Q Was there anything that prevents you from
6 accessing Capri's property through that easement?

7 A At times, yes, when cars are stacked up
8 ordering coffee.

9 Q That wasn't my question. Can't you get
10 through to the Capri's property through that
11 easement?

12 A Yes.

13 Q That's what the easement says, provide
14 ingress and egress to access the Capri's property.

15 A Uh-huh.

16 Q And that's what the easement does.

17 A That's what the easement is there for.

18 Q And you said that you got involved when
19 they were with the Hughes company?

20 A Yes, Jackson Hughes.

21 Q I want to show you an email. It's dated
22 August 22nd, 2013. I ask you if you can identify it.

23 A Yes. It's an email I wrote to, uh, Bill
24 Runge and Greg Carter.

25 Q And, uh, is it your testimony they were

1 working with the Hughes company at that point?

2 **A** At the time, we hired them, I think, when
3 they were with Hughes. But then when we brought the
4 property from Hughes, I believe they at some point
5 went over to Collett.

6 **Q** Okay. But that email was written last year.
7 And they had presented you with an easement, a
8 drawing of an easement that's attached to the email
9 that you essentially approved, isn't that true?

10 **MR. ELLIS:** Your Honor, I object to this.
11 This email was written August 22, 2013. I'm
12 quite sure that's while this lawsuit was
13 pending. It was an attempt to try to work
14 something out.

15 **MR. CASSIDY:** I would certainly take issue
16 with that, Your Honor. What I'm trying to
17 show --

18 **THE COURT:** Let me take a look at that
19 email. I know it's not been entered into
20 evidence.

21 **(WHEREUPON, the document is passed up to the**
22 **Court.)**

23 **THE COURT:** And what is, uh, -- what's
24 your argument? I'm sorry.

25 **MR. CASSIDY:** Your Honor, my point is that

1 several iterations of the drawings were being
2 sent back and forth long before this lawsuit was
3 ever filed. My only point is to show that they
4 were working cooperatively with one another to
5 get this easement done. Somewhere along the
6 line, the whole tone of the conversation stopped
7 when this lawsuit was filed. No one ever
8 complained that this easement wasn't being used
9 for ingress and egress.

10 **THE COURT:** This was after the lawsuit was
11 filed, right?

12 **MR. CASSIDY:** I just checked the -- to be
13 fair, I just checked. The complaint was filed in
14 July.

15 **THE COURT:** In July. And this was in
16 August. So if the tone changed and the lawsuit
17 was filed -- as I read this, this was, as far as
18 I see it, a pretty nice tone.

19 **MR. CASSIDY:** These people really are not
20 at odds, to be honest with you, Your Honor.

21 **THE COURT:** Okay.

22 **MR. CASSIDY:** We're dropping this in your
23 lap to determine whether we're using this
24 easement property. I mean, I think these folks
25 get along. I think Mr. IX would agree with that.

1 We're not at odds with one another.

2 **THE COURT:** I think he can answer your
3 question without going into this email too much.

4 **MR. CASSIDY:** Okay. I think he's answered
5 my question, Your Honor. I don't have any
6 further questions.

7 **THE COURT:** All right. Anything else?

8 **MR. ELLIS:** Nothing further.

9 **THE COURT:** Sir, you can step down.
10 Any other reply witnesses?

11 **MR. ELLIS:** No, Your Honor.

12 **THE COURT:** And I will say, for the
13 record, I think both of y'all tried an
14 outstanding case here this morning. It's been a
15 short case, but I think a real well tried case.
16 If you want to make any, uh, brief closing
17 remarks, I will certainly hear from you. But I
18 think you both laid your issues out pretty well.

19 **MR. ELLIS:** Thank you, Your Honor. May it
20 please the Court. Thank you for the compliment.
21 I appreciate that. Not only does the witnesses
22 get along with each other most of the time, but
23 I have enjoyed working with Mr. Cassidy on this
24 because we narrowed down the issues here on what
25 this is about. I found it very interesting.

1 It is about what is the scope of the
2 easement. It begins with a point -- there was a
3 point at which all of these issues first arrived
4 that I had concerns, as did my client, that this
5 was going to cause a real snarl. We have all
6 seen Starbucks lines get pretty long. We have
7 all been to Chick-fil-A's and McDonald's where
8 the lines have been very long. The issue -- so
9 far that has not happened. I will say that now
10 they have been there for a while, you might see
11 some of the traffic picking up.

12 The real issue for us with this question is
13 what is the scope of the right that was given in
14 the easement agreement that we both agreed
15 applies here? Your Honor, I cited in my
16 pretrial brief a case. And I will hand up copies
17 to Your Honor. That is a case in which someone
18 was using -- someone had the right to use an
19 easement for a specific purpose.

20 **THE COURT:** And I think I have got an
21 index of cases.

22 **MR. ELLIS:** And then sublet it out to
23 someone else to use it for a different purpose.
24 As I recall the case, there was not any
25 discussion in here -- well, is it causing a

1 problem? Is this making the easement hard to
2 use? No, just simply using it for a purpose
3 that you don't have. An easement is the right
4 to use the property of another for a specific
5 purpose.

6 If you give me the right to grow squash in
7 your backyard, I don't then have the right to go
8 around and grow tomatoes. They make the
9 argument that we use the land to grow squash,
10 maybe the land is more valuable. Maybe tomatoes
11 will make your land more valuable. That is not
12 the right.

13 We are the successors-in-interest of the
14 grantor of the easement in this case. Your
15 Honor, the right in this case is for vehicular
16 ingress and egress to travel over property. It
17 gave the owners of Track B the right to travel
18 over property to get vehicular ingress and
19 egress to Track A.

20 Your Honor, I don't agree with their
21 reading of the easement. I don't know if it
22 matters that much, but I don't agree with their
23 reading of the easement that everybody gets to
24 use Track A. The 45-foot portion of the
25 easement as we discussed, that is pretty much

1 the entire row into the shopping center. That
2 is a huge portion of the road into the shopping
3 center. Clearly, everybody who goes down that
4 is not restricted to going to Track A. What
5 this says the owners of Track A and their
6 tenants and invitees get a right in common with
7 us to use it to get to Track A. Of course, the
8 shopping public that comes in may be going to
9 both places anyway. I don't agree that our use
10 of it is restricted to Track A. There is a big
11 right of vehicular ingress and egress.

12 I certainly understand the positions that
13 they have to take that the Starbucks drive-
14 through lane can be used by everybody. But I'm
15 sorry. From a preponderance of the evidence
16 standpoint, I would have a hard time buying that
17 for this reason, it is a drive-through lane. It
18 is not something that everybody out there is
19 invited to use. It is clearly the intent from
20 the lease -- the intent was to take -- their
21 intent was to take a portion of this and
22 dedicate it to the use of a single tenant.

23 We haven't use this very much. This is not
24 caused snares with our clients. We haven't
25 really had these kind of problems. Number 1,

1 Trader Joe's and Academy Sports has a right to
2 come up and complain about this has hardly
3 expired. They make a claim at a later time. We
4 don't know what problems will arise.

5 Furthermore, we don't know what the use of
6 the property would be. Once again, these
7 properties may be torn down and other buildings
8 put in there where they do want to make use of
9 it. I don't think one can argue too plausibly
10 that taking this portion of the easement and
11 making a Starbucks drive-through lane a pre-
12 ordering board, a menu board where cars are
13 clearly expected to stop and do stop to order
14 coffee does not exceed the right which is motor
15 vehicles to travel onto and over the asphalt
16 parking area of Track B as shown on the plan
17 hereto attached as Exhibit C, basically we're
18 talking about the cross-section.

19 Putting a Starbucks lane in here clearly
20 limits the common right of all parties to the
21 use of that. Your Honor, I have to disagree
22 strenuously, this is for the court to determine.
23 This is what declaratory judgment is for to say
24 that basically selling coffee in the easement
25 meets the definition of ingress and egress.

1 Once again, they can't sell Christmas trees
2 there. They can have a Christmas tree lot out
3 there. Even if somebody is not blocking
4 traffic, they cannot have other people doing
5 other activities in the easement.

6 All they are allowed to use our property
7 for, it is our property. All they are allowed
8 to use it for is to allow cars to travel to get
9 from point A to point B. They are having cars
10 stop to buy coffee in the area. They are
11 stopping in the easement. That is what they are
12 doing. It simply exceeds the scope of the
13 easement.

14 Your Honor, I don't have to prove in this
15 case that we are harmed by it. I don't have to
16 prove that anybody has complained to us yet. I
17 simply have to show that they are doing
18 something that goes beyond the scope of the
19 license that was granted to them. I think, Your
20 Honor, clearly that they are. Once again, I
21 don't know what is going to happen three years
22 from now, four years from now, five years from
23 now. I think it has to be understood clearly
24 that if we ever sell this property, as Mr.
25 Johnson testified to, it is not desirable with a

1 portion of the easement dedicated as a Starbucks
2 drive-through lane as it would be if it were
3 freely for both parties to use.

4 I want to address one more thing and then I
5 will stop. The plaintiffs have made -- maybe
6 two more things. The plaintiff has said a lot
7 of things about the right-of-way shall be for
8 the benefit of the owner, any tenant, licensee.
9 I will submit to the court that that was
10 language designed to make sure that this was
11 interpreted at a later time as appurtenant
12 easement. The grantee of the easement is always
13 considered to have the dominant easement.
14 Appurtenant easement, in order to be that has to
15 run with the land. It has to be for the use of
16 the land it serves. If not, it is an easement
17 in gross.

18 There are two types of easement in growth.
19 One is a general easement in gross. The other
20 is a commercial easement in gross. A commercial
21 easement in gross can be assigned and a general
22 easement in gross cannot. They can carefully
23 draft the easement to try to make it an
24 appurtenant easement meaning that it will
25 specifically say it benefits a piece of property

1 because if it doesn't do that, it cannot be
2 assigned to parties.

3 Your Honor, I will say one more thing about
4 this. I did say one more thing, but one more
5 thing. Paragraph two talks about parking. This
6 covers a parking easement as well, this area in
7 here that we talked about, there are actually
8 parking spaces right now in the 45-foot portion.
9 There could be parking in here too, the way I
10 read the easement. It is parking and vehicular
11 ingress and egress.

12 At the end of this, there are basically two
13 points. Number 1, using this for a drive-
14 through where cars are expected to line up for a
15 particular tenant to sit there for a period of
16 time in the easement to order coffee to make a
17 transaction in the easement exceeds the scope of
18 the easement. It exceeds the license that was
19 given to them. Your Honor, I believe that they
20 are interfering with our ability and our right
21 to equal use of the easement. So it is both
22 things, it exceeds the general scope, secondly,
23 it interferes with our right. Thank you, Your
24 Honor.

25 **MR. CASSIDY:** Your Honor, I ditto Burney's

1 comments. I appreciate the nice comments you
2 make. Burney's a good lawyer and we haven't had
3 any crosswords. I can't say that's always been
4 the case in a case.

5 I like to keep these cases simple. I think
6 that the nuts and bolts of this case is the last
7 sentence in the easement agreement that says the
8 right-of-way shall be for the benefit of the
9 owner, the tenant or the licensee. There is no
10 other reason to have that right-of-way along the
11 backside of the building but for to access the
12 three tenants that are occupying that building.
13 The people that go behind that building, they
14 don't have to go through the drive-through
15 window if they don't want to. They can get to
16 the building from the 45-foot easement off of
17 Woodruff Road.

18 There is no reason for Academy Sports or
19 Trader Joe's folks to ever want to be out on the
20 easement other than to access our building.
21 That is the intent of the easement. We make no
22 bones about it.

23 The lighthouse cases are clearly
24 distinguishable. They were going way overboard
25 with the use that they wanted to use it for.

1 The court said, whoa, this is an easement to let
2 you get access to your property. The lighthouse
3 case was, the utility company put a cell tower
4 there and they wanted to access a cell tower or
5 a utility situation. They wanted to drive
6 trucks over there to maintain their property.

7 In this particular case, we are using the
8 easement for its intended purpose, that is to
9 access our property. They make a big to-do
10 about their lease having a problem. We did not
11 enter this lease agreement with them. The
12 easement was in place since 1986, long before
13 this lease ever came into place. The fact that
14 they might have identified an area as a common
15 area that was and isn't our problem.

16 They tell you that Academy Sports or Trader
17 Joe's could call this lease. I have never seen
18 a lease that says you can default the lease for
19 a technical problem, none of which has come up.
20 To me, that is just an absurd argument. They
21 have access to all the parking around that
22 building. If they want to go to the Starbucks
23 or they want to go to Sleepy's or they want to
24 go to Zoe's, they can use the easement just like
25 any of the people that are visiting it who are

1 customers of our clients. If the Academy Sports
2 folks want to use it, nobody is stopping them.
3 There is no barriers. There is nothing that
4 prohibits them from accessing the easement.

5 The fact that there is a sign that says
6 there is a drive-through, we don't make any
7 bones about it. There is a drive-through there.
8 The drive-through window is on our property. If
9 people elect to sit there and wait five minutes
10 to get a cup of coffee, that is their choice.
11 We welcome the Trader Joe's folks and the
12 Academy Sports folks to come over there and have
13 a cup of coffee.

14 It is just absurd to me that the argument
15 that they are making says just because they want
16 to keep saying it is a drive-through, it is an
17 access easement. That is all that it is. When
18 you look at that video, you can see the width of
19 the easement. You can go two ways on the
20 traffic pattern.

21 It makes absolutely no sense. I have to
22 really think long and hard before I get on
23 Woodruff Road to begin with. But why do you
24 want to go behind that building in the opposite
25 direction of everybody coming off of Woodruff

1 Road is absurd. It just doesn't make any sense.
2 The natural flow of the traffic is around that
3 building and out. Nobody is going to come into
4 that building and try to get out. There is no
5 reason to go that way. It just doesn't make any
6 logical sense.

7 I would submit to the court that the
8 easement speaks for itself and it tells us that
9 we can use the easement to access our property.
10 If those folks want to access our property
11 through the easement, we are not stopping them.
12 Thank you.

13 **THE COURT:** Thank you. Anything in reply?

14 **MR. ELLIS:** Your Honor, yes. Again, I
15 don't really agree that it doesn't apply to us.
16 We are only allowed to use the easement to
17 access Track A. They are given the ability to
18 use it to serve their property where we have the
19 rights to use that generally in common with
20 them.

21 Your Honor, I also would like to pass up to
22 the court this case. I highlighted a portion.
23 This is what, this addresses the issue that I
24 think is dealt with by is meant to benefit Track
25 A. This is where the core basis explains the

1 different types of easements. Again, there is a
2 dominant tenant and servient. Dominant, it is
3 for the purpose of benefitting their land. They
4 don't get an easement if it is not a benefit to
5 them. But an easement can still be a very
6 limited license. That is what we believe this
7 is. It is not only what we believe it is, it is
8 what it clearly is. It is a limited license to
9 do certain things.

10 While Mr. Cassidy can't believe some of the
11 arguments I am making, I can't literally believe
12 the argument that they are making that this is
13 the -- selling coffee in the easement is
14 vehicular ingress and egress traffic. It is
15 not. It is a drive-through lane that does not
16 meet the common definition of what is known as
17 ingress and egress when you read into the lease.
18 It is not. It is doing something that is
19 different. It is something that they don't have
20 the right to do.

21 Again, I appreciate those arguments but
22 what they have clearly done is taken a portion
23 of this and dedicated it to the use of one
24 party. To say that they welcome our right to
25 use it equally with them, I simply doubt that.

1 They have said, they have an obligation
2 contractually to provide a drive-through lane to
3 Starbucks. I think Starbucks will be very, very
4 surprised to find out that the leasor is saying
5 that Trader Joe's can drive is truck across it
6 to go from Point A to Point B as well. The
7 intent of this is clearly meant to create a
8 dedicated drive-through lane. Even if it is
9 not, they are selling coffee here. Having cars
10 stop and place in order to buy a coffee simply
11 exceeds the scope of the easement. But, I
12 appreciate the court hearing this. Thank you
13 very, very much.

14 **MR. CASSIDY:** Judge, can I mention one
15 thing?

16 **THE COURT:** Certainly.

17 **MR. CASSIDY:** Since it is nonjury.

18 **THE COURT:** Certainly.

19 **MR. CASSIDY:** Part of the relief they're
20 asking for is for you to enjoin them from using
21 that easement. They have got to show
22 irreparable harm. They have not shown one bit
23 of irreparable harm.

24 **THE COURT:** I did have the question as to,
25 let's say that I agree with you that they

1 exceeded the scope of the easement, what is it
2 you want them to do? Take down the drive-
3 through lane?

4 **MR. ELLIS:** Yes. As far as irreparable
5 harm, I don't agree with him about that. This
6 is a declaratory judgment action. I bought my
7 book with me. Under declaratory judgment acts,
8 Your Honor, we are entitled to ask the court to
9 interpret easements, contracts, the statutes,
10 whatever. I believe the court does have the
11 authority and I am asking the court to issue a
12 ruling that they do not have the authority to
13 use this as a drive-through lane. The statute
14 specifically provides that the court may order
15 relief consistent with the court's rulings. I
16 don't think I have to show irreparable harm.

17 Furthermore, Your Honor, even if I did have
18 to show irreparable harm, I can show, as Mr.
19 Johnson testified, that you are lowering the
20 value of what we have if you expand the scope of
21 the easement. It takes away the value of our
22 rights. So, thank you.

23 **THE COURT:** You concede at this point that
24 you will have no -- if I understand the
25 testimony right. I just want to be clear -- that

1 you don't have any damages at this time. All
2 you are asking is to interpret this and say
3 don't use the easement in this manner?

4 **MR. ELLIS:** I am not seeking an order of
5 damages, no, Your Honor. We are seeking a
6 construction under the declaratory judgment act
7 of the easement and whether or not their use
8 exceeds that scope. Thank you.

9 **MR. CASSIDY:** Judge?

10 **THE COURT:** Yes, sir.

11 **MR. CASSIDY:** Judge, I threatened to hit
12 him with this book. I think I'm going to hit
13 him with this poster. You are a practical
14 person. There is no reason on God's green earth
15 why they would ever want to use that 25-foot
16 parcel for their property. That's all I have.

17 **THE COURT:** Let me just ask you this. I
18 will sort of turn the tables since I am asking a
19 couple of questions here. How long would you
20 say -- is it your point that these cars can be
21 parked there however long and go across this 25-
22 foot easement and they could be there for hours
23 on in but that still does not prevent anybody
24 from using that easement, from Trader Joe's or
25 Academy Sports using that easement in a manner

1 consistent with what they believe, driving a
2 truck through or something like that? You think
3 those cars being there doesn't affect their use
4 of the easement or limit, not affect, limit
5 their use of the easement?

6 MR. CASSIDY: Judge, again, it is to
7 benefit our property. There is absolutely no
8 reason whatsoever for a truck to want to go
9 around the building through that easement. If
10 they wanted to, they could. Quite honestly,
11 that is an absurd interpretation of it. The
12 easement, they use it as a drive-through. There
13 has been no we went through Christmastime when
14 people are just drinking coffee like crazy,
15 there has never been a problem there.

16 The fact that someone goes in there and has
17 to wait five minutes to get to the window, that
18 is their election. If they did not want to
19 wait, they could go around and go to the front
20 of the building and go in. There is no evidence
21 whatsoever that this is impeding the flow of
22 traffic or that they don't have the right to use
23 it. If they ever get in line to go around the
24 building, they have a right to choose to do
25 that.

1 We're not saying only Starbucks customers
2 can go through it. Anybody who wants to go
3 through it can go through it. If they elect to
4 want to have to wait, how long have you had to
5 wait going down Woodruff Road?

6 **THE COURT:** In a day, a lot longer than I
7 thought.

8 **MR. CASSIDY:** If you want to go down
9 Woodruff Road and you have to wait, you don't
10 have a right to sue somebody because you don't
11 have free passage.

12 **THE COURT:** Well, let me -- well, let me
13 just kind of take another stab at it. I am
14 really asking out of curiosity. I don't know --
15 I don't know that I have framed the issue in my
16 mind yet. Can you imagine or envision a
17 scenario, a real scenario that could exist in
18 which Starbucks' use of that easement as a
19 drive-through could cause problems for Trader
20 Joe's or Academy Sports?

21 **MR. CASSIDY:** None whatsoever, Your Honor.
22 Again, it has been in place for almost a year
23 now, a little short of a year. There has been
24 absolutely no problems whatsoever. They talk
25 about the building to change, if the building

1 changes and they are not using it for the
2 property use, that is a horse of a different
3 color. Right now, that building is being used
4 for Zoe's, Sleepy's and Starbucks. If you want
5 to access that property from the back of the
6 easement, the 25-foot strip, they have every
7 right to do so. The 45-foot strip, I can't even
8 imagine that that is an issue here. There is
9 nothing that prohibits the flow of traffic from
10 the entranceway on Woodruff Road.

11 **THE COURT:** All right. Yes sir.

12 **MR. ELLIS:** Judge, if I may, here is the
13 problem. It could be a problem. Cars have
14 backed up that far. Cars could back up to the
15 45-foot easement. We haven't. Because we haven't
16 necessarily seen it yet doesn't necessarily mean
17 that is not going to happen and couldn't be a
18 problem in the future. Also, Your Honor, Trader
19 Joe's and Academy Sports aren't necessarily the
20 particular issue. They are the issue today.

21 The issue is another building -- if another
22 tenant comes in there that does need to make
23 full use of that lot, they have got a 10-year
24 lease. That could be a problem. Also, I don't
25 know if a certain number of trucks go back there

1 if they could not use it.

2 Your Honor, I would also like to address
3 this point that cars that go to Starbucks make
4 the election to sit there. The point is, they
5 don't have the right to make the election for
6 everybody else. That is kind of the problem
7 here is that when we purchased this property and
8 they purchased this property, there is a
9 recorded document that says what the likes of
10 the parties are.

11 I think that a reasonable person reading
12 that would say you have got traffic flow. You
13 get to go on a normal flow from Point A to Point
14 B, not that you get to stop and order a coffee
15 and hold up people behind you. That is the
16 point here is that that simply exceeds the scope
17 of what the parties agreed to when this was
18 initially entered into. They are successors in
19 interest. We are successors in interest.

20 **THE COURT:** Just assuming that Starbucks
21 is still a tenant when Trader Joe's and Academy
22 Sports decide to go away and some other fabulous
23 place takes its place, they would know, they
24 could look across the parking lot and see I am
25 leasing this building and there is this easement

1 and there is a Starbucks with a drive-through
2 through this easement. A future tenant would
3 enter into a lease knowing the deal.

4 **MR. ELLIS:** They would say therefore I am
5 not going to pay as much in rent because
6 Starbucks --

7 **MR. CASSIDY:** That is clearly not correct
8 at all.

9 **THE COURT:** I see -- I see both arguments.
10 I do see both arguments. All right. I just had
11 a couple of questions out of curiosity. Please
12 don't take by anything that I have said to
13 either side that I formed an opinion in any way
14 because I have not. Y'all made me definitely
15 think about things I never thought of.
16 Especially when I am ordering a cup of coffee at
17 Starbucks.

18 **MR. CASSIDY:** On Woodruff Road.

19 **THE COURT:** On Woodruff Road. I have a
20 lot of things to think about now. All right.

21 But before you leave, the one thing I do
22 want to make sure we've got all of our exhibits.
23 I have got a couple of exhibits. I am just sort
24 of feeling the ones with stickers. Those with A
25 and B are the ones that I've got. I've got

1 Defendant's 1, 2 and 3. I will give you those.
2 And there are some exhibits right here.

3 MR. CASSIDY: Judge, I have no objection to
4 putting the premises in evidence and you can go
5 out there and look at it yourself while you are
6 getting a cup of coffee.

7 MR. ELLIS: Do we have all of our exhibits
8 in?

9 THE COURT: Burney, do you have -- and I'm
10 sorry, I can't see that far. I don't know which
11 one it is. Did you say you think you have a
12 smaller size of that?

13 MR. ELLIS: I do. I think I do.

14 (WHEREUPON, the proceedings conclude at
15 approximately 1:06 p.m.)
16
17
18
19

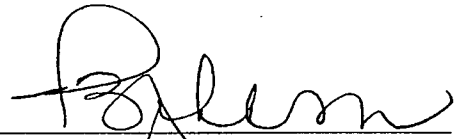
CERTIFICATE

155

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

I, the undersigned, Teresa B. Johnson, Official Court Reporter for the Thirteenth 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 trial of the captioned case, relative to appeal, in the Court of Common Pleas for Greenville, South Carolina, on this 12th day of March, 2015.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

A handwritten signature in cursive script, appearing to read 'T. B. Johnson', is written over a horizontal line.

Teresa B. Johnson

Official Court Reporter

Address of Grantee: Mid-South Development Company, Inc.
2830 Breard
Monroe, Louisiana 71201

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

STATE OF LOUISIANA
PARISH OF OUACHITA

STATE OF TENNESSEE
COUNTY OF DAVIDSON

FILED
JUN 9 2 31 PM '66
JONNIE S. TANNERSLEY
R.H.C.

AGREEMENT

KNOW ALL MEN BY THESE PRESENTS, that this agreement was made and entered into on the dates hereinafter stated by and between:

MID-SOUTH DEVELOPMENT COMPANY, INC., a corporation chartered under the laws of the State of Texas, represented herein by its duly authorized President, Alton H. Roward, (hereinafter referred to as "MID-SOUTH")

AND

GREENVILLE ASSOCIATES, LTD, a limited partnership organized under the laws of the State of Tennessee, represented herein by its duly authorized general partner, (hereinafter referred to as "GREENVILLE")

WHEREAS, MID-SOUTH is the owner in fee of that property situated in Greenville County, South Carolina, hereinafter referred to as Tract A, containing 1.145 acres and being more fully described on Exhibit "A" attached hereto and made a part hereof; and

WHEREAS, GREENVILLE is the owner in fee of that property situated in Greenville County, South Carolina, hereinafter referred to as Tract B, containing 10.51 acres and being more fully described on Exhibit "B" attached hereto and made a part hereof;

NOW, THEREFORE, in consideration of the mutual agreements herein contained, the parties covenant and agree for themselves, their heirs, successors and assigns as follows:

1. RIGHT OF WAY TO MID-SOUTH. Subject to the limitations set forth in paragraph 3 below, MID-SOUTH and all tenants and licensees of Tract A or any part thereof and their business invitees, licensees and employees shall have a right of way at all times, in common with the owner of Tract B and all tenants and licensees of Tract B or any part thereof, for motor vehicles to travel onto and over the asphalt parking area of

-15-(200) 547.1-1-9.5 (1.145A) Note
out of 547.1-1-9.1

1300 5 11A01



Tract B as shown on the plat attached hereto on Exhibit "C", for the purpose of ingress and egress to Tract A from Woodruff Road (SC Hwy. 146). Said right of way shall be for the benefit of the fee owner, any tenant, or licensee of Tract A or any part thereof.

2. PARKING EASEMENT TO MID-SOUTH. Subject to the limitations set forth in paragraph 3 below, MID-SOUTH and all tenants and licensees of Tract A or any part thereof and their business invitees, licensees and employees shall have the right to use, free of charge the asphalt parking area of Tract B as shown on the plat attached hereto as Exhibit "C", in common with GREENVILLE and all tenants and licensees of Tract B or any part thereof and their business invitees, licensees and employees.

3. LIMITS OF RIGHT OF WAY AND PARKING EASEMENT TO MID-SOUTH. The right of way and parking easement described in Paragraphs 1 and 2 above and illustrated on Exhibit "D" as "easement" shall be an easement appurtenant to and a covenant running with the land. The easement is to be within the existing driveway and parking area on Tract B and, as illustrated on Exhibit "D" shall be 25 feet along the rear property line of Tract A and shall be 45 feet along the western most property line of Tract A. It is expressly understood and agreed that nothing in this agreement shall be construed to require Greenville or its successors in title to perform any maintenance or repair to, or any replacements of the easement area described in this paragraph; provided however, that for so long as Greenville or its successors in title or any tenant of Tract B shall maintain the above described easement area, owner of Tract A shall reimburse such party annually, for one-half (1/2) of the expenses incurred by such party in performing such maintenance.

4. PARKING EASEMENT TO GREENVILLE. GREENVILLE and all tenants and licensees of Tract B or any part thereof and their business invitees, licensees and employees shall have the right to use, free of charge the paved parking areas of Tract A in common with MID-SOUTH and all tenants and licensees of Tract B.

or any part thereof and their business invitees, licensees and employees as shown on the plat attached hereto as Exhibit "D". It is expressly understood and agreed that nothing in this agreement shall be construed to require Greenville or its successors in title to perform any maintenance or repair to, or any replacements of the easement area described in this paragraph.

5. ADDITIONAL EASEMENTS. In addition to the permanent right of way and parking easement to Mid-South, Greenville further grants a permanent easement to Mid-South and all tenants and licensees of Tract A or any part thereof and their employees to place an advertising sign on the pole below the "Supersaver Wholesale Warehouse" advertising sign; said pole is located at the Northeast corner of Tract B. Said advertising sign shall be in accordance with all Greenville County ordinances and of a size and style acceptable to the owners of Tract A, Greenville and any licensees or lessees of Tract A and Tract B. The easement granted by this paragraph shall remain in effect only for so long as A. Howard Wholesale Company is the tenant of Tract B.

6. EASEMENT FOR WATER AND SEWER SERVICE, REPAIR AND MAINTENANCE. Mid-South and all tenants and licensees of Tract A or any part thereof and their licensees and employees are hereby granted a perpetual easement which shall be an easement appurtenant to and a covenant running with the land, to tap on to the eight (8") inch water line lying Northeast of Tract A as shown on Exhibit "D", in one location for the purpose of tapping onto the line and running a new line (collectively referred to hereinafter as "work") to Tract A should it be determined that there is a need for additional water service to Tract A and provided that such water service will be separately metered for use and provided further that prior to the commencement of the work, the party proposing to exercise the easement rights described above provide to the owner of Tract B, evidence satisfactory to such owner, that the work and use of the water line installed by the work will not reduce the volume of water or the pressure of the

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water that serves the improvements on Tract B, below a level acceptable to said owner. The work, including the cost of separate metering, shall be done at the sole expense of the owner of Tract A and such work shall be done in such a manner that will cause the least amount of interference with the use of the adjoining Tract B. Said work shall be in compliance with all governmental regulations applying thereto and the owner of Tract A shall, at its own expense, make any adjustments, alterations and maintenance necessary to keep the work in compliance with governmental regulations from time to time applicable to the work. The owner of Tract A shall promptly repair any damage done to Tract B or any other property in carrying out said work at its sole expense in a good and workmanlike manner. Additionally, Tract A is hereby granted a perpetual easement, being an easement appurtenant to and a covenant running with the land to make whatever repairs or improvements as may be necessary from time to time to insure the continued full use and benefit of the sewer line which services Tract A, at the expense of the owner of Tract A. Said repairs and improvements to be made in such a manner as to cause the least inconvenience to Tract B and its use. All damages done to Tract B or any other property in making said repairs or improvements shall be promptly repaired at the sole expense of the owner of Tract A in a good and workmanlike manner. Said sewer line is shown as a "25' SAN SEWER EASEMENT" on attached Exhibit "C".

7. COVENANTS RUNNING WITH THE LAND. The easements hereby granted, the restrictions hereby imposed, and the right of way hereby granted shall be easements, restrictions, rights of way and covenants running with the land and shall inure to the benefit of, and be binding upon, the parties hereto and their respective heirs, successors and assigns, including, but without limitation all subsequent owners of Tract A and of Tract B and all persons claiming under them.

8. LESSEE CONSENT. Also appearing herein is A. Howard Wholesale Company, d/b/a Super Saver Wholesale Warehouse a

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corporation chartered under the laws of the State of Louisiana, and lessee of Tract B, who appears herein through its duly authorized officer solely for the purpose of acknowledging and consenting to this agreement under all terms and conditions contained herein and agreeing that its lease and any rights thereunder shall be subject to this agreement.

9. CONSENT OF MORTGAGEE: Also appearing herein is First Mutual Savings Association of Florida, a stock corporation domiciled in the State of Florida, represented herein by its duly authorized officer, who appears herein solely for the purpose of acknowledging and consenting to this agreement under all terms and conditions herein and agreeing that its mortgage on Tract B and any rights thereunder shall be subject to this agreement.

IN WITNESS WHEREOF, MID-SOUTH has caused its corporate seal to be affixed hereto and these presents to be subscribed by its duly authorized officer, on this 5th day of May, 1986.

SIGNED, sealed and delivered
in the presence of:

MID-SOUTH DEVELOPMENT COMPANY,
INC.,

Cindy Saffor
Myrtle Perdue

BY: Alton A. Howard
ALTON A. HOWARD, PRESIDENT

STATE OF LOUISIANA
PARISH OF OUACHITA

PROBATE

BEFORE ME, the undersigned Notary, personally appeared the undersigned witness and made oath that (s)he saw the within named corporation, by its duly authorized officer, sign and seal the within written agreement and that (s)he, with the other witness subscribed above witnessed the execution thereof.

SWORN TO BEFORE ME, this 5th day of May,

1986.

Michael P. [Signature]
NOTARY PUBLIC
MY COMMISSION EXPIRES AT DEATH

- 5 -

(CONTINUED ON NEXT PAGE)

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IN WITNESS WHEREOF, GREENVILLE has caused its corporate seal to be affixed hereto and these presents to be subscribed by its duly authorized general partner, on this 11th day of May, 1986.

SIGNED, seal and delivered in the presence of:

L. David Dodd

GREENVILLE ASSOCIATES, LTD.

BY: L. H. Hardaway, Jr.
L. H. HARDAWAY, JR., GENERAL PARTNER

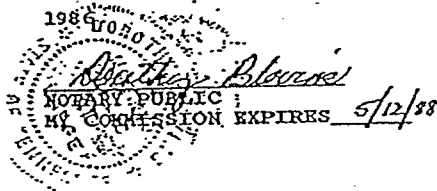
L. H. Hardaway, Jr.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

PROBATE

BEFORE ME, the undersigned Notary, personally appeared the undersigned witness and made oath that (s)he saw the within named Greenville Associates, Ltd., by its duly authorized general partner, sign and seal the within written agreement and that (s)he, with the other witness subscribed above witnessed the execution thereof.

SWORN TO BEFORE ME, this 11th day of May, 1986.



L. David Dodd

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(CONTINUED ON NEXT PAGE)

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IN WITNESS WHEREOF, A. HOWARD WHOLESALE COMPANY has caused its corporate seal to be affixed hereto and these presents to be subscribed by its duly authorized officer, on this 5th day of May, 1986.

SIGNED, sealed and delivered in the presence of:

A. HOWARD WHOLESALE COMPANY

BY:

ARLTON H. HOWARD

Cindy Taylor

Myrtis Perdue

STATE OF LOUISIANA
PARISH OF OUACHITA

PROBATE

BEFORE ME, the undersigned Notary, personally appeared the undersigned witness and made oath that (s)he saw the within named A. Howard Wholesale Company, by its duly authorized officer, sign and seal the within written agreement and that (s)he, with the other witness subscribed above witnessed the execution thereof.

SWORN TO BEFORE ME, this 5th day of May, 1986.

1986.

NOTARY PUBLIC
MY COMMISSION EXPIRES AT DEATH

Cindy Taylor

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IN WITNESS WHEREOF, MORTGAGEE has caused its corporate seal to be affixed hereto and these presents to be subscribed by its duly authorized officer, on this 9th day of May, 1986.

SIGNED, sealed and delivered in the presence of:

FIRST MUTUAL SAVINGS ASSOCIATION OF FLORIDA, A STOCK CORPORATION

BY: [Signature]

TITLE: Vice President

STATE OF FLORIDA
COUNTY OF ESCAMBIA

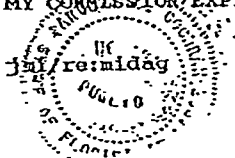
PROBATE

BEFORE ME, the undersigned Notary, personally appeared the undersigned witness and made oath that (s)he saw the within named Mortgagor by its duly authorized officer, sign and seal the within written agreement and that (s)he, with the other witness subscribed above witnessed the execution thereof.

SWORN TO BEFORE ME, this 9th day of May, 1986.

[Signature]
NOTARY PUBLIC

MY COMMISSION EXPIRES My Commission Expires Sept. 26, 1989



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(CONTINUED ON NEXT PAGE)

0228

EXHIBIT 'A'

Beginning at a concrete right-of-way marker at the intersection of the southern right-of-way of Woodruff Road (S.C. Highway 146) and the western right-of-way of Interstate 85 and running along Interstate 85 right-of-way S6-45W 113.09' to a concrete right-of-way marker, thence S55-10W 145.00' to a point, thence leaving I-85 right-of-way N50-59W 197.00' to a point, thence N39-01E 233.00' to a point on the right-of-way of Woodruff Road, thence along said right-of-way S51-36E 177.00' to the point of beginning. This tract contains 1.145 acres.

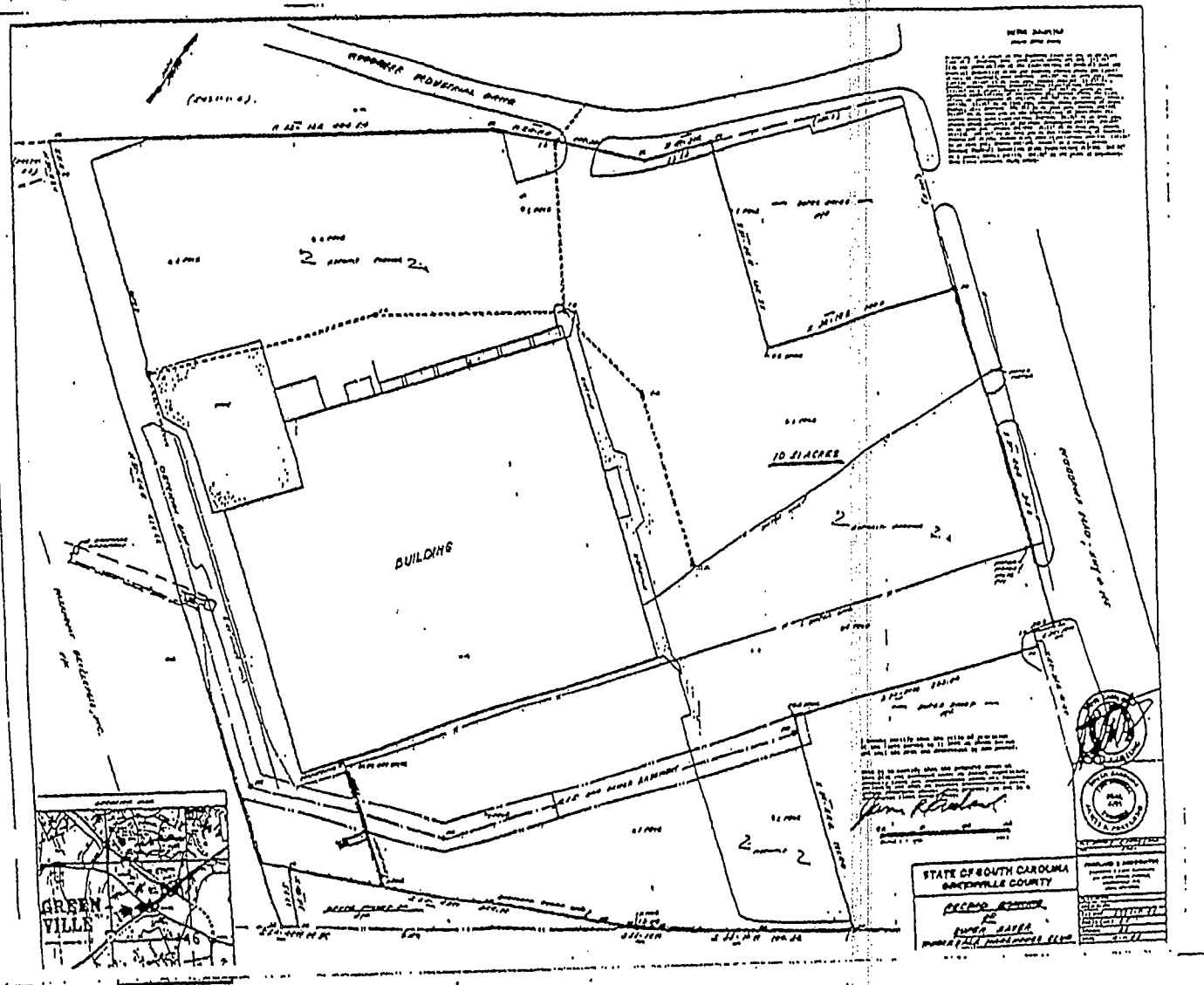
EXHIBIT 'B'

Beginning at a point on the southern right-of-way on Woodruff Road (S.C. Highway 146) said point being S51-48E 172.50' from the intersection of the right-of-way of Woodruff Road and Woodruff Industrial Drive and running thence along the right-of-way of Woodruff Road S51-48E 315.30' to an iron pin, thence S38-10W 20.00' to an iron pin, thence S51-36E 12.47' to a point, thence leaving Woodruff Road right-of-way S39-01W 233.00' to a point, thence S50-59E 197.00' to point on the western right-of-way of Interstate 85, thence along the right-of-way of Interstate 85 S55-10W 188.52' to an iron pin, thence S55-16W 13.40' to an iron pin, thence along property of Boyce Miller, Jr., S64-63W 326.72' to an iron pin, thence S42-51E 54.07' to an iron pin on the right-of-way of Interstate 85, thence along said right-of-way S54-42W 14.35' to an iron pin, thence along property of Paramount Developers N51-44W 696.63' to an iron pin, thence N51-09W 25.11' to an iron pin, thence N53-13E 404.64' to an iron pin on the right-of-way of Woodruff Industrial Drive, thence along said right-of-way N64-11E 142.30' to an iron pin, thence N41-31E 63.68' to a point, thence leaving Woodruff Industrial Drive right-of-way S51-48E 182.93' to a point, thence N38-12E 180.00' to the point of beginning. This tract contains 10.51 acres.

0231

(CONTINUED ON NEXT PAGE)

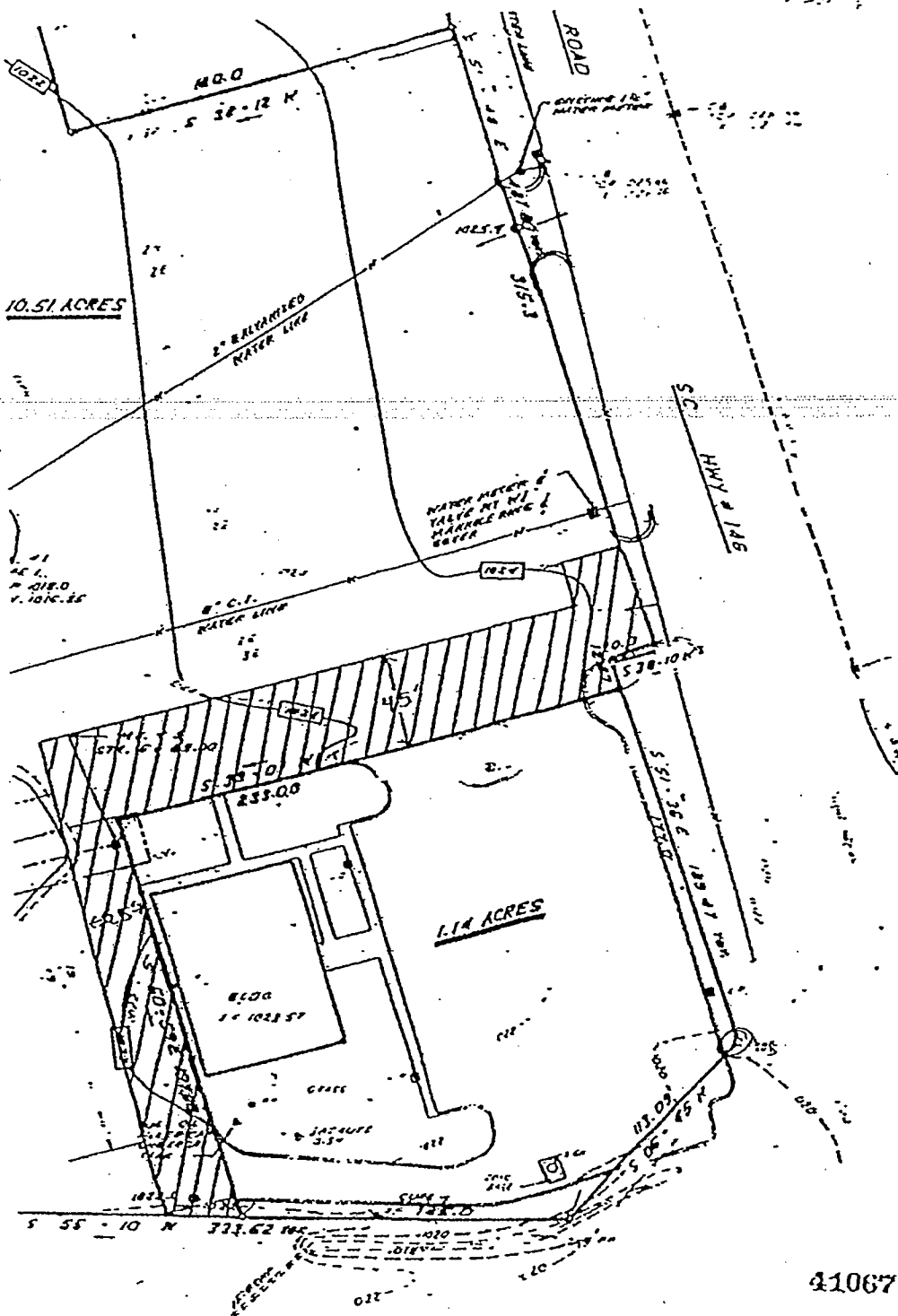
EXHIBIT 'C'



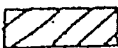
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EXHIBIT "D"

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RECORDED JUN 9 1986 at 2:31 P/M



Denotes Easement

Prepared by
Tinsley & Adams, LLP
418 Main Street, P O Box 1506
Greenville, SC 29648

2013051481 DEED
4 PGS
Book DE 2426 Page 2753-2756
June 26, 2013 04:24:43 PM Cons \$2,250,000.00
Rec \$10.00 Cnty Tax \$2,475.00 State Tax \$5,650.00

FILED IN GREENVILLE COUNTY, SC

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

DEED

Individual

KNOW ALL MEN BY THESE PRESENTS, that Joseph Dean Bagwell (hereinafter called "Grantor") for and in consideration of the sum of TEN AND NO/100 (\$10.00) DOLLARS and other valuable consideration, to the Grantor in hand paid at and before the sealing of these presents by SC Greenville Hwy 146, LLC, a South Carolina limited liability company (hereinafter called "Grantee") the receipt whereof is hereby acknowledged, has granted, bargained, sold and released, and by these presents do grant, bargain, sell and release unto the Grantee, its successors and assigns:

All that certain piece, parcel or lot of land, situate, lying and being in the State of South Carolina, County of Greenville, located at or near the intersection of Woodruff Road (Highway No. 146) with the right of way of Interstate Highway 85 containing 1.145 acres as shown on plat prepared for record drawing of Super Saver Wholesale Warehouse Club, property of Greenville Associates, Limited, by Freeland & Associates, Engineers dated December 13, 1985 and recertified on May 19, 1986 recorded in Book 12-H at Page 5 Reference to said plat is hereby craved for the metes and bounds thereof

Together with all rights of way and easement of every type and description including, without limitation, right of ingress and egress, parking use of advertising signs, water and sewer service as is more fully set out and subject to terms of Agreement between Mid South Development Company, Inc. and Greenville Associates Limited dated May 5 and 6, 1986 and recorded in the RMC Office for Greenville County in Deed Book 1268 at page 162 together with all rights of Grantors in and to agreement between Grantors and A Howard Wholesale Company, Inc., dated May 30, 1986 being recorded in the RMC Office for Greenville County in Deed book 1268 at Page 168.

This is the identical property conveyed to Joseph Dean Bagwell by deed of William M Brooks dated February 13, 2002 and recorded in the RMC Office in Deed Book 1884 at Page 1173 in Greenville County

Grantee's Mailing Address: 550 S. Main Street, Suite 300, Greenville SC 29601

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

TO HAVE AND TO HOLD, all and Singular the said Premises before mentioned unto the said Grantee, its Successors and Assigns forever.

And the Grantor does hereby bind himself and his heirs, successors and assigns, to warrant and forever defend all and singular the said premises unto the said Grantee, its Successors and Assigns against him and his heirs, successors and assigns, and any person whomsoever lawfully claiming, or to claim the same, or any part thereof.



Any reference in this instrument to the singular shall include the plural, and vice versa. Any reference to one gender shall include the others, including the neuter. Such words of inheritance shall be applicable as are required by the gender of the Grantee.

IN WITNESS WHEREOF, the Grantor has hereunto set his hand and seal.

DATE: 14th June 2013

SIGNED, SEALED AND DELIVERED
IN THE PRESENCE OF:

Thomas H. Hargis
Witness #1

Joseph Dean Bagwell
Joseph Dean Bagwell

[Signature]
Witness #2

STATE OF SOUTH CAROLINA

PROBATE

COUNTY OF Greenwood

PERSONALLY appeared before me the undersigned witness who, being first duly sworn, says that (s)he saw the within-named Grantor sign, seal, and deliver the within Deed; and that (s)he with the other witness whose signature appears above, witnessed the execution thereof.

Sworn to before me 14th June 2013

Thomas H. Hargis
Witness #1

[Signature]
NOTARY PUBLIC FOR SOUTH CAROLINA
MY COMMISSION EXPIRES: 8/1/14

STATE OF SOUTH CAROLINA)

Page 1 of 2

COUNTY OF GREENVILLE)

AFFIDAVIT FOR TAXABLE OR EXEMPT TRANSFERS

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

- 1 I have read the information on this affidavit and I understand such information
- 2 The property being transferred is located at 1130 Woodruff Road, Greenville SC bearing Greenville County Tax Map Number 0547010100905 was transferred by Joseph Dean Bagwell to SC Greenville Hwy 146, LLC, a South Carolina limited liability Company on June 2013
- 3 Check one of the following The Deed is
- (a) X Subject to the Deed recording fee as a transfer for consideration paid or to be paid in money or money's worth
- (b) _____ Subject to the deed recording fee as a transfer between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, or as a transfer to a trust or as a distribution to a trust beneficiary
- (c) _____ Exempt from the deed recording fee because (See information section of affidavit)
- (If Exempt, please skip items 4-7 and go to item 8 of this affidavit)

If exempt under exemption #14 as described in the Information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty? Check Yes _____ or No _____

- 4 Check one of the following if either item 3(a) or item 3(b) above has been checked (See information section of this affidavit)
- (a) X The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of 2,250,000.00
- (b) _____ The fee is computed on the fair market value of the realty which is _____
- (c) _____ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____
- 5 Check Yes _____ or No _____ to the following A lien or encumbrance existed on the land, tenement or realty before the transfer and remained on the land, tenement, or realty after the transfer If "Yes", the amount of the outstanding balance of this lien or encumbrance is _____
- 6 The deed recording fee is computed as follows
- | | | |
|-----|---|--------------|
| (a) | Place the amount listed in item 4 above here | 2,250,000.00 |
| (b) | Place the amount listed in item 5 above here
(If no amount is listed, place zero here) | _____ |
| (c) | Subtract Line 6(b) from Line 6(a) and place result here | 2,250,000.00 |

- 7 The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is _____
- 8 As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as _____
- 9 I understand that a person required to furnish this affidavit who willfully furnishes a false or fraudulent affidavit is guilty of a misdemeanor, and upon conviction, must be fined not more than one thousand dollars or imprisoned not more than one year, or both

Joseph D. Bagwell
Responsible Person Connected with the Transaction

Sworn to before me June 2013

Notary Public for South Carolina

My Commission Expires 8/14/22

Joseph D. Bagwell II
Print or Type Name Here

INFORMATION

Except as provided in this paragraph, the term "value" means "the consideration paid or to be paid in money or money's worth for the realty." Consideration paid or to be paid in money's worth includes, but is not limited to, the other realty, personal property, stocks, bonds, partnership interest and other intangible property, the forgiveness or cancellation of a debt, the assumption of a debt, and the surrendering of any right. The fair market value of the consideration must be used in calculating the consideration paid in money's worth. Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value of the consideration. In the case of realty transferred between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, and in the case of realty transferred to a trust or as a distribution to a trust beneficiary, "value" means the realty's fair market value. A deduction from value is allowed for the amount of any lien or encumbrance existing on the land, tenement, or realty before the transfer and remaining on the land, tenement, or realty after the transfer. Taxpayers may elect to use the fair market value for property tax purposes in determining fair market value under the provisions of the law.

Exempted from the fee are Deeds

- (1) transferring realty in which the value of the realty, as defined in Code Section 12-24-30, is equal to or less than one hundred dollars,
- (2) transferring realty to the federal government or to a state, its agencies and departments, and its political subdivisions, including school districts,
- (3) that are otherwise exempted under the laws and Constitution of this State or of the United States,
- (4) transferring realty in which no gain or loss is recognized by reason of Section 1041 of the Internal Revenue Code as defined in Section 12-6-40(A),
- (5) transferring realty in order to partition realty as long as no consideration is paid for the transfer other than the interests in the realty that are being exchanged in order to partition the realty,
- (6) transferring an individual grave space at a cemetery owned by a cemetery company licensed under Chapter 55 of Title 39,
- (7) that constitute a contract for sale of timber to be cut,
- (8) transferring realty to a corporation, a partnership, or a trust in order to become, or as a stockholder, partner, or trust beneficiary of the entity provided no consideration is paid for the transfer other than stock in the corporation, interest in the partnership, beneficiary interest in the trust, or the increase in value in such stock or interest held by the grantor. However, the transfer of realty from a corporation, a partnership, or a trust to a stockholder, partner, or trust beneficiary of the entity is subject to the fee even if the realty is transferred to another corporation, a partnership, or trust,
- (9) transferring realty from a family partnership to a partner or from a family trust to a beneficiary, provided no consideration is paid for the transfer other than a reduction in the grantee's interest in the partnership or trust. A 'family partnership' is a partnership whose partners are all members of the same family. A 'family trust' is a trust, in which the beneficiaries are all members of the same family. The beneficiaries of a family trust may also include charitable entities. 'Family' means the grantor and the grantor's spouse, parents, grandparents, sisters, brothers, children, stepchildren, grandchildren, and the spouses and lineal descendants of any of the above. A 'charitable entity' means an entity which may receive deductible contributions under Section 170 of the Internal Revenue Code as defined in Section 12-6-40(A),
- (10) transferring realty in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation to the continuing or new corporation,
- (11) transferring realty in a merger or consolidation from a constituent partnership to the continuing or new partnership,
- (12) that constitute a corrective deed or a quitclaim deed used to confirm title already vested in the grantee, provided no consideration of any kind is paid or to be paid for the corrective or quitclaim deed,
- (13) transferring realty subject to a mortgage to the mortgagee whether by a deed in lieu of foreclosure executed by the mortgagor or deed pursuant to foreclosure proceedings,
- (14) Transferring realty from an agent to the agent's principal in which the realty was purchased with funds of the principal, provided that a notarized document is also filed with the deed that establishes the fact that the agent and principal relationship existed at the time the original purchase as well as for the purpose of purchasing the realty,
- (15) Transferring title to facilities for transmitting electricity that is transferred, sold, or exchanged by electrical utilities, municipalities, electric cooperatives, or political subdivisions to a limited liability company which is subject to regulation under the Federal Power Act (16 U.S.C. Section 791(a)) and which is formed to operate or to take functional control of electric transmission assets as defined in the Federal Power Act.

FILED FOR RECORD IN GREENVILLE COUNTY, SC ROD
2013051481 Book: DE 2428 Page: 2755-2758
June 20, 2013 04:24:43 PM

Timothy J. Hanning

Mail after recording to:
Harbor City Title Insurance Agency, Inc.
6201 Fairview Road, Suite 225
Charlotte, NC 28210
File # 1008-2260

Grantee's Address: 3333 New Hyde Park Road, Suite 100
New Hyde Park, NY 11042

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

LIMITED WARRANTY DEED
(Lot 2)

KNOW ALL MEN BY THESE PRESENTS, that WOODRUFF 100, LLC, a South Carolina limited liability company (hereinafter "Grantor") in consideration of Fourteen Million One Hundred Eighty-Nine Thousand Three Hundred Sixty and No/100 Dollars (\$14,189,360.00), has granted, bargained, sold, and released, and by these presents does grant, bargain, sell, and release unto WOODRUFF ROAD SC, LLC, a South Carolina limited liability company (hereinafter "Grantee"), its successors and assigns, all of Grantor's right, title and interest in the following described real property:

Reference is made to Exhibit A which is incorporated hereby by reference (the "Property").

Greenville County Tax Map No.: Portion of Parcel #0547010100904.

TOGETHER WITH all and singular, the rights, members, hereditaments, and appurtenances to the Property and all of the improvements belonging or in anywise incident or appertaining thereto.

THIS CONVEYANCE is made subject to the matters set forth on Exhibit B to the extent same affects the Property without re-imposing the same herein.

TO HAVE AND TO HOLD, all and singular, the Property unto Grantee and Grantee's successors and assigns, forever and Grantor does hereby bind itself and its successors and assigns to warrant and forever defend, all and singular, the Property unto Grantee and Grantee's successors and assigns against Grantor and its successors and assigns and any person or persons whomsoever lawfully claiming or to claim the same, or any part thereof, by, through, or upon Grantor, but not otherwise.

[SIGNATURE ON FOLLOWING PAGE]



2010081000 DEED
5 PGS
Book: DE 2381 Page: 625-643
November 20, 2010 09:55:23 AM Cone: \$14,189,360.00
Rec: \$12.00 Cnty Tax: \$15,860.45 State Tax: \$28,662.72

FILED IN GREENVILLE COUNTY, SC

1282038.1

1



0237

IN WITNESS WHEREOF, Grantor has set its hand and seal to this deed this 22nd day of
November, 2010.

Witnesses:

Woodruff 100, LLC, a South Carolina
limited liability company

[Signature]
Michele F. Lyne

By: [Signature] (SEAL)
Name: G. Jackson Hughes, Jr.
Its: Manager

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

ACKNOWLEDGMENT

I, Michele F. Lyne, a notary public for said County and State, do
hereby certify that G. Jackson Hughes, Jr., as the duly authorized Manager of Woodruff 100,
LLC, a South Carolina limited liability company, personally appeared before me this date and
executed the foregoing instrument.

WITNESS my hand and notarial seal this 22nd day of November, 2010.

[Signature]
Notary Public for South Carolina
My Commission Expires: My Commission Expires
November 3, 2016

EXHIBIT A

Legal Description

ALL THAT CERTAIN piece, parcel, or tract of land, with improvements thereon, situate, lying and being in the State of South Carolina, County of Greenville, and being shown and designated as Lot 2, containing 7.32 acres, more or less, according to a plat of survey entitled "Subdivision for Woodruff 100" prepared by MSP & Associates Land Surveying, Inc., dated September 21, 2010, and recorded in the Office of the Register of Deeds for Greenville County, South Carolina in Plat Book 1112 at Page 28 on November 9, 2010 and having such metes and bounds, courses and distances as are shown on said plat, which is incorporated herein by reference.

The above-described property is a portion of the property conveyed to 100 Woodruff, LLC by deed of Natick SC Greenville Realty Corp., a South Carolina corporation recorded in the Office of the Register of Deeds for Greenville County in Book 2342 at Page 1509 on October 7, 2008.

EXHIBIT B

Title Exceptions

EXHIBIT B

1. Easements, Setback Lines and any other facts shown on that Plat in Book 42H, Pages 18A and B; and Book 1088, Page 16, all of the Greenville County Registry.
2. Terms and Conditions of Memorandum of Lease by and between Woodruff 100, LLC, Lessor, and Academy, Ltd., Lessee, recorded in Book DE2343, Page 1914 of the Greenville County Registry.
3. Deed to Right of Way and Release Agreement to the City of Greenville as recorded in Book 740, Page 197 of the Greenville County Registry.
4. Easement(s) in favor of Duke Power Company as recorded in Book 377, Page 479; Book 381, Page 401; and Book 1269, Page 588; all of the Greenville County Registry.
5. Easement(s) in favor of Southern Public Utilities Company as recorded in Book 166, Page 56 of the Greenville County Registry.
6. ~~Agreement, by and between Mid-South Development Company, Inc. and Greenville Associates, Ltd. as recorded in Book 1268, Page 152 of the Greenville County Registry.~~
7. Reservation of easement for sanitary sewer line contained in Deed from Mid-South Development Company, Inc. to Greenville Associates, Ltd. dated December 26, 1985 as recorded in Book 1256, Page 391 of the Greenville County Registry.
8. Declaration of Covenants and Reciprocal Easement Agreement by and between Natick SC Greenville Realty Corp. and Home Depot USA, Inc. dated June 7, 2000 as recorded in Book 1914, Page 576; as affected by Amendment to Declaration of Covenants and Reciprocal Easement Agreement recorded in Book DE2342, Page 1513; as affected by Second Amendment to Declaration of Covenants and Reciprocal Easement Agreement recorded in Book DE2353, Page 1225, all of the Greenville County Registry.
9. Sanitary Sewer Easement(s) in favor of the City of Greenville as recorded in Book 1996, Page 1641; and Book DE2358, Page 130, all of the Greenville County Registry.
10. Cross Access, Storm Drainage and Parking Easement by and between Woodruff 100, LLC and Verdae Properties, LLC dated October 3, 2008 as recorded in Book DE2342, Page 1522 of the Greenville County Registry.

11. Rights of tenants, as tenants only, under unrecorded leases, as set forth in the Exhibit.
12. Easement(s) in favor of Commissioner's of Public Works of the City of Greenville, South Carolina as recorded in Book DE2351, Page 5213 of the Greenville County Registry.
13. Permit Variance issued by the City of Greenville recorded in Book 2359, Page 3061; and Book 2363, Page 2859, all of the Greenville County Registry.
14. Terms and Conditions of Memorandum of Lease by and between Woodruff 100, LLC, Lessor, and Trader Joe's East, Inc., Lessee, recorded in Book DE2373, Page 5409 of the Greenville County Registry.
15. As to Parcels 2 and 3: Terms and Conditions of Memorandum of Lease by and between Verdae Properties, Inc., Lessor, and Home Depot USA, Inc., Lessee, recorded in Book 1799, Page 772; as affected by Fifth Amendment to Lease and First Amendment to Memorandum of Lease recorded in Book 1871, Page 650; as affected by Sixth Amendment to Lease and Second Amendment to Memorandum of Lease recorded in Book 1890, Page 731.
16. Easement Agreement dated as of the 19th day of November, 2010 by and between WOODRUFF 100, LLC, and WOODRUFF ROAD SC, LLC, to be recorded simultaneously herewith.
17. Restriction Agreement dated as of the 19th day of November, 2010, by and between Woodruff Road SC, LLC and Woodruff 100, LLC, to be recorded simultaneously herewith.

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

AFFIDAVIT FOR TAXABLE OR EXEMPT TRANSFERS

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

1. I have read the information on this affidavit and I understand such information.
2. The property being transferred is located at Lot 2 containing 7.32 ± acres located near Woodruff Road in Greenville, South Carolina being a portion of County Tax Map Number 0547010100904, was transferred by Woodruff 100, LLC to Woodruff Road SC, LLC on November 19, 2010.
3. Check one of the following. The deed is

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

(If exempt, please skip items 4-7, and go to item 8 of this affidavit.)

If exempt under exemption #14 as described in the Information section of this affidavit, did the agent and principal relationship exist at the time of the original sale and was the purpose of this relationship to purchase the realty?
Check Yes ☐ or No ☐

4. Check one of the following if either item 3(a) or item 3(b) above has been checked (See Information section of this affidavit):

- a) ☒ The fee is computed on the consideration paid or to be paid in money or money's worth in the amount of \$14,189,360.00.
- b) ☐ The fee is computed on the fair market value of the realty which is _____
- c) ☐ The fee is computed on the fair market value of the realty as established for property tax purposes which is _____

5. Check Yes ☐ or No ☒ to the following: A lien or encumbrance existed on the land, tenement, or realty before the transfer and remained on the land, tenement, or realty after the transfer. If "Yes", the amount of the outstanding balance of this lien or encumbrance is: _____

6. The deed recording fee is computed as follows:

- a) Place the amount listed in item 4 above here: \$14,189,360.00
- b) Place the amount listed in item 5 above here: \$0.00
(If no amount is listed, place zero here.)
- c) Subtract Line 6(b) from Line 6(a) and place result here: \$14,189,360.00

7. The deed recording fee due is based on the amount listed on Line 6(c) above and the deed recording fee due is: \$52,501.15.

8. As required by Code Section 12-24-70, I state that I am a responsible person who was connected with the transaction as Seller's Manager.

GREENVILLE 1252330 1
11/18/10

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

G. Jackson Hughes, Jr.
Signature of Responsible Person Connected with the Transaction

G. Jackson Hughes, Jr.
Print or Type Name Here

SWORN to before me this 10th
day of November, 2010.

Michael J. Dwyer
Notary Public for
My Commission Expires November 8, 2018

INFORMATION

Except as provided in this paragraph, the term "value" means "the consideration paid or to be paid in money or money's worth for the realty." Consideration paid or to be paid in money's worth includes, but is not limited to, other realty, personal property, stocks, bonds, partnership interest and other intangible property, the forgiveness or cancellation of a debt, the assumption of a debt, and the surrendering of any right. The fair market value of the consideration must be used in calculating the consideration paid in money's worth. Taxpayers may elect to use the fair market value of the realty being transferred in determining fair market value of the consideration. In the case of realty transferred between a corporation, a partnership, or other entity and a stockholder, partner, or owner of the entity, and in the case of realty transferred to a trust or as a distribution to a trust beneficiary, "value" means the realty's fair market value. A deduction from value is allowed for the amount of any lien or encumbrance existing on the land, tenement, or realty before the transfer and remaining on the land, tenement, or realty after the transfer. Taxpayers may elect to use the fair market value for property tax purposes in determining fair market value under the provisions of the law.

Exempted from the fee are deeds:

- (1) transferring realty in which the value of the realty, as defined in code Section 12-14-30, is equal to or less than one hundred dollars,
- (2) transferring realty to the federal government or to a state, its agencies and departments, and its political subdivisions, including school districts,
- (3) that are otherwise exempted under the laws and Constitution of this State or of the United States,
- (4) transferring realty in which no gain or loss is recognized by reason of Section 1041 of the Internal Revenue Code as defined in Section 12-6-40(A),
- (5) transferring realty in order to partition realty as long as no consideration is paid for the transfer other than the interests in the realty that are being exchanged in order to partition the realty,
- (6) transferring an individual grave space at a cemetery owned by a cemetery company licensed under Chapter 55 of Title 39,
- (7) that constitute a contract for the sale of timber to be cut,
- (8) transferring realty to a corporation, a partnership or a trust in order to become, or as, a stockholder, partner, or trust beneficiary of the entity provided no consideration is paid for the transfer other than stock in the corporation, interest in the partnership, beneficiary interest in the trust, or the increase in value in such stock or interest held by the grantor. However, the transfer of realty from a corporation, a partnership, or a trust to a stockholder, partner, or trust beneficiary of the entity is subject to the fee even if the realty is transferred to another corporation, a partnership, or trust,
- (9) transferring realty from a family partnership to a partner or from a family trust to a beneficiary, provided no consideration is paid for the transfer other than a reduction in the grantor's interest in the partnership or trust. A "family partnership" is a partnership whose partners are all members of the same family. A "family trust" is a trust in which the beneficiaries are all members of the same family. The beneficiaries of a family trust may also include charitable entities. "Family" means the grantor and the grantor's spouse, parents, grandparents, sisters, brothers, children, stepchildren, grandchildren, and the spouses and lineal descendants of any of the above. A "charitable entity" means an entity which may receive deductible contributions under Section 170 of the Internal Revenue Code as defined in Section 12-6-40(A),
- (10) transferring realty in a statutory merger or consolidation from a constituent corporation to the continuing or new corporation,
- (11) transferring realty in a merger or consolidation from a constituent partnership to the continuing or new partnership;
- (12) that constitute a corrective deed or a quitclaim deed used to confirm title already vested in the grantee, provided that no consideration of any kind is paid or is to be paid under the corrective or quitclaim deed,
- (13) transferring realty subject to a mortgage to the mortgagee whether by a deed in lieu of foreclosure executed by the mortgagor or deed executed pursuant to foreclosure proceedings,
- (14) transferring realty from an agent to the agent's principal in which the realty was purchased with funds of the principal, provided that a notarized document is also filed with the deed that establishes the fact that the agent and principal relationship existed at the time of the original purchase as well as for the purpose of purchasing the realty, and,
- (15) transferring title to facilities for transmitting electricity that is transferred, sold, or exchanged by electrical utilities, municipalities, electric cooperatives, or political subdivisions to a limited liability company which is subject to regulation under the Federal Power Act (16 U.S.C. Section 791(a)) and which is formed to operate or to take functional control of electric transmission assets as defined in the Federal Power Act

FILED FOR RECORD IN GREENVILLE COUNTY, SC ROD
2010081800 Book: DE 2381 Page: 636-643

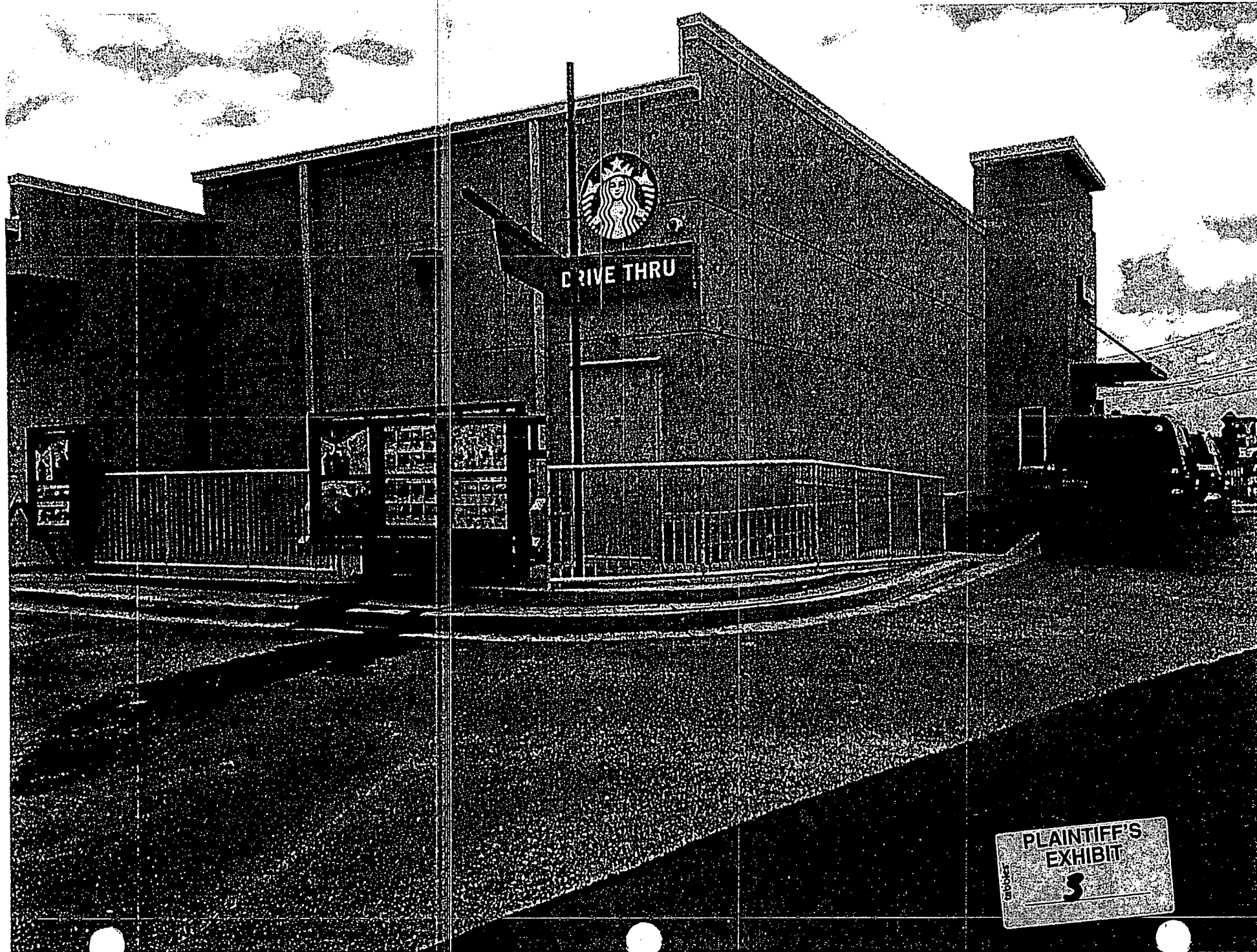
November 29, 2010 02:58:35 PM

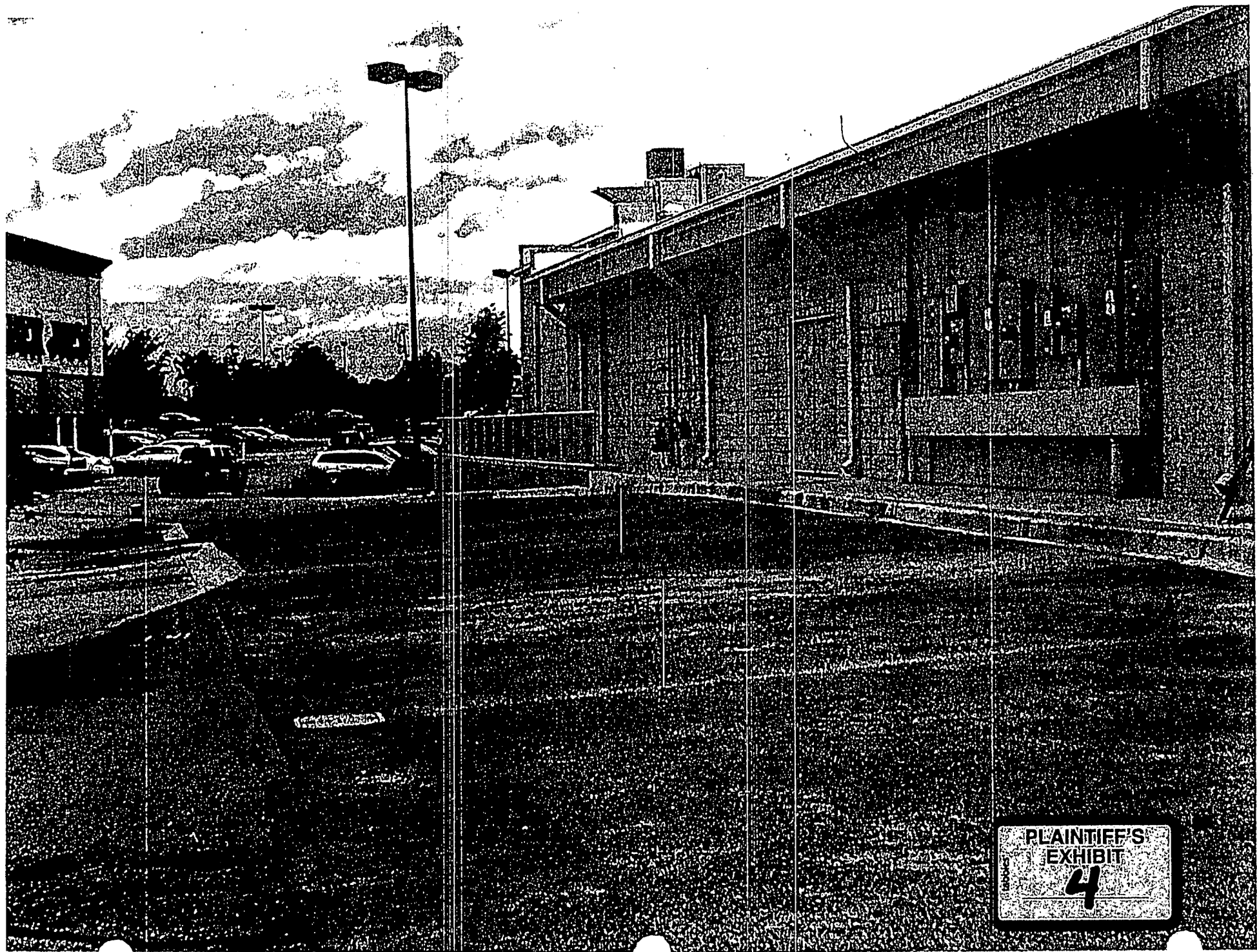
Timothy J. Manning

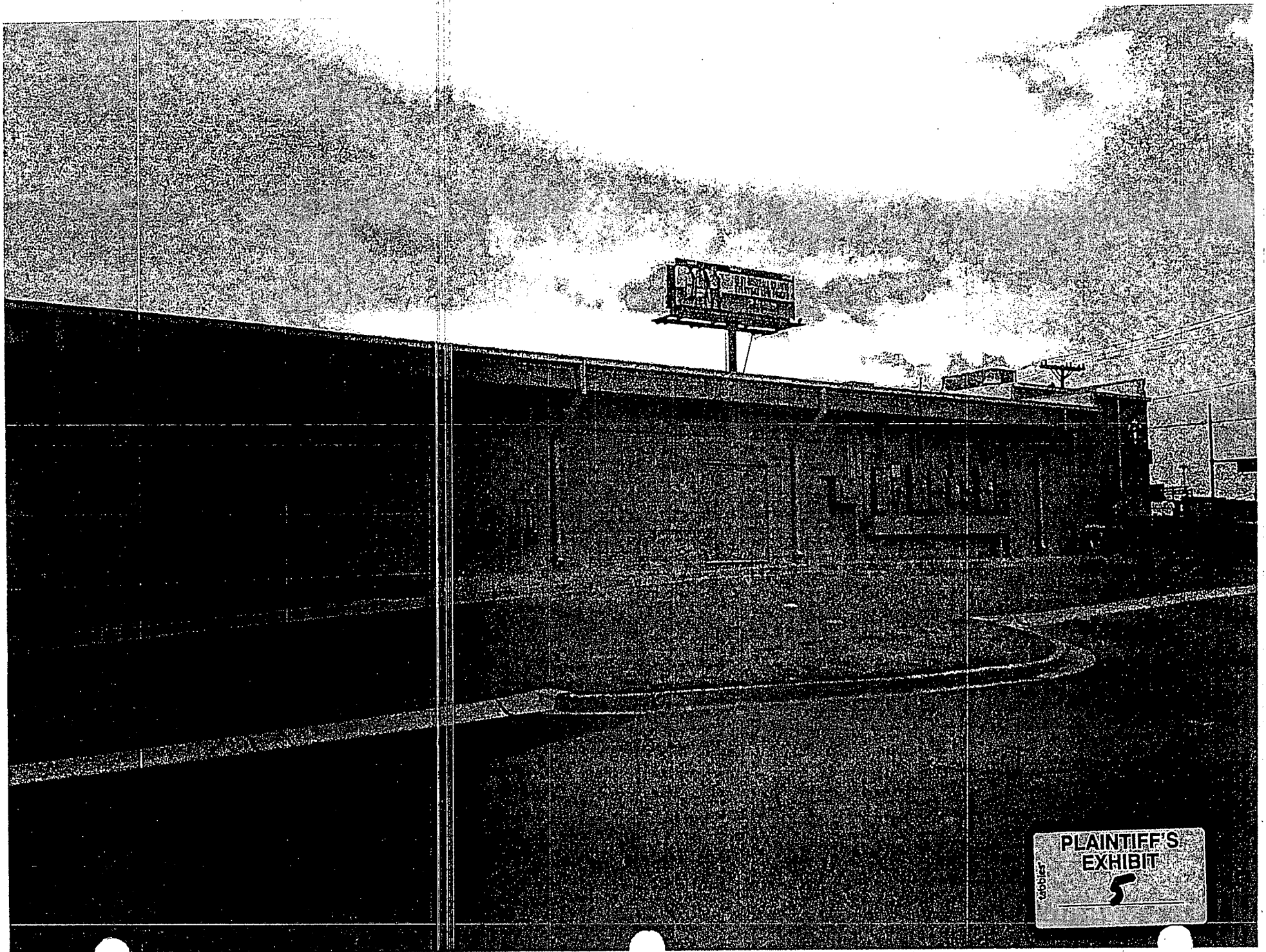
GREENVILLE 1252330 1
11/18/10



PLAINTIFF'S
EXHIBIT
2







PLAINTIFF'S
EXHIBIT
5

CONFIDENTIAL

COMMERCIAL LEASE

1130 WOODRUFF ROAD
GREENVILLE, SOUTH CAROLINA

between

SC GREENVILLE HWY 146, LLC

and

STARBUCKS CORPORATION



PJW STARBUCKS

CONFIDENTIAL

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CONFIDENTIAL

COMMERCIAL LEASE (Multi-Tenant Building)

THIS COMMERCIAL LEASE ("Lease"), is made and entered into as of June 18, 2013 by and between SC Greenville Hwy 146, LLC, a South Carolina limited liability company ("Landlord") and Starbucks Corporation, a Washington corporation ("Tenant").

1. PREMISES.

1.1 PREMISES. Landlord will be the owner of a building located at 1130 Woodruff Road, Greenville, SC (the "Building") situated upon the real property legally described in Exhibit A attached hereto and by this reference incorporated herein (the "Property"). ~~In consideration of the mutual promises, covenants, and conditions herein set forth, Landlord hereby leases to Tenant, and Tenant hereby leases from Landlord, for the Term (defined below) of this Lease, those certain premises with a fully entitled drive-through in the Building containing approximately 1,790 square feet of Gross Leasable Area (as defined below) and measuring 24.71' x 70', as shown by cross-hatching on Exhibit B attached hereto and by this reference incorporated herein (the "Premises"). In addition, Tenant shall have the right to operate a drive-through facility containing one (1) drive-through lane as shown on Exhibit B-1, a pass-through lane if required by any applicable laws, rules, or regulations, and install a clearance bar in a location to be determined by Tenant in its sole discretion in the rear of the Building. Tenant understands that an easement restricting such clearance bar is in effect and may not be allowed based on previous restrictions placed on the Property that affect the drive-through area. If Tenant is notified any time during the Term (as defined in Section 2.1 below) that it must remove such clearance bar, Landlord agrees to replace it as shown on the attached Exhibit B-1 or at a mutually agreeable location. For purposes of this Lease, the "Gross Leasable Area" of the Premises means the interior space of the Premises as measured from the inside face of all demising walls and the exterior measurement on all non-demising walls of the Building, and shall not include the drive-through area, any outdoor seating area, common areas or any other areas exterior to the Premises. Tenant is also the beneficiary of easement rights over certain parcels adjacent to and near the Premises pursuant to that certain Agreement by and between Mid-South Development Company, Inc. and Greenville Associates, Ltd. dated May 5, 1986 and recorded in Book 1268, Page 152 of the Greenville County Register of Deeds Office (the "REA").~~

1.2 TITLE CONTINGENCY. ~~Landlord shall become the fee simple owner of the Property on or before June 30, 2013 (the "Closing Date"), and Landlord shall provide Tenant a copy of the recorded warranty deed indicating Landlord as the fee simple owner (the "Deed") within fourteen (14) days after the Closing Date. If Tenant fails to receive a copy of the Deed within the 14-day period, Tenant may terminate this Lease by giving ten (10) days notice to Landlord; provided, however, if Landlord provides Tenant a copy of the Deed within said ten (10) day period, Tenant's termination shall be null and void, and the Lease shall remain in full force and effect. In the event Tenant terminates this Lease pursuant to this Section, Landlord shall reimburse Tenant for all of Tenant's expenses incurred in connection with this Lease, including, without limitation, site selection and lease negotiation costs and expenses (including the allocated cost of in-house personnel). Landlord shall also return all monies previously deposited by Tenant, if any, within five (5) business days of the date Landlord receives Tenant's notice of termination.~~

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2. TERM.

2.1 TERM. The "Initial Term" shall mean ten (10) Lease Years, commencing on the Rent Commencement Date (as defined in Section 3.1 below), and ending on the last day of the tenth (10th) Lease Year, unless sooner terminated or extended as provided herein. For purposes of this Lease, the word "Term" shall mean the Initial Term and any Extension Term (as defined in Section 2.4.1 below), and the "Expiration Date" shall mean the last day of the last Lease Year of the Term. Promptly after the Rent Commencement Date, Landlord and Tenant shall execute a certificate in the form of Exhibit F stating the actual Commencement Date (as defined in Section 2.2. below), the Rent Commencement Date, and the Expiration Date. Landlord's failure or refusal to execute and deliver such certificate to Tenant within ten (10) days after receipt thereof shall constitute an acknowledgment by Landlord that the factual statements contained therein are true and correct without exception and may be relied upon by Tenant.

2.2 DELIVERY. The "Commencement Date" shall mean the date on which all of the following conditions have been satisfied, or waived by Tenant in writing:

- (a) Landlord has completed Landlord's Work (as defined in Section 4.2);
- (b) Landlord has delivered actual possession and control of the Premises to Tenant;
- (c) Landlord and Tenant have executed and delivered a written notice of delivery and acceptance of the Premises in the form attached hereto as Exhibit D;
- (d) Landlord has delivered a fully executed copy of this Lease to Tenant;
- (e) Landlord has removed all Hazardous Substances from the Property and the Premises and provided evidence thereof from the applicable government agency or certified environmental consultant, including but not limited to removal of the heating oil tank (UST) in accordance with all Environmental Laws, and performance of all required testing and cleanup in connection therewith, and reasonable proof of such removal from the applicable government agency or certified environmental consultant.

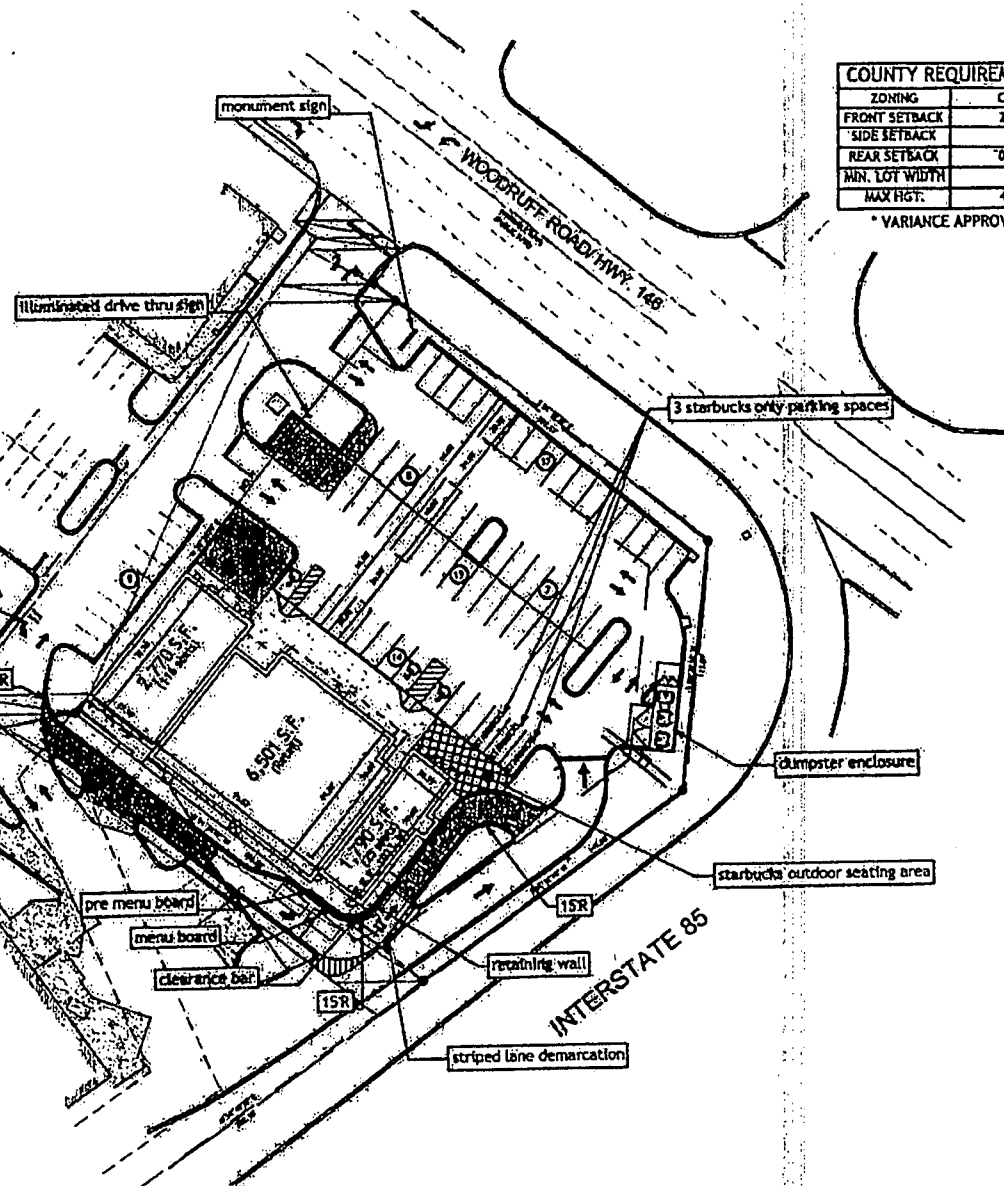
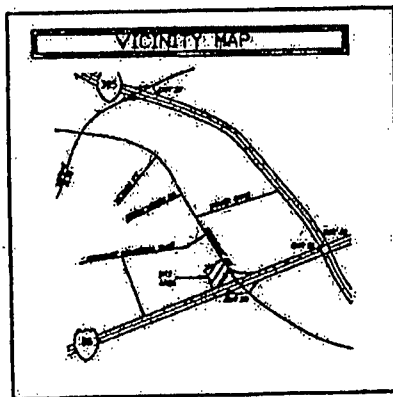
Landlord shall deliver the Premises to Tenant, in the condition called for in subsections (a) through (e) above on November 1, 2013 (the "Scheduled Delivery Date"). Tenant, in its sole discretion, may elect to accept delivery of the Premises prior to the aforesaid date, but is not required to do so. Tenant's election to accept delivery of the Premises prior to the Scheduled Delivery Date (or any other changes to the Scheduled Delivery Date) must be in writing and signed by a duly authorized signatory of Tenant in order to be effective.

2.3 LEASE YEAR. For the purpose of this Lease, subject to the two additional provisions set forth below in this Section 2.3, the term "Lease Year" shall mean and refer to that period of twelve (12) full consecutive calendar months beginning with the first full calendar month of the Term and each subsequent period of twelve (12) consecutive calendar months during the Term. If the Term commences on a day other than the first day of a calendar month, then the initial fractional month of the Term plus the next succeeding twelve (12) full calendar months shall constitute the first Lease Year of the Term. If the last day of the first Lease Year

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COUNTY REQUIREMENTS	
ZONING	C-2
FRONT SETBACK	25'
SIDE SETBACK	0'-0"
REAR SETBACK	0'-0"
MIN. LOT WIDTH	0'-0"
MAX HGT.	45'

* VARIANCE APPROVED

blueWATER
civil design

bluewater civil design, LLC
11 Washington Park, Suite 100 • Greenville, SC 29601
www.bluewatercivil.com • info@bluewatercivil.com

site data

jurisdiction: Greenville County
tax map no.: 0547010100905
zoning: C-2 Commercial
parcel area: 11.1 acres
PROPOSED
building area: 11,061 S.F.
parking: 75 SPACES



scale: 1" = 50'

Starbucks
Woodruff Road

SITE PLAN

SP-13

EXHIBIT B-1

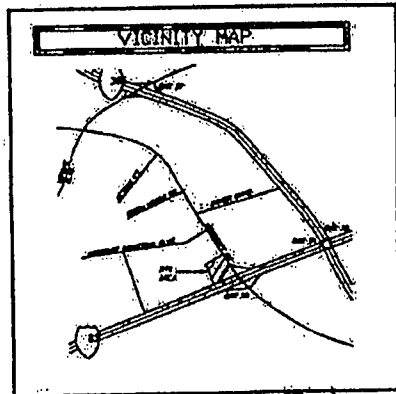
DRIVE THROUGH LANES, PARKING, TRASH ENCLOSURES AND OUTDOOR SEATING

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© 2001 Starbucks Corporation
Revised October 2010

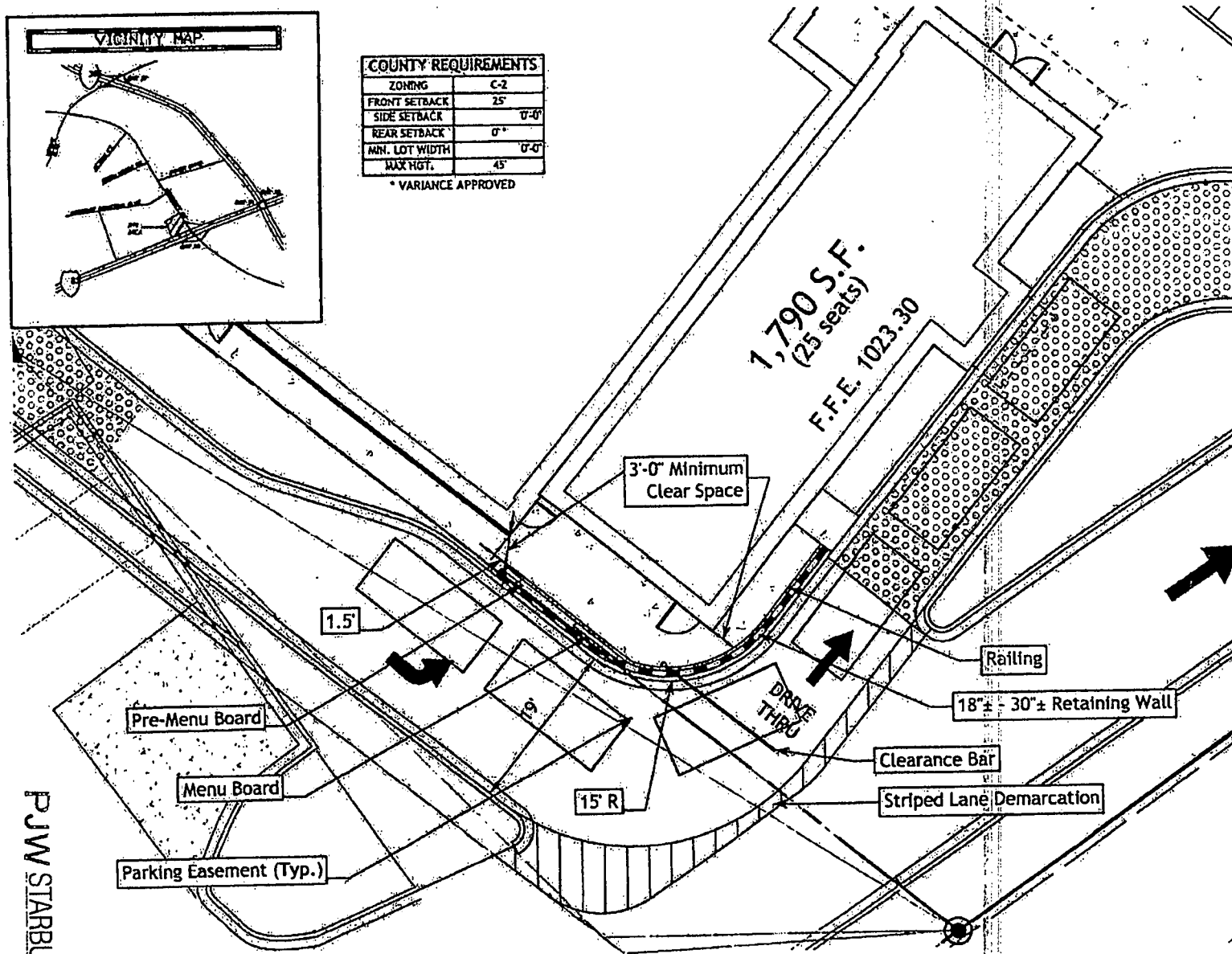
PJW STARBUCKS

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blueWATER
civil design

bluewatercivil.com
11 Washington Park, Suite 100 • Greenville, SC 29601
www.bluewatercivil.com • info@bluewatercivil.com

site data

Jurisdiction: Greenville County
tax map no.: 0547010100905
zoning: C-2 Commercial
parcel area: ±1.1-acres
PROPOSED
building area: 11,061 S.F.
parking: 75 SPACES



scale: 1" = 50'

Starbucks
Woodruff Road
DRIVE THRU
PLAN

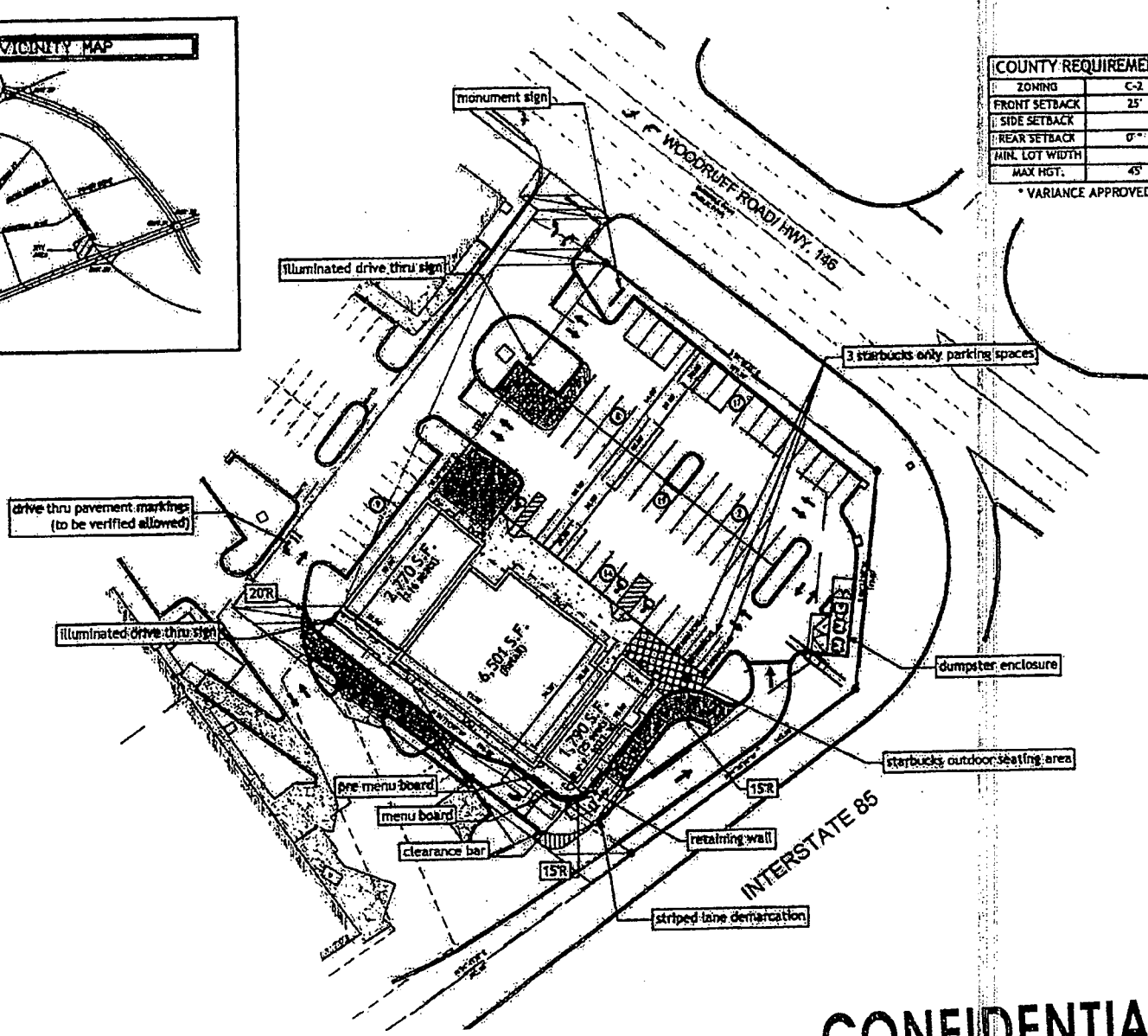
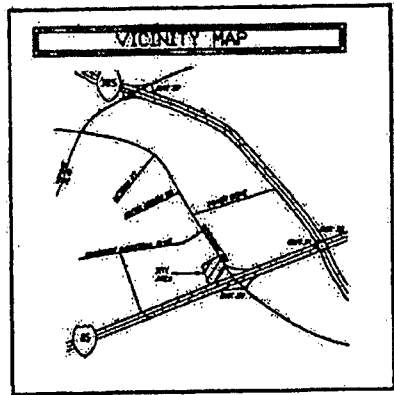
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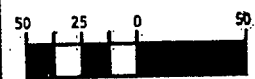


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civil design
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19 Washington Park, Suite 100 • Greenville, SC 29601
www.bluewatercivil.com • info@bluewatercivil.com

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parking: 75 SPACES



scale: 1" = 50'

Starbucks
Woodruff Road

SITE PLAN
SP-13

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STARBUCKS COFFEE COMPANY

Landlord Work Letter

DT - Site Concrete	- Furnish and install concrete footings and anchor bolts per Tenant's construction documents for the following items: 1) Preview menu board 2) Order menu board 3) Speaker post/Order Confirmation System (OCS) 4) Directional signage (minimum 3 per store) 5) DT Entry Beacon Sign 6) Height restriction bar 7) Tenant's dedicated Monument sign/pylon sign 8) DT artwork panels (minimum 6 per store) 9) Order menu board shroud/canopy - portal enclosure - Provide pad constructed of 6" thick, reinforced with welded wire mesh, stamped concrete. The width of the pad shall be the width of the drive-thru lane or no less than 12' wide and the length shall extend 18'. - Provide two (2) areas of porous paving per Tenant's construction document. The first porous paving area shall be; 1. The width of the drive-thru lane or no less than 12' wide and the length shall extend from entry to drive thru lane (as indicated on Tenant's design drawings) to 16' beyond this point. The second porous paving area shall be; 2. The width of the drive-thru lane or no less than 12' wide and the length shall extend 8' in either direction from the centerline of the order confirmation system (OCS). - Provide sidewalk along drive thru lane of stamped and stained concrete paving per Tenants construction documents. - Furnish and install 6" diameter steel pipe bollards, filled with concrete, painted and located per Tenant's construction documents.
DT - Drive-Thru Window	- Furnish and install the Tenant specified drive-thru service window with all connections fully operational per manufacturer's specifications per Tenant's construction documents. - Furnish and install 110-volt 15 amp service, transoms and sidelights, including bump out and exterior shelf, per Tenant's construction documents. - Height of service window must be 36" on the inside above finished floor and 42" on the outside measured from drive-thru lane. - Furnish and install air curtain/fly fan at drive thru window per Tenant's construction documents or local code.
DT - Awnings	Furnish and install an exterior awning above drive-thru window per Tenant's construction documents.
DT - Site Lighting	- Furnish and install two (2) exterior, Tenant specified, lights located adjacent to drive-thru window per Tenant's construction documents. - Minimum foot candles for exterior lighting around building perimeter shall be a minimum of 1.5 ftc at grade level.

Landlord: William T. Runze
Print Name: WILLIAM T. RUNZE
Title: TRUCKER
Date: 12-4-12

Tenant: Starbucks Coffee Company
Print Name: Warren Webster
Title: Store Development Manager
Date: 12-28-12

LL Initials WR Date 12-4-12

Tenant Initials WW Date 12-28-12

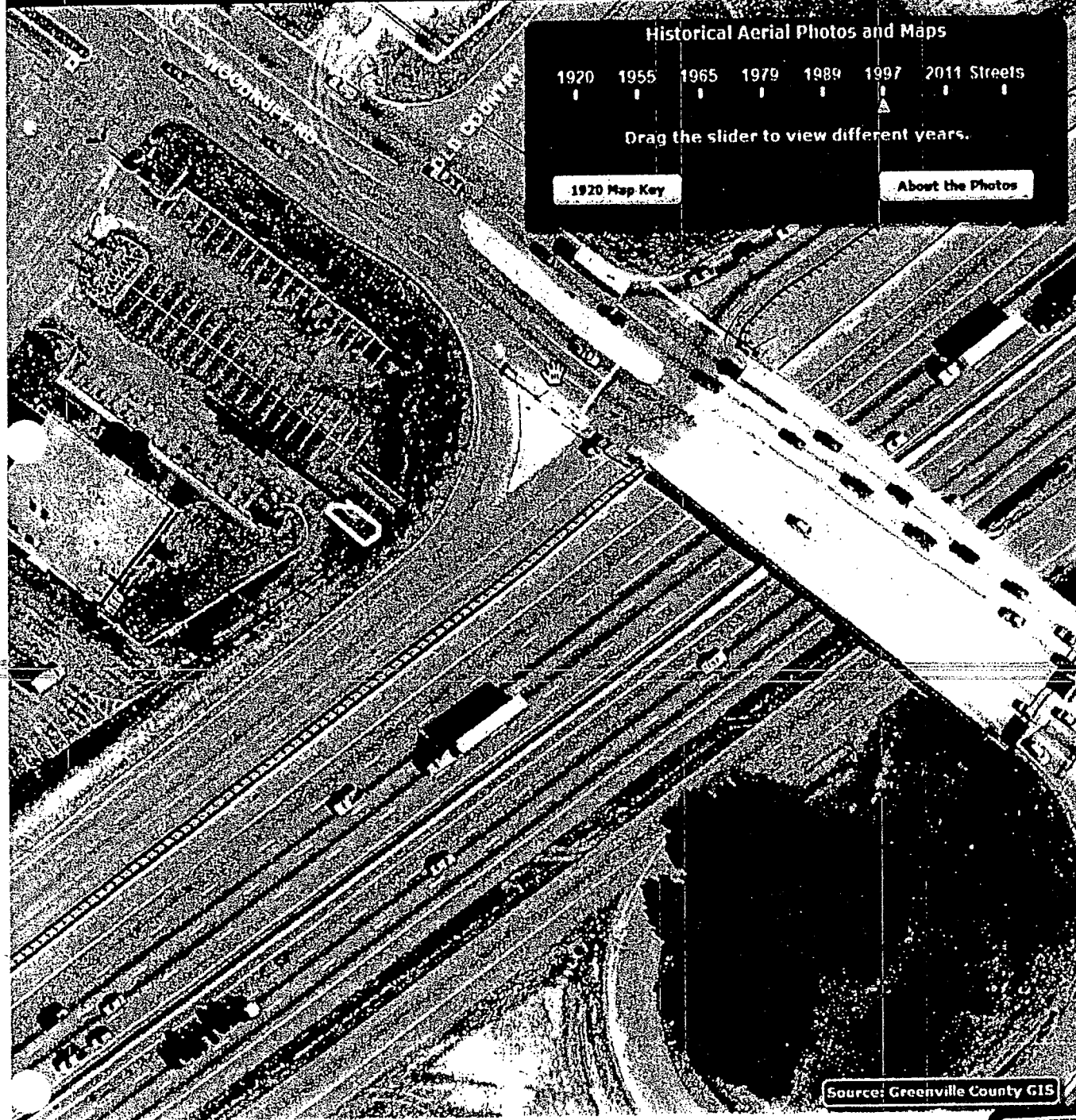
Version Date: September 14, 2012

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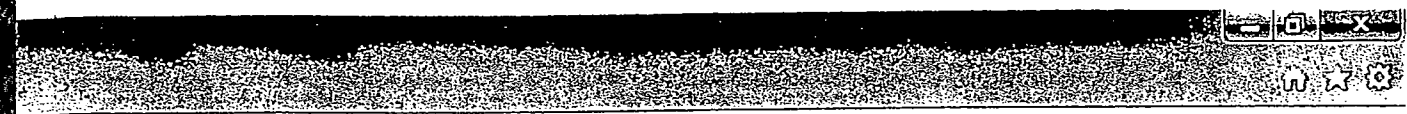
Historical Aerial Photos and Maps

1920 1955 1965 1979 1989 1997 2011 Streets

Drag the slider to view different years.

1920 Map Key About the Photos

Source: Greenville County GIS



Historical Aerial Photos and Maps

1920 1955 1965 1979 1989 1997 2011 Streets

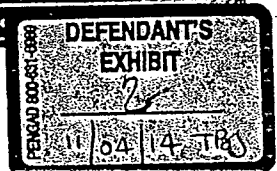
Drag the slider to view different years.

1920 Map Key

About the Photos



Source: City of Greenville



2010



0262

1997



0263

Starbucks Drive-Thru Counts

1120 Woodruff Road

Greenville, SC

Tuesday, April 29: 8:20AM - 0
9:05 AM - 5
1:00 PM - 5
1:20 PM - 1
2:00 PM - 0

Thursday, May 1: 6:45 AM - 1
6:48 AM - 3
6:52 AM - 6
6:58 AM - 1
6:59 AM - 2

Friday, May 2: 8:30 AM - 0

Saturday, May 3: 8:40 AM - 3
9:05 AM - 0

Sunday, May 4: 11:30 AM - 2
2:00 PM - 3
7:00 PM - 2
7:15 PM - 0
7:45 PM - 0

Wednesday, May 7: 9:00 PM - 0

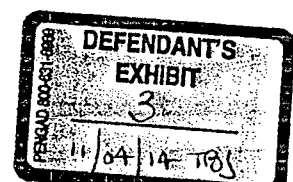
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9:00 AM - 3

Saturday, May 10: 9:20 AM - 5
9:45 AM - 1

Sunday, May 11: 12:30 PM - 2
1:50 PM - 1

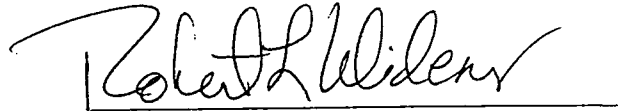
Tuesday, May 13: 8:15 AM - 3

0264



CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material. I also certify that this Record is in compliance with the August 13, 2007 order of the South Carolina Supreme Court.



Robert L. Widener
McNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800
ATTORNEYS FOR APPELLANT

September 11, 2015