

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas

Marvin H. Dukes, III, Master-in-Equity

Appellate Case No. 2016-001789

The Edgewater on Broad Creek Owners Association, Inc.
and
the Council of Co-Owners of the Edgewater on Broad Creek Horizontal
Property Regime Phase I, ...Plaintiffs

Of which The Edgewater on Broad Creek Owners Association, Inc. is the Respondent

v.

Ephesian Ventures, LLC Appellant.

RECORD ON APPEAL
VOLUME II

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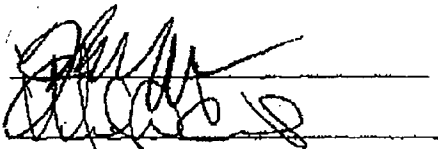
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TOGETHER with all and singular the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining.

TO HAVE AND TO HOLD, all and singular the said premises before mentioned unto the said Grantee, Ephesian Ventures, LLC, its successors and assigns, forever, so that the Grantor, Broad Creek Edgewater, LP, nor its successors and assigns, nor any other entity, person or persons, claiming under it, shall at any time hereafter, by any way or means, have, claim or demand any right or title to the aforesaid premises or appurtenances, or any part or parcel thereof.

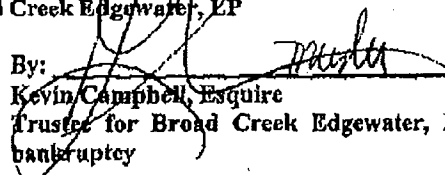
WITNESS the Grantor's Hand and Seal this 14 day of July in the year of our Lord Two Thousand Eight (2008).

Signed, Sealed and Delivered
in the Presence of:



Broad Creek Edgewater, LP

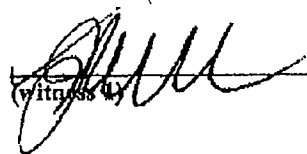
By:


Kevin Campbell, Esquire
Trustee for Broad Creek Edgewater, LP in
bankruptcy

STATE OF SOUTH CAROLINA)
CHARLESTON)
COUNTY OF BEAUFORT)

PROBATE

PERSONALLY appeared the undersigned witness and made oath that (s)he saw the within named Broad Creek Edgewater, LP, by Kevin Campbell, Esquire, its Trustee sign, seal and as the Grantor's act and deed deliver the within Limited Warranty Deed and that deponent with Michael Conway witnessed the execution thereof.



(Witness)

SWORN to before me this
14 of July, 2008.

 (Seal)
Notary Public for South Carolina
My Commission expires: 8/31/14

Exhibit A
Property Description

All that certain piece, parcel of tract of land, situate, lying and being on Hilton Head Island, Beaufort County, South Carolina, containing approximately 16.01 acres, shown as "Additional Property of Edgewater on Broad Creek" on that certain ALTA/ACSM LAND TITLE SURVEY prepared for Bear Properties, LLC, certified by Terry G. Hatchell of Surveying Consultants, Bluffton, SC, SCRLS No. 11059 dated May 16, 2008, to be recorded, and also the approximately 16.01 acres shown as "ADDITIONAL PROPERTY OF EDGEWATER ON BROAD CREEK" on that plat entitled "SURVEY OF EDGEWATER ON BROAD CREEK HORIZONTAL PROPERTY REGIME-PHASE I" prepared by Surveying Services, Inc., certified to by James W. Edwards, SCRLS #15515, dated December 19, 2002, and recorded in Plat Book 91 at Page 5 in the Office of the ROD for Beaufort County on 12/31/02. *RS10-011-000-0004-0000*

Being also all rights retained by Grantor, if any, to that certain piece, parcel of tract of land, situate, lying and being on Hilton Head Island, Beaufort County, South Carolina, containing approximately 7.64 acres, shown as "REGIME PARCEL I" on that certain plat entitled "SURVEY OF EDGEWATER ON BROAD CREEK HORIZONTAL PROPERTY REGIME-PHASE I" prepared by Surveying Services, Inc., certified to by James W. Edwards, SCRLS #15515, dated December 19, 2002, and recorded in Plat Book 91 at Page 5 in the Office of the ROD for Beaufort County on 12/31/02. (hereinafter also referred to as "Adjacent Tract").

Together with all Declarant (as that term is defined in the Master Deed noted below) rights, title to real estate, covenants, restrictions, improvements and any other rights now held by Seller as owner or Declarant in the aforesaid property:

- a. Seller's non-exclusive easement for ingress and egress over the streets and highways, open or proposed, in front of or adjoining the land and across that certain tract of land containing 7.64 acres, more or less (the "Adjacent Tract") previously submitted to that certain Master Deed Establishing Edgewater on Broad Creek Horizontal Property Regime recorded on December 31, 2002, in the Office of the Register of Deeds for Beaufort County South Carolina in Record Book 1689 at Page 574 (the "Master Deed"); and
- b. all developmental rights, easements, rights of way, ponds, lagoons, waterways, privileges, permits, licenses, appurtenances and other rights pertaining thereto, if any, for the Property and the Adjacent Tract, and
- c. to the extent such exists, water and sewage capacity and spray field rights for the entire Project [which shall herein be used to describe the Property described in Exhibit A and the adjacent tract containing approximately 7.64 acres] and any remaining such rights and/or capacity in (including a capacity which at a minimum would allow a density of twelve units per acre), and
- d. all rights and obligations as the Declarant (but none of the Declarant obligations, if any if such purported and alleged obligations: (a) arose following the recordation of the original Master Deed [which was recorded on December 31, 2002, in the Office of the Register of Deeds for Beaufort County South Carolina in Book 1689 at page 574] by

action or inaction of the Seller and/or (b) have not been the subject of a valid amendment of said Master Deed recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, and any other rights affecting the Property and all of Seller's interest in any roadways, bridges, access ways, easements, covenants, restrictions, or right affecting the Property (provided, however, Purchaser shall not be obligated in any way to perform any duty, take on any burden, pay any sum due by Seller in connection with the transfer of these rights or otherwise, except for Purchaser's obligation to pay the Town of Hilton Head Transfer Tax; all of which are hereinafter referred to as the "Property."

The foregoing property is being acquired from Broad Creek Edgewater, LP, by and through Kevin Campbell, Esquire, the duly appointed and acting Trustee for Broad Creek Edgewater, LP, a South Carolina Limited Partnership, in bankruptcy and pursuant to an order to be issued by the United States Bankruptcy Court. The foregoing property is a portion of the property acquired by Broad Creek Edgewater, LP, a South Carolina Limited Partnership by deeds recorded in the Office of the ROD for Beaufort County, South Carolina Book 1194, at Page 2435, Book 1196, at Page 2438 and Book 1196, at Page 2441.

EXHIBIT B

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: 07-02546-DD

**ORDER APPROVING SALE FREE AND CLEAR OF LIENS, JUDGMENTS AND
ENCUMBRANCES PURSUANT TO 11 U.S.C. §363(f)**

The relief set forth on the following pages, for a total of 7 pages including this page, is hereby **ORDERED**.

**FILED BY THE COURT
05/27/2008**



Entered: 05/28/2008

A handwritten signature in black ink, appearing to read "S. R. O.", written over a horizontal line.

US Bankruptcy Court Judge
District of South Carolina

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE: BROAD CREEK EDGEWATER, LP Debtor.	)))))	B/K Case No. 07-02546-DD Chapter 7 ORDER APPROVING SALE
---	-----------------------	--

THIS MATTER comes before the Court upon the application of Kevin Campbell, the duly appointed and acting Chapter 7 Trustee for the above Debtor (hereinafter referred to as the "Trustee") for authority to sell the property of the estate identified on the attached Exhibit "A" (hereinafter referred to as the "Edgewater Property") free and clear of all liens, judgments and encumbrances pursuant to 11 U.S.C. §363(f). There were no objections to the application.

The Trustee proposes to sell the Edgewater Property to Bear Properties, LLC, a Georgia Limited Liability Company, or its assigns (the "Buyer"). The Buyer is a good faith purchaser for value under §363(m) and does not have any known adverse interest in this case or any parties involved in this case, including the Debtor, its counsel and the U.S. Trustee's office. The Buyer is not a creditor of the Debtor. The sales price is \$9,000,000, with a closing to take place after Court approval at a date not more than thirty (30) days from the entry of a final Order approving the sale (including any appeals or other actions which would limit the finality of this Order), at place and time to be agreed upon by the parties.

EXCEPT AS OTHERWISE PROVIDED IN THE PURCHASE AGREEMENT, THE TRUSTEE IS SELLING THE ABOVE-REFERENCED PROPERTY "AS IS," WITH NO WARRANTIES WHATSOEVER INCLUDING, BUT NOT LIMITED TO, WARRANTY AS TO TITLE. THE BUYER AGREES TO RECEIVE THE PROPERTY WITH ALL FAULTS. THE TRUSTEE MAKES NO WARRANTY, EXPRESS OR IMPLIED, REGARDING THE PROPERTY, AND SPECIFICALLY EXCLUDES ANY IMPLIED WARRANTY OF MERCHANTABILITY AND ANY IMPLIED WARRANTY OF FITNESS FOR A PARTICULAR USE.

THE TRUSTEE SHALL PROVIDE AT CLOSING "INSURABLE TITLE." INSURABLE TITLE IS DEFINED AS TITLE THAT IS FREE AND CLEAR OF ALL LIENS AND ENCUMBRANCES BASED ON AN ORDER ENTERED BY THE BANKRUPTCY COURT ALLOWING THE TRUSTEE TO CONVEY THE PROPERTY FREE AND CLEAR OF ANY SUCH LIENS AND ENCUMBRANCES AND INSURABLE WITHOUT INDEMNITY BY THE TRUSTEE AT NORMAL RATES BY A REPUTABLE NATIONAL TITLE COMPANY (AS CHOSEN BY THE PURCHASER PURSUANT TO THE AGREEMENT BEING APPROVED BY THIS ORDER) AND THAT ALL LIENS AND ENCUMBRANCES ATTACH ONLY TO THE PROCEEDS OF THE SALE AND TITLE IS SUBJECT TO COVENANTS, CONDITIONS

AND RESTRICTIONS OF RECORD, INCLUDING, BUT NOT LIMITED TO, THE MASTER DEED AND THE GENERAL OR STANDARD CONDITIONS OF ANY TITLE INSURANCE COMPANY, BUT SPECIFICALLY EXCLUDING PARAGRAPH 5 OF THE OCTOBER 31, 2006 ORDER ISSUED BY THE COURT OF COMMON PLEAS FOR THE COUNTY OF BEAUFORT WHICH SUIT WAS BROUGHT BY PAUL L. HUMMEL, ROBERT J. DEMA, JOHN EDWARDS, JR., JAQUELINE HEISS, KEN MEEKS, ROBERT FITZGERALD AND JOHN DOE PLAINTIFFS 1-20 INDIVIDUALLY AND AS CO-OWNERS IN EDGEWATER ON BROAD CREEK HORIZONTAL PROPERTY REGIME (THE "PLAINTIFFS") AND PLAINTIFF'S COUNSEL STIPULATED AT THE HEARING ON THE APPLICATION FOR SALE OF PROPERTY THAT PARAGRAPH 5 WAS NO LONGER VALID AND WOULD NOT EFFECT THE PROPERTY AND RIGHTS BEING SOLD TO PURCHASER HEREIN.

THE BUYER HAS BEEN GIVEN AN OPPORTUNITY TO HAVE TITLE TO THE REAL PROPERTY RESEARCHED AND ACCEPTS THE STATUS OF THE REAL PROPERTY. THE TRUSTEE DOES NOT PROVIDE LIEN OPINIONS. PROPERTY TO BE CONVEYED BY QUIT CLAIM DEED.

THE BUYER HAS BEEN GIVEN THE OPPORTUNITY TO EXAMINE THE PROPERTY BEFORE SIGNING ANY CONTRACT OR SUBMITTING A BID TO PURCHASE THE PROPERTY, AND TO PERFORM SUCH TESTING, IF APPLICABLE, TO DETECT POSSIBLE LATENT DEFECTS.

At closing, with the exception of the real estate commission, the Trustee shall be authorized to pay normal seller's closing costs as set forth in the Purchase Agreement.

Alex Graham, Auctioneer (SC License #3997); Sperry Van Ness Commercial Properties, LLC, 1250 Fairmont Avenue, Mt. Pleasant, SC 29464, has been duly appointed as the Trustee's sale's agent. Except as provided for herein, a sales commission of Four (4%) percent of the contract sales price shall be paid, with the Trustee being responsible for the payment of the Trustee's agent two (2%) percent commission and one (1%) percent Buyer's agent commission. The Buyer shall be responsible for paying the remaining one (1%) percent Purchaser's agent commission. As provided for herein, the real estate commissions will not be paid at closing, but shall attach to the net sale proceeds pending agreement between the parties or further Order of this Court.

There is a disputed first mortgage lien held by Regions Bank, dated May 6, 2005, as assigned to Distinct Edgewater, LLC on January 3, 2007. There are related UCC-1's also of record held by Regions Bank and also assigned to Distinct Edgewater, LLC. The Trustee disputes the amount owed to this creditor. This creditor's lien shall attach to the net sale proceeds until an agreement is reached between the parties, or further order of this Court.

The Trustee disputes that certain Mechanic's Lien action filed by Strecansky & Co. (Case No. 06-CP-07-2497). The Trustee believes that this cause of action has been sold and/or assigned to CDCJ Holdings, LLC. The Trustee has filed an adversary proceeding

(Adv. Pro. No. 07-80148-DD) to have this Court determine the validity and extent of this lien. The Trustee believes that the lien was not properly perfected or is not otherwise valid. Further, the Trustee disputes the amount owed to this creditor. This disputed lien shall attach to the net sale proceeds until an agreement is reached between the parties or further Order of this Court.

The Trustee disputes that certain Mechanic's Lien action filed by KRA, Inc. (Case No. 08-CP-07-2325). The Trustee believes that this cause of action has been sold and/or assigned to Distinct SC Limited, LLC. The Trustee has filed an adversary proceeding (Adv. Pro. No. 07-80105-DD) to have this Court determine the validity and extent of this lien. The Trustee believes that the lien was not properly perfected or is not otherwise valid. Further, the Trustee disputes the amount owed to this creditor. This disputed lien shall attach to the net sale proceeds until an agreement is reached between the parties or further Order of this Court.

Pursuant to a Court approved lending order filed on August 23, 2007 and May 6, 2008, there is a mortgage from the Debtor to John W. Baird as Trustee for the John W. Baird Trust, dated August 23, 2007. This mortgage secures certain amounts that have already been paid or will be paid to the Estate for expenses, including, but not limited to, adequate protection payments, operating costs, and costs and fees of marketing, as well as potential future advances to the Estate. Pursuant to said Order, this lien is junior and subordinate to all presently existing liens, judgments or encumbrances on the subject property to the extent those liens, judgments or encumbrances are not otherwise voided or avoided by further Order of this Court.

The Trustee disputes a purported lien or security interest held by Landplan Partnership, Inc. as recorded in M/L Book 27 at Page 505. An Order finding this lien to be invalid has been entered by this Court. This sale is free and clear of this avoided lien.

The Trustee disputes that certain Mechanic's Lien action filed by Pro Slab, Incorporated (Case No. 07-CP-07-92). An Order finding this lien to be invalid has been entered by this Court. This sale is free and clear of this avoided lien.

The Trustee disputes a purported lien or security interest held by Callibogue Enterprises as recorded in M/L Book 28 at Page 1958. An Order finding this lien to be invalid has been entered by this Court. This sale is free and clear of this avoided lien.

The Trustee disputes a purported judgment lien or security interest held by Paul A. Hummel, et al. under Case No. 06-CP-07-3556 as recorded in Judgment Book 2006-2556. The Trustee believes that the lien constitutes an avoidable preference and/or fraudulent conveyance. Further, the Trustee disputes the amount owed to this creditor. This disputed lien shall attach to the net sale proceeds until an agreement is reached between the parties or further Order of this Court.

The Trustee is not aware of any other liens, judgments, encumbrances or other

interests. To the extent they may exist, they are disputed and they shall attach to the estate's interest in the net sale proceeds pursuant to 11 U.S.C. §363(f)(4). This sale is free and clear of all liens, judgments encumbrances and other interests pursuant to 11 U.S.C. §363(f).

Net sale proceeds is defined as those funds remaining after payment of normal seller's closing costs, as set forth in the Purchase Agreement or otherwise provided for in this Order.

In the event that after payment of all valid and perfected superior liens, county real property and other taxes and seller's closing costs and other expenses provided for herein, if there remains insufficient net sale proceeds to pay all Chapter 7 administrative claims, including the real estate/sales commissions, the Chapter 7 administrative claims, including real estate/sales commissions, shall be pro-rated.

In the event the net sale proceeds are sufficient and the administrative claims are paid in full, including the full commission to the Sales Agent/Auctioneer, then the Sales Agent/Auctioneer shall repay to the Estate the costs and expenses incurred in the marketing and sale and/or auction of the property, which could be in the approximate amount of \$32,042, which sums have or will be advanced to the Estate by the John W. Baird Trust, pursuant to previous Court Order and secured by the mortgage referenced herein.

If for any reason this sale does not occur within the time set forth herein, the Trustee may instead sell this property to a back-up bid for the same or higher price, provided it closes within 60 days of the date of the final entry of this Order.

I find that this matter is properly before this Court and that there were no objections filed to this Notice of Sale.

I find that ten (10) day stay pursuant to Fed.R.Bankr.P. 6004(g) be waived in this matter and that upon the entry of the Order the Trustee be allowed to immediately enforce and implement the terms of said Order. It is, therefore

ORDERED, ADJUDGED and DECREED that the Trustee is authorized to sell and to convey the above-described property free and clear of all liens, judgments and encumbrances pursuant to 11 U.S.C. §363(f), on the terms and conditions recited herein and to sign any and all documents necessary to effectuate the transfer.

IT IS FURTHER ORDERED that the ten (10) day stay pursuant to Fed.R.Bankr.P. 6004(g) be waived in this matter and that upon the entry of the Order the Trustee be allowed to immediately enforce and implement the terms of said Order.

IT IS FURTHER ORDERED that the disputed liens set forth herein shall attach to the net sale proceeds as provided for herein until disbursed pursuant to further Order of this Court;

IT IS SO ORDERED!

EXHIBIT "A"

All Declarant (as that term is defined in the Master Deed noted below) rights, title to real estate, covenants, restrictions, improvements and any other rights now held by Seller as owner or Declarant in all that certain piece, parcel, tract of land located on Hilton Head Island, Beaufort County, South Carolina, consisting of approximately 16.01 acres and shown as "Additional Property of Edgewater on Broad Creek" on that certain plat entitled "SURVEY OF: EDGEWATER ON BROAD CREEK HORIZONTAL PROPERTY REGIME - PHASE 1" prepared by Surveying Services, Inc., certified to by James W. Edwards, SCRLS #15515 dated December 19, 2002, and recorded in Plat book 91 at page 5 in the ROD Office for Beaufort County South Carolina on 12/31/02, and all that certain piece, parcel of tract of land, situate, lying and being on Hilton Head Island, Beaufort County, South Carolina, containing approximately 16.01 acres, shown as "Additional Property of Edgewater on Broad Creek" on that certain ALTA/ACSM LAND TITLE SURVEY prepared for Bear Properties, LLC, certified by Terry G. Hatchell of Surveying Consultants, Bluffton, SC, SCRLS No. 11059 dated May 16, 2008, to be recorded, together with:

- a. A non-exclusive easement for ingress and egress over Seller's interest, if any, in the streets and highways, open or proposed, in front of or adjoining the land and across that certain tract of land containing 7.64 acres, more or less (the "Adjacent Tract") previously submitted to that certain Master Deed Establishing Edgewater on Broad Creek Horizontal Property Regime recorded on December 31, 2002, in the Office of the Register of Deeds for Beaufort County South Carolina in Record Book 1689 at Page 574 (the "Master Deed"); and
- b. all developmental rights, easements, rights of way, ponds, lagoons, waterways, privileges, permits, licenses, appurtenances and other rights pertaining thereto, if any, for the Property and the Adjacent Tract; and
- c. to the extent such exists, water and sewage capacity and spray field rights for the entire Project [which shall herein be used to describe the Property described in Exhibit A and the adjacent tract containing approximately 7.64 acres] and any remaining such rights and/or capacity in (including a capacity which at a minimum would allow a density of twelve units per acre); and
- d. the right to use all documents called for in this Agreement to be delivered to Purchaser in the same manner as Seller; and
- e. all rights and obligations as the Declarant (but none of the Declarant obligations, if any if such purported and alleged obligations: (a) arose following the recordation of the original Master Deed [which was recorded on December 31, 2002, in the Office of the Register of Deeds for Beaufort County South Carolina in Book 1689 at page 574] by action or inaction of the Seller and/or (b) have not been the subject of a valid amendment of said Master Deed recorded in the Office of the Register of Deeds for Beaufort County, South Carolina as of the date this Agreement is first executed by the Purchaser, which such purported and/or alleged obligations are set out in Exhibit G) under the Master Deed, and any other rights affecting the

Property and all of Seller's interest in any roadways, bridges, access ways, easements, covenants, restrictions, or right affecting the Property (provided, however, Purchaser shall not be obligated in any way to perform any duty, take on any burden, pay any sum due by Seller in connection with the transfer of these rights or otherwise, except for Purchaser's obligation, as provided in this agreement, to pay the Town of Hilton Head Transfer Tax;

All of which is hereinafter referred to as the "Edgewater Property".

BAE SYSTEMS

Bankruptcy Noticing Center
2515 Network Place, 3rd Floor
Herndon, Virginia 20171-3514

CERTIFICATE OF SERVICE

District/office: 0420-2
Case: 07-02546

User: douglass
Form ID: pdf01

Page 1 of 1
Total Served: 7

Date Recd: May 28, 2008

The following entities were served by first class mail on May 30, 2008.
 sty +J. Ronald Jones, Jr., 126 Seven Farms Drive, Suite 200, Charleston, SC 29492-8144
 sty +Michael H. Conrady, 890 Johnnie Dodds Blvd, PO Box 684, Mount Pleasant, SC 29465-0684
 sty +Michael W. Mogil, 301 Professional Building, Hilton Head Island, SC 29928
 sty +R. Geoffrey Levy, 2100 Wayne Street, Columbia, SC 29201-2057
 tr +Kevin Campbell, PO Box 684, Mount Pleasant, SC 29465-0684
 wst +US Trustee's Office, Strom Thurmond Federal Building, 1835 Assembly St., Suite 953,
 Columbia, SC 29201-2448
 adb +BROAD CREEK EDGEHATER, LP, 189 Marshland Road, Hilton Head Island, SC 29926-2103

The following entities were served by electronic transmission.
 NONE.

TOTAL: 0

***** BYPASSED RECIPIENTS *****

NONE.

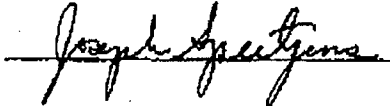
TOTAL: 0

Addresses marked '-' were corrected by inserting the ZIP or replacing an incorrect ZIP.
 USPS regulations require that automation-compatible mail display the correct ZIP.

I, Joseph Spoelgens, declare under the penalty of perjury that I have served the attached document on the above listed entities in the manner shown, and prepared the Certificate of Service and that it is true and correct to the best of my information and belief.

Meeting of Creditor Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: May 30, 2008

Signature: 

**U.S. BANKRUPTCY COURT
District of South Carolina**

Case Number: 07-2546

The relief set forth on the following pages, for a total of 2 pages including this page,
is hereby **ORDERED**.

FILED

at ___ o'clock & ___ min. ___ M

FILED BY THE COURT ON MAY 22 2008



United States Bankruptcy Court
Columbia, South Carolina (228)

A handwritten signature in black ink, appearing to read "David R. Duncan".

David R. Duncan
US Bankruptcy Court Judge
District of South Carolina

ENTERED: **ENTERED**

MAY 23 2008

R. S. S.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA

IN RE:	)	
	)	Chapter 7
Broad Creek Edgewater, LP,	)	
	)	Case No.: 07-02546-dd
Debtor.	)	

ORDER APPROVING BIDDING PROCEDURES

This proceeding comes before the Court on the notice and motion of the Chapter 7 trustee for approval of certain bidding proceeding to assist in selling the Debtor's assets.

The Court has been informed that all parties in interest have been notified of the proposed bidding procedures, and no objections to the proposed bidding procedures have been received. The Chapter 7 trustee has represented to the Court that such bidding procedures are in the best interest of the creditors of the estate. It is therefore,

ORDERED, ADJUDGED, AND DECREED, that the bidding procedures set forth in the Motion are approved and the Asset Purchase Agreement with Bear Properties LLC is approved, including the termination fee of \$200,000, the initial overbid of \$350,000 and subsequent bidding increments of \$50,000.

The Applicant:

/s/ Kevin Campbell
Kevin Campbell, Chapter 7 Trustee

BAE SYSTEMS

Bankruptcy Noticing Center
2525 Network Place, 3rd Floor
Herndon, Virginia 20171-3514

CERTIFICATE OF SERVICE

District/off: 0420-2
Case: 07-02546

User: shealy
Form ID: pdf01

Page 1 of 1
Total Served: 6

Date Recd: May 23, 2008

The following entities were served by first class mail on May 25, 2008.

sty +John Timothy Stack, Office of the United States Trustee, 1835 Assembly Street Suite 953,
Columbia, SC 29201-2448
aty +Joseph F. Buzhardt, III, Office of the United States Trustee, 1835 Assembly Street Suite 953,
Columbia, SC 29201-2448
sty +Michael H. Conrady, 830 Johnnie Dodds Blvd, PO Box 684, Mount Pleasant, SC 29465-0684
cy +Kevin Campbell, PO Box 684, Mount Pleasant, SC 29465-0684
vel +US Trustee's Office, Strom Thurmond Federal Building, 1835 Assembly St., Suite 953,
Columbia, SC 29201-2448
adb +BROAD CREEK EDGEWATER, LP, 309 Marshland Road, Hilton Head Island, SC 29926-2103

The following entities were served by electronic transmission.
NONE.

TOTAL: 0

***** BYPASSED RECIPIENTS *****

NONE.

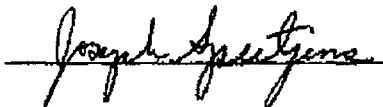
TOTAL: 0

Addressees marked '+' were corrected by inserting the ZIP or replacing an incorrect ZIP.
USPS regulations require that automation-compatible mail display the correct ZIP.

I, Joseph Speetjens, declare under the penalty of perjury that I have served the attached document on the above listed entities in the manner shown, and prepared the Certificate of Service and that it is true and correct to the best of my information and belief.

Meeting of Creditors Notices only (Official Form 9): Pursuant to Fed. R. Bank. P. 2002(a)(1), a notice containing the complete Social Security Number (SSN) of the debtor(s) was furnished to all parties listed. This official court copy contains the redacted SSN as required by the bankruptcy rules and the Judiciary's privacy policies.

Date: May 25, 2008

Signature: 

TOWN OF HILTON HEAD ISLAND

One Town Center Court, Hilton Head Island, S.C. 29928

(843) 341-4600 Fax (843) 842-7728

www.hiltonheadislandsc.gov

EXHIBIT

19

Thomas D. Peoples
Mayor

Kenneth S. Heltzke
Mayor Pro Tem

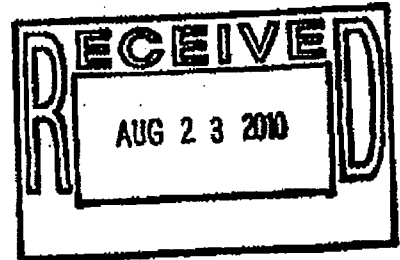
Council Members

Willie (Bill) Ferguson
William D. Harkins
Drew A. Laughlin
John Safay
George W. Williams, Jr.

Stephen G. Riley
Town Manager

August 19, 2010

Mr. Chester C. Williams
17 Pope Avenue Executive Park Road
Unit 2
P.O. Box 6028
Hilton Head Island, SC 29938-6028



Dear Chet:

This letter is in response to APL100008 [an appeal to the Planning Commission of an administrative determination made by me in a letter to you dated July 28, 2010] which you submitted to the Town on August 9, 2010. I have reviewed your materials, the State Code and the Town's Land Management Ordinance (LMO) and have determined that this appeal should not be heard by the Planning Commission. My July 28th letter was clear that I was making an administrative determination and the LMO states that administrative determinations are appeals to the Board of Zoning Appeals. Further State Code states that approvals and disapprovals of land development plans may be appealed to the Planning Commission; my determination was clearly not an approval or disapproval of a land development plan.

I am returning the appeal materials to you and have requested a refund for the appeal application fee.

Sincerely,

A handwritten signature in dark ink, appearing to read "Teri B. Lewis".

Teri B. Lewis
LMO Official

**BEFORE THE BOARD OF ZONING APPEALS
OF THE TOWN OF HILTON HEAD ISLAND, SOUTH CAROLINA**

In Re:

Appeal of Ephesian Ventures, L. L. C.

Appeal Number APL100007

NATURE OF APPEAL

This is an appeal from a determination of Teri B. Lewis to unilaterally revoke a previously granted permit. Ephesian Ventures, L. L. C. (hereinafter, "Ephesian"), owns property in the unfinished "Edgewater" project area on Hilton Head Island. Ephesian also holds certain rights under recorded Covenants and Restrictions. The nature of the rights held by Ephesian is the subject of a dispute between Ephesian and the Edgewater Property Owners Association (hereinafter, "Edgewater").

In its appeal, Ephesian states as follows:

This Appeal seeks to reverse the decision of the LMO Official to refuse to institute revocation proceedings under Section 16-63-310(C) of the Town's Land Management Ordinance (the "LMO") regarding the Notice of Action. The 07/26/10 Letter says that the administrative determination contained therein may be appealed to the BZA.¹

RELEVANT BACKGROUND

The underlying matter arises from actions undertaken by the Edgewater. The matter arose when Edgewater was discovered to be building a tabby walkway prior to obtaining any permit for the work. In April of 2010, the Edgewater's un-permitted work was discovered and Edgewater was ordered to stop the work. In response, the Edgewater filed an application for an XDPR for the work, and a permit was granted in a Notice of Action on April 15, 2010. At that point, Ephesian notified the Town that it possessed certain rights

¹ The reference to the LMO contains a typographical error. The relevant code section is § 16-3-301(C).

by virtue of covenants held by Ephesian, including the right to approve the improvements that the Edgewater were making. Ephesian's position is that the Edgewater cannot make the proposed improvements unless and until Ephesian approves them. Edgewater disputes this. At the urging of Ephesian, the Town wrote to the Edgewater on April 30, 2010, rescinding the April 15, 2010, Notice of Action. In response to that action, Edgewater filed an appeal.

The Administrator subsequently re-considered her decision to rescind the April 15, 2010, Notice of Action, but held any final decision on it in abeyance pending a resolution between Ephesian and Edgewater as to the disputed rights claimed by Ephesian.² The Administrator notified both the Edgewater and Ephesian that they needed to resolve the issue of the disputed rights of Ephesian before she could make any final decision on the Notice of Action.

Ephesian has filed an appeal related to the issuance of the Notice of Action with the Town's Planning Commission on July 9, 2010. That appeal is scheduled to be heard on March ____, 2011.

Ephesian wrote to the Administrator on July 8, 2010, demanding that she revoke the April 15, 2010, Notice of Action. By a letter dated July 26, 2010, the Administrator declined to do so. The Administrator wrote Ephesian on July 26, 2010, that she would not revoke the Notice of Action until Ephesian and the Edgewater reached a conclusion on the

² The Town does not take a position on the validity of the claim of Ephesian, and concedes that Ephesian well may be correct in its assertion. The point, however, is that the LMO does not grant the Administrator to unilaterally revoke an issued permit. The dispute as to Ephesian's rights will either have to be resolved by agreement of Ephesian, or by the pending appeal to the Planning Commission on the issuance of the April 15, 2010, Notice of Action, or by declaratory judgment or other action brought by them in Circuit Court.

issues related to the covenants (hereinafter, the "July 26, 2010, Determination").

EPHESIAN'S APPEAL

Ephesian argues that under the terms of § 16-3-310, *Code of the Town of Hilton Head Island* (1983, as amended), the Administrator has a "duty and obligation to institute revocation proceedings regarding the Notice of Action under LMO Section 16-3-310(C). .

RELEVANT LAW

§ 16-3-310, *Code of the Town of Hilton Head Island* (1983, as amended), reads:

C. A vested right to a site specific development plan or phased development plan is subject to revocation by the local governing body upon its determination, after notice and public hearing, that there was a material misrepresentation by the landowner or substantial noncompliance with the terms and conditions of the original or amended approval.

Until there is a determination that a material misrepresentation has, in fact, occurred, there is simply no basis for the Administrator to act. As was mentioned above, the dispute as to Ephesian's rights will either have to be resolved by agreement of Ephesian, or by the pending appeal to the Planning Commission on the issuance of the April 15, 2010, Notice of Action, or by declaratory judgment or other action brought by them in Circuit Court.³ Once the issue of Ephesian's rights has been determined by a body with the authority to make the determination, the Town can move forward and take any action that might be appropriate.⁴

³ Again, the Town does not take a position in the dispute between Ephesian and Edgewater. The Town cannot take the side of one party or the other, the parties themselves must resolve that dispute. Were the Town to do so, and do so in error, then the Town would be exposed to liability by the wronged party.

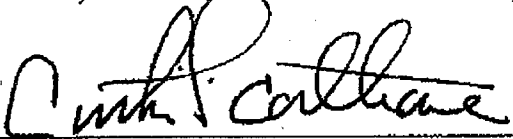
⁴ Ephesian argues that officials of the Town have expressed some belief that Ephesian's position is correct. While that may be so, the LMO does not grant to any Town representative the authority to arbitrate disputes such as the ongoing dispute between Ephesian and Edgewater.

CONCLUSION

Under the plain language of § 16-3-310, *Code of the Town of Hilton Head Island* (1983, as amended), the Administrator does not have a duty or obligation to take any action until there has actually been a determination that some misrepresentation occurred in the Edgewater application for the XDPR. Until that happens, there is no basis for the Administrator to take any action to commence the process to revoke Edgewater's XDPR.

Respectfully Submitted:

ALFORD, WILKINS AND COLTRANE, L. L. C.

By: 

Curtis L. Coltrane
Post Office Drawer 8008
Hilton Head Island, SC 2938
(843) 842-5500
curtis@awc-lawfirm.com

Hilton Head Island, South Carolina

This 24th Day of March, 2011.

EXHIBIT

21

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

EDGEWATER ON BROAD CREEK)
OWNERS ASSOCIATION, INC.,)

Plaintiff,)

v.)

EPHESIAN VENTURES, LLC,)

Defendant.)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO. 2011-CP-07-2954AFFIDAVIT OF WILLIAM J.
EISENMAN IN SUPPORT OF
MOTION FOR PARTIAL
SUMMARY JUDGMENT

15 PM 3:36

The Affiant, William J. Eisenman, after first being duly sworn, does state and avow as follows:

1. That he is a citizen and resident of Beaufort County, South Carolina, and over the age of eighteen.
2. That he resides at 42 Wiler's Creek Way, Hilton Head Island, Beaufort County, South Carolina. That he is the President of Edgewater on Broad Creek Owners Association, Inc. (hereinafter "Association") and has had such office since in or around March, 2011.
3. That the Association is a South Carolina incorporated non-profit council of co-owners created pursuant to the South Carolina Horizontal Property Act, S.C. Code §§ 27-31-10, *et seq.* (1976 as amended) and the South Carolina Nonprofit Corporation Act of 1994 (S.C. Code § 33-31-101, *et seq.*) to administer to the Edgewater on Broad Creek Horizontal Property Regime (hereinafter "Regime"), and particularly the common elements of same.
4. That Defendant Ephesian Ventures, LLC is successor to the Declarant of the Regime, Edgewater Broad Creek, L.P. Declarant Edgewater Broad Creek, L.P. initially described the Regime as a multi-phase project in which additional land parcel(s) were intended to be subjected to the existing horizontal property regime, thus enlarging the Regime and the number of units that would exist thereon. Through no fault of unit owners/members of the Association, the Declarant and all successors to the Declarant did not subject the additional property referenced in the Master Deed to the Regime and Horizontal Property Act prior to the stated deadline of December 31, 2010 for Phase In within the Master Deed.

Accordingly, the Regime consists only of that part of the horizontal property regime initially characterized as Phase I, being one building with 23 units within situate on approximately 7.64 acres with access off Marshland Road on Hilton Head Island.

5. I am informed that Defendant Ephesian Ventures, LLC asserts that it is the successor in interest to the Declarant by virtue of Declarant being placed in an involuntary Chapter 7 bankruptcy case filed in 2007 in the United States Bankruptcy Court for South Carolina, and the subsequent rulings of the U.S. Bankruptcy Court Judge, and the assignment(s) of property interests approved by the U.S. Bankruptcy Court.
6. Ephesian Ventures, LLC purports to hold and exercise certain reservations of right(s) impacting on the Association and Regime, and has used the purported reservations of right(s) to prevent the Association from building its own swimming pool on property classified as common elements within the 7.64 acres owned by the Association members, and in constructing other improvements.
7. In or about July, 2009, the Defendant unilaterally and immediately shut down the swimming pool on Defendant's land which had been used by the Association and its owners and guests from approximately 2005 through July, 2009. Myself, and other owners relied on the existence of a pool facility when making our decision to purchase at Edgewater and I note that a prospective pool was presented to all prospective owners in the sales literature for Edgewater, and was, and is, an important facet of life as contemplated at Edgewater. Since July, 2009, and through today, the Association and its owners and guests have had no use of a swimming pool.
8. Thereafter, after unsuccessful efforts to negotiate continued use of the pool, the Association in 2009 passed a resolution to construct its own pool on Association common elements, and made application to the Town of Hilton Head Island for a design review permit ("DRP"). The Defendant appeared at the Town meetings held to review the DRP, but did not object to the design review permit. Thereafter, and immediately before the Association filed its application for a pool development permit, the Defendant, acting through its attorney Chester Williams, filed formal letter objections with the Town, objecting to both the development permit for a swimming pool and for an expedited permit allowing the Association to construct a walking path, both on Association common elements. A brief summary of acts of the Association and the Defendant along this line include, without limit,

the following: (a) In March 2010 the Association sought a pool permit to construct on the 7.64-acre Regime and the Design Review Board of the Town of Hilton Head Island approved the proposal; (b) On April 12, 2010 the Association submitted an XDPR application for a tabby walk; (c) By letter of April 28, 2010 from Defendant's counsel, Defendant sought rescission of the Association's permits; (d) Appeals and other administrative acts followed relating to the Association having the authority to implement improvements to the common elements of the Regime it is tasked to maintain. The Town of Hilton Head Island decided a ruling on Defendant's power under the Master Deed and Bylaws was needed. Thereafter, the permit applications stalled, and this lawsuit followed. The applications remained stalled as of this date.

9. Upon information and belief, the Defendant maintains and has asserted to the Association and Town that (a) all decisions regarding improvements and use of the Regime common elements require that Defendant be consulted in advance about the impact on allegedly reserved ingress and egress by Defendant across the common elements (Reservation 2); (b) that without consultation the Defendant may "improve" the common elements on the Association's land "by clearing, tree pruning, constructing additional parking and common facilities and (c) to install lines, equipment and facilities for utility and drainage purposes ...".
10. The Association still desires to construct a swimming pool on its common elements so as to improve the quality of life, recreational amenities, and property values at Edgewater. The Association further desires to obtain formal approval for its existing walking path, and to secure present and future access to the waterfront, which access was unilaterally cut off by Defendant in July, 2009 and remains cut off today. Without conceding in any manner that Ephesian held or holds a veto power over the Association's actions on its own property, the Association, acting through its attorney, Michael W. Mogil, issued a specific request to Ephesian, by letter from its attorney, Michael W. Mogil, dated September 17, 2014 to Ephesian's attorney, Chester Williams, providing notice that the Association intended to build a swimming pool at a site that had at one time been a prospective location on the common elements. That letter is attached as Exhibit A hereto. The letter also gave notice that the Association planned to continue use of its Tabby Walk and to apply for permission to make further improvements for the access route to its Clubhouse. Ephesian responded, by

letter dated October 2, 2015 from Mr. Williams, by declining to accommodate Edgewater's request unless part of a global settlement between the parties.

11. The Association requires to have input and influence on acceptable ingress and egress points to the future development on Defendant's land. Defendant has filed a preliminary application with the Town to increase the prospective density on Defendant's 16.03 acres to 253 units in six additional buildings. The Association has learned and believes that Defendant presently intends an interval ownership ("timeshare") project on the 16.03 acres, which will dramatically and significantly increase the ingress, egress, traffic and demand on the rights of way, and property in general. The Association maintains that the present ingress and egress to Defendant's lands, a right of way which enters from Marshland Road and passes immediately around and through the Association's property, was not intended for use by residents at a project proposed for increased density and timeshare use, and that such prospective density and increased use will be a burden and significant hardship upon the Association. Upon information and belief, the Defendant's property is accessible through a second, existing right of way on the eastern border of the property, abutting the Cross Island toll complex, such that the right of way passing through the existing guard gate is not the only existing and available access for Defendant to its lands. This second access was intended as a construction access, and is and should be utilized for future construction on the Defendant's land.
12. Article IV, Section 2 of the Regime Bylaws states that the Board of Directors shall have the powers and duties necessary for the administration of the affairs of the Association. Article IV, Section 3(d) and (e) reference the Board of Directors establishing an annual budget and taking into account replacement of improvements to the Common Elements. The Association Board of Directors tries to adhere to the Master Deed and Bylaws. The reservations claimed by the Defendant, in practice, render impossible the type of management to which the Board of Directors is tasked. Implementation by the Defendant of improvements to the Regime common elements necessitates maintenance of the improvements that the Board of Directors may not have the ability to fund. A primary Board function would be compromised.

13. Defendant's asserted reservations of right are quite sweeping, and jeopardize the ability of the Association to freely exercise its fiduciary duty, and to fix and maintain a budget without unreasonable disruption by the Defendant.
14. The Plaintiff commenced this lawsuit against the Defendant in 2011 to obtain, without limit, a declaratory judgment that Defendant could not unreasonably interfere in Plaintiff's operation of the Association and maintenance of the Regime or restrict its use of its common elements. At the time, and presently, the Declarant owned, and owns, less than 10 percent of the Units. Moreover, after January 1, 2010, the Board of Directors eliminated requirements set forth in Article VII, Section 15 of the Bylaws.
15. That Broad Creek Edgewater, L.P. constructed a clubhouse on the Association's common elements at the entrance to the Edgewater property. Since 2006, that clubhouse has been used for Association meetings and functions, and a portion of the clubhouse has been converted into a gymnasium and fitness center, funded by the Association and used intensively by its members. It would burden and damage the Association members if the gymnasium and clubhouse were converted to a use that did not benefit the Association, and it would be impractical and extremely burdensome for the Defendant, or any other person or entity, to enter upon the Association's property and conduct sales or other operations from the existing clubhouse facility, solely to benefit a project on lands not belonging to or available to the Association members.

[REMAINDER OF THIS PAGE INTENTIONALLY LEFT BLANK]

FURTHER THE AFFIANT SAYETH NOT.

William J. Eisenman
William J. Eisenman

SWORN TO BEFORE ME THIS
11 DAY OF SEPTEMBER, 2015.

Sharon L. Wilson
Notary Public for South Carolina
My Commission Expires: 11/21/2017

Exhibit A

MOGIL LAW FIRM

Ste. 303, 2 Corpus Christie Place
Hilton Head Island, SC 29928
Telephone (843) 785-8110
Fax (843) 785-9676

Michael W. Mogil

Email: mmogil@mogillaw.com

admitted in SC, NY, FL

September 17, 2014

Chet Williams, Esq.
Law Office of Chester C. Williams P.C.
17 Executive Park Road, Suite 2
PO Box 6028
Hilton Head Island, SC 29938-6028

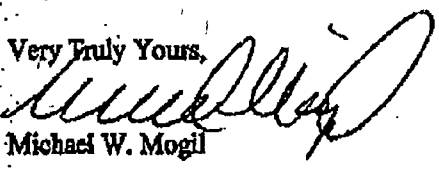
RE: Edgewater Notification Regarding Swimming Pool Project

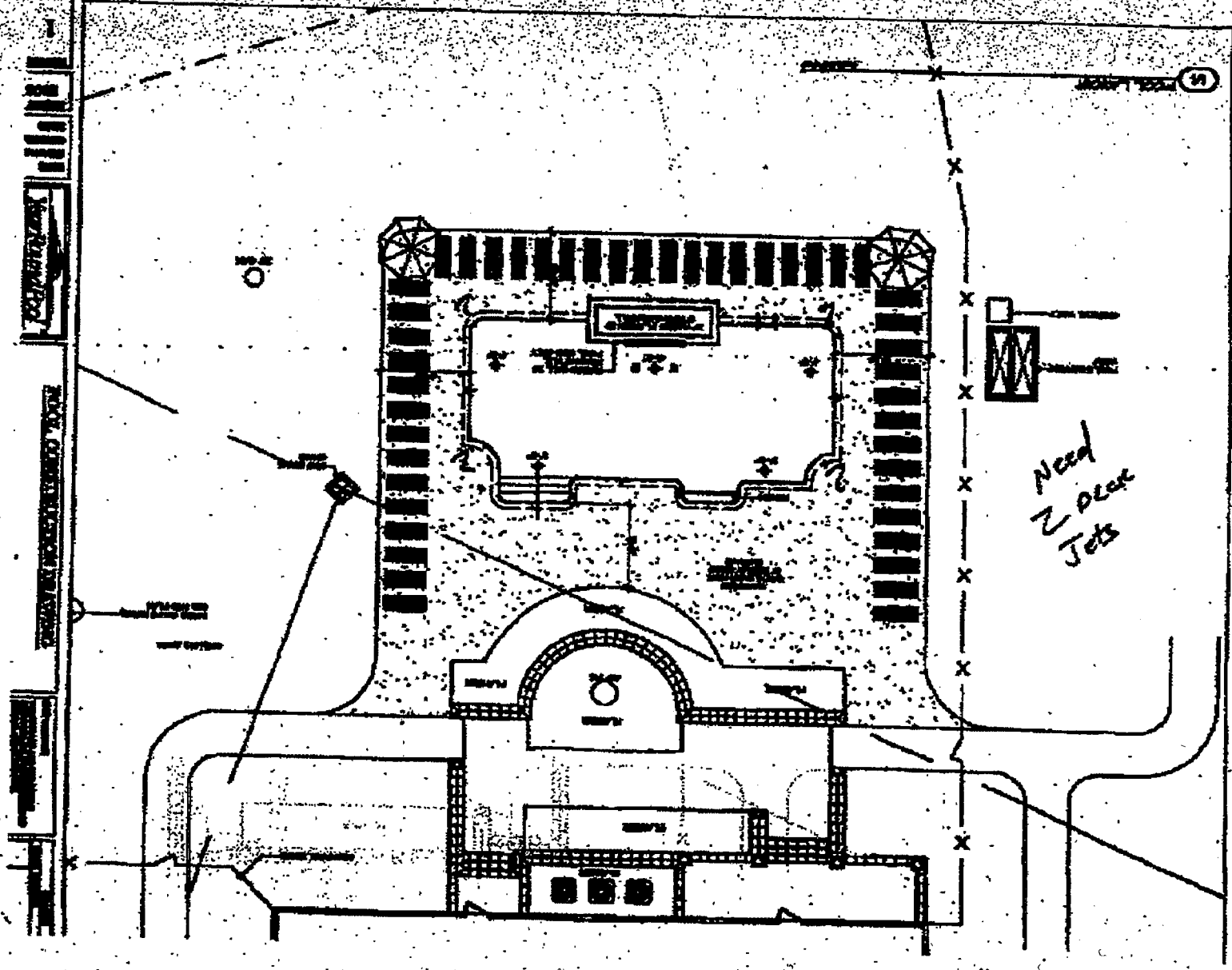
Dear Chet,

The Edgewater on Broad Creek Homeowners' Association intends to move forward with plans to construct a swimming pool on its property, to be opened in the spring of 2015. The pool is planned for the general area on Edgewater Property situated between the existing club house and tennis courts—an area that we mutually agreed upon for the site of a future pool during the negotiations last summer, which was also re-drawn on the site plan by our Board. A copy of the pool plan is re-attached for your review. To the extent that it is argued that the Master Deed [may] reserve(s) some rights of easement and access across Edgewater's property benefitting the Declarant interest, this letter confirms that the swimming pool will be located and designed to not interfere with any such non re-locatable easements or accesses.

The Association plans to continue use of the Tabby Walk it constructed in 2010, and to the extent necessary, to apply to the Town for permission to construct further improvements for the access route from its building across its property to its Clubhouse. Any such improvements will not interfere with Ephesian's property or planned uses.

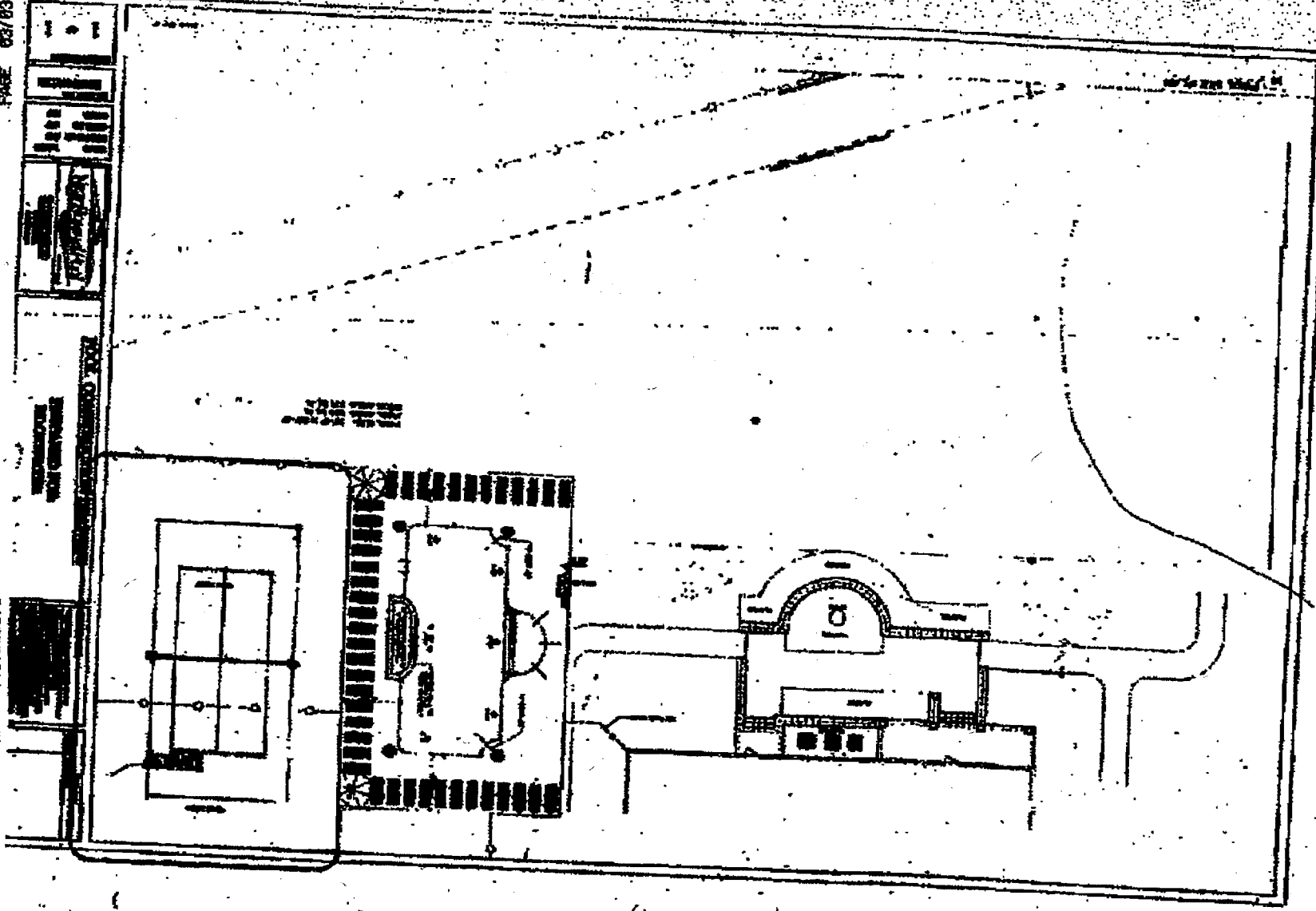
Very Truly Yours,


Michael W. Mogil



08/26/2013 18:16 843785372

PAGE 03/03



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CASE NO.: 2011-CP-07-2994
THE EDGEWATER ON BROAD CREEK	)	
OWNERS ASSOCIATION, INC.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
EPHESIAN VENTURES, LLC,	)	
	)	
Defendant.	)	

2016 MAR -8 PM 3:08
 JEFF AM ROSENBAUM
 BEAUFORT COUNTY, S.C.
 CLERK OF COURT

DEFENDANT EPHESIAN VENTURES, LLC'S
MOTION TO ALTER OR AMEND JUDGMENT PURSUANT TO SCRCP 59(e)

PLEASE TAKE NOTICE that Defendant, Ephesian Ventures, LLC (hereinafter "Defendant"), moves pursuant to SCRCP Rule 59(e) for this Honorable Court to reconsider and amend its Order Granting Plaintiff's Motion for Partial Summary Judgment filed February 26, 2016 ("Order").

Defendant continues to take the position that, when taken as a whole, the reservation of certain rights by the Declarant in the Master Deed, to which Defendant is the successor in interest, are perpetual and that they were designed to protect the Declarant's interest in retaining flexibility in how it chooses to develop property adjacent to the 7.64 acre Regime-controlled ("Phase 1") tract as well as amenities on the 7.64 tract itself. Specifically, the Declarant retained ownership of all water and sewer lines. Secondly, it retained the right to improve the Phase 1 tract by "clearing, tree pruning, constructing additional parking and common facilities, including, but not necessarily limited to recreational facilities, lagoons, and the like, pertaining to The Edgewater on Broad Creek Horizontal Property Regime." Third, the Declarant reserved "the

right to install lines, equipment and facilities for utility and drainage purposes and to grant easements over the property for the installation of additional lines, equipment or facilities for utility and drainage purposes from time to time." Finally, the Declarant reserved the right to use the clubhouse on the Phase 1 property.

Plaintiffs have argued and the Order has adopted the idea that none of these reservations of rights by the Declarant create exclusive rights to any portion of the Phase 1 property. Further, the Court has ratified the Plaintiff's argument that the Declarant's right to use the clubhouse as a sales office or relocate the primary interest to the Phase 1 property were automatically extinguished because the Defendant, as successor to the Declarant's rights, chose not to submit additional phases to the Regime by the deadline set forth in the Master Deed. The Order also addresses Section 6(b)(9) of the Master Deed, which provides, "Any additional amenities or recreational facilities, which may or may not be the Additional Phases, are solely at the option of the Declarant." The remainder of that section stands for the proposition that the Declarant shall not be responsible for building or conveying any additional amenities to the Regime, even if they are represented as such in promotional materials. The Order states, "Furthermore, nothing in the referenced provision provides the Declarant or assignee Defendant the exclusive right to construct, approve, authorize, interfere with, supervise or veto amenities in Phase 1." Order of February 24, 2016, p. 12.

Defendants would argue that in order to give meaning to the word "solely" in Section 6(b)(9) of the Master Deed, that it is designed precisely to retain such exclusive rights over the Phase 1 property. Further, it is expressly contemplated that those rights were retained for reasons that may have nothing to do with the Phase 1 property. The Declarant clearly contemplated that the Additional Property, as identified in the Master Deed, might not ever be submitted to the

Regime. However, it is also clear that the Declarant wished to retain complete control over what could be built on the Phase 1 property in order to provide for a cohesive plan of development for all of the property. At a bare minimum, those reservations should be read as requiring that the Regime seek and receive the approval of the Defendant, as the Declarant's assignee, before it proceeds with plans to add improvements to the Phase 1 property. What's more, to the extent that ambiguities may be present within the cited portions of the Master Deed, questions of fact certainly exist, which make summary judgment inappropriate at this juncture.

Therefore, Defendant respectfully moves this Honorable Court for an Order altering and amending its prior Order. Specifically, Defendant asks for a determination that none of the Defendant's retained rights under the Master Deed have been extinguished other than those that were expressly set to expire in 2010. Secondly, while Defendant does not contest that the Regime may build improvements on the Phase 1 property, Defendant asks the Court to amend its Order to find that Defendant has retained the right to approve or veto such proposed improvements, including a swimming pool, in order to protect Defendant's interests in developing its own property or making improvements to the Phase 1 property to service Defendant's property at a later date.

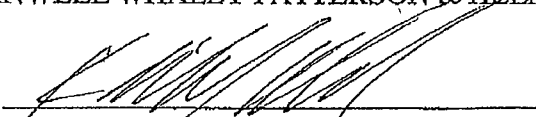
This Motion may be further supported by a Memorandum of Law, South Carolina statutory and case law, South Carolina Rules of Civil Procedure, and the South Carolina Rules of Evidence, as will be set forth in the Memorandum of Law filed herewith in this matter.

IT IS SO MOVED.

[SIGNATURE PAGE TO FOLLOW]

Respectfully submitted,

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

M. Dawes Cooke, Esquire
K. Michael Barfield, Esquire
288 Meeting St., Ste 200 (29401)
Post Office Drawer H
Charleston, SC 29402
(843) 577-7700 FAX (843) 577-7708
mdc@barnwell-whaley.com
mbarfield@barnwell-whaley.com
Attorneys for Ephesian Ventures, LLC

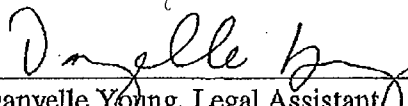
Charleston, South Carolina
March 7, 2016

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Motion to Alter or Amend Judgment Pursuant to SCRP 59(e)** has been forwarded to counsel of record via United States Mail and/or Electronic Mail this 7th day of March, 2016 as follows:

Michael W. Mogil, Esquire
LAW OFFICES OF MICHAEL W. MOGIL, P.A.
2 Corpus Christie Place, Ste. 303
Hilton Head Island, SC 29928
mmogil@mogillaw.com
Attorneys for Plaintiff

Wm. Weston Jones Newton, Esquire
F. Ward Borden, Esquire
JONES SIMPSON & NEWTON, P.A.
Post Office Box 1938
Bluffton, South Carolina 29910
wborden@jsplaw.net
Co-Counsel for the Plaintiff



Danyelle Young, Legal Assistant

2016 MAR -8 PM 3:08
JERRI ANN ROSENEAU
BEAUFORT COUNTY, S.C.
CLERK OF COURT

EDGEWATER ON BROAD CREEK vs EPHESIAN VENTURES
Case No. 2011-CP-07-2994

1

1 IN THE COURT OF COMMON PLEAS
2 FOURTEENTH JUDICIAL CIRCUIT
3 STATE OF SOUTH CAROLINA
4 COUNTY OF BEAUFORT
5

6 EDGEWATER ON BROAD CREEK OWNERS
7 ASSOCIATION, INC.,

8 Plaintiff,
9

10 vs. CIVIL ACTION NUMBER
11 2011-CP-07-2994
12

13 EPHESIAN VENTURES, LLC,
14 Defendant.
15

16 -----/

17 The Hearing for Partial Summary
18 Judgment, in the above-entitled cause, taken
19 before the Honorable Judge Marvin H. Dukes, III,
20 Master-in-Equity, taken by Ceil Weser, Certified
21 Court Reporter and Notary Public, at the
22 Beaufort County Courthouse, 102 Ribaut Road,
23 Beaufort, South Carolina, on the 21st day of
24 September, 2015, commencing at or about the hour
25 of 1:42 p.m.



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1 APPEARANCES OF COUNSEL:

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1 THE COURT: Good afternoon. We
2 are here in 2011-CP-07-2994, this is
3 Edgewater on Broad Creek, et al. versus
4 Ephesian Ventures, LLC. We are here
5 today scheduled on a Plaintiff's Motion
6 For Partial Summary Judgment.

7 And Mr. Newton, you represent the
8 Plaintiff as well?

9 MR. NEWTON: Yes, sir, I do.

10 THE COURT: And Mr. Mogil, I am
11 happy to hear from either one of you or
12 both, or however you want to do it.

13 MR. NEWTON: Thank you, Judge.
14 Judge, with me here today, Let me just
15 make a couple of quick introductions:
16 Bill Eisanham, who is president of
17 Edgewater on Broad Creek Horizontal
18 Property Regime; Bobby Fitzgerald and
19 Pat Duggar, who are board members of
20 Edgewater on Broad Creek Horizontal
21 Property Regime; and obviously you know
22 Mr. Mogil; and Mr. Borden from my
23 office.

24 Your Honor, we are here today on
25 behalf of the Edgewater on Broad Creek



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1 Horizontal Property Regime, which is a
2 duly constituted Horizontal Property
3 Regime under the laws of the State of
4 South Carolina, consisting of 23
5 individual owners on 7.64 acres of land
6 located on Hilton Head Island.

7 These 23 owners have purchased and
8 paid in full all of their obligations
9 relative to the ownership of their
10 respective condominiums, but our
11 victims in a power struggle with the
12 Defendant Limited Liability Company,
13 who as the owner of the adjacent parcel
14 of land once eligible to be a part of
15 the Regime is seeking to enhance his
16 interest at the expense and detriment
17 of the 23 unit owners' ability to enjoy
18 their own property.

19 The Horizontal Property Regime
20 came into existence by the recording of
21 a Master Deed in December of 2002. It
22 is Exhibit Number 2 to the material you
23 have in front of you. And as
24 specifically described in Exhibit A it
25 consists of 7.64 acres.



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1 Exhibit A 1 of the Master Deed
2 reflects an additional 16.01 acres,
3 which were designated as additional
4 land that could potentially be added to
5 the Regime as subsequent phases. The
6 full development of the 23 acres was to
7 potentially have a maximum of a 147
8 units, plus various amenities.
9 Pursuant to the express terms of the
10 Master Deed, the declarant had until
11 December 31, 2010 to submit a portion
12 or portions of the additional 16.01
13 acres to the Edgewater Regime. Neither
14 the Declarant nor its successor acted
15 within the applicable time frame, and
16 no additional land has been submitted
17 to the Regime.

18 By October 2006 all of the 23
19 units comprising Phase 1 have been
20 conveyed to individual unit owners.

21 On or about May 9, 2007 the
22 Creditors put the Declarant developer
23 Broad Creek on Edgewater into Chapter 7
24 bankruptcy, and by Order entered May
25 28, 2008, the bankruptcy court approved



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1 the Trustees' proposal to sell the
2 additional acreage to *Bayer
3 Properties, LLC and entered into a Bill
4 of Sale and instrument of Assignment
5 and Assumption with it. Their
6 properties assigned all rights and
7 interest in the purchase agreement to
8 Appleton Vision, LLC, which in turn
9 assigned all of its rights and interest
10 in the Purchase Agreement to Defendant
11 Ephesian Ventures.

12 The Chapter 7 Trustee executed a
13 Quit Claim Deed to Ephesian Ventures
14 and a Bill of Sale, both of which are
15 included as exhibits, those are 6 and 7
16 to the items that you have; and both of
17 which transfer or purport to transfer
18 to Defendant Ephesian Ventures certain
19 Declarant rights formerly held by the
20 developer Declarant Broad Creek on
21 Edgewater, LP.

22 Your Honor, Ephesian essentially
23 has asserted nonspecific rights as an
24 obstacle under a particular provision
25 of the South Carolina Code, which has



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1 caused the Town of Hilton Head Island
2 not to issue development permits for a
3 crushed shell walkway and a small
4 swimming pool on its own property. If
5 I may, your Honor, here is a copy of
6 the Statute I am referring to. And
7 that is really what we are here about
8 today. We will get into a little more
9 discussion, but as you note from our
10 Motion For Summary Judgment we are
11 essentially asking for the court's
12 confirmation that we have the right to
13 make improvements to our own Regime
14 property without prior approval or
15 without a veto right being exercised by
16 the Defendant.

17 Judge, we don't believe that there
18 are any material facts in dispute. And
19 with regard to the Declaratory Judgment
20 claims for which we are here today on
21 partial Summary Judgment, the common
22 law is clear with regard to enforcing
23 restrictions on property being
24 disfavored and being strictly
25 construed. We are not seeking an



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1 annulment from the Declarant, but we
2 are seeking to understand under the
3 terms of the divorce what rights they
4 have in trying to stop us from building
5 a crushed shell walkway on our own
6 property and a small swimming pool on
7 our own property.

8 Accordingly, we believe that as a
9 matter of law we are entitled to an
10 Order that the Regime has the authority
11 to make improvements to its own
12 property, including a walkway and a
13 pool subject to the town requirements,
14 but not subject to the prior approval
15 or Defendant's blessing. Further, that
16 the Defendant has no right to use the
17 clubhouse on the Regime property and
18 that may actually not be in an issue at
19 this time. I don't know.

20 And that the Defendant has no
21 right to relocate the entrance to our
22 property, which is on our property,
23 which as well that may not be at issue
24 at this time.

25 Your Honor, that is an overview.



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1 I am happy to go into our specific
2 argument of the materials that we have
3 submitted to you. I think that
4 fundamentally there are about three
5 documents that will allow the Court to
6 make its decision, one is the
7 reservation of rights in the Master
8 Deed. Two is the rights that have been
9 conveyed to Ephesian or purported to be
10 conveyed in the Bill of Sale and the
11 Quit Claim Deed also from the
12 bankruptcy debtor to Ephesian Ventures.

13 We have got a number of arguments,
14 your Honor, with regard to the
15 interpretation of the language, whether
16 it actually does or does not do what
17 the Defendants suggest that the
18 language does. We don't believe that
19 there is anything in any of that
20 language that gives them the exclusive
21 right to improve our property. Clearly
22 there are some reserved easements that
23 they have, but those easements are no
24 different than anyone else holding an
25 easement over someone else's property.



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1 That does not require prior approval or
2 a veto power of attempting to do
3 something as the Regime was attempting
4 to do.

5 Your Honor, with regard to the
6 town permits, just so that we are
7 clear, and I am happy to go into the
8 detail in my argument, but again by way
9 of background there are four separate
10 pending appeals with the Town over a
11 walkway that date back to 2010, with
12 regard to whether they could build
13 their own walkway; and it ultimately
14 culminated in the Town taking the
15 position based on the assertion by Chet
16 Williams, and I think I have handed up
17 the law, that that code section
18 required the Town to determine whether
19 there were any restrictive covenants
20 that prohibited the building of a
21 walkway and a swimming pool and that
22 because the Regime had not made the
23 Town aware of these nonspecific rights
24 that they could not get a development
25 permit. You know, a close examination



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1 of the Statute it talks about
2 restrictive covenants. I don't think
3 there is any restrictive covenant again
4 that gives the exclusive right to
5 Ephesian to do anything, but further a
6 close analysis of the Statute it talks
7 about the permit does not mean an
8 authorization to build or place a
9 structure on a tract or parcel of land.

10 So your Honor, I am happy to stop
11 with the overview and hear from the
12 Defendant, or I am happy to go into the
13 specific detailed arguments with
14 regard --

15 THE COURT: With one this
16 complicated I would just as soon hear
17 the other side's overview and then
18 maybe go back and forth as need be.

19 MR. COOKE: Thank you. Well, for
20 the record I am Dawes Cooke and Michael
21 Barfield, we are with Barnwell Whaley
22 Patterson and Helms and we represent
23 the Defendants in this case. I will
24 say that we were just handed this
25 Memorandum and exhibits as we walked in



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1 this morning, and I glanced over it and
2 it is possible that as things play out
3 we may ask for an opportunity to
4 respond to that; but I will give you at
5 least the overview here.

6 Your Honor, we represent the
7 Defendant who acquired essentially all
8 of the rights of the Developer
9 Declarant as it is called in the
10 documents here, which include
11 rights-of-way and rights with regard to
12 both phase 1 and with what we call the
13 additional properties. And essentially
14 what we believe the Plaintiffs are
15 asking this Court to do would be to act
16 as a Court in Equity and essentially
17 nullify Ephesian's rights with regard
18 to Phase 1, which is where the
19 Plaintiff's property is located; but
20 those rights were granted to Ephesian
21 and they survive to this day.

22 We have -- this is the original
23 description of what was conveyed to
24 Ephesian, and it says -- property
25 description says: Being also all



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1 rights retained by Grantor, if any, to
2 that certain piece, parcel, tract of
3 land, situant lying and being on Hilton
4 Head Island, Beaufort County,
5 containing approximately 7.64 acres
6 shown as Regime Parcel 1 on that
7 certain plat titled -- and so forth and
8 so on, together with all Declarant, as
9 that term is defined in the Master Deed
10 noted below, rights, title to real
11 estate, covenants, restrictions,
12 improvements, and any other rights now
13 held by seller as owner or Declarant in
14 the aforesaid property. And then there
15 is some more that includes all
16 developmental rights, easements,
17 rights-of-way, ponds, lagoons,
18 waterways, privileges, permits,
19 licenses, appurtenances, and other
20 rights pertaining thereto, if any, for
21 the property and the adjacent tract;
22 and I have an extra copy of that
23 document that may be included in
24 what --
25 I think it is included.



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1 MR. NEWTON: What is that?

2 Exhibit A to what?

3 MR. COOKE: To the Bill of sale.

4 MR. NEWTON: It is Exhibit 6, yes,
5 sir.

6 MR. COOKE: All right.

7 So and as I glance through the
8 Plaintiff's Memorandum they are
9 suggesting that we are arguing that we
10 acquired more rights than the Declarant
11 had, and for purposes of this motion
12 today, no, we are not. We are asking
13 for the preservation of the same rights
14 that the Declarant possessed in this
15 property.

16 And that includes if you look at
17 the Master Deed, beginning in Section
18 Exhibit A, page 38, of the Master Deed,
19 it says: Save and except here
20 therefrom the right of ingress and
21 egress unto the Declarant herein, its
22 successors, assigned's, and grantees.
23 Further save and except therefrom the
24 right of ingress and egress over and
25 across all roads and walkways within



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1 the said phase 1 property shown on the
2 above-described plat of Edgewater on
3 Broad Creek. Said reserved reservation
4 being unto to the Declarant herein, its
5 successors and assigned's and grantees.
6 Said reserved easement expressly for,
7 but not limited to the purpose of
8 construction, and all construction
9 related activities on the phase 1
10 property, and on the additional
11 property described as Exhibit A 1.
12 Further save and except from the
13 above-described property title to and
14 ownership of all water and sewer lines
15 located on said parcels or hereafter
16 installed thereon, together with all
17 pipes, pumps, pumping stations, or
18 other equipment or facilities located
19 thereon, together with an easement to
20 such lines, equipment and facilities to
21 allow for the maintenance, repair, or
22 replacement of such lines, facilities,
23 or equipment, or for the purpose of
24 installing additional lines, equipment,
25 and facilities thereon from time to



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1 time.

2 And it is true that those for the
3 most part are nonexclusive easements,
4 but the use to which the Plaintiff
5 claims they are ask this court to
6 declare that it has the unfettered
7 right to put its property would
8 interfere with our client's
9 nonexclusive easements over rights of
10 egress and ingress, ownership of the
11 water and sewer lines. One of the
12 improvements that the Plaintiff wants
13 to put in is a swimming pool, which of
14 course would make use of our water and
15 sewer lines.

16 There is an additional provision
17 on page 18 of the deed where it says:
18 Any additional amenities or
19 recreational facilities, which may or
20 may not be in the additional phases are
21 solely at the option of Declarant. The
22 description in any sales or promotion
23 literature of the Declarant of any
24 potential additional amenities or
25 recreational facilities shall not of



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1 itself oblige the Declarant to
2 construct such or to convey them to the
3 Regime as common elements.

4 THE COURT: Well, the additional
5 phases I was thinking was your client's
6 property.

7 MR. COOKE: That is true, that is
8 true. But this says which may or may
9 not be in the additional phases. So it
10 is not limited to additional. This is
11 broad enough to include any additional
12 amenities or recreational facilities
13 which may or may not be in the
14 additional phases.

15 So our clients are very anxious to
16 try to resolve this. We have been
17 working for, gosh, three years now to
18 try to resolve this matter, so that
19 they can be good neighbors. We were
20 very close. We made a proposal even as
21 recently as last week; but with all due
22 respect it appears to us that what the
23 Plaintiffs are trying to do is ask this
24 Court to step in and use its broad
25 equitable powers to take for itself the



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1 rights that it has been trying to
2 negotiate with our client. And you
3 know, at the very least that would
4 require a trial, so that the court can
5 weigh the equities and determine
6 whether it is even possible, let alone
7 equitable to essentially grant the
8 Plaintiff those rights and nullify the
9 rights that our client has. So that is
10 our overview.

11 THE COURT: Did you all mediate
12 this case yet?

13 MR. COOKE: Yes, and have
14 continued and are continuing to try to
15 negotiate. Mr. Barfield can probably
16 address that in more detail from our
17 perspective.

18 THE COURT: Thank you for that
19 overview. So we will maybe go back to
20 Mr. Newton and launch into the minutia
21 of it.

22 MR. NEWTON: Thank you, Judge. I
23 mean based on Mr. Cooke's summary,
24 perhaps we can focus on a couple of
25 points. For purposes of this



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1 discussion I understand that we are not
2 talking about more expansive rights
3 than that which the Declarant had at
4 the time or that he had that Ephesian
5 now claims to have.

6 But I want to focus in on for a
7 few minutes on the specific language in
8 Exhibit A to the Master Deed, because I
9 don't find anything in there that says
10 any of those rights are exclusive. We
11 are not asking the Court at this point
12 by way of this partial Summary Judgment
13 Motion to reinterpret or to exercise
14 its equitable powers, other than to
15 look at the language and interpret
16 whether the language as asserted
17 provides them with an exclusive right
18 to approve whether we can put in a
19 crushed shell walkway and a small
20 swimming pool.

21 Again, your Honor, based on that
22 Statute somewhere around here, I think
23 this is Exhibit 13 to what you have,
24 but in the letter to the town Chet
25 Williams said: Among the rights



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1 reserved in the Master Deed as held by
2 Ephesian pursuant to the Quit Claim,
3 the right to improve the Regime by
4 clearing, tree pruning, constructing
5 additional parking facilities,
6 including, but not necessarily limited
7 to recreational facilities, et cetera.
8 If you look at the specific language in
9 the Master Deed, it says: And the like
10 pertaining to the Edgewater on Broad
11 Creek Horizontal Property Regime. That
12 is Exhibit 13.

13 THE COURT: Where are you in
14 Exhibit A again? I am sorry.

15 MR. NEWTON: Judge, I am on page 2
16 essentially of Exhibit A. It is page
17 39.

18 THE COURT: Okay.

19 MR. NEWTON: Where it says
20 pertaining to the Regime.

21 So your Honor, we are not here to
22 ask you to say that they have no right
23 of ingress and egress. What we are
24 here to say, to ask the Court, is that
25 the Town based on this letter and this



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1 statute being misinterpreted and
2 misconstrued to the Town, it doesn't
3 have anything to do with easements. It
4 doesn't have anything to do with even
5 this Master Deed if they were to be
6 construed as restrictive covenants. It
7 does not mean authorization to build or
8 place a structure on a tract or parcel
9 of land.

10 We are simply asking for the Court
11 not to redefine what their rights are.
12 There are lots of time for the divorce,
13 if you will, between the parties in the
14 future and opportunities for challenges
15 as to scope of easements and use and
16 whether they are beyond that was
17 originally contemplated for 147 units,
18 and the timeshare activity that looks
19 likely to happen; but this is simply --
20 there is nothing in these documents
21 that gives them the exclusive right to
22 do any of these things. And that
23 furthermore, under the common law in
24 the Sea Pines' case that these are
25 indefinite rights that they point to as



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1 prohibiting us from being able to put
2 in a crushed shell walkway or a small
3 swimming pool. And you know at the
4 very least it is against public policy.
5 As it relates to the section page
6 18, which your Honor is Section 6 B 9
7 of the Declaration, that is page 18 of
8 the Master Deed, again, there is
9 nothing there that says they have the
10 exclusive right. I mean quite honestly
11 that is a CYA language that the
12 Declarant reserved in itself discretion
13 as to what if any additional amenities
14 might be built by it. They left
15 themselves a way out of any amenity
16 that they may have put out in
17 promotional literature by disclaiming
18 an obligation to construct further
19 amenities. There is nothing in that
20 provision that gives them the exclusive
21 right -- quite honestly there is
22 nothing in there that gives them the
23 right in that language to build
24 anything on Phase 1. Perhaps it is by
25 inference. But that provision clearly



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1 relates to the additional phases.

2 Your Honor, furthermore, we are
3 challenged by the indeterminate
4 improvements, alterations, adjustments
5 they may or may not make. Our bylaws
6 in this same recorded document requires
7 that we prepare annual budgets. It
8 charges us with the responsibility to
9 make repairs and replacements to our
10 common elements, and yet now we are
11 being told that that language somehow
12 gives the current holder of those
13 rights the ability not to allow
14 anything to happen that they don't
15 bless and approve in advance. You
16 know, there was a phase-out -- excuse
17 me, there was a phase-in opportunity
18 for this additional 16 acres; and by
19 the express terms of the Master Deed
20 that phase-in expired December 31 of
21 2010, and that is in Section 6 of the
22 Master Deed.

23 So you know, your Honor, we do
24 believe that a lot of these rights upon
25 the full trial in this case are greatly



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1 restricted beyond that which the
2 Defendant thinks they are; but at the
3 very least we believe that it is
4 appropriate for partial Summary
5 Judgment to confirm that we do have the
6 right to construct a swimming pool,
7 crushed shell walkway, or make other
8 improvements. Now, your Honor, we are
9 not here to say that that is without
10 regard to their easements or without
11 regard to their utility lines if they
12 want to let us use their water line to
13 put water in our pool. We own the
14 land, we can grant an easement to the
15 water company to give us another water
16 line. But I still can't find anything
17 in here that gives them the exclusive
18 right to control the property that is
19 owned pro rata by 23 individuals.

20 MR. COOKE: Can I respond to that
21 briefly?

22 THE COURT: Yes, please, go ahead.

23 MR. COOKE: Your Honor, this is
24 not a -- even if the Court were
25 inclined to do it, it would not be



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1 appropriate to try to do it by Summary
2 Judgment, because what the Plaintiffs
3 are doing is they are basically putting
4 the camel's nose under the tent and
5 saying we are just asking for something
6 small. Right now we just want a little
7 gravel, crushed shell driveway and a
8 little walkway and a little swimming
9 pool. But to do that the Court has to
10 nullify to some extent at least, to
11 some extent at least, my client's
12 easements, and specifically my client's
13 ownership of the water and sewer lines
14 if they are going to put a pool in
15 there.

16 So it would require at least some
17 findings of fact and conclusions as to
18 whether the proposed improvements would
19 impinge upon my client's free exercise
20 of its easements, because even though
21 Weston characterizes these as
22 nonexclusive, you can't say that as to
23 the water and sewer which we actually
24 own. But even to the extent that it is
25 nonexclusive, if you allow the



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1 Plaintiffs the unfettered access to
2 construct the improvements that they
3 choose anywhere on their property, then
4 it is almost by definition going to
5 interfere with my client's exercise of
6 its easements, which are expressly
7 reserved, both as to Phase 1 and as to
8 the additional properties.

9 THE COURT: Help me out with
10 Exhibit A, page 38.

11 MR. NEWTON: Yes.

12 MR. COOKE: Kind of to Mr. Cooke's
13 point, when you get down there, the
14 second to the last full paragraph:
15 Further save and except for the
16 above-described property, title to an
17 ownership of all water and sewer lines
18 located on said parcels or hereafter
19 installed thereon. So it is just not
20 the rights of ingress and egress in the
21 preceding paragraphs, this one has to
22 do with title that they are reserving
23 and ownership of anything in the ground
24 now or in the future.

25 MR. NEWTON: Your Honor, and we



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1 would not -- for purposes of this
2 motion we are not contesting they don't
3 own the water pipes.

4 THE COURT: But if you put a new
5 one in the ground hereafter, doesn't it
6 become theirs? That language I guess
7 is -- maybe I am reading it wrong. I
8 haven't seen this for years.

9 MR. NEWTON: Your Honor, perhaps
10 if that is interpreted to mean that we
11 don't have the right ourselves to put
12 in any water pipes in the ground. But
13 again that doesn't have anything to do
14 with the shell walkway. It doesn't
15 have anything to do with that which is
16 borderline abuse of process with the
17 Town to assert that there are
18 restrictive covenants, when there are
19 none, and we have talked about none
20 here today other than easements that
21 that State Statute covers.

22 THE COURT: Obviously I was
23 talking about the pool.

24 MR. NEWTON: No, I understand,
25 your Honor. But you know, the issue of



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1 scope of easements -- I mean again when
2 I said we are not here to seek an
3 annulment. We are not here seeking a
4 full determination. It just cannot
5 be -- number 1, these reserved rights
6 in no way, shape or form are exclusive
7 except for perhaps the ownership of the
8 water lines. But as it relates to any
9 of the other rights being asserted, it
10 is just an indeterminate we have the
11 veto power over your property, you can
12 do nothing, that has been advanced. I
13 mean that clearly flies in the face of
14 the Sea Pines' case with regard to the
15 common law of this State in terms of
16 enforcing recorded, restrictive
17 covenants or obligations.

18 They are indefinite rights that
19 are being asserted, and it is no
20 different than if I have an easement to
21 cross Seaside Farms on St. Helena. It
22 can't be that if I decide to build a
23 house on Seaside Farms that I have got
24 to go ask the folks that live on either
25 side of me that have easements to cross



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1 it, do you mind if I build a house,
2 because you might decide next week to
3 ride your car through where I am
4 building a house. I have never known
5 that the law of easements went so far
6 as to give somebody a preliminary veto
7 power over anything and everything that
8 might be considered to be done on the
9 property.

10 THE COURT: Now you are talking
11 about back to the gravel walkway or
12 whatever, right?

13 MR. NEWTON: Your Honor, we are
14 actually looking for an Order that says
15 that we have the right to make
16 improvements on our property. Now, if
17 whatever we are doing infringes upon a
18 specific easement that the Defendant
19 has, they have the opportunity for
20 redress. Just like if they attempt to
21 build three, four, 500 units in what
22 was contemplated as no more than a 147
23 total, we have the right to bring them
24 back to Court and say that is beyond
25 the scope of the easement that was



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1 relied upon.

2 But we are not asking for you to
3 define all of these rights today.
4 Quite honestly we are asking for a very
5 narrow issue.

6 THE COURT: Well, you all are
7 asking for a ruling that the rights of
8 ingress and egress set forth -- I know
9 you are asking for more than that, but
10 with regard to the walkway you are
11 asking that the rights of ingress and
12 egress be determined not to be
13 exclusive. Is that essentially what
14 you are asking for?

15 MR. NEWTON: Yes, sir. I mean if
16 you look at the Motion For Summary
17 Judgment essentially we are asking that
18 we can build a swimming pool and other
19 improvements to our property.

20 Now, that doesn't mean that it is
21 an unfettered right to build a pool.
22 If we propose building a pool that is
23 on top of their water lines, that is an
24 issue people have to deal with. But
25 there is no preliminary advance we have



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1 to ask for your approval.

2 Now, your Honor, I will tell you
3 the Motion goes on to talk about the
4 clubhouse which I am not sure is an
5 issue today. It talks about the right
6 to relocate the Association's ingress
7 and egress. I don't believe that is
8 necessarily an issue at this point.

9 And the Motion goes on to say, to
10 seek that the ingress and egress is
11 extinguished, except to the Court
12 determines no other ingress and egress
13 exists. I am not here arguing that
14 point today, your Honor.

15 THE COURT: Let me make sure then
16 just for the record. So the Motion at
17 this point, the other parts are
18 withdrawn.

19 Is that no, they are not?

20 MR. NEWTON: They are not
21 withdrawn. They are still asserted,
22 your Honor. I am just not arguing for
23 those items at this point.

24 THE COURT: I got you.

25 MR. NEWTON: Essentially, we are



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1 here asking for an Order of the Court
2 that we don't -- that there is nothing
3 in this language that has been asserted
4 today that requires or affords an
5 unfettered veto, an undetermined right
6 in favor of the Defendant before we can
7 do anything on our property.

8 I mean clearly through a public
9 permitting processes if we propose to
10 do something that infringes on their
11 rights. It just cannot simply be that
12 these folks can never do anything on
13 their property. I can't understand how
14 that is equitable in any sense of the
15 word.

16 MR. COOKE: Except that the court
17 is being asked to nullify the provision
18 that says any additional amenities or
19 recreational facilities which may or
20 may not be in additional phases are
21 solely at the option of Declarant.

22 So at best what the I think the
23 Plaintiff is claiming is that that
24 language is ambiguous and therefore the
25 Court would have to make inquiry or



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1 make findings to determine what the
2 intent of the parties was with that.
3 And again that is just beyond the scope
4 of Summary Judgment and the Court is
5 being asked to essentially in the
6 abstract simply say uncategorically
7 that allowing them to put a pool and
8 this walkway in would not interfere
9 with any of the rights that were
10 reserved to the Declarant, and you
11 can't do that based on the record
12 before the Court.

13 THE COURT: Let me ask you this,
14 is it the opinion of the Defendant that
15 the walkway is a recreational facility
16 or amenity?

17 MR. COOKE: It is an amenity. It
18 is at least an amenity, and I think
19 they envision it as an accessory to the
20 pool.

21 THE COURT: As amenity?

22 MR. BARFIELD: To the clubhouse.

23 MR. COOKE: To the clubhouse, I am
24 sorry, which really is an amenity.

25 MR. BARFIELD: And it traverses



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1 common elements, which is a salient
2 point.

3 MR. NEWTON: Your Honor, as we
4 noted at the outset there are four
5 separate pending appeals where with the
6 Town for the permits to be able to put
7 in these couple of little things.
8 There was no action commenced by
9 Ephesian, that what our proposal was,
10 was beyond our ability or interfered
11 with their specific rights. It was
12 nothing more than this shapeless
13 assessment that they have got an
14 absolute veto power over anything that
15 we want to do.

16 I will note that within the same
17 Master Deed, and I alluded to it
18 earlier, there are multiple references
19 as to the board's responsibility of
20 making repairs, additions, and
21 improvements, or alterations of or to
22 the common property, replacement of
23 improvements to the common elements.

24 Your Honor, other than this
25 paragraph 9 and the suggestion that it



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1 is somehow exclusive, we don't believe
2 that there is -- we struggle to even
3 find an irreconcilable conflict with
4 what we are proposing in the rights
5 that they have or the assertion that
6 they have exclusive rights; and again
7 as it relates to that language I think
8 it is capable of interpretation, your
9 Honor, that it doesn't give them the
10 right to do it. In fact, it does not
11 say that they have the right to make
12 any improvements to our property. That
13 may be an inference, but again if it is
14 an inference and that is what is being
15 argued, I believe that is -- that the
16 Sea Pines' case takes care of that.

17 MR. COOKE: Your Honor, I also
18 would just call the Court's attention
19 to the bottom of page 38: Further, the
20 Declarant expressly reserves the right
21 to improve the aforementioned property
22 by clearing, tree pruning, constructing
23 additional parking, and common
24 facilities, including, but not
25 necessarily limited, to recreational



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1 facilities, drainage facilities,
2 lagoons, and the like, pertaining to
3 the Edgewater on Broad Creek Horizontal
4 Property regime. I just don't see how
5 the Court can find on Summary Judgment
6 based on the record before you that the
7 additional facilities that the
8 Plaintiff wants to put on as a matter
9 of law do not and cannot interfere with
10 these rights retained by Ephesian.

11 THE COURT: It would have been
12 really easy to put the word
13 "exclusively" in all of these, and it
14 doesn't have that part, I mean that
15 paragraph in particular.

16 MR. COOKE: True, but if they --
17 if the Plaintiffs are allowed to make
18 use of the property that nullifies
19 this, that interferes with this, then
20 we don't even have the nonexclusive
21 rights. We don't have any right if
22 that right is interfered with by
23 putting a swimming pool there or
24 putting a walkway there.

25 MR. NEWTON: Your Honor, if I may,



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1 just the part that Dawes just read from
2 is we agree that that language is
3 pretty clear as to what their
4 reservation of rights are in terms to
5 do those things.

6 We think the important language is
7 pertaining to the Edgewater on Broad
8 Creek Horizontal Property Regime. So
9 we are delighted if they want to make
10 the improvements to our property that
11 pertains to our Regime. I am not sure
12 it goes so far as to let them use it
13 for others.

14 There is a pictorial, if it gives
15 you any sense of where, so that you can
16 sort of orient yourself, the black line
17 here is the Phase 1, and this is the
18 additional property. I think there is
19 a smaller exhibit that is included. 2
20 A.

21 MR. MOGIL: Your Honor, can I be
22 heard on a point?

23 THE COURT: Sure, Mr. Mogil. Go
24 ahead.

25 MR. MOGIL: On this same point I



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1 think it is important to take a step
2 back and look at the context in which
3 these provisions -- we believe these
4 provisions were drafted, and that this
5 is a development in which at least
6 initially the Declarant would have had
7 to reserve rights to construct
8 improvements within the Regime, because
9 it was intending, although not
10 committed, but intending to commit
11 further property to the Regime. And it
12 wouldn't make any sense to allow back
13 in 2007 the owners of one component of
14 the Regime to alter the character of
15 the Regime as contemplated. But in
16 2010 that right expired.

17 So that Dawes' client right now
18 couldn't conceivably build a pool on
19 phase 1 without our owners' permission,
20 because they no longer have the right
21 to add property and add units. They
22 don't have any control over our board
23 or over our budget. And he can correct
24 me if I am wrong, but you have to look
25 at this in the context of what was



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1 intended at the beginning and what
2 happened when they declined to continue
3 with the project past the expiration
4 date. So they couldn't build a pool in
5 Phase 1 unless we gave them our
6 blessing.

7 THE COURT: Of course you have to
8 be careful about intent in a Summary
9 Judgment motion.

10 MR. MOGIL: Correct. But we are
11 not even looking at the intent. It is
12 clear they don't have the right anymore
13 to build a pool. They can't commit
14 further property in the Regime, and the
15 board and the owners exclusively
16 control their property. I think that
17 much doesn't require fact finding.
18 That part is I think undisputed.

19 MR. DAWES: They don't exclusively
20 retain that right. It is subject to
21 these specific reservations of rights
22 by the Declarant.

23 THE COURT: But the one's that
24 seem exclusive to me, and I understand
25 you are looking at page 18, paragraph



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1 9, as essentially saying that they have
2 got sort of final cut on everything.
3 But if you go back to Exhibit A, the
4 pipe thing seems to indicate if you put
5 a pipe in the ground it belongs to
6 Ephesian, but the rest of it are
7 nonexclusive rights, I think, if I am
8 reading this correctly. They have got
9 the right to do all sorts of things.

10 But I don't see that it is
11 exclusive other than the ownership that
12 we have already discussed here. I kind
13 of read that paragraph 9 on page 18
14 sort of the same way Mr. Newton reads
15 it. Anyway, obviously I will need to
16 read through all this and figure it
17 out.

18 What else do we have? Anything?

19 MR. MOGIL: I would just add, and
20 again I kind of said that this is the
21 main point, but the clubhouse was in
22 our Motion and that clubhouse was
23 originally used as a sales office, your
24 Honor; and we have converted it into a
25 gymnasium and the owners have converted



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1 it and they paid for it, and that is in
2 the Motion simply because in the Master
3 Deed it provided the Declarant the
4 right to come back and use that
5 clubhouse for future use, and we don't
6 think that that makes any sense given
7 that the phasing is completed. They
8 wouldn't be using that clubhouse
9 further to benefit the Regime.

10 And you know, and so you know,
11 your Honor, the water that we are
12 talking about, the owners now have
13 water that is going through those
14 pipes. Any time they turn on the
15 spigot I assume it is going through the
16 same pipes that the Regime dedicates to
17 it. So that is there. And as the memo
18 points out, and you will see when you
19 read it, at one point there was a pool
20 that was on the -- or is a pool that is
21 on the Declarant's land that was given
22 by the developer for use by the owners;
23 and then through negotiations
24 continues, and this whole dispute
25 started when the owners were denied use



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1 and wanted to build their own pool in
2 replacement. And that is when the
3 dispute starts. So if you see the pool
4 on that diagram, I don't know if it is
5 in front of you, that the pool that is
6 there.

7 THE COURT: I see a lagoon.

8 MR. MOGIL: There is a large
9 beautiful pool there now, but it is on
10 Declarant's land; and when that use was
11 cut off that is why this case is before
12 you, because they want to build their
13 own pool because they can't use that
14 pool anymore.

15 THE COURT: All right.

16 MR. BARFIELD: Your Honor, if I
17 may respond to those two points?

18 THE COURT: With regard to the
19 clubhouse, you will note that the
20 Master Deed is very, very clear
21 throughout that the Declarant, the
22 original Declarant was under no
23 obligation to submit anything further
24 to the Regime that he chose to or it
25 chose to build on the phase 1 property



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1 or any other parcel that is in the
2 additional property. But there is the
3 right to use the clubhouse as set forth
4 in the Master Deed is expressly
5 retained. So in other words, to make
6 the assumption that because the current
7 or the successor Declarant's ability to
8 submit additional property or
9 additional buildings, amenities, what
10 have you to the Regime, because that
11 has been cut off, that somehow the
12 right to use the clubhouse for what is
13 expressly reserved is cut off, one does
14 not flow from the other automatically.

15 If at some point Ephesian develops
16 something, and they have not determined
17 what they will do with the additional
18 property, and they wish to sell it, the
19 right to sell that from the clubhouse
20 has been expressly reserved. Those two
21 things are not tied to the existing
22 Regime.

23 With regard to -- what was the
24 second point? You talked about the old
25 pool. What was the second issue you



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1 mentioned, Mike?

2 MR. MOGIL: That this dispute
3 started because the pool --

4 MR. BARFIELD: Yeah, yeah, yeah,
5 we don't disagree with that either.

6 MR. MOGIL: That the pool that was
7 being used was never on Phase 1.

8 MR. BARFIELD: Right.

9 MR. MOGIL: The Developer built it
10 and because it was still a development
11 allowed them to use it, and then after
12 negotiations fell through after
13 Ephesian took it over and allowed some
14 use, it fell apart and that use was cut
15 off. So this case started because they
16 went to build a pool because they
17 couldn't use the other pool, and right
18 now they don't have a pool in Phase 1.

19 MR. BARFIELD: It was the water in
20 the pipes, that is what you meant.

21 MR. MOGIL: Right.

22 MR. BARFIELD: Of course the pipes
23 service the existing building. That
24 has never been disputed. I can't
25 recall off the top of my head if there



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1 is an express easement reserved in the
2 occupants of the Phase 1 building to
3 use the pipes to support the existing
4 building. I think that might be in
5 there, but obviously we don't contest
6 their ability to do that.

7 The issue with the burden on those
8 pipes goes directly to our ability or
9 Ephesian's ability to do with their
10 land as they choose, because any
11 additional burden placed on that
12 infrastructure to support the Phase 1
13 property is directly proportional to an
14 impact that results on Ephesian's
15 ability to develop the phase or the
16 additional property.

17 THE COURT: Of course you can fix
18 that in about five minutes with two or
19 three inch line running from the street
20 to the main, right, back to the pool.

21 MR. BARFIELD: But as you pointed
22 out, your Honor, the Master Deed may
23 mean, and we contend that it does, that
24 anything that is put in the ground
25 becomes ours. It is quirky, but it is



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1 there.

2 THE COURT: Yeah, I guess what I
3 meant is in response to your
4 overburdened system, it would be easy
5 to dig a trench to lay a pipe in there.

6 MR. NEWTON: Quickly, if may, your
7 Honor.

8 THE COURT: Yes.

9 MR. NEWTON: With regard to the
10 clubhouse as Mr. Barfield said there is
11 a lot of scope of easements issues that
12 have yet to be determined at a later
13 time. I mean if it is challenged that
14 we can take two showers, but not three
15 in a given period of time, we will
16 certainly be in a position to do that.
17 Just like all of these documents
18 originally contemplated there would be
19 no more than 147 units on this
20 property, period. And so clearly any
21 shared use of the driveways, any shared
22 use of ingress and egress, any of these
23 easements quite honestly that are here
24 would be contemplated as being limited
25 and restricted to nothing but 147 total



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1 units. Now, we will have the chance to
2 argue that as we continue into the
3 future.

4 For purposes of today the issue
5 about the clubhouse, I think it goes
6 without saying Section 12.02 does
7 pretty clearly provide that that
8 reserved right provided Declarant shall
9 be entitled to use one or more unit
10 and/or the clubhouse for purposes of a
11 sales model and/or office until the
12 entire project to include future phases
13 have been sold. Well, future phases
14 are defined in 9.04. Future phases
15 were on the additional land. There is
16 nothing that can be submitted to the
17 Regime on the additional land as a
18 future phase to the Regime the right to
19 use the clubhouse is expressly
20 extinguished by the terms of the Master
21 Deed. For some reason I didn't think
22 that was in conflict anymore but --

23 MR. BARFIELD: Well, and perhaps
24 we can talk about the use. That may
25 put -- that may put a restriction on



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1 the right to use the clubhouse as a
2 quote/unquote "sales office". Now,
3 however the Declarant I believe has
4 reserved rights in the existing
5 amenities outside of this singular
6 provision.

7 MR. NEWTON: If it is not in the
8 Master Deed or in the Deed, or in the
9 Quit Claim, that is part of what we are
10 asking. Show us what rights that the
11 town was told you can't have a shared
12 walkway because it interferes with our
13 rights. And if there is language in
14 these documents that simply says you
15 can use anything and everything of ours
16 I must have missed it.

17 MR. BARFIELD: Well, in the
18 property description --

19 MR. NEWTON: Okay.

20 MR. BARFIELD: -- the first one.
21 First off, in the Exhibit to the Deed
22 issued by the Bankruptcy Court, the
23 Declarant, the new Declarant's
24 successor for Declarant was given all
25 developmental rights, easements,



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1 rights-of-way, ponds, lagoons,
2 waterways, privileges, permits,
3 licenses, appurtenances, and other
4 rights pertaining to, if any, for the
5 property and the adjacent tract. Well,
6 the property is the Phase 1 property in
7 this regard. The Bankruptcy Court
8 issued this Deed.

9 THE COURT: That just takes us
10 back to Exhibit 1. I mean it couldn't
11 give anymore than what they were --

12 MR. BARFIELD: Correct, but I
13 think that there is a question of fact
14 because the -- where is Exhibit 1 to
15 the Master Deed?

16 MR. COOKE: Exhibit A?

17 MR. BARFIELD: Yes.

18 MR. COOKE: Judge, while he is
19 looking for that, I was just going to
20 ask if there is an accommodation, if
21 the Court perhaps would give us a day
22 to read their Brief that was just
23 handed to us and if there is anything
24 to submit.

25 THE COURT: Certainly.



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1 MR. NEWTON: We don't have any
2 objection.

3 THE COURT: You can have more than
4 a day.

5 MR. BARFIELD: As Mr. Cooke
6 pointed out earlier this paragraph that
7 begins on the bottom of page 38 and
8 continues to the top of page 39, there
9 is an express reservation of rights to
10 improve the property by clearing, tree
11 pruning, constructing additional
12 parking common facilities, so on and so
13 forth; and I believe Plaintiff relies
14 on the last phase of that. It says:
15 Pertaining to the Edgewater on Broad
16 Creek Horizontal Property Regime.
17 Well, what does that mean?

18 And so I am not sure it is a
19 question of law to construe the phrase
20 pertaining to the Edgewater on Broad
21 Creek Horizontal Property Regime, does
22 that mean that it must be for the
23 exclusive benefit of the Phase 1
24 owners? Or does that simply mean that
25 it impacts the Phase 1 property, but it



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1 is for the exclusive benefit of the
2 successor Declarant.

3 And so again to add to Mr. Cooke's
4 comments I think Summary Judgment is
5 not the right stage of the case to make
6 that determination, and so the
7 clubhouse falls under that umbrella.

8 THE COURT: I will grant you it is
9 not easy, but I guess from looking
10 through here, what I don't see is the
11 word "exclusive" or "exclusively".
12 Again, the pipes in the ground thing
13 may be a different matter, but -- and
14 it would have been pretty easy to put
15 that in there.

16 MR. BARFIELD: Well, it is not the
17 best crafted Master deed, your Honor,
18 we will concede that. But that is
19 synonymous with saying it is replete
20 with ambiguities, which is synonymous
21 with saying questions of fact. But I
22 will also say they are seeking to
23 exclude, to latch onto that word,
24 Ephesian from access to the clubhouse.
25 Now whether or not they intend to use



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1 it as a sales office, I am not sure
2 what they would want to do. But in
3 terms of shutting them out of the
4 clubhouse, that seems to fly in the
5 face of their position as to what
6 Ephesian can exclude them from.

7 MR. NEWTON: Except, your Honor,
8 as you have so keenly pointed out,
9 Ephesian can have no greater rights
10 than that which was reserved in the
11 Master Deed. The Master Deed is on our
12 property. We pay to insure it.
13 Ephesian pays not a dime for property
14 taxes, for insurance, for the light
15 bill that goes to it; and even in that
16 Exhibit A description that we just so
17 eloquently went through, and we
18 obviously pointed out the pertaining to
19 language, they reserve the right to
20 make those improvements, whatever they
21 are whenever we get to argue them, but
22 I am looking through here and see
23 nothing that says they can use our
24 clubhouse. Nothing that says they can
25 use our tennis courts. They can cut



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1 our trees if they want to. Arguably
2 they can put a parking lot on our
3 property. I am not sure that they can
4 use it, but that is for a different
5 day.

6 But the clubhouse language is
7 pretty clear that that right has
8 expired, unless there is another
9 specific reference to the ability to
10 use the clubhouse that I have not seen
11 in the Master Deed.

12 THE COURT: You are saying that if
13 the Phase 1 property was conveyed by
14 Exhibit A, it would have had to have a
15 save and except for that real estate in
16 there, to reserve that. Is that --

17 MR. NEWTON: Or the rights to use
18 it. I mean clearly the rights were
19 there as set forth in 12.02, which is
20 page 28 of the Master Deed.

21 THE COURT: Yeah.

22 MR. NEWTON: Entitled to use it
23 for purposes of a sales model or until
24 the entire project to include future
25 phases have been sold. Future phases



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1 of course is adding that which comes
2 from the additional property into the
3 Regime. Well, there can be no future
4 phases. I mean future phases in this
5 document, there can be none. The phase
6 out has expired. It expired
7 without there being any factual issue
8 on December 31, 2010. It is gone. And
9 they had the right to use it until.
10 Until has happened, and unless there is
11 some other language somewhere in here
12 that says they can continue to use our
13 clubhouse and, you know, surely there
14 would have been provision made for
15 shared insurance and sharing power
16 bills and that sort of thing.

17 But your Honor, our contention
18 today with Summary Judgment, and quite
19 honestly at the outset when I said it
20 may not be an issue is just the narrow
21 language of 12.02, that right has
22 expired within the four corners of the
23 document; and I don't think the
24 language is ambiguous whatsoever.

25 THE COURT: All right.



EDGEWATER ON BROAD CREEK vs EPHESIAN VENTURES
Case No. 2011-CP-07-2994

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1 Anything else on that?

2 MR. COOKE: No, your Honor.

3 THE COURT: Anything else for this
4 record?

5 MR. COOKE: No, just when I said a
6 day, I thought maybe just a day to let
7 you know if we want to submit anything,
8 and then if we do then --

9 THE COURT: Oh, yes. I was
10 completely impressed.

11 MR. COOKE: I wasn't really going
12 to ask Mr. Barfield --

13 THE COURT: I didn't expect you to
14 drive all the way home, read the whole
15 thing and respond tonight.

16 Yes, let me know tomorrow or the
17 next day if you want to respond; and
18 then assume for the moment you want to
19 respond, ten days?

20 MR. COOKE: That would be more
21 than enough, yeah.

22 THE COURT: Plus a few days to let
23 me know, so 12 days or so.

24 MR. COOKE: That would be
25 wonderful.



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1 THE COURT: That is fine. If you
2 need more time or less time or
3 whatever, just coordinate with
4 everybody, and just let me know
5 whatever you all agreed to.

6 MR. NEWTON: Your Honor, and we
7 may talk, I mean if that happens we may
8 want the brief opportunity to offer
9 something if it comes up, but there was
10 no intention to ambush Mr. Cooke today.
11 That is a fairly voluminous exhibits
12 that went with it in putting it
13 together.

14 MR. BARFIELD: We put those in
15 evidence, 67 --

16 MR. NEWTON: Yes, sir, and we have
17 no objection.

18 MR. BARFIELD: And we will
19 stipulate that there is nothing in it
20 that we have not seen before.

21 THE COURT: Okay.

22 MR. BARFIELD: Apart from
23 Mr. Newton's arguments excepted.

24 THE COURT: Well, good. Well,
25 thank you all very much. That will



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1 conclude the record.

2 (Whereupon, the hearing was
3 concluded at 2:47 p.m.)
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Case No. 2011-CP-07-2994

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C E R T I F I C A T E

STATE OF SOUTH CAROLINA:

BEAUFORT COUNTY:

I, Ceil Weser, CSR and Notary

Public in and for the above county and state, do
hereby certify that the foregoing testimony was
taken before me at the time and place
herein before set forth; that the witness was by
me first duly sworn to testify to the truth, the
whole truth, and nothing but the truth, that
thereupon the foregoing testimony was later
reduced by computer transcription; and I certify
that this is a true and correct transcript of my
stenographic notes so taken.

I further certify that I am not of
counsel to either party, nor interested in the
event of this cause.

Ceil Weser, CCR

Notary Public

Beaufort, South Carolina



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1 State of South Carolina) Court of Common Pleas
2 County of Beaufort) 14th Judicial Circuit
3) No.: 2011-CP-07-2994

4 The Edgewater on Broad)
5 Creek Owners)
6 Association,)

7 Plaintiff,)

8 vs.)

9 Ephesian Ventures, LLC,)

10 Defendant.)

HEARING

July 11, 2016

11
12 Hearing reported by Deborah S. Thomas,
13 Certified Verbatim Reporter and Notary Public in and
14 for the State of South Carolina; said hearing held
15 before the Honorable Marvin H. Dukes, III, Beaufort
16 County Master in Equity and Special Circuit Court
17 Judge in accordance with the South Carolina Rules of
18 Civil Procedure, at the Beaufort County Courthouse,
19 102 Ribaut Road, Room 212, Beaufort, South Carolina,
20 on July 11, 2016, at the hour of 11:11 a.m.

21
22 THOMAS REPORTING SERVICES
23 156 Argent Way
24 Bluffton, South Carolina 29909
25 (803) 206-7390

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Bill Eisenman

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EXHIBIT INDEX

Exhibits:

Marked at Page

(None were proffered.)

* * * * *

1 This hearing is taken in accordance
2 with the South Carolina Rules of Civil Procedure.

3 JUDGE DUKES: Good morning. We are
4 here on 11-CP-07-2994, Edgewater on Broad Creek
5 Owners Association versus Ephesian. This matter
6 comes to me as a 59(e) motion after my order
7 granting Plaintiff's motion for partial summary
8 judgment which was filed February 26th, 2016.

9 And the motion that we are dealing with
10 this morning was filed March 8th, 2016. And I'm
11 happy to hear from you, sir.

12 MR. BARFIELD: Thank you, Your Honor.
13 We will be very, very brief here this morning I'm
14 sure. Just to kind of re-acclimate everybody to the
15 nature of the case, this is a matter involving a
16 planned development in Hilton Head which has the
17 chronology of it was that a single developer was
18 going to develop a multi-building, multi-family
19 project called Edgewater on Broad Creek.

20 One building was completed which is on
21 what is referred to in the context of the case as
22 the Phase 1 property. The Phase 1 property in total
23 is seven and a half acres, roughly. And you can see
24 on the blow-up that Mr. Newton brought that this is
25 the -- it's labeled as Regime Parcel 1 here, but

1 this is the Phase 1 property.

2 JUDGE DUKES: Is that an exhibit from
3 the previous hearing, Exhibit 2-A?

4 MR. BARFIELD: Yes, Your Honor.
5 Exhibit 2-A.

6 JUDGE DUKES: So somewhere in the
7 previous record is 2-A. Okay.

8 MR. BARFIELD: The initial developer
9 also began to construct a second building which is
10 shown over here labeled Building 2. That building
11 was, in essence, framed up. It's a steel-framed
12 building. It has concrete floors, but it was -- the
13 original developer went belly up at that point in
14 the construction of that building.

15 There is also an existing clubhouse
16 labeled Community Center on here. And there is a
17 small gatehouse to access the building off of
18 Marshland Road which is here.

19 The original developer went into
20 bankruptcy. My client, Ephesian Properties, LLC,
21 purchased the developer's rights out of bankruptcy.
22 Those rights being what are granted under the master
23 deed at least as of that point in time.

24 They also purchased out of the bankruptcy
25 in fee simple the rest of the property that -- what

1 is labeled on the master deed as additional
2 property. That is a defined term. And this is
3 approximately 16 acres, 16.01 acres of undeveloped
4 land. There is a small crabbing dock that was built
5 somewhere along the river that is over there. Yes.
6 I've got to orient myself to where it is. Over
7 here. But apart from that this is raw land.

8 Building 2, the uncompleted building, is
9 on the additional property however. So we have the
10 dubious distinction of owning this as well. This
11 dispute started largely over the H.O.A -- when I say
12 the H.O.A., those are the occupants of the single
13 building that is completed. That is a 23-unit condo
14 building.

15 They wanted to build a pool. And they
16 also wanted to build a -- what they referred to as a
17 tabby walk which is, you know, a decorative walkway
18 between their building and the pool they wanted to
19 construct.

20 Our -- Ephesian's, my client,
21 counterclaimed. Basically, we opposed their ability
22 to do that under the master deed and under what we
23 got pursuant to the bankruptcy. Also, we have a
24 counterclaim for -- to determine whether or not we
25 obtained the density rights for the -- the remaining

1 density rights for the Phase 1 property through the
2 bankruptcy as well. That issue is not before the
3 Court today.

4 The motion for summary judgment that was
5 granted was a motion for partial summary judgment.
6 So really what we are -- what we are talking about
7 here today is your order granting partial summary
8 judgment. And I'm going to narrow that down even
9 further because there are components of that order
10 that we are fine with, that we don't disagree with.

11 Specifically what we are fine with are
12 those issues -- those rights that conveyed through
13 the bankruptcy that were established by the master
14 deeds that came with expiration dates. And so there
15 were certain rights that the initial developer had
16 that he had to exercise by a particular date --

17 MR. NEWTON: 4/22.

18 MR. BARFIELD: -- or they expired.
19 Those rights have expired. And so if we ever had
20 them, they are gone. And so we are fine with that.
21 What we are really left with then is the more
22 esoteric question of if the master deed grants the
23 developer an unlimited right to place amenities or
24 approve amenities that are placed on the Phase 1
25 property as well as an unlimited easement to use the

1 Phase 1 property to service whatever may be
2 developed on the additional property, which Ephesian
3 now owns.

4 How do you reconcile that with the
5 regime's desire to do things like building a pool?
6 And so ultimately that comes down to the question
7 does the regime have to come to my client and
8 negotiate a deal to build a pool or a tabby walkway
9 or anything on their property before they can even
10 go to the Town to apply for permission to do that.

11 We say yes. We say that the master deed
12 does, in fact, because it gives us rights --
13 unfettered rights over the Phase 1 property for
14 amenities. And, again, rights to use Phase 1 to
15 service amenities we may build on additional
16 property that common sense dictates they have to
17 come to us and get our agreement before they go to
18 the town.

19 Obviously we can fight about it at the
20 Town level, but we think the master deed under its
21 own terms requires them to come to us first before
22 they even get to that stage.

23 And that is in essence the portion of the
24 order that is in dispute at this point. Everything
25 else I believe we are in agreement on. They really,

1 really want us to tear down this partially completed
2 building. That ultimately will take care of itself.
3 Right now we have a permit that has been extended
4 by -- pursuant to what would you call it, Weston?
5 What is the technical term? The Legislature has
6 extended the --

7 MR. NEWTON: There was a bill that
8 extended -- it's not abatement, but tolled.

9 MR. BARFIELD: Yeah. Basically
10 building permit because of the economy crash and
11 lots of buildings were left uncompleted, they
12 grandfathered in building permits that had been
13 issued. And so this thing is sort of stuck in time.
14 Ultimately it will be unstuck and that will take
15 care of itself.

16 I don't believe that the building -- the
17 partially completed building is part of what is at
18 issue today.

19 MR. NEWTON: No.

20 MR. BARFIELD: So really what we are
21 talking about is, you know, what does the master
22 deed give us vis-a-vis veto power over what they
23 want to do on their property.

24 JUDGE DUKES: So let me ask because
25 the motion to reconsider was broader than that. It

1 included the sales center and included a few other
2 things that seemed to be at odds with it sounds like
3 the issue on the time, the 2010 date. So is that
4 abandoned for purposes of the 59?

5 MR. BARFIELD: Yes, sir. I made the
6 motion to reconsider as broad as I thought it needed
7 to be to protect whatever my client wanted to
8 protect at the time. Having spoken to my client
9 since then, you know, we realize that certain things
10 were simply, you know, beyond the scope of what they
11 could legitimately claim under the master deed. So,
12 yeah, anything that has expired is gone.

13 JUDGE DUKES: Okay. So the remaining
14 issue to summarize, maybe it's slightly broader than
15 this, is Ephesian's claims that they have an
16 exclusive easement. You said unlimited. Again,
17 unlimited is the right term, but it sounded like
18 they have an exclusive easement to the exclusion of
19 the Phase 1 Plaintiffs to cross the Phase 1 property
20 to service amenities within the remaining property?

21 MR. BARFIELD: That's right. And I
22 use the material unlimited in the temporal sense. I
23 mean, there is no expiration date on that easement.

24 JUDGE DUKES: Okay.

25 MR. BARFIELD: That's correct. That

1 is correct. And also I believe -- bear with me.
2 The master deed also provides for -- there is a
3 provision that deals with -- thank you. There is a
4 provision that deals with the right to develop
5 amenities on Phase 1 as well that appears to rest
6 exclusively in the developer.

7 In other words, if they want to put
8 something on Phase 1 the developer has to give the
9 thumbs up which is separate and apart from this
10 easement they have.

11 JUDGE DUKES: Okay. I understand.
12 Anything else?

13 MR. BARFIELD: No, Your Honor. I
14 think it's as simple as that. It really becomes --
15 and I think at the hearing -- the first hearing we
16 had on this matter I think you put it very well as I
17 recall which is it comes down to the question of
18 does a master deed grant some sort of perpetual veto
19 right over what the regime can do on its property or
20 does equity or, you know, a reasonable
21 interpretation of the master deed mandate that there
22 has to be some sort of -- not necessarily an end
23 date, but at some point they have to be able to take
24 their property in their own hands and be able to go
25 to the Town and seek approval for what they want to

1 do.

2 You know, the master deed says what it
3 says. You know, I sympathize with their plight, but
4 again I think if they came to our people with
5 specific proposals there would be -- I mean, the
6 whole thing started because they went to the Town
7 first and applied for the pool. My people found out
8 about it. They put a stop to it. The Town said, we
9 wash our hand of this. This needs to be for the
10 court to decide.

11 And so we've never really gotten to a
12 place where since litigation ensued that they have
13 come to us and said, you know, what do you think
14 about a pool here and what do you think about a
15 walkway here? Can we -- you know --

16 JUDGE DUKES: Have you all mediated
17 this at all?

18 MR. BARFIELD: We have, Your Honor.
19 That was quite some time ago. The tenor of the case
20 was much different at the time. Again, just by way
21 of background, the gravamen of our counterclaim was
22 that we wanted a declaratory judgment saying that we
23 had obtained the density rights, the per acre
24 density rights for the undeveloped portion of the
25 Phase 1 property such that we could aggregate

1 density rights that we definitely have here with
2 density rights that we say we obtained in the
3 bankruptcy here.

4 Since that time there have been some
5 changes in the development ordinances in the Town of
6 Hilton Head that makes that a smaller issue.
7 They've increased the max density per acre for
8 multi-family as a matter of right.

9 Although that counterclaim is still alive,
10 we would -- even though we've got more density than
11 we had, as a matter of right we still have a
12 counterclaim that we've got this, too.

13 JUDGE DUKES: But easier to resolve
14 than it was before?

15 MR. BARFIELD: Much easier to resolve
16 than it was before, exactly.

17 JUDGE DUKES: Got you. Okay. All
18 right. Who is going to --

19 MR. NEWTON: Judge, thank you. A
20 couple of points. As it relates to the equity and
21 public policy arguments that Mr. Barfield just
22 alluded to, your order granting partial summary
23 judgment appropriately says that those matters are
24 not ripe for disposition at this point in time.

25 But what we believe your order is spot on

1 and is correct in granting partial summary judgment
2 is that the Defendant has still not demonstrated or
3 directed the Court's attention or the Plaintiff's
4 attention to any language in the master deed that
5 gives them the exclusive right to do anything.

6 You know, as Mr. Barfield indicated, the
7 genesis of this argument involves an attorney for
8 Ephesian asserting nonspecific rights with the Town
9 of Hilton Head under 629-11-45 which is a provision
10 in the Planning Act that says you are suppose to
11 make the Town aware of any restrictive covenants
12 that are in conflict with what is being proposed.

13 And that has never been a focus of here is
14 the language that says you can't move forward with
15 developing your own property. Your order
16 appropriately addresses article that is on Page 18
17 of the master deed. And that is Section 6(d)(9).
18 And as your order says, the Defendants have argued
19 that the language which essentially is a -- in a
20 section talking about and in context is all about
21 adding additional property, reserves whether they
22 decide that something is going to be built on
23 additional phases so that they are not forced into
24 building that which may have been in sales or
25 promotional material.

1 Your order correctly points out there is
2 nothing in here that gives them the exclusive right
3 over Phase 1 property. This is talking about the
4 additional phases that now no longer exist. Now,
5 the other reservation of rights is in Exhibit A
6 which is Page 38 of the master deed.

7 And your order correctly points out that
8 the only exclusive rights with regard to the
9 reservation of Mr. Barfield's client now as assignee
10 of the declarant is as it relates to the ownership
11 of water and sewer lines.

12 I mean, there are a handful of reservation
13 of rights, ingress and egress, that are not subject
14 to the discussion here today to cross the roads, use
15 the walkways. There is a right, as your order
16 points out, to make improvements to the property.
17 So again that would be Mr. Barfield's client, but it
18 is limited such that the improvements must pertain
19 to the regime. And the regime now is nothing but
20 7.64 acres. It can be nothing more because the time
21 to add additional property has expired.

22 You know, we believe the common law is
23 clear as set forth in your order with regard to
24 enforcing restrictive covenants on property being
25 disfavored. And that the master deed should be

1 narrowly construed.

2 We don't believe there are any material
3 facts in dispute regarding the limited declaratory
4 judgment claims for which partial summary judgment
5 was sought. And, you know, we continue to remain of
6 the position, which was consistent with the court's
7 ruling, that the only exclusive rights are those
8 that deal with the ownership of the water and sewer
9 lines.

10 And that there is nothing in the master
11 deed that gives Ephesian any exclusive rights save
12 and except water and sewer.

13 JUDGE DUKES: All right. Anything
14 else?

15 MR. BARFIELD: Yes, Your Honor. It
16 really is an interesting question. I agree the
17 affirmative ownership and control of water and sewer
18 rights is expressly granted. So, you know, even
19 if -- and we discussed this last time. Even if they
20 get down the road with constructing a pool, there
21 may be an issue there as to how that pool is filled
22 up with water and maintained because of the water
23 and sewer rights, but that is an issue for a much
24 later date and hopefully will never have to be
25 fought over.

1 The more interesting question though is
2 these provisions wherein the declarant reserves
3 certain rights such as on the last paragraph on Page
4 38, that is the Exhibit A to the master deed, where
5 it says, further, the declarant expressly reserves
6 the right to improve the aforementioned property
7 which is in fact Phase 1 property as defined in the
8 first paragraph there.

9 By clearing, tree pruning, constructing
10 additional parking, and common facilities including
11 but not necessarily limited to recreational
12 facilities, drainage facilities, lagoons and the
13 like. And as Mr. Newton pointed out, pertaining to
14 the Edgewater on Broad Creek Horizontal Property
15 Regime.

16 Well, in all likelihood when this exhibit
17 was drafted, it was not contemplated that there
18 would be this severance of interest because the
19 original developer intended to create a
20 comprehensive development plan. Nevertheless, that
21 language does beg the question.

22 Now, if these things are reserved, and
23 they are clearly reserved, to what extent is it
24 incumbent upon the owners on the Phase 1 property to
25 come to us and say, we need your permission to do X,

1 Y, and Z because anything they did -- they may do on
2 the Phase 1 property will to some degree or another
3 limit our ability to exercise the rights that are
4 reserved under this language.

5 And so do we -- does the law mandate that
6 we have to have a specific plan in place as of the
7 day they decide that they want to do something on
8 Phase 1 or do we have the right to basically rest on
9 that reservation unless and until we decide to
10 exercise it? That is in essence the rub. And I
11 don't think that it's -- I wish I had a case that
12 dealt with that expressly, but I don't think there
13 is one out there. And so it's somewhat of a novel
14 issue when you deal with a reservation of rights
15 like this and -- over the property of another.

16 JUDGE DUKES: This is a little
17 outside of summary judgment, I suppose, but just out
18 of curiosity, maybe I asked this back in February,
19 but I've heard so many things since, what is
20 Ephesian's interest in whether or not they run a
21 water line to their pool from a practical
22 standpoint? Why would it somehow harm them or
23 detract from their value? What real interest do
24 they have from a monetary or practical standpoint in
25 trying to assert this right?

1 MR. BARFIELD: And that is an
2 excellent question. And I guess my -- the best
3 answer I can give you there is because Ephesian does
4 not have an immediate plan -- there was an initial
5 proposal submitted to the Town several years ago
6 that they've since opted not to pursue. And so
7 right now there are no immediate plans to develop.

8 And so the answer I would give would be to
9 go back to first semester of property class where
10 the professors I think universally talk about
11 property rights in terms of a bundle of sticks, you
12 know. And a deed conveys what it purports to convey
13 on its face. You get that whole bundle of sticks.

14 And so the answer to your question from
15 our prospective is anything that they did on their
16 property without our approval would be tantamount to
17 removing sticks slowly but surely from our bundle of
18 sticks, therefore diminishing our ability to do what
19 we ultimately would like to do with the property
20 which may be to simply sell it to a third party.

21 And so in the marketplace the more rights
22 we have the more valuable --

23 JUDGE DUKES: Well, that is sort of a
24 legal argument. I mean, I guess I was thinking from
25 a practical argument because I mean from a practical

1 standpoint if they are going to build a water slide
2 that makes a bunch of crazy noise or something, I
3 can see that being an issue, but you are going to
4 have the right to challenge that through the Town of
5 Hilton Head anyway, right?

6 I mean, you've already got as a neighbor
7 the ability to challenge practically anything that
8 happens in the Town of Hilton Head.

9 MR. BARFIELD: Correct.

10 JUDGE DUKES: And, of course, what
11 you all have all told me is the offending thing out
12 there is the building that is actually on Ephesian's
13 property that is made of rusty steel and concrete,
14 needs to be torn down. So it can't be an esthetic
15 thing with the pool. I don't know. I mean, maybe
16 there is no answer to this. And I get the legal
17 bundle of sticks thing. I was just thinking from a
18 practical standpoint isn't a neighbor that has an
19 enhancement, an enhancement to the adjoining
20 property, but anyway, that is a practical thing.

21 MR. BARFIELD: Yeah. And I wish --
22 frankly I wish I had a more concrete answer on the
23 practical question, but because, in essence,
24 Ephesian is kind of back to square one as to what
25 they intend to do. And, again, their intention may

1 ultimately be to convey all of their property to a
2 buyer. And maybe that is the most concrete
3 practical answer I can give you. The more rights
4 they retain, the more rights they have, the more
5 valuable the Ephesian property is on the open market
6 should they decide to sell it to a third party
7 buyer, but in terms -- if they decide to keep it and
8 develop it themselves, the practical call upshot is
9 that they have -- you know, the more rights they
10 have, the more freedom they have to do what they
11 will.

12 And that may include, you know -- this
13 would probably be a bone of contention if it ever
14 came to that, but it may be that they want to add
15 additional parking on the Phase 1 property to
16 service -- we can fight at that point over whether
17 or not that is -- what is the catch phrase?
18 Pertaining to the Edgewater on Broad Creek
19 Horizontal Property Regime. I have a feeling that
20 would be the big fight there, but nevertheless if
21 they put a pool in a location that ultimately
22 Ephesian decides would be the optimal location for
23 parking or trees or any of the things that are
24 described in that paragraph, you know, they would be
25 foreclosed.

1 JUDGE DUKES: All right. That is a
2 practical reason. Okay. I get it. I can see that
3 being a battle that you've suggested. I just
4 couldn't figure out why if the whole purpose was to
5 exclude them from having a pool which would
6 effectively devalue a neighbor, why would you
7 devalue a neighbor? That would have the effect of
8 devaluing yourself, but okay. I see there are other
9 practical -- perhaps practical reasons that they
10 might want to pursue this. Okay. Thanks. Anything
11 else?

12 MR. NEWTON: Judge, the only thing we
13 would say is that, you know, as you found in your
14 order none of this language says that these are
15 exclusive rights. There is nothing in the master
16 deed. There is no authority that any reservation of
17 rights of Ephesian other than the issue of water and
18 sewer ownership are exclusive.

19 The bylaws which are attached to the
20 master deed specifically provide consistent with the
21 Horizontal Property Regime Act that the Board is
22 responsible to maintain and improve its common
23 elements. So in context to say -- to imply that
24 this reservation of rights which very appropriately,
25 and as noted in your order, is qualified by the only

1 thing that Ephesian can now do on Phase 1 property,
2 save and except the easements they have for water
3 and sewer, but this clearing, tree pruning,
4 constructing additional parking, additional
5 recreational facilities, that has to relate to the
6 regime which now is nothing more than the
7 7.64 acres.

8 There is no reservation of rights here
9 that they can build a swimming pool on our property
10 for the benefit of their 16 acres. That isn't what
11 this language says. I mean, the language of the
12 master deed is very clear as to what constitutes
13 the regime and when the right to expand it expired.

14 And as the Defendant has acknowledged,
15 they don't contest that. So the only way to review
16 and to interpret this document, read this document
17 in context is this was a right that now exists as it
18 relates to our own property.

19 Now, at one point in time it was
20 contemplated that this whole thing might be
21 developed together, but those rights have expired.
22 And, you know, we are not here to say that Ephesian
23 doesn't have any rights to the property, but clearly
24 they don't have any exclusive rights to do anything
25 except with regard to the ownership of water and

1 sewer.

2 And we think that the document when read
3 as a whole is crystal clear in that regard. I'm
4 happy to give you the references to the master
5 deed -- I mean to the by-laws section if you want
6 them, but they are in the record as well as
7 referenced in the court's order granting partial
8 summary judgment.

9 JUDGE DUKES: The ones you were just
10 referencing? I mean, I can find them in here.

11 MR. BARFIELD: It is interesting.
12 Does the word exclusive have to expressly appear on
13 the face of the document or can it be implied, you
14 know, when it says the declarant expressly reserves
15 the right, et cetera, what the -- it doesn't say in
16 tandem with. It's a reservation of a right. I
17 think exclusivity could be --

18 JUDGE DUKES: Doesn't it say
19 exclusive in other places though?

20 MR. NEWTON: No, sir. I mean, Judge,
21 the question of that is every time somebody reserves
22 an easement, it's an exclusive easement that nobody
23 else can use? So, I mean, taking Mr. Barfield's
24 argument to the next level, they reserve the right
25 of ingress and egress into the declarant. Well, I

1 guess that means our people can't drive to their
2 condominiums any longer.

3 JUDGE DUKES: Okay. All right.
4 Anything else for the record?

5 MR. NEWTON: No, sir.

6 MR. BARFIELD: No, Your Honor. I
7 think that is it.

8 JUDGE DUKES: All right. Have you
9 all scheduled -- you said you did one mediation at
10 one point?

11 MR. BARFIELD: Yes, sir. We have
12 actually -- you know, we have a kind of kicked this
13 hearing down the road a couple of times. We didn't
14 want to continue to inconvenience the court's
15 calendar so we went forward with it today, but we
16 have actually been actively engaged in settlement
17 discussions since the last hearing. Just a lot of
18 moving parts on a case like this. And obviously
19 whenever you are dealing with an H.O.A. I think, you
20 know, there are cats to be herded. So -- but I'm
21 still optimistic that we can --

22 JUDGE DUKES: I mean, would another
23 required mediation help or hurt? I'm happy to put
24 it in a scheduling order. You know what, we don't
25 have to do that on the record. Anything else for

1 this record? That will conclude the record then.

2 Thanks.

3 (Whereupon, the hearing was concluded at 11:42
4 a.m.)

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1 Certificate of Reporter

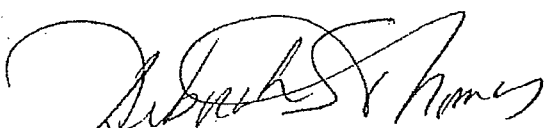
2
3 I, Deborah S. Thomas, Certified Verbatim
4 Reporter and Notary Public in and for the State of
5 South Carolina, do hereby certify that I reported
6 the hearing of Edgewater vs. Ephesian, on the 11th
7 day of July, 2016: and that the foregoing 27 pages
8 constitute a true and correct transcription of the
9 said hearing.

10
11 I further certify that I am neither
12 attorney nor counsel for, nor related to or employed
13 by, any of the parties connected with this action,
14 nor am I financially interested in said cause.

15
16 I further certify that the original of
17 said transcript shall be hereafter delivered to
18 K. Michael Barfield, Barnwell Whaley Patterson &
19 Helms, LLC, 288 Meeting Street, Suite 203,
20 Charleston, South Carolina 29401.

21
22 In witness whereof I set my hand and seal
23 this 27th day of September, 2016.

24
25 My Commission
expires 1/4/18

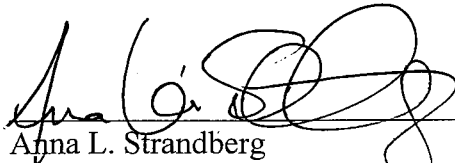

Deborah S. Thomas, CVRM
and Notary Public for the
State of South Carolina



Certificate of Counsel

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the other parties and not any other material.

Oct. 22, 2018
Date



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