

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

The Honorable Clifton Newman, Circuit Court Judge

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Appellate Case No.: 2013-001843  
(Trial Court Case No.: 2011-CP-23-6376)

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AUG 29 2014

**SC Court of Appeals**

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Kevin McCarthy and Courtney R. McCarthy, Appellants,

v.

The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Keowee Falls Investment Group, LLC; Cliffs Real Estate, Inc., The Cliffs Golf and Country Club, Inc.; and S&ME, Inc., Defendants,

Of whom S&ME, Inc. is the Respondent.

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**RECORD ON APPEAL  
VOLUME I OF III**

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	THIRTEENTH JUDICIAL CIRCUIT
	)	
Kevin McCarthy and Courtney E. McCarthy,	)	C. A. No. 2011-CP-23-6376
	)	
Plaintiffs,	)	
	)	
v.	)	<b>SCHEDULING ORDER</b>
	)	
Keowee Falls Investment Group, LLC,	)	
The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South, Cliffs Real Estate, Inc., The Cliffs Golf and County Club, Inc., and S&ME, Inc.,	)	
	)	
Defendants.	)	
	)	

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This matter came before the Court on June 29, 2012, for a status conference. Pursuant to the consent of the parties, the following schedule is established for this case:

1. Plaintiffs shall file and serve a document identifying by full name, address, and telephone number each person whom Plaintiffs expects to call as an expert at trial by **October 31, 2012.**
2. Defendant(s) shall file and serve a document identifying by full name, address, and telephone number each person whom Defendant(s) expects to call as an expert at trial by **November 30, 2012.**
3. Discovery shall be completed no later than **December 31, 2012.** Discovery shall be deemed completed within this time only if discovery is initiated at such time as to afford the responding party the full time provided under the applicable rule of Civil Procedure in which to respond prior to the discovery completion date noted in this paragraph.

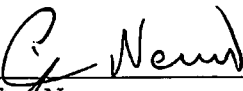
**The parties may, with the consent of all counsel, conduct discovery up to the time of trial, provided the deadlines in this order are not affected.**

4. All motions, except (a) those relating to the admissibility of evidence at trial and (b) those to compel discovery, shall be filed no later than **January 15, 2013.**
5. The parties will mediate the case on or before **January 30, 2013.** All parties are ordered, pursuant to Rule 6 of the SCADR, to have a person with settlement authority available at the mediation.

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6. The parties will conduct a pre-trial conference during the month of February 2013 or as soon thereafter as set by the Court.
7. This case will be set for a date certain trial on or after March 1, 2013.

**IT IS SO ORDERED.**

  
\_\_\_\_\_  
Clifton Newman  
Presiding Judge

July 9, 2012  
Kingstree, South Carolina

STATE OF SOUTH CAROLINA )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS

Kevin McCarthy and Courtney E. McCarthy, )  
2011 22 P 2:45 )

Plaintiffs, )

vs. )

**ORDER DENYING MOTION TO  
AMEND AS TO DEFENDANT S&ME,  
INC.**

Keowee Falls Investment Group, LLC, The )  
Cliffs Communities, LLC d/b/a The Cliff at )  
Keowee Falls South, Cliffs Real Estate, Inc., )  
The Cliffs Golf and Country Club, Inc., and )  
S&ME, Inc., )

C.A. No.: 2011-CP-23-6376

Defendants. )

This matter came before the Court on Plaintiffs' Motion to Amend their Complaint to: (1) amend the Statement of Facts (Am. Compl. ¶¶ 10, 16-17, 20-36); (2) amend Plaintiffs' claim for professional negligence against Defendant S&ME, Inc. (Am. Compl. ¶¶ 71-76); and (3) amend their Complaint to add a cause of action for negligent misrepresentation against Defendant S&ME, Inc. (Am. Compl. ¶¶ 81-93). A hearing was held on May 3, 2013. Representing the parties were Thomas E. Dudley, III attorney for Plaintiffs; Elizabeth M. McMillan attorney for Defendants Keowee Falls Investment Group, LLC, The Cliffs Communities, LLC, Cliffs Real Estate, Inc., and The Cliffs Golf and Country Club, Inc.; and Stephanie H. Burton attorney for Defendant S&ME, Inc.

**FACTUAL BACKGROUND**

This action arises out of Plaintiffs' 2005 purchase of Lot 32 at the Cliffs at Keowee Falls South. Plaintiffs allege that a deep-seated slope failure is occurring at the lot and that Defendant S&ME, Inc. ("S&ME") was negligent for failing to discover the alleged slope failure.

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On June 20, 2005, Plaintiffs executed a contract to purchase Lot 32 from Keowee Falls Investment Group, LLC ("KFIG"), owner of Lot 32. (K. McCarthy Dep. p. 35, Ex. 3; C. McCarthy Dep. Ex. 1). Thereafter, The Cliffs Communities, Inc. hired S&ME to perform certain geotechnical investigation services at adjacent Lot 31. (Birdsong Aff. ¶2).

On July 18, 2005, S&ME issued a report concerning its geotechnical investigation of Lot 31 to The Cliffs Communities. (Birdsong Aff. ¶ 2, Ex. A). On August 5, 2005, the sale between Plaintiffs and KFIG closed and title to Lot 32 was transferred from KFIG to Plaintiffs. (K. McCarthy Dep. p. 51, Ex. 9; C. McCarthy Dep. Ex. 2).

Nearly six years later after they purchased lot 32, in April, 2011, Jack Harrell, the current owner of Lot 31 called Plaintiff Kevin McCarthy and told him: "Well, I'm your neighbor down there, and we got a problem. The lots are falling into the lake." (K. McCarthy Dep. p. 75). Sometime thereafter, Mr. Harrell or his counsel provided Plaintiffs or their counsel with a copy of a portion of the July 18, 2005 S&ME report. (K. McCarthy Dep. p. 89).

On September 27, 2011, Plaintiffs filed their Summons and a Complaint alleging a single cause of action of professional negligence against S&ME. On June 29, 2012, a status conference was held by this Court at which time certain deadlines were established in this case. On July 9, 2012, this Court issued a scheduling order, which included the following deadlines:

3. Discovery shall be completed no later than December 31, 2012. Discovery shall be deemed completed within this time only if discovery is initiated at such time as to afford the responding party the full time provided under the applicable rule of Civil Procedure in which to respond prior to the completion date noted in this paragraph.

4. All motions, except (a) those relating to the admissibility of evidence at trial and (b) those to compel discovery, shall be filed no later than January 15, 2013.

5. The parties will mediate the case on or before January 30, 2013. All parties are ordered pursuant to Rule 6 of the SCADR, to have a person with settlement authority available at the mediation.

On January 15, 2013, S&ME filed its Motion for Summary Judgment. On March 20, 2013, Plaintiffs filed their Motion to Amend.

### LEGAL CONCLUSIONS

#### 1. S&ME will be Prejudiced if Plaintiffs Are Granted Leave to Amend.

Pursuant to Rule 15, this Court must also consider whether S&ME would be prejudiced by the amendment. Prejudice occurs when an amendment adds a new claim or defense which would require the opposing party to introduce additional or different evidence. Ball v. Canadian Am. Express Co., 314 S.C. 272, 275, 442 S.E.2d 620, 622 (Ct. App. 1994).

Plaintiffs did not file their Motion to Amend until nearly three months after the close of discovery established in the Court's scheduling order. If the Motion to Amend were granted, S&ME would be required to defend the new claim without the benefit of conducting discovery or this Court would have to allow discovery to be reopened to address this new claim further delaying the ultimate resolution of this case. Accordingly, the Court denies Plaintiffs' Motion to Amend.

#### 2. Plaintiffs Inexcusably Delayed in Filing Their Motion to Amend.

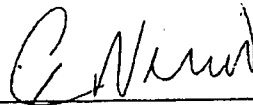
Plaintiffs' inexcusable delay in filing the Motion to Amend also justifies the refusal to grant leave to amend. Crowley v. Spivey, 285 S.C. 397, 414, 329 S.E.2d 774, 784 (Ct. App. 1985) (citing Braudie v. Richland County, 217 S.C. 57, 59 S.E.2d 548 (1950)). A party inexcusably delays when it seeks to amend a complaint well after it becomes aware of an asserted factual basis of a new claim. Id.

Nearly three months after the conclusion of discovery and over two months after S&ME filed its Motion for Summary Judgment and mediation was held, Plaintiffs filed their Motion to Amend alleging that there were new facts learned during discovery. Plaintiffs' proposed claim for negligent misrepresentation is premised on the July 18, 2005 report prepared by S&ME. By their own admission, Plaintiffs knew of the existence of this report in April 2011. In their original Complaint, Plaintiffs asserted that they received a copy of the report in the spring of 2011. (Compl. ¶¶ 15-16). Plaintiffs also attached a copy of a portion of the report to their original Complaint. (Compl. Ex. C). S&ME's employee witnesses involved in preparing the report were deposed in the Harrell matter long ago. Walker Birdsong and Howard Perry were deposed on November 26, 2012, and Michael Revis was deposed on November 28, 2012. The deposition of Don Nickell, the Cliffs' employee who asked S&ME to prepare the report, occurred on November 5, 2012.

Plaintiffs have been aware of the factual matter underlying their claim for negligent misrepresentation for some time. Their delay in seeking leave to amend the Complaint until after the discovery and motions deadlines passed is inexcusable in light of this knowledge. Accordingly, Plaintiffs' Motion to Amend is denied.

For the foregoing reasons, the Court DENIES Plaintiffs' Motion to Amend as to Defendant S&ME, Inc.

AND IT IS SO ORDERED.

  
\_\_\_\_\_  
Clifton Newman,  
Presiding Judge

July 9, 2013

Columbia, South Carolina



FILED - CLERK OF COURT  
 GREENVILLE, CO. S.C.  
 PAUL E. WILSON, CLERK

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

2013 JUL 22 } P 2:31

IN THE COURT OF COMMON PLEAS

Kevin McCarthy and Courtney E. McCarthy, )

Plaintiffs, )

vs. )

Keowee Falls Investment Group, LLC, The )  
 Cliffs Communities, LLC d/b/a The Cliff at )  
 Keowee Falls South, Cliffs Real Estate, Inc., )  
 The Cliffs Golf and Country Club, Inc., and )  
 S&ME, Inc., )

Defendants. )

**ORDER GRANTING S&ME INC.'S  
 MOTION FOR SUMMARY JUDGMENT**

C.A. No.: 2011-CP-23-6376

This matter came before the Court on Defendant S&ME, Inc.'s Motion for Summary Judgment. A hearing was held on May 3, 2013. Representing the parties at the hearing were Thomas E. Dudley, III attorney for Plaintiffs, Elizabeth M. McMillan attorney for Defendants Keowee Falls Investment Group, LLC, The Cliffs Communities, LLC, Cliffs Real Estate, Inc., and The Cliffs Golf and Country Club, Inc., and Stephanie H. Burton attorney for Defendant S&ME, Inc.

**FINDINGS OF FACT**

1. On December 16, 2002, Keowee Falls Investment Group, LLC ("KFIG") purchased approximately 2000 acres of land from Crescent Resources, LLC for development. (Oconee Cnty. Reg. of Deeds, Bk. 1256, p. 257). A portion of that land was developed as the Cliffs at Keowee Falls South development.

2. In early 2005, Plaintiffs Kevin McCarthy and his girlfriend Courtney Rountree, now Courtney McCarthy, began looking for a vacation home in the Lake Keowee area. (K. McCarthy Dep. p. 9). Plaintiffs chose Lake Keowee because it was equidistant between Kevin

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McCarthy's residence in Atlanta, Georgia and Courtney McCarthy's residence in Charlotte, North Carolina. (K. McCarthy Dep. p. 61).

3. In June 2005, Plaintiffs met Jay Scott of Cliffs Real Estate, Inc. to look at waterfront property at Lake Keowee. (K. McCarthy Dep. p. 17). Plaintiffs looked at a number of potential lots, including Lot 32 at the Cliffs at Keowee Falls South, as well as several homes which had been constructed. (K. McCarthy Dep. p. 15; C. McCarthy Dep. pp. 8-9).

4. Thereafter, Plaintiffs decided to purchase Lot 32. On June 20, 2005, Plaintiffs each entered into a Real Estate Sale and Purchase Agreement with KFIG as the Seller for the purchase of Lot 32. (K. McCarthy Dep. p. 35, Ex. 3; C. McCarthy Dep. Ex. 1).

5. Pursuant to the Real Estate Sale and Purchase Agreement, Plaintiffs agreed to purchase Lot 32 for \$1,105,000.00. Plaintiffs also agreed to purchase a membership in the Cliffs Golf and Country Club for \$75,000.00. (K. McCarthy Dep. Ex. 3, p. 1; C. McCarthy Dep. Ex. 1, p. 1).

6. On June 22, 2005, S&ME's geotechnical engineers Walker Birdsong and Michael Revis sent a proposal to Don Nickell, Vice President of Planning Engineering and Development for The Cliffs Communities, Inc. to perform a geotechnical evaluation of three unidentified lots. (Pls.' Mem. Opp. Ex. F).

7. Birdsong and Nickell subsequently agreed that S&ME's geotechnical evaluation services would be limited to evaluation of Lot 31 at the Cliffs at Keowee Falls South. (Birdsong Aff. ¶ 2). Thus, S&ME never investigated geotechnical conditions at Lot 32. (Birdsong Aff. ¶ 3).

8. On June 27, 2005, Don Nickell executed an Agreement for Services for S&ME's services to be performed at Lot 31. (Pls. Mot. Opp. Ex. H.) The Agreement for Services contains the following terms:

7. **Reports:** In connection with the performance of the Services, Consultant shall deliver to Client one or more reports or other written documents reflecting Services provided and the results of such Services. All reports and written documents delivered to Client are instruments reflecting the Services provided by Consultant pursuant to this Agreement and are made available for Client's use subject to the limitations of this Agreement. Instruments of Service provided by Consultant to Client pursuant to this Agreement are provided for the exclusive use of Client, and Client's agents and employees for the Project and are not to be used or relied upon by third parties or in connection with other projects....

Any Instruments of Service, including reports, generated as part of this Agreement are intended solely for use by Client and shall not be provided to any other person or entity without Consultant's written authorization....

9. **Confidentiality:** Subject to any obligation Consultant may have under applicable law or regulation, Consultant will endeavor to release information relating to the Services only to its employees and subcontractors in the performance of the Services to Client's authorized Representative(s) and to persons designated by the authorized representative to receive such information.

9. Thereafter, S&ME performed a geotechnical investigation of Lot 31. (Birdsong Aff. ¶ 2).

10. On June 18, 2005, S&ME issued a report directly to the Cliffs. (Birdsong Aff. Ex. A). The July 18, 2005 report found that unique features exist on Lot 31 and recommended either the installation of rammed aggregate piers or the undercut and replacement of soils on a portion of the lot to support a residence. S&ME did not find that an ongoing slope failure was occurring on lot 31. (Birdsong Aff. Ex. A, p. 2). Plaintiffs were not aware of nor did they see the S&ME report. (K. McCarthy Dep. pp. 89-91).

11. On August 5, 2005, Plaintiffs and KFIG closed on Plaintiffs' purchase of Lot 32. (K. McCarthy Dep. p. 35). By deed dated August 5, 2005, KFIG transferred title to Lot 32 to

Plaintiff Kevin McCarthy. (K. McCarthy Dep. Ex. 9). By deed of the same date, Kevin McCarthy transferred an undivided one-half interest in Lot 32 to Courtney Rountree. (C. McCarthy Dep. Ex. 2).

12. Plaintiffs never constructed a house on Lot 32. (K. McCarthy Dep. pp. 101-102).

13. Plaintiffs were not aware of any problem with Lot 32 until six years after purchase when in April 2011, Jack Harrell, the current owner of Lot 31, called Kevin McCarthy and advised him: "Well, I'm your neighbor down there, and we got a problem. The lots are falling into the lake." (K. McCarthy Dep. p. 75).

14. Sometime thereafter, Jack Harrell or his counsel sent Plaintiffs or their counsel a portion of the July 18, 2005 report prepared by S&ME. (K. McCarthy Dep. p. 89).

15. Prior to receiving a portion of S&ME's July 18, 2005 report, Plaintiffs had never heard of S&ME. (K. McCarthy Dep. p. 90). Plaintiffs have never hired S&ME to perform any work on Lot 32. (K. McCarthy Dep. p. 91).

16. On September 27, 2011, Plaintiffs filed their Complaint alleging a single cause of action for professional negligence against S&ME. Plaintiffs allege that a deep-seated slope failure is occurring at Lot 32 and that S&ME was negligent because it failed to discover such condition on Lot 31, report the condition to the Cliffs, and advise the Cliffs that the condition might affect adjacent lots.

17. Defendants have retained an expert who opines that the installation of a composite system of micropiles and tieback anchors would make Lot 32 suitable for residential construction. His estimated cost is \$679,000.00. (D. Chappell Dep. Ex. 4).





was enacted for the special benefit of the private party is a test for determining whether a right of private action is created by implication.”)

24. To determine whether a cause of action is implied, this Court must consider whether: (1) the essential purpose of the statute is to protect from the kind of harm suffered by Plaintiffs; and (2) Plaintiffs are a member of the class of persons the statute is intended to protect. See Norton v. Opening Break of Aiken, Inc., 313 S.C. 508, 512, 443 S.E.2d 406, 409 (Ct. App. 1994) (holding a regulation may create a duty of care and applying the same standard); Summers v. Harrison Constr., 298 S.C. 451, 455, 381 S.E.2d 493, 496 (Ct. App. 1989) (citing Rayfield v. South Carolina Dep’t of Corrections, 297 S.C. 95, 103, 374 S.E.2d 910, 914) (Ct. App. 1988)).

25. The purpose of Chapter 22 of Title 40 of the South Carolina Code is:

Purpose. It is the policy of this State and the purpose of this chapter to encourage the development of professional engineers in this State and to promote the accountability for engineering practice in a global economy. The State recognizes the need for more qualified engineers to support the local and global economy and, to that end, encourages efforts to increase access to accredited education, the examinations, and the experience necessary and appropriate to protect the health, safety, and welfare of South Carolina citizens and to support licensure as the basis of accountability.

S.C. Code Ann. § 40-22-2 (2013).

26. The regulations serve the same purpose. S.C. Code Ann. § 40-22-60(A) (2013) (“The board may adopt rules governing its proceedings and may promulgate regulations necessary to carry out the provisions of this Chapter.”); S.C. Code Regs. 49-300(A) (2013) (the Rules of Professional Conduct are intended to “safeguard the life, health, property and welfare of the public”).

27. The engineering licensure regulations do not give rise to any implied right of action or impose a legal duty upon S&ME in favor of Plaintiffs. The South Carolina Court of

Appeals squarely addressed this issue in Hurst v. Sandy, 329 S.C. 471, 494 S.E.2d 847 (Ct. App. 1997). In Hurst, the plaintiffs asserted a negligence claim against an engineer licensed in California whose California stamp was affixed to plans to be used for construction of a residence in South Carolina. Id. at 475, 494 S.E.2d at 849. The plaintiffs argued that the engineer engaged in the unauthorized practice of engineering in violation of South Carolina Code Section 40-22-30 and asserted a claim for negligence per se. Id. at 477-78, 494 S.E.2d at 850.

28. The South Carolina Court of Appeals held that the provisions of Chapter 22 of Title 40 are intended to regulate the practice of engineering by licensing and registration requirements. Id. at 478, 494 S.E.2d at 850. The court further held that the provisions are directed to the engineering profession because it authorizes the Registration Board to sanction a registrant who violates any provision of the statute or regulations. Id. at 479, 494 S.E.2d at 851. Accordingly, the court held:

Our reading of the relevant South Carolina code sections and cases convinces us that the essential purpose of the statute, as alleged by the Hursts, is inconsistent with the legislative intent in enacting this statute. Further, we find that a licensing statute will not ordinarily provide a basis for a negligence per se action. Therefore, we hold, as to this claim, the Hursts have not demonstrated that an issue of material fact is in dispute. We affirm the trial court on this cause of action.

Id.

29. This Court adopts the ruling in Hurst and concludes that the statute and regulations cited by Plaintiffs do not create a duty of care owed by S&ME to Plaintiffs.

**S&ME's Contract with The Cliffs Communities  
Did Not Create a Tort Duty in Favor of Plaintiffs**

30. A contract between two parties can create a duty of care to a third party. See McCullough v. Goodrich & Pennington Mortgage Fund, Inc., 373 S.C. 43, 49, 644 S.E.2d 43, 46 (2007).

31. A contract may create a duty to a third party if its contractual terms indicate that the contracting parties intended to benefit that third party. See Barker v. Sauls, 289 S.C. 121, 345 S.E.2d 244 (1986) (Holding that an insurance broker who contracted with an employer to sell workers' compensation insurance was liable to an employee for negligence in failing to procure the policy because the employee was an intended third party beneficiary of the contract). Whether such a duty is created depends upon the contract's language. See Cullum Mechanical Constr., Inc. v. South Carolina Baptist Hosp., 344 S.C. 426, 432, 544 S.E.2d 838, 842 (2001) (finding that a factual issue existed whether "special conditions" in the contract documents imposed a duty of care on an architect to assure payment to non-contracting third party); Gilbert v. Miller, 356 S.C. 25, 30, 586 S.E.2d 861, 864 (Ct. App. 2003) ("It is clear the language of the lease did not intend to make [the plaintiff], as either a tenant or a guest, a third party beneficiary by imposing a duty in tort on the landlord to prevent a tenant's dog from injuring another."); Dorrell v. South Carolina Dep't of Transp., 361 S.C. 312, 318, 605 S.E.2d 12, 15 (2004) (Contractor hired to repave a road owed a duty to the traveling public at large to not negligently perform its work because contract's terms required the contractor to perform its work in a manner to insure the safety of the traveling public); Andrade v. Johnson, 356 S.C. 238, 246, 588 S.E.2d 588, 592 (2003) (In reviewing the terms of an agreement between a utility company and contractor which granted the contractor preferred vendor status the court held that the agreement did not give rise to a duty of care owed relating to the contractor's negligent installation of an HVAC system).

32. Here, there is no evidence that S&ME's report was used by the Cliffs for any purpose other than evaluation of Lot 31. Furthermore, the contract between S&ME and the

Cliffs specifically prohibits distribution of any reports prepared by S&ME to third parties without S&ME's written consent:

**7. REPORTS:**

[...] Instruments of Service provided by Consultant to Client pursuant to this Agreement are provided for the exclusive use of Client, and Client's agents and employees for the Project and are not to be used or relied upon by third parties or in connection with other projects. [...]

[...] Any Instruments of Service, including reports, generated as part of this Agreement are intended solely for use by Client and shall not be provided to any other person or entity without Consultant's written authorization. [...]

(Pl. Memo. Opp. Exh. H).

33. There is no evidence that S&ME authorized the Cliffs to distribute the report to Plaintiffs or did so. In fact, there is no evidence that S&ME was aware of Plaintiffs' existence. Admittedly, Plaintiffs never saw the report until several years after they purchased their lot. (K. McCarthy Dep. pp. 89-91). Accordingly, there is nothing in the contract between S&ME and The Cliffs Communities, Inc. that indicates S&ME assumed a duty of care to any third party, including Plaintiffs.

**Plaintiffs Are Not Owed a Duty of Care Based on Any Legally Recognized Status**

34. South Carolina's courts have limited imposition of a duty based upon "status" to cases involving premises liability, products liability, and volunteers. See Singleton v. Sherer, 377 S.C. 185, 200, 659, S.E.2d 196, 204 (Ct. App. 2008) ("The nature and scope of a duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury."); Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001) (In a premises liability case, the standard of care is dependent upon the plaintiff's status as an invitee, licensee, trespasser, or child); Bray v. Marathon Corp., 356 S.C. 111, 117, 588 S.E.2d 93, 95-96 (2003) (Recognizing differing duties of care owed by a

manufacturer to a plaintiff based on his status as a user of its products or a bystander); Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (When an act is voluntarily undertaken, the actor may owe a duty based on their status as a volunteer). There are no South Carolina cases which hold that a future adjacent landowner has any special legal status and the Court declines to impose one here.

**Plaintiffs Do Not Have Any Legally Recognized Property Interest**

35. A duty may be owed to persons with certain property interests. For instance, the courts have held that a third party may owe a duty to the holder of a secured interest in damaged personal property. Compare McCullough v. Goodrich & Pennington Mort. Fund, Inc., 373 S.C. 43, 50-52, 644 S.E.2d 43, 47-48 (2007) (finding that a mortgage servicer did not owe any duty to a lender who had a security interest in the borrower's contractual right to receive payments) with Universal C.I.T. Credit Corp. v. Trapp, 232 S.C. 297, 101 S.E.2d 829 (1958) (holding one who damages personal property owes a duty to the holder of a security interest in the property); Wilkes v. S. Ry. Co., 85 S.C. 346, 67 S.E. 292 (1910) (same). Unlike these cases, Plaintiffs have never had any property interest in lot 31. Furthermore, they did not have a property interest in adjacent Lot 32 at the time that S&ME prepared its July 18, 2005 report. This Court declines to find that the future ownership of adjacent property is a legally recognized property interest establishing a duty of care.

**S&ME Did Not Owe a Duty of Care Arising From a Special Relationship and**

**Plaintiffs' Claims are Barred by the Economic Loss Rule**

36. The economic loss rule, initially created in the products liability context, provides generally that "[t]here is no tort liability [...] if the damage suffered by the plaintiff is only to the product itself. In other words, tort liability only lies where the damage done is to other property

or is personal injury.” Kennedy v. Columbia Lumber & Mfg. Co., Inc., 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989).

37. South Carolina’s courts have adopted two narrow exceptions to this rule: (1) a plaintiff may pursue tort remedies for purely economic losses against a residential home builder who breaches a legal duty in constructing a home, Kennedy, 299 S.C. at 345-46, 384 S.E.2d at 737; and (2) in certain circumstances, where a non-contracting third party shares a “special relationship” with the alleged tortfeasor which gives rise to a distinct extra-contractual legal duty, he may recover in tort for the breach of such duty. Tommy L. Griffin Plumbing & Heating Co. v. Jordan, Jones & Goulding, Inc., 320 S.C. 49, 463 S.E.2d 85 (1995).

38. The Court finds that the residential home builder exception is inapplicable here. S&ME is not a residential homebuilder and did not construct defective housing. See Sapp v. Ford Motor Co., 386 S.C. 143, 150, 687 S.E.2d 47, 51 (2009) (finding that the framework adopted by Kennedy “is a narrow one,” and is “applicable only in the residential real estate construction context”).

39. The Court also finds no “special relationship” based upon the evidence in the record. Whether a “special relationship” exists “depend[s] on the facts and circumstances of each case.” Tommy L. Griffin, 320 S.C. at 55-56, 463 S.E.2d at 88. In design and construction cases, South Carolina’s courts have found a “special relationship” only where there is either a close working relationship between project participants or where a third party foreseeably relies upon the services of the professional in taking some action. See Tommy L. Griffin, 320 S.C. at 55-56, 463 S.E.2d at 89; Cullum Mechanical Constr., Inc. v. South Carolina Baptist Hosp., 344 S.C. 426, 544 S.E.2d 838 (2001); South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986).

40. In Tommy L. Griffin, the court found a "special relationship" to exist between a project engineer and a subcontractor giving rise to a tort duty because the engineer closely supervised and controlled construction. Tommy L. Griffin, 320 S.C. at 56, 463 S.E.2d at 89. Similarly, in Cullum, the court found that a "special relationship" might exist between an architect and a subcontractor because the architect assumed responsibility under its contract with the owner to withholding certifications for payments if the subcontractors were not paid. Cullum, 344 S.C. at 432, 544 S.E.2d at 842.

41. Here, Plaintiffs did not enter into any contract with S&ME nor did S&ME provide any professional services on the lot ultimately purchased by Plaintiffs. Unlike the engineer in Tommy L. Griffin and the architect in Cullum, S&ME did not have a close working relationship or any relationship with Plaintiffs. Moreover, S&ME's contract with the Cliffs Communities, Inc. expressly prohibited distribution of its reports to third parties. (J. Harrell Dep. Exh. 30, § 7).

42. Plaintiffs have not demonstrated that they relied on S&ME's report in taking some action. Indeed, Plaintiffs testified that they did not even see S&ME's report until six years after they bought lot 32. (K. McCarthy Dep. pp. 89-91). See South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 376, 346 S.E.2d 324, 325 (1986) (finding that a consultant owes a duty only to "non-contracting parties who have reasonably relied on their reports in taking some action").

43. Plaintiffs do not claim any personal injury or property damage; rather, they seek damages for the purchase price of their property. Accordingly, Plaintiffs' claims are barred by the economic loss rule.

44. This conclusion is supported by two recent unpublished decisions from the Federal District Court for the District of South Carolina. In Ross Dress for Less, Inc. v. Lauth

Constr. Group, LLC et al, C.A. No. 0:10-703-CMC (D.S.C. 2012), Judge Cameron Currie granted a motion for summary judgment filed by a geotechnical engineering firm finding that “Plaintiff has not established a special relationship between MacTec and Plaintiff creating a legal duty from MacTec, as a geotechnical engineer hired by a general contractor to complete soil analysis on property for a developer, to Plaintiff, as a subsequent commercial purchaser of the property.”

45. Likewise, in Long v. O’Reilly’s Automotive Stores, Inc., et al, C.A. No., 6:12-901-MGL (D.S.C. 2013), Judge Mary Lewis granted a motion to dismiss filed by a civil engineer and his firm ruling that the engineer did not owe any duty of care to an adjacent landowner who complained of water entering his property as a result of the design and construction of an adjacent O’Reilly’s store. Judge Lewis concluded that the mere fact that an engineer provides services at an adjacent property is not legally sufficient to establish a duty of care owed to an adjacent landowner.

46. Other states that have considered similar cases have concluded that a consultant hired to prepare a report does not owe a duty of care to future purchasers. See Hartman v. Urban, 946 S.W.2d 546 (Tex. App. 1997) (holding that even though a surveyor knew that the purpose of the subdivision was to sell lots to the public, the surveyor did not owe any duty to the plaintiffs who were subsequent lot purchasers). See also Essex v. Ryan, 446 N.E.2d 368 (Ind. App. Dist. 2 1983) (surveyor did not owe duty of care to future lot purchaser when they relied on erroneous survey and built addition that encroached on their neighbor’s lot because plaintiffs were not in privity with surveyor and surveyor did not have actual knowledge that the plaintiff would rely on the survey).

47. This Court concludes that a special relationship does not exist between an engineer hired to perform professional services for real property and future purchasers of an adjacent lot.

**S&ME'S ALLEGED NEGLIGENCE DID NOT  
PROXIMATELY CAUSE PLAINTIFFS' DAMAGES**

48. Proximate cause consists of two parts: (1) causation in fact; and (2) legal cause. See Oliver v. South Carolina Dep't of Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). Causation in fact is proved by establishing that the plaintiff's injury would not have occurred "but for" the defendant's negligence. Id. Legal cause is proved by establishing foreseeability and that the injury occurred as a natural and probable consequence of the defendant's negligence. See Vinson v. Hartley, 324 S.C. 289, 400, 477 S.E.2d 715, 721 (Ct. App. 1996).

49. If there is no genuine issue of material fact whether a defendant's actions were the proximate cause of a plaintiff's injury, then summary judgment is appropriate. See Singleton v. Sherer, 377 S.C. 185, 203, 659 S.E.2d 196, 206-07 (Ct. App. 2008).

50. Plaintiffs argue that S&ME's failure to discover a slope failure at Lot 31 and report that the geologic condition may extend into Lot 32 in its July 18, 2005 report proximately caused their damages. Plaintiffs theorize that had S&ME so informed the Cliffs, it would have informed KFIG, which would have informed Plaintiffs, who would have cancelled their pending contract to purchase Lot 32.

51. There is no evidence in the record to support Plaintiffs' speculation. Had S&ME reported the alleged slope failure, it would not have been responsible for the cost of repair because it did not own the lot or sell it. When a consultant erroneously reports about soil conditions, the cause of any damage is the condition itself and not the consultant's failure to identify the condition. See Gagne v. Bertran, 43 Cal. 2d 481, 492, 75 P.2d 15 (1954) ("Because

of defendant's negligence plaintiffs erroneously believed [the property] was more suitable for their purpose than it actually was. The additional expense [in removing extra fill] they incurred, however, flowed from the condition of their land and not from defendant's report as to what that condition was."); Wendward Corp. v. Group Designs, Inc., 428 A.2d 57 (Me. 1981) (holding that geotechnical engineer's failure to discover and report defects at a site which increased the cost to develop the property did not proximately cause damages because the increased costs were due to the soil condition); Progressive Survey v. Pearson, 120 N.H. 58, 410 A.2d 1123 (1980) (holding that erroneous survey containing inaccurate elevations did not proximately cause increased development costs because "the elevation of the brook, and not defendant's erroneous survey, caused the increase in development costs"); Mosteller Mansion, LLC v. Mactec Eng'g & Consulting, 661 S.E.2d 788 (N.C. App. 2008) (unpublished) (upholding limitation of liability and indirect damages clauses for increased development costs due to a geotechnical engineer's failure to correctly identify soil types because the costs "do not flow directly and immediately from any action of Defendant."). Thus, S&ME's alleged negligence did not proximately cause Plaintiffs' damages because the damages flow from the condition of Lot 32 itself and not S&ME's failure to report the condition.

52. This principle is true regardless of whether Plaintiffs would have decided not to purchase Lot 32 had they known its true condition. In Gagne, plaintiffs argued they would not have purchased their lot had they known the true extent of fill dirt. Gagne, 43 Cal. 2d at 485, 275 P.2d 15.

53. Plaintiffs never saw the July 18, 2005 report prior to purchasing Lot 32. Although there are no South Carolina cases directly on point, other jurisdictions addressing similar questions hold that a negligently prepared report in connection with the purchase of real property

cannot proximately cause any damages when a plaintiff does not actually see or review the report prior to purchasing real property. See Hughes v. Holt, 140 Vt. 38, 435 A.2d 687 (1981) (holding that an allegedly negligent appraisal performed after the plaintiff homebuyers executed a purchase and sale agreement could not proximately cause plaintiffs' damages); Williams v. United Community Bank, 724 S.E.2d 543, 549 (N.C. App. 2012) (holding that plaintiffs failed to establish a prima facie case of negligence because the evidence showed that the plaintiffs signed the purchase contracts without reviewing the allegedly negligently prepared appraisals).

54. Plaintiffs never saw the July 18, 2005 report prior to purchasing Lot 32. It could not have been the proximate cause of their claimed damages.

**PLAINTIFFS' ARE NOT ENTITLED TO RECOVER  
THE PURCHASE PRICE OF LOT 32 FROM S&ME**

55. Plaintiffs seek to recover the purchase price of Lot 32. This is not a proper measure of damages unless the injury to real property is permanent. See Yadkin Brick Co., Inc. v. Materials Recovery Co., 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000) (diminution in value of property is proper measure of damages where the injury to real property is of a permanent nature).

56. Where a repair is feasible, the proper measure of damages is the cost of repair. See Scott v. Fort Roofing & Sheet Metal Works, Inc., 299 S.C. 449, 385 S.E.2d 826 (1989) ("Cost of repair or restoration is a valid measure of damages for injury to a building although compensation may be limited to the value of the building before damage was inflicted."); Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986); Joyner v. St. Matthews Builders, 263 S.C. 136, 140, 208 S.E.2d 48, 50 (1974) ("In the absence of evidence of specific damages, the measure of damages for injury to real property is the difference between the value of the entire premises before and after injury thereto."); John Thurmond & Assoc., Inc.

v. Kennedy, 284 Ga. 469, 470, 668 S.E.2d 666, 668 (Ga. 2008) (“...damages for defective construction, whether those damages are the result of a breach of contract or negligence of the contractor, are determined by measuring the cost of repairing or restoring the damage, unless the cost of repair is disproportionate to the property’s probable loss of value”).

57. At the hearing, Plaintiffs asserted that their expert Carroll Crowther had established that a repair on Lot 32 would be impossible. However, the record reflects that Crowther has stated only that a repair might be expensive, not that it would be impossible.

58. On August 8, 2011, Crowther issued a report to Plaintiffs’ counsel in which he stated only that “Stabilization of this lot sufficient for construction of a house would be very expensive, if even possible.” (Crowther Dep. Exh. 5, p. 4)

59. Moreover, Crowther testified that he has not completed the analysis necessary to determine whether a repair of Lot 32 would be feasible:

Q. Have you done any analysis to determine what the topography of the weak zone is?

A. No.

Q. Can that be done?

A. Yes.

Q. Why haven’t you done it?

A. **I haven’t been asked to. Because that would be necessary to trying to evaluate if there is a possible remediation.** All I’m telling you is, from the surface, it’s obvious that the slope is failing.

Q. And if one was going to determine – if somebody asked you, Mr. Crowther, I want you to determine whether there’s a possible remediation. What work would you have to accomplish that task?

A. I’d have to, number one, determine where the slide is occurring, what’s the mass of soil that we’ve got to try to stabilize.

[...]

Q. [...] That would be number one. Number two, what would you do?

A. That would be the starting point. And then determine what the forces are that caused that to fail. And what kind of force you would have to install or what kind of strength you'd have to add to that mass to keep it from moving.

(Crowther Dep. pp. 55-57) (emphasis added).

60. The evidence establishes that a repair is feasible. Doug Chappell testified that his company performed a similar repair at Lake Keowee and, assuming a slope failure is occurring, the estimated cost to repair lot 32 is \$679,700.00 (Chappell Dep. Exh. 4).

61. In this case, the uncontroverted evidence is that the lot can<sup>be</sup> repaired at a cost of \$679,000.00. There is no evidence that the repair cost is grossly disproportionate to the value of the property. Accordingly, Plaintiffs' damages are limited to the cost of repair.

**PLAINTIFFS ARE NOT ENTITLED TO RECOVER ATTORNEY'S FEES**

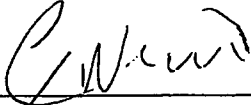
62. In their complaint, Plaintiffs seek recovery of attorney's fees against S&ME. At the hearing, Plaintiffs conceded that such fees are not recoverable.

**PLAINTIFFS ARE NOT ENTITLED TO AN AWARD OF PUNITIVE DAMAGES AGAINST S&ME**

63. In South Carolina, punitive damages are recoverable where a defendant's misconduct is willful, wanton, or in reckless disregard of the plaintiff's rights. See Mellen v. Lane, 377 S.C. 261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008). Plaintiffs' primary contention is that S&ME should have discovered that an ongoing slope failure was occurring on Lot 31 when it conducted its investigation of that lot in July 2005 and recognized that this condition might affect other properties. Even if those allegations are true, this Court does not find that such a misdiagnosis is a willful, wanton, or reckless disregard of Plaintiffs' rights that would justify an award of punitive damages

27. For the foregoing reasons, S&ME's Motion for Summary Judgment is GRANTED.

AND IT IS SO ORDERED.

  
\_\_\_\_\_  
Clifton Newman,  
Presiding Judge

July 15, 2013

Columbia, South Carolina

Comp

STATE OF SOUTH CAROLINA  
COUNTY OF GREENVILLE  
FILED - CLERK OF COURT  
GREENVILLE CO. S.C.  
PAUL F. WILSON, CLERK  
IN THE COURT OF COMMON PLEAS

2013 DEC 3 AM 10 08

KEVIN MCCARTHY AND COURTNEY  
R. MCCARTHY,

Civil Action No. 2011-CP-23-6376

Plaintiffs,

**ORDER DENYING MOTION TO  
ALTER OR AMEND**

vs.

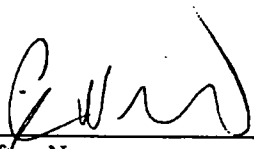
THE CLIFFS COMMUNITIES, LLC  
D/B/A THE CLIFFS AT KEOWEE FALLS  
SOUTH; KEOWEE FALLS  
INVESTMENT GROUP, LLC; CLIFFS  
REAL ESTATE, INC., THE CLIFFS  
GOLF AND COUNTRY CLUB, INC.;  
AND S&ME, INC.,

Defendants.

This matter came before the Court by way of Plaintiffs Kevin McCarthy and Courtney R. McCarthy's Motion to Alter or Amend the Order Granting Summary Judgment filed on August 2, 2013. Having carefully considered the arguments submitted and the applicable law, the Court finds that the Motion to Alter or Amend should be denied.

It is therefore ORDERED that the Plaintiffs' Motion to Alter or Amend is DENIED.

AND IT IS SO ORDERED.

  
Clifton Newman  
Presiding Judge

November 25, 2013  
Columbia, South Carolina



Greenville County, South Carolina, and has as a subsidiary Defendant Keowee Falls Investment Group, LLC. The Cliffs Communities, LLC does business as The Cliffs at Keowee Falls South.

3. Upon information and belief, Defendant Keowee Falls Investment Group, LLC is a limited liability company existing under the laws of the State of South Carolina with its primary place of business in Greenville County, South Carolina. Upon information and belief, Keowee Falls is controlled by The Cliffs Communities.

4. Upon information and belief, Defendant Cliffs Real Estate, Inc. is a corporation existing under the laws of the State of South Carolina with its primary place of business in Greenville County, South Carolina, and who acted as the dual real estate agent for the Plaintiffs and Cliffs Defendants for the sale of the subject Lot to the Plaintiffs and for a subsequent listing agreement with Plaintiffs.

5. Upon information and belief, Defendant The Cliffs Golf and Country Club, Inc. is a corporation existing under the laws of the State of South Carolina with its primary place of business in Greenville County, South Carolina who was a party to the subject Real Estate Sale and Purchase Agreement and was paid monies, and has continued to be paid monies, in consideration of the Plaintiffs entering said contract.

6. The Cliffs Defendants were all involved, as seller- and/or as agents of the seller- in the acts surrounding the sale described herein to Plaintiffs of Lot 32, Jasmine Point, said Lot being located in the subdivision known as The Cliffs

at Keowee Falls South in the County of Greenville, State of South Carolina (the "Lot").

7. Upon information and belief, Defendant S&ME is a North Carolina corporation doing business in South Carolina, maintaining a place of business in Greenville, South Carolina, and operating an engineering firm that conducted investigations and offered professional opinions related to property in The Cliffs at Keowee Falls South subdivision, including Plaintiffs' Lot.

8. The Court has Jurisdiction over the parties and subject matter in this action, and Venue is proper in this Court.

#### **STATEMENT OF THE FACTS**

9. Prior to June 6, 2005, Plaintiffs toured the Cliffs at Keowee Falls South subdivision with a Cliffs Defendants' employee, J. Scott. Plaintiffs desired to purchase the vacant Lot, which is the subject of this action.

10. Prior to purchasing the subject Lot, the Cliffs Defendants gave the Plaintiffs a H.U.D. Report dated May 5, 2004 (a copy of said HUD Report is attached hereto and incorporated herein by reference as **Exhibit "A"**). The report contained express representations about the subdivision, including the build-ability of the lots in the subdivision (including the Lot at issue) and that unsuitable subsurface conditions were not present that would warrant the use of special construction techniques to build on the lots (including the Lot at issue).

11. On or about June 20, 2005, the Plaintiffs and the Cliffs Defendants executed a "Real Estate Sale and Purchase Agreement" (a copy of said contract is attached hereto and incorporated herein by reference as **Exhibit "B"**).

12. As evidenced by the terms of said contract, the Cliffs Defendants understood that the Plaintiffs, in consideration of purchasing the Lot, intended to build a house on the Lot for use as a second home, or that if Plaintiffs sold the Lot, that purchaser would be able to build a residence on it.

13. The H.U.D. Report and the contract with the Cliffs Defendants contained an express representation that if DHEC had not previously approved the installation of a septic system on the Lot, or the Plaintiffs were unable to obtain a septic permit, and if the Cliffs is unable to secure such approval, the Cliffs Defendants would refund Plaintiffs' purchase price.

14. The contract also included a provision whereby the Defendant Cliffs Real Estate, Inc. was paid a portion of the sales price as its purported commission for selling the Lot to Plaintiffs upon the express premise (and understandings described herein) that the Lot be suitable for residential construction.

15. The contract also obligated the Plaintiffs to, *inter alia*, pay monies to Defendant The Cliffs Golf and Country Club, Inc. for a membership to the Cliffs Golf and Country Club based on the Plaintiffs purchase of the subject Lot- the basis of said Lot purchase (suitability for residential construction) being known to The Cliffs Golf and Country Club, Inc. by virtue of its inclusion as a party in the subject contract.

16. Sometime in April or May of 2011, Plaintiffs were contacted by an adjacent property owner, Jack Harrell ("Harrell") about a subsurface condition

that was effecting Harrell's lot and the *cul de sac* which is located above and adjacent to both the Plaintiffs' Lot and Harrell's lot.

17. Harrell shared with Plaintiffs an engineer's report dated July 2005 from Defendant S&ME that was submitted to, and for the benefit of, the Cliffs Defendants concerning abnormal geological conditions on Harrell's lot that extended to Plaintiffs' Lot (a copy of said S&ME report is attached hereto and incorporated herein by reference as **Exhibit "C"**). Harrell also shared the results of his own engineer's investigation which identified a geological condition known as a "scarp" or slope failure that was occurring on not only Harrell's lot, but on both of Harrell's neighboring lots, including the Lot owned by Plaintiffs. (See copy of Carroll L. Crowther, P.E.'s engineering report ["Harrell Report"], attached hereto and incorporated herein by reference as **Exhibit "D"**).

18. Carroll L. Crowther, P.E. ("C. Crowther") was hired by Plaintiffs and conducted a site investigation on Plaintiffs' Lot. C. Crowther determined the scarp or slope failure caused an unstable soil condition on Plaintiffs' Lot. C. Crowther determined that normal, reasonable construction techniques could not be used to build a house on Plaintiffs' Lot ("McCarthy Report"). (See copy of Carroll L. Crowther, P.E.'s McCarthy Report attached hereto and incorporated herein by reference as **Exhibit "E"**).

19. C. Crowther opined that the "scarp" or slope failure on Plaintiffs' Lot made the site unsuitable for a septic system (See **Exhibit "E"**).

20. Based on C. Crowther's findings, Plaintiffs are unable to build a house on their Lot because of the unstable soil conditions located thereon.

Further, Plaintiffs understand they would not be able to sell the Lot for a value comparable to the amount they paid for the Lot because no house can be built on it.

**FOR A FIRST CAUSE OF ACTION**  
**(Breach of Contract – The Cliffs Defendants)**

21. The allegations of the preceding paragraphs are incorporated herein by reference.

22. Plaintiffs entered into a contract with the Cliffs Defendants for the purchase of Lot 32, Jasmine Cove in The Cliffs at Keowee Falls South subdivision (See Exhibit "B").

23. The Cliffs Defendants expressly warranted that no unstable soils were on the Lot such that the use of any special construction techniques would not be required to build a residence thereon.

24. The Cliffs Defendants also expressly warranted that if DHEC would not approve of an individual sewage treatment system on the Lot, then the Cliffs Defendants would refund the purchase price in exchange for Plaintiffs deeding the Lot back to Defendant Cliffs.

25. The Cliffs Defendants also expressly warranted that there were no unusual natural hazards on the Lot.

26. The Cliffs Defendants breached the contract in one or more of the following particulars:

(i) the Lot contains unstable soils such that no residence can be reasonably built thereon, or at a minimum, special construction techniques would be required;

(ii) a DHEC permit for an individual sewage treatment system will not be possible because of the unstable soils on the Lot;

(iii) despite the Cliffs Defendants' knowledge of the Plaintiffs inability to obtain a permit for an individual sewage treatment system, the Cliffs Defendants have not agreed to refund the purchase price as they were required under the contract;

(iv) the Lot contains an unusual natural hazard; and

(v) the Cliffs failed to disclose the knowledge they had about the unstable soil condition on the Lot from 2005-2011.

27. Because of the nature of the unstable soil condition, it effectively nullifies any value having been transferred by the Cliffs Defendants to the Plaintiffs. In consideration of the representations made by the Cliffs Defendants, the Plaintiffs and the Cliffs Defendants entered into the subject contract with the mutual understanding and agreement that the value paid by the Plaintiffs to the Cliffs Defendants was representative of the Plaintiffs' ability to reasonably build a house on the Lot, was representative of the Lot's suitability for normal residential construction techniques, and, regardless of whether the Plaintiffs ever built a house on the Lot, was representative of the marketability of the Lot upon which the Plaintiffs could rely in transferring it for comparable value to any potential grantees of the Plaintiffs. These representations made by the Cliffs Defendants being false are further breaches of the contract.

28. Because of the nature of the Cliffs Defendants' breaches of the contract, the Plaintiffs seek rescission of the contract, the value paid by Plaintiffs for the Lot, all other monies paid by the Plaintiffs to the Cliffs Defendants and all direct and consequential damages, plus attorneys' fees, costs and interest.

29. As an additional, alternative request for relief, the Plaintiffs seek a refund of the purchase price pursuant to the provisions of the above referenced H.U.D. Report and contract, which provide for the refund of Plaintiffs' purchase price, and other costs, plus attorneys' fees, since the Lot cannot be permitted for an individual sewage treatment system nor can a residence be built without using special construction techniques.

**FOR A SECOND CAUSE OF ACTION**  
**(Fraud – The Cliffs Defendants)**

30. The allegations of the preceding paragraphs are incorporated herein by reference.

31. The Cliffs Defendants were aware in July of 2005 that an unusual subsurface condition existed on several lots in the subject subdivision, including the Plaintiffs' Lot, the existence of which could effect the construction of a residence on Plaintiffs' Lot and, therefore, the marketability of that Lot. Yet, the Cliffs Defendants never disclosed this information to Plaintiffs prior to (during, or anytime after) the closing on the Plaintiffs' Lot in August of 2005.

32. Further, despite knowledge of the conditions affecting the subject Lot, the Cliffs Defendants did not require an engineer to further investigate the "scarp" to determine the extent it impacted the Plaintiffs' Lot and the value of said Lot. Had such investigation taken place, the scarp would have been identified on Plaintiffs' Lot, materially affecting the sales contract.

33. The Cliffs Defendants either knew of the falsity of its material misrepresentations or recklessly disregarded the truth or falsity of the misrepresentations.

34. The failure of the Cliffs Defendants to disclose this material information was a material misrepresentation that the Cliffs Defendants intended for the Plaintiffs to act upon, for which the Plaintiffs were completely ignorant of and, pursuant to their right to rely thereon, did rely thereon in consummating the purchase of the Lot that is now worthless.

35. As a consequential and proximate result of Plaintiffs acts in reliance on the Cliffs Defendants' misrepresentations, the Plaintiffs suffered actual, consequential, special and punitive damages in an amount to be determined by a jury, together with costs, attorneys' fees and interest.

**FOR A THIRD CAUSE OF ACTION**  
**(Negligent Misrepresentation – The Cliffs Defendants)**

36. The allegations of the preceding paragraphs are incorporated herein by reference.

37. The Cliffs Defendants were aware in July of 2005 that an unusual subsurface condition existed on several lots in the subject subdivision, including the Plaintiffs' Lot, the existence of which could affect the construction of a residence on Plaintiffs' Lot and, therefore, the marketability of the Lot. Yet, the Cliffs Defendants never disclosed this information to Plaintiffs prior to (during, or anytime after) the closing on the Plaintiffs' Lot in August of 2005.

38. Further, despite knowledge of the conditions affecting the subject Lot, the Cliffs Defendants did not require an engineer to further investigate the "scarp" to determine the extent it impacted Plaintiffs' Lot 32 and the value of said Lot. Had such investigation taken place, the scarp would have been identified on Plaintiffs' Lot, materially affecting the sale contract.

39. The failure of the Cliffs Defendants to disclose this material information was a material misrepresentation that the Plaintiffs justifiably relied upon in consummating the purchase of the Lot that is now worthless.

40. The Cliffs Defendants had a pecuniary interest in making the misrepresentation to the Plaintiffs, and the Cliffs Defendants owed a duty of care to see that truthful information was communicated to the Plaintiffs.

41. The Cliffs Defendants breached its duty by failing to exercise due care.

42. The Plaintiffs suffered a pecuniary loss as a direct and proximate result of their reliance on the Cliffs Defendants' misrepresentations in an amount of consequential, special and punitive damages to be determined by a jury, together with costs, attorneys' fees and interest for which it hereby sues.

**FOR A FOURTH CAUSE OF ACTION**  
**(Constructive Fraud – The Cliffs Defendants)**

43. The allegations of the preceding paragraphs are incorporated herein by reference.

44. The Cliffs Defendants were aware in July of 2005 that an unusual subsurface condition existed on several lots in the subject subdivision, including the Plaintiffs' Lot, the existence of which could affect the construction of a residence on Plaintiffs' Lot and, therefore, the marketability of the Lot. Yet, the Cliffs Defendants never disclosed this information to Plaintiffs prior to (during, or anytime after) the closing on the Plaintiffs' Lot in August of 2005, materially affecting the sales contract.

45. Further, despite knowledge of the conditions affecting the subject Lot, the Cliffs Defendants did not require an engineer to further investigate the "scarp" to determine the extent it impacted Plaintiffs' Lot 32 and the value of said Lot. Had such investigation taken place, the scarp would have been identified on Plaintiffs' Lot.

46. The Cliffs Defendants ought to have known of the falsity of its material misrepresentations.

47. The failure of the Cliffs Defendants to disclose this material information was a material misrepresentation that the Cliffs Defendants intended for the Plaintiffs to act upon, for which the Plaintiffs were completely ignorant of; and, pursuant to the Plaintiffs right to rely thereon, did rely thereon in consummating the purchase of the Lot that is now worthless.

48. As a consequential and proximate result of Plaintiffs acts in reliance on the Cliffs Defendants' misrepresentations, the Plaintiffs suffered consequential, special and punitive damages in an amount to be determined by a jury, together with costs, attorneys' fees and interest for which it hereby sues.

**FOR A FIFTH CAUSE OF ACTION**  
**(Professional Negligence - S&ME)**

49. The allegations of the preceding paragraphs are incorporated herein by reference.

50. Defendant S&ME was engaged by the Cliffs Defendants to investigate subsurface conditions affecting the (Harrell's) lot adjacent to Plaintiffs' Lot for the purpose of accurately reporting subsurface conditions in light of the affect of same on the suitability of the property for residential construction,

recommending proper testing, and recommending proper methods of remediation, if any.

51. Defendant S&ME issued a report identifying that there was abnormal geological conditions (the scarp) on Harrell's lot that extended to Plaintiffs' Lot and that there was evidence that a "scarp" existed on Harrell's lot as well as the *cul de sac* which is located above (in elevation) and adjacent to both the Plaintiffs' Lot and Harrell's lot – the *cul de sac* serving as the points of vehicular ingress/egress to/from the roadway and both lots.

52. Upon information and belief, S&ME's professional opinion was sought in order to determine whether residential construction could reasonably take place on the property next to Plaintiffs. Based on S&ME's conclusions regarding the existence and location of the "scarp" feature together with S&ME's knowledge of its purpose in issuing a professional opinion, S&ME knew or should have known that the "scarp" feature would materially impact the viability of residential construction on the surrounding property, to include the property of the Plaintiffs.

53. S&ME owed a duty of care to the owners (including without limitation the Cliffs, Harrells and Plaintiffs) of the properties upon which S&ME discovered the "scarp" to perform further testing, or recommended additional testing on adjacent lots, and/or to inform such owners of S&ME's knowledge regarding the "scarp", and the material impact this feature could have on the viability, or lack thereof, of reasonable, residential construction taking place on

said properties and the impact this feature could have on the value of the property.

54. Upon information and belief, Defendant S&ME did not further investigate, or recommend additional investigation, the extent in which the scarp affected the Plaintiffs' Lot, or otherwise notify the owners of said properties of the abnormal geological conditions and the impact the same could have on the value of the property and the viability of reasonable, residential construction taking place on the property.

55. Defendant S&ME, without conducting any further meaningful tests on the Harrell lot or on the Plaintiffs' Lot and without otherwise notifying the owners of the potential significance of the abnormal geological conditions, simply opined that a residence could be built on the Harrell lot.

56. Defendant S&ME's silence as to Plaintiffs' Lot amounted to a material omission as to a condition known to Defendant S&ME that could materially effect the use of, value of, and the viability of reasonable residential construction on the Plaintiffs' Lot.

57. All of the above violates the standard of care of Geotechnical Engineers in South Carolina, particularly in the Upstate of South Carolina, where Plaintiffs' Lot is located.

58. In compliance with S.C. Code Ann. 15-26-100, *et. seq.* Plaintiff is filing as a part of this Complaint an affidavit based on the available evidence at the time of the filing of the affidavit. This affidavit, executed by Carroll L. Crowther, P.E. is attached hereto and incorporated herein by reference as

**Exhibit "F".**

59. As a consequential and proximate result of Defendant S&ME's failure to adhere to the standard of care, Plaintiffs have been damaged as they paid over \$1 million dollars for a Lot that cannot be used as represented, for which the Plaintiffs hereby sue, together with consequential, special and punitive damages in an amount to be determined by a jury, and costs, attorneys' fees and interest.

**FOR A SIXTH CAUSE OF ACTION**  
**(Violation of the Interstate Land Sales Full Disclosure Act,**  
**15 U.S.C.A. § 1701, et. seq. (the "Act")**  
**-The Cliffs Defendants)**

60. The allegations of the preceding paragraphs are incorporated herein by reference.

61. This cause of action is brought by Plaintiffs against all Cliffs Defendants under the provisions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. §§ 1701, et. seq., for rescission, compensatory damages, as well as interest, court costs, attorneys' fees, independent expert fees, and all travel costs to and from the Lot.

62. This Court has jurisdiction over this claim pursuant to 15 U.S.C.A. § 1719, which provides concurrent non-removable jurisdiction on actions brought under the Act that are filed in state court. State courts have concurrent jurisdiction over suits in equity and actions at law brought to enforce any liability or duty created by this title. In accordance with the Act, "Any suit or action may be brought ... in the district where the offer or sale took place, if the Defendant participated therein... No case arising under this chapter and brought in any

State court of competent jurisdiction shall be removed to any court of the United States".

63. The Plaintiffs are "purchasers" within the provisions of the Act. The Defendants, as defined above, collectively and individually are the "Developer", or agents of the "Developer" within the context of the Act. At the time of the sale, Mr. McCarthy resided in Georgia and Ms. McCarthy resided in North Carolina.

64. The Act prohibits the sale or lease of "lots" in a "subdivision" using any means of interstate commerce, unless the lots are either exempt or registered with the United States Department of Housing and Urban Development ("HUD"). The Act applies, if, by means of interstate commerce (e.g. print media, television, internet, etc.) are used to solicit offers to buy or to make offers to sell, regardless of whether the owner/developer has engaged in any advertising or other marketing or sales activities directed outside the state where the property is located.

65. The subject Lot is located in a subdivision and was sold by the Cliffs Defendants using means of interstate commerce such that the Act applies to the Lot. Furthermore, the subject Lot is not considered "exempt", as defined in the Act.

66. Unless a particular sale or lease is exempt from the registration requirements, the Act requires preparation and filing of a "Statement of Record" with HUD's Office of Interstate Land Sales Registration. The Statement of Record consists of two parts: a detailed disclosure document referred to as the Property Report, and an Additional Information and Documentation section (or

"AID") that provides additional information and documentation to support the representations made in the Property Report.

67. Upon information and belief, the Cliffs Defendants did not provide the Plaintiff a full Statement of Record, but only a Property Report.

68. Pursuant to the Act, the Cliffs Defendants were to provide a statement of record that included, *inter alia*, an accurate statement of the topography of the subdivision, a statement of the existence of any unusual conditions relating to safety which affect the subdivision and are known to the developer, and such other information and documents as being reasonably necessary or appropriate for the protection of the purchasers. Moreover, the Act required the Cliffs Defendants to provide the Plaintiffs with a Property Report that contained information necessary or appropriate in the public interest of for the protection of the purchasers such as the Plaintiffs.

69. Further in accordance with the Act, "it shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails ... to sell or lease any lot where any part of the statement of record or the property report contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein... to employ any device, scheme, or artifice to defraud; to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or

lease) not misleading, with respect to any information pertinent to the lot or subdivision; to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser...".

70. The Property Report provided by the Cliffs Defendants contained untrue statements of material facts and omitted to state material facts required to be stated therein. Specifically, the Cliffs Defendants failed to make any statement to the Plaintiffs regarding the abnormal geological condition of the property despite the fact that such a statement and associated facts were material and pertinent in light of the circumstances and within the context of the overall offer and sale. Moreover, the Cliffs Defendants made the following misrepresentations in the Property Report (see Exhibit "A"):

**GENERAL TOPOGRAPHY**

The general topography of the land within Keowee Falls South is a combination of gently rolling hills and valleys.

...  
None of the lots in the subdivision contains any steep slopes, rock, outcropping, unstable or expansive soil conditions that could necessitate the use of special construction techniques to build.  
...

**DRAINAGE AND FILL**

None of the lots require draining or fill prior to being used for the construction of residences.

**FLOOD PLAIN**

The subdivision is not located within a flood plain or an area designated by any federal, state or local agency as being prone to flooding. ...

**FLOODING AND SOIL EROSION**

We will provide temporary and permanent control measures within the subdivision which will aggressively control storm water, erosion and sediment control, including sodding and seeding in

areas of heavy grading or cut and fill, along with construction of diversion ditches and sediment control basins as necessary. ...

...

#### HAZARDS

We are not aware of any unusual safety factors or hazards that affect the subdivision or any proposed plans for construction that may create a future nuisance or safety hazard.

...

The lots covered by this Property Report are not subject to unusual natural hazards, and no federal, state or local agency has formally identified the area as one subject to the frequent occurrence of natural hazards.

71. The above referenced representations made by the Cliffs Defendants and their agents were misleading, and operated as a fraud and deceit upon the Plaintiffs, and were made in violation of the Act, for which the Plaintiffs hereby sue.

#### **FOR A SEVENTH CAUSE OF ACTION**

**(Violation of the S.C. Unfair Trade Practices Act– The Cliffs Defendants)**

72. The allegations of the preceding paragraphs are incorporated herein by reference.

73. The above described misrepresentations made by the Cliffs Defendants to the Plaintiffs were unfair and deceptive, as defined in the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et. seq.* (the "UTPA"), and have proximately caused the Plaintiffs to suffer an ascertainable loss of property and money.

74. The actions of the Cliffs Defendants affect the public interest because their actions are capable of repetition in the deception and defrauding of others, and, in fact, have been repeated in the deception and defrauding of

others, to include without limitation, the Plaintiffs' neighbors. The repeated actions of the Plaintiffs affect the public's interest.

75. The actions of the Cliffs Defendants were willful within the meaning and interest of § 39-5-140 of the UTPA.

76. As a direct and proximate result of the actions of the Cliffs Defendants, the Plaintiffs paid funds greater than the actual value of the Lot. As such, the violation of the UTPA entitles Plaintiffs to treble damages and reasonable attorneys' fees, for which the Plaintiffs hereby sue.

**WHEREFORE**, Kevin McCarthy and Courtney E. McCarthy pray for the following relief:

- a) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the First Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- b) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Second Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- c) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities; LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Third Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- d) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Fourth Cause of Action in an amount to be determined by a

jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;

- e) Judgment against Defendant S&ME, Inc. for the Fifth Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- f) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Sixth Cause of Action for rescission, and judgment in an amount to be determined by a jury, compensatory damages, as well as interest, court costs, attorneys' fees, independent expert fees, and all travel costs to and from the Lot, together with interest at the legal rate as determined and disbursements of this action;
- g) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Seventh Cause of Action for treble damages and attorneys' fees, together with interest at the legal rate as determined and disbursements of this action;
- h) For an award of attorneys' fees;
- i) For an award of the costs of this action; and
- j) For such other and further relief that this Court deems just and proper.

Respectfully submitted this 23 day of September, 2011.

KENISON, DUDLEY & CRAWFORD, LLC



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Thomas E. Dudley, III (SC Bar # 66154)  
M. Stokely Holder (SC Bar # 73892)  
F. Lee Prickett, III (SC Bar # 76178)  
704 E. McBee Avenue  
Greenville, South Carolina 29601  
PH: (864) 242-4899  
FAX: (864) 242-4844  
Attorneys for Plaintiffs

# READ THIS PROPERTY REPORT BEFORE SIGNING ANYTHING

This Report is prepared and issued by the developer of this subdivision. It is NOT prepared or issued by the Federal Government.

Federal law requires that you receive this Report prior to your signing a contract or agreement to buy or lease a lot in this subdivision. However, NO FEDERAL AGENCY HAS JUDGED THE MERITS OR VALUE, IF ANY, OF THIS PROPERTY.

If you received this Report before you signed a contract or agreement, you may cancel your contract or agreement by giving notice to the seller any time before midnight of the seventh (7th) day following the signing of the contract or agreement.

If you did not receive this Report before you signed a contract or agreement, you may cancel the contract or agreement any time within two (2) years from the date of signing.

Name of Subdivision: The Cliffs at Keowee Falls South

Name of Developer: Keowee Falls Investment Group, LLC

Date of This Report: May 3, 2004

NPMB1:10643.3-RD-(B7K) 021723-00052

PLAINTIFF'S  
EXHIBIT

"A"

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NOTE: In this Property Report, the words "you" and "your" refer to the buyer. The words "we," "us," and "our" refer to the developer.

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RISKS OF BUYING LAND

The future value of any land is uncertain and dependent upon many factors. DO NOT expect all land to increase in value.

Any value that your lot may have will be affected if the roads, utilities and all proposed improvements are not completed.

Resale of your lot may be difficult or impossible, since you may face the competition of our own sales program, and local real estate brokers may not be interested in listing your lot.

Any subdivision will have an impact on the surrounding environment. Whether or not the impact is adverse and the degree of impact, will depend on the location, size, planning, and extent of development. Subdivisions, which adversely affect the environment, may cause governmental agencies to impose restrictions on the use of the land. Changes in plant and animal life, air and water quality, and noise levels may affect your use and enjoyment of your lot and your ability to sell it.

In the purchase of real estate, many technical requirements must be met in order to assure that you receive proper title. Since this purchase involves a major expenditure of money, it is recommended that you seek professional advice before you obligate yourself.

- WARNINGS -

THROUGHOUT THE PROPERTY REPORT THERE ARE SPECIFIC WARNINGS CONCERNING THE DEVELOPER, THE SUBDIVISION, OR INDIVIDUAL LOTS. BE SURE TO READ ALL WARNINGS CAREFULLY BEFORE SIGNING ANY CONTRACT OR AGREEMENT.

GENERAL INFORMATION

This report covers two hundred thirty-seven (237) single-family building lots located in The Cliffs at Keowee Falls South in Oconee County, South Carolina. See page 24 for a listing of these lots. It is estimated that this subdivision will eventually contain approximately 250 lots.

The developer of this subdivision is:

Keowee Falls Investment Group, LLC  
1849 Cleo Chapman Highway  
Sunset, SC 29685

Telephone number: (864) 836-1120

Answers to questions and information about this subdivision may be obtained by telephoning the developer at the number listed above.

Please note the following additional warnings.

THE RECREATIONAL FACILITIES LOCATED, OR TO BE LOCATED, WITHIN THE CLIFFS AT KEOWEE FALLS SOUTH ARE OWNED BY A THIRD PARTY, PRIVATE CLUB AND NOT BY THE PROPERTY OWNERS' ASSOCIATION OF WHICH YOU WILL BE A MEMBER. USE OF THESE RECREATIONAL FACILITIES IS ONLY AVAILABLE TO PERSONS ACQUIRING A MEMBERSHIP IN THE PRIVATE CLUB. MEMBERSHIP AND USE OF THE RECREATIONAL FACILITIES ARE NOT INCLUDED IN THE PURCHASE PRICE OF A LOT. CURRENTLY, LOT OWNERS ARE ENTITLED TO APPLY FOR MEMBERSHIP SUBJECT TO AVAILABILITY AND PAYMENT OF THE MEMBERSHIP FEES, MONTHLY DUES AND USE FEES AS SET BY THE OWNER OF THE CLUB. YOU SHOULD CAREFULLY CONSIDER YOUR PURCHASE, IF IT IS BASED UPON AN ASSUMPTION THAT YOU WILL BE ABLE TO USE THE RECREATIONAL FACILITIES OWNED BY THE PRIVATE CLUB AND LOCATED WITHIN THE CLIFFS AT KEOWEE FALLS SOUTH. FURTHER INFORMATION REGARDING THE CLUB FACILITIES CAN BE FOUND ON PAGE 16 OF THIS PROPERTY REPORT.

-WARNING-

THE COST OF CLUB MEMBERSHIPS ARE SUBSTANTIAL AND NO REFUND OF THE PURCHASE PRICE OF YOUR LOT WILL BE MADE IF YOU ARE UNABLE TO BECOME A MEMBER.

TITLE TO THE PROPERTY AND LAND USE

GENERAL INSTRUCTIONS

A person with legal title to property generally has the right to own, use, and enjoy the property. A contract to buy a lot may give you possession but does not give you legal title. You will not have legal title until you receive a valid deed. A restriction or an encumbrance on your lot or on the subdivision could adversely affect your title.

Here we will discuss the sales contract you will sign and the deed you will receive. We will also provide you with information about any land use restrictions and encumbrances, mortgages, or liens affecting your lot and some important facts about payments, recording, and title insurance.

METHOD OF SALE

Sales Contract and Delivery of Deed

In connection with the purchase of a lot, you will sign a sales contract in which you will agree to pay cash for a lot. We have not arranged for any financing for purchasers, and you will be responsible for arranging your own financing if desired.

We will deliver the deed to the property to you on the date of closing. In any event, we must deliver a deed to you within 180 days after the date on which the sales contract is signed by you.

Type of Deed

The transfer of legal title to all lots in the subdivision will be by a general warranty deed.

Oil, Gas, and Mineral Rights

The mineral and metallic rights to all lots in this subdivision will belong to each lot purchaser.

ENCUMBRANCES, MORTGAGES, AND LIENS

There are blanket encumbrances, mortgages or liens on some of the lots included in this offering. Those are: (1) a Mortgage of Real Estate from Keowee Falls Investment Group, LLC to The National Bank of South Carolina ("NBSC"); (2) two Mortgages of Real Estate from Keowee Falls Investment Group, LLC to Mike Cannon, Brenda Cannon and Isaac Anthony Saad ("Cannon & Saad"); (3) two Mortgages of Real Estate from Keowee Falls Investment Group, LLC to John Martin ("Martin"); (4) a Mortgage of Real Estate from Keowee Falls Investment Group, LLC to S&C, Inc. ("S&C, Inc."); (5) a Mortgage of Real Estate from Keowee Falls Investment Group, LLC to Wachovia Bank ("Wachovia"); and (6) a Mortgage of Real Estate from Keowee Falls Investment Group, LLC to Regions Bank ("Regions"), each such Mortgage of Real Estate covering the lots so indicated in the Listing of Lots on page 24 below.

Release Provisions

We will obtain a release from the mortgage liens covering your lot at the time of closing. The release fees will be paid to the mortgage holder simultaneously with the closing of your lot, and a document evidencing the release shall be recorded prior to the recording of your deed.

Only we may exercise the release fees payable for each lot described above. Therefore, if we default on the mortgage prior to obtaining a release, you may lose your lot and all monies paid.

#### RECORDING THE CONTRACT AND DEED

##### Method and Purpose of Recording

The sales contract for the purchase of your lot does not contain acknowledgments, and therefore, may not be recorded. Under South Carolina law, recording a sales contract places third parties on notice that the subject property is under a contract for sale, but does not protect purchasers from claims of later purchasers or creditors of anyone having an interest in the land.

The deed to your lot may be recorded. It is the responsibility of the closing attorney to record the deed as soon as practicable after closing. You will be responsible for the cost of recording the deed. Under South Carolina law, recording a deed protects you from a claim by a third person after the date of recording the deed.

- WARNING -

**UNLESS YOUR CONTRACT OR DEED IS RECORDED, YOU MAY LOSE YOUR LOT THROUGH THE CLAIMS OF SUBSEQUENT PURCHASERS OR SUBSEQUENT CREDITORS OF ANYONE HAVING AN INTEREST IN THE LAND.**

##### Title Insurance

The developer will not purchase a title insurance policy on your behalf. We recommend that you obtain an attorney's opinion of title or a title insurance policy that will describe the rights of ownership being acquired in the lot. We recommend that a professional interpret any title opinion or policy obtained.

#### PAYMENTS

##### Escrow

Pursuant to your contract, your earnest money deposits will be placed in a third party controlled trust account with Olson, Smith, Jordan & Cox, Attorneys at Law, whose address is PO Box 1633, Clemson, South Carolina 29633, Attention: Chris Olson, Esq.

The escrow agent will maintain your deposits in a segregated account. Your deposits will be maintained in a non-interest bearing attorney trust account. The escrow agent is responsible for disbursing funds at closing or otherwise as directed under your sales contract. In the event of a dispute, the escrow agent is authorized to pay over the funds to a court for settlement.

##### Prepayment

If an independent financial institution finances the purchase of your lot, you will need to review the financing documents to determine whether there is any prepayment penalty.

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#### Default

In the event that the sale does not close because you default in the performance of your obligations under the terms of the sales contract, we must give you written notification of your default, and you will have 20 days after you receive the notice to correct the default. To the extent that such default is not corrected within said 20-day period, we have the right to terminate the sales contract and retain your earnest money deposit (not more than 10% of the purchase price) or seek all damages available under South Carolina law.

#### RESTRICTIONS ON THE USE OF YOUR LOT

##### Restrictive Covenants

The Declaration of Covenants, Conditions, and Restrictions for The Cliffs at Keowee Falls South have been recorded against the lots in the Oconee County Register of Deeds office. The restrictive covenants require lot owners to secure permissions, approvals, or take other actions prior to using or disposing of lots. These provisions will be discussed in the paragraphs below. This discussion will highlight only certain areas of the restrictive covenants and should not be a substitute for your careful study of them.

The restrictive covenants provide for our right, through an Architectural Review Committee ("ARC") to approve or disapprove the architectural plan for any house or lot improvement to be constructed on your lot, including staking, clearing, excavation, grading and other site work, exterior alteration of existing improvements, and planting or removal of landscaping materials. All plans must be submitted to the ARC for review and approval prior to commencement of any such work. The ARC may refuse to approve your plans and specifications on any grounds that are inconsistent with the restrictive covenants, including, but not limited to, purely aesthetic considerations, as long as such grounds are not arbitrary or capricious.

The restrictive covenants also contain a repurchase provision that provides that we as the Declarant, during the Declarant Control Period, have the right and option to purchase any Lot, or Dwelling within the Development which is offered for sale by the property owner, such option to be at the price and on the terms and conditions of any bona fide offer which is acceptable to the owner and which is made in writing to the owner. The owner will promptly submit a copy of the offer to us as Declarant, and we as Declarant will have a period of ten (10) business days (exclusive of Saturday, Sunday and Federal holidays) from and after the presentation of such offer to us in which to exercise the purchase option by giving the owner written notice of exercise in accordance with the restrictive covenants. If an owner provides a copy of the offer and we fail to respond or to exercise the purchase option within said ten (10) -day period, we will be deemed to have waived the purchase option. If we decline to exercise the purchase option, we as Declarant will execute an instrument evidencing our waiver of the repurchase option, which instrument will be in recordable form. In the event we decline to exercise the purchase option and the sale to a third party is not consummated on such terms and conditions set forth in the bona fide offer submitted to us within six (6) months of submission, or within the period of time set forth in such bona fide offer, whichever is later, the terms and limitations of the option to purchase will again be imposed upon any sale by the owner. If we as Declarant elect to purchase, the transaction will be consummated within the period of time set for closing in said bona fide offer, or within thirty (30) days following delivery of written notice by us to such Owner of our decision to so purchase such Lot or Dwelling, whichever is later.

Section 6.1 of the restrictive covenants requires that the exterior of all dwellings and other structures constructed upon a lot must be completed within eighteen (18) months after the construction commences, except where such completion is impossible or would result in great hardship to the owner or the builder due to strikes, fires, national emergencies or natural calamities. No dwelling may be occupied until construction is completed

and all necessary approvals of governmental authorities have been obtained. In addition, Article 6 sets out a number of restrictions on use of property within Keowee Falls South.

As additional lots are brought within the plan of development for Keowee Falls South, they are submitted to the restrictive covenants by the filing of a Supplemental Declaration of Covenants, Conditions and Restrictions. A Supplemental Declaration is filed on or before the closing of the first lot to which it relates, and may contain additional covenants, conditions and restrictions applicable solely to the lots described in such filing. For instance, if lots are to be part of a separately designated neighborhood, they may be subjected to additional covenants, restrictions and easements applicable only to the Lots within the designated neighborhood, and to neighborhood assessments for the maintenance, repair and replacement of the designated neighborhood's common property that the owners in the designated neighborhood have exclusive use.

Crescent Communities of S.C., LLC, the grantor of the land to us as the owner and developer of Keowee Falls South, has also imposed upon all the single-family lots hereunder General Deed Restrictions, which were appended to the deed to us.

A complete copy of these restrictive covenants is available upon request.

#### Easements

There are easements, which may affect your plans for building or using your lot, including drainage easements, and building set back easements as shown on the recorded plats for the subdivision. Each lot is surveyed to the centerline of the adjoining road, and, therefore, each lot is subject to a right-of-way easement over and across the front of the lot bordering the road and as shown on the recorded plat. Two or more Lots may also share a common access easement over and across one or more of the designated Lots for shared access, each such access being generally 30' wide, unless otherwise noted on the survey. The primary roads and shared access easements will be Common Areas to be maintained by the Association. ~~(Each Lot is subject to a 25' building setback on the front of the lot, measured from the right-of-way and easement line, unless otherwise indicated on the survey. Each lot is subject to a rear yard and side yard setback of 20' and each Lot bordering Lake Keowee is subject to a building setback of 50', measured from the 800' mean sea level (MSL) contour, or 5' measured from the 804' MSL contour, whichever is greater.~~

Lots 11, 12, 20, 23, 25, and 27 in Emerald Bay (formerly known as, "Phase 1A") are subject to a 30' common access easement to Lake Keowee, which will be an Association Common Area providing ~~(pedestrian access to the lake.)~~ The same is true for Emerald Bay Lots 54, 55 and 56; Lots 28 and 29; and Lots 30 and 31, which are, as groups, also subject to 30' common access easements to Lake Keowee, to be Association Common Areas providing pedestrian access to the lake.

Emerald Bay Lots 46, 47 and 48 are subject to a trail easement.

Lots 64, 65, 68 and 69; Lots 9 and 10; Lots 10, 11 and 12; Lots 20 and 21; Lots 35 and 36, of Laurel Pointe are subject to a 30' common access easement to Lake Keowee; Lots 9 and 10, as well as Lots 10, 11 and 12, and Lots 20 and 21; Lots 63 and 64; Lots 65 and 66; Lots 72 and 73; Lots 74 and 75; and Lots 85 and 86, all in Laurel Pointe, are, as groups, subject to a 30' common access easement, which will be Association Common Areas, providing shared access to Lake Keowee.

Lots 2 and 3, Lots 8, 9 and 10, Lots 18 and 19, Lots 20 and 21, Lots 30, 31 and 32; Lots 38 and 39 of Jasmine Cove are subject to a 30' common access easement. Lot 83, Lots 87 and 88 of Emerald Bay are subject to a 30' common access easement.

In addition, Article 7 of the restrictive covenants sets forth certain easements relating to encroachments, utilities, access and development of additional property, golf balls, and the golf course. You are advised to read Article 7 of the restrictive covenants in its entirety for an understanding of the particular provisions relating to such easements.

The entire subdivision is subject to one or more recorded flood easements to Duke Power Company over and across those portions of the subdivision lying below 810' MSL, for backing, ponding, raising, flooding and diverting waters of the Keowee River and its tributaries that are incident to the construction, operation, maintenance, repair, altering or replacing the dam and electric power plant across the Keowee River and creating Lake Keowee, the spillway of which dam shall not exceed 800' MSL.

#### PLATS, ZONING, SURVEYING, PERMITS, AND ENVIRONMENT.

##### Plats

The plats covering the lots in this Property Report have been filed of record in the Oconee County Register of Deeds office. The descriptions of the lots on the recorded plats are legally adequate for the conveying of the lots.

##### Zoning

The lots may be used for single-family residences in accordance with the restrictive covenants.

##### Surveying

Each lot will be surveyed and marked for identification on the recorded subdivision plat. There will be no charge to you for the cost of the survey.

##### Permits

In order to begin construction on your lot, you must obtain a building permit. A building permit may be obtained from the Oconee County Planning/Building Permits office located at 415 S. Pine Street, Walhalla, SC 29691. In addition to the approval of the ARC discussed in the "Restrictive Covenants" section of this Property Report, you must obtain a permit for the installation of a septic system from the South Carolina Department of Health and Environmental Control located at 200 Booker Drive, Walhalla, SC 29691.

##### Environment

No determination has been made as to the possible adverse effects the subdivision may have upon the environment and surrounding area.

ROADS

**ACCESS TO THE SUBDIVISION**

A public, two-lane road, paved with asphalt and having a wearing surface of 24 feet in width, provides access to the subdivision. This road is maintained by the South Carolina Department of Transportation. There is no direct cost to lot purchasers for maintenance or improvements of this road.

**ACCESS WITHIN THE SUBDIVISION**

Access within the subdivision will be provided to the lots by private, paved, two-lane roads as shown on the recorded plats filed of record in the Oconee County Register of Deeds office. We are responsible for the construction costs of the interior roads within the subdivision, and there is no cost to you for such construction. We have entered into an Escrow Agreement with Nexsen, Pruet, Jacobs & Pollard, LLC, pursuant to which we deposit into the escrow at the closing of each Lot in Phase I and Emerald Bay Lots 11-82 the sum of \$7,085.87 and at the Closing of Emerald Bay Lots 101-103 and Laurel Pointe Lots 2-50 \$10,325.40, which represents 125% of the South Carolina Registered Engineer's estimate of the cost to complete roads within the subdivision serving the identified lots, as well as the cost to complete related drainage facilities and central water service to those lots.

The roads within the subdivision are currently being cleared and graded to permit access by conventional automobile. After completion, the interior roads will be conveyed to and owned by the property owners association. The following chart reflects the current status of the arterial roadways in the subdivision.

Roads

Unit	Estimated starting date (month/year)	Percentage of construction complete	Estimated Completion Date (month/year)	Present surface	Final surface
Phase I					
2-3, 9-11, 18, 21, 23, 27-29, 32, 34-35, 37-39, 41, 43, 46, 49-56	1-Sep-2002	100%	Available	asphalt	asphalt
Emerald Bay 11-82	15-Jan-2003	60%	3/1/2006 *	gravel	asphalt
Emerald Bay 101-103	15-Jan-2003	30%	3/1/2006 *	gravel	asphalt
Laurel Pointe 2-50, 61-66, 67A, 67B, 68-84, 85A, 85B, 86-89	1-Aug-2003	60%	1-Sep-2006	gravel	asphalt
Jasmine Cove (42)	1-Jan-2004	40%	1-Jan-2007	gravel	asphalt

Unit	Estimated starting date (month/year)	Percentage of construction complete	Estimated Completion Date (month/year)	Present surface	Final surface
Emerald Bay 83-93	1-Jan-2004	60%	1-Jan-2007	gravel	asphalt
<p>* The estimated completion dates for roads in the Emerald Bay Lots 11-82 phase was previously amended to September 1, 2004 because we failed to achieve development goals required for an earlier estimated completion date of January 2004. We have further amended the completion for Lots 11-82 to March 1, 2006 because we are unable to meet the September 1, 2004 completion date; and have further amended the previous estimate for Emerald Bay Lots 101-103 to March 1, 2006 because we are unable to meet the earlier estimate of September 1, 2004.</p>					

We are responsible for maintenance of the interior roads until they are conveyed to the property owners association. After completion, the roads will be conveyed to the property owners association, which will assume full responsibility for maintenance of the roads.

An annual budget prepared by the property owners association includes assessments for contributions by the owners for the cost to maintain the roads, and therefore, all lot owners contribute to the maintenance costs of the roads. The roads will be maintained so as to permit access to lots on a year round basis.

The table below identifies the distance (in miles) from the center of the subdivision to nearby communities.

Community Name	Population	Distance Over Paved Roads (miles)	Distance Over Unpaved Roads (miles)	Total Distance
Walhalla	3,801	4	1	21
Salem	126	5	1	6
Seneca	8,200	14	1	15

Walhalla is the County seat of Oconee County, South Carolina.

UTILITIES

Here we will discuss the availability and costs of basic utilities. The areas covered will be water, sewer, electricity, telephone, and fuel or other energy sources.

-WATER

Central System

Water will be supplied to individual lots by a central water system. The supplier of water is Salem Water Company. The address for the supplier is Salem Water Company, 5-A Park Avenue, Salem, SC 29676.

Water lines will be extended in front of or adjacent to all lots in this offering. The current percentage of completion and the estimated availability dates for water service are set forth in the table below.

Water

Unit	Estimated starting date (month/year)	Percentage of construction complete	Estimated service availability date (month/year)
Phase 1			
2-3, 9-11, 18, 21, 23, 27-29, 32, 34-35, 37-39, 41, 43, 46, 49-56	1-Feb-2003	100%	Available
Emerald Bay 11-82	9/1/2004 *	0%	1/1/2005 *
Emerald Bay 101-103	9/1/2004 *	0%	1/1/2005*
Laurel Points 2-50, 61-66, 67A, 67B, 68-84, 85A, 85B, 86-89	12/1/2004 *	0%	7/1/2005 *
Jasmine Cove 1-42	1/1-Jan-2005	0%	1/1-Jan-2007

Unit	Estimated starting date (month/year)	Percentage of construction complete	Estimated service availability date (month/year)
Emerald Bay 83-93	1-Jan-2005	0%	1-Jan-2007
<p>* The estimated start date for water in the Emerald Bay Lots 11-82 phase was previously amended to April 1, 2004 because we failed to achieve development goals required for an earlier estimated start date of January 2004. We have further amended the estimated construction start for Lots 11-82 to September 1, 2004 because we are unable to meet the April 1, 2004 start date, and have, as a result, amended the estimated completion date from January 1, 2005 to September 1, 2005. We have further amended the previous estimated start date for Emerald Bay Lots 101-103 to September 1, 2004 because we are unable to meet the earlier estimate of April 1, 2004, and have, as a result, amended the estimated completion date from January 1, 2005 to September 1, 2005. The estimated start date for water in the first phase of Laurel Pointe has also been amended to December 1, 2004 because we are unable to achieve development goals required for the earlier estimated construction start date of July 1, 2004, and have, as a result, amended the estimated completion date from July 1, 2005 to December 1, 2005.</p>			

The present capacity of the central water system is sufficient to supply all of the lots in this subdivision. Water lines will not be extended to lots in future phases until the developer sells lots in said phases.

We are responsible for the construction and installation costs of extending central water service to your lot, and there is no cost to you for such construction and installation. We have entered into an Escrow Agreement with Nexsen, Pruet, Jacobs & Pollard, LLC, pursuant to which we deposit into the escrow at the closing of each Lot in Phase 1 and Emerald Bay Lots 11-82 the sum of \$7,085.87 and at the Closing of Emerald Bay Lots 101-103 and Laurel Pointe Lots 2-50 \$10,325.40, which represents 125% of the South Carolina Registered Engineer's estimate of the cost to complete central water service within the subdivision serving the identified lots, as well as the cost to complete related facilities and roads to those lots.

**-WARNING-**

**THERE IS NO FINANCIAL ASSURANCE FOR ANY FUTURE EXPANSION OF THE WATER SYSTEM BEYOND THAT WHICH IS NECESSARY TO SERVE THE LOTS IN THIS INITIAL FILING.**

There will be no cost to you for installation or construction of the water lines from the central water system to your lot. However, you will be responsible for the cost of constructing or installing lines from the lot line to the residence at an estimated cost of \$4.00 per linear foot.

If you purchase a lot prior to the date that the central water system is available to your lot, you may not install a private well or other water system. Use of the central water system is mandatory.

**SEWER**

**Individual Systems**

Septic tanks will be used for sewage disposal. Each lot must be individually evaluated for suitability as to the use of a septic system by the issuer of the permit. You will be responsible for the costs of construction of

your individual system. A permit for constructing an individual sewage disposal system must be obtained from the South Carolina Department of Health and Environmental Control located at 200 Booker Drive, Walhalla, SC 29691, at a cost of \$105.

Lot owners will be required to have their individual sewage disposal system designed by a licensed installer. The total cost of installing an individual septic system on your lot, including the necessary testing, is estimated to be between \$3,000 and \$30,000 depending on the terrain of your lot and house size.

You will be responsible for maintaining and pumping the individual septic system on a regular basis. A pumping and hauling service is available, and the estimated cost of that service for a family of four living in a house on a year-round basis is \$300 to \$500.

-WARNING-

WE CANNOT PROVIDE ASSURANCE THAT YOUR LOT WILL BE APPROVED FOR A PERMIT FOR THE INSTALLATION AND USE OF AN INDIVIDUAL SEWAGE DISPOSAL SYSTEM. IF YOUR LOT IS NOT APPROVED FOR A PERMIT AND WE ARE UNABLE TO RESOLVE THE PROBLEM SO AS TO PERMIT SUCH INSTALLATION AND USE OF A SEPTIC SYSTEM WITHIN 60 DAYS AFTER WE RECEIVE NOTICE OF DISAPPROVAL, WE WILL REFUND THE PURCHASE PRICE OF YOUR LOT. PLEASE REFER TO YOUR CONTRACT OF SALE FOR SPECIFIC INFORMATION REGARDING THIS CONTRACTUAL OBLIGATION.

**ELECTRICITY**

Duke Power will provide electrical service to the subdivision.

Primary electrical service lines will be extended to the front of or adjacent to all lots in the subdivision. Duke Power will be responsible for construction of the lines, and there will be no cost to you.

The current percentage of completion and the estimated availability dates for electrical service are set forth in the table below.

Electricity

Unit	Estimated starting date (month/year)	Percentage of construction complete	Estimated service availability date (month/year)	Cost to Complete
Phase 1				
2-3, 9-11, 18, 21, 23, 27-29, 32, 34-35, 37-39, 41, 43, 46, 49-56	24-Mar-2003	100%	Available	\$0.00
Emerald Bay 11-82	4/1/2004 *	0%	1/1/2005 *	\$0.00
Emerald Bay 101-103	1-Apr-2004	0%	1-Jan-2005	\$0.00

Unit	Estimated starting date (month/year)	Percentage of construction complete	Estimated service availability date (month/year)	Cost to Complete
Laurel Pointe 2-50, 61-66, 67A, 67B, 68-84, 85A, 85B, 86-89	1-Jul-2004	0%	1-Jul-2004	\$0.00
Jasmine Cove 1-42	1-Jan-2005	0%	1-Jan-2007	
Emerald Bay 83-93	1-Jan-2005	0%	1-Jan-2007	
<p>* The estimated start date for electricity in the Emerald Bay Lots 11-82 phase was previously amended to April 1, 2004 because we failed to achieve development goals required for an earlier estimated start date of January 2004, and have, as a result, amended the estimated completion date from January 1, 2005 to September 1, 2005.</p>				

Duke Power will be responsible for maintenance of the electric service lines. You will not be responsible for any construction costs in connection with construction of the electric service lines to your lot. You will be responsible for installing electric lines within each lot and dwelling. You may be charged a hook-up service fee, and such charge is subject to change.

-WARNING-

THERE ARE NO FUNDS SET ASIDE IN AN ESCROW OR TRUST ACCOUNT NOR HAVE ANY OTHER FINANCIAL ARRANGEMENTS BEEN MADE TO ASSURE COMPLETION OF THE ELECTRIC LINES.

TELEPHONE

Bell South will provide telephone service. Service lines are or will be extended in front of or adjacent to each of the lots in this filing. You will not be responsible for any construction costs in connection with the telephone service lines. You will be responsible for installing telephone lines within each lot and dwelling. The current percentage of completion and the estimated availability dates for electrical service are set forth in the table below.

Telephone

Unit	Estimated starting date (month/year)	Percentage of construction complete	Estimated service availability date (month/year)
Phase I			
2-3, 9-11, 18, 21, 23, 27-29, 32, 34-35, 37-39, 41, 43, 46, 49-56	1-Jan-2004	0%	1-Jun-2004
Emerald Bay 11-82	1-Jun-2004	0%	1-Jan-2005
Emerald Bay 101-103	1-Jun-2004	0%	1-Jan-2005
Laurel Pointe 2-50, 61-66, 67A, 67B, 68-84, 85A, 85B, 86-89	1-Jul-2004	0%	1/1/2005*
Jasmine Cove 1-42	1-Jan-2005	0%	1-Jan-2007
Emerald Bay 83-93	1-Jan-2005	0%	1-Jan-2007

\*The estimated completion date for telephone in the first phase of Laurel Pointe has been amended to January 1, 2005 because we are unable to achieve development goals required for the earlier estimated construction completion date of July 1, 2004.

FUEL OR OTHER ENERGY SOURCE

There is no other fuel or energy source than the electrical service.

FINANCIAL INFORMATION

We were formed on September 10, 2002. From our formation to the date hereof, we have engaged primarily in development activities. Nevertheless, we have experienced an operating loss that may affect our ability to discharge our financial obligations.

A copy of our financial statements for the period ending December 31, 2003 is available from us upon request.

### LOCAL SERVICES

In this topic, we will discuss the availability of fire and public protection and the location of schools, medical care, shopping facilities, mail services and public transportation.

#### FIRE PROTECTION

Salem Fire & Rescue Squad, approximately 5 miles from the subdivision, provides fire protection to the subdivision. Fire protection is available year round.

#### POLICE PROTECTION

The Oconee County Sheriff's Department provides police protection. Police protection is available year round.

#### SCHOOLS

The elementary school available to residents of the subdivision is Tamassee/Salem Elementary School, located approximately 5½ miles from the subdivision. Tamassee/Salem Middle School is located approximately 5 miles from the subdivision, and Tamassee/Salem High School is located approximately 5 miles from the subdivision. School bus transportation is available from within the subdivision.

#### HOSPITAL

Oconee Memorial Hospital, located on 298 Memorial Drive in Seneca, South Carolina, is the nearest hospital to the subdivision, located approximately 16.4 miles from the Nimmons Bridge Road main gate to the subdivision. Ambulance service is available.

#### PHYSICIANS AND DENTISTS

The nearest Physicians office is located in Walhalla, South Carolina. The nearest Dentist office is located in Walhalla, South Carolina.

#### SHOPPING FACILITIES

Nearby shopping facilities include Key Mart Grocery, Amoco Gas Station, Wine Emporium and Hair Loft approximately 3.7 miles from the Nimmons Bridge Road main gate to the subdivision. Wachovia Bank is approximately 5.1 miles from the subdivision; Bi-Lo Grocery, Ingles Grocery and CVS Pharmacy approximately 13.6 miles; Eckerd Drugs approximately 13.8 miles; Lowes Home Improvement approximately 16.4 miles; and The Home Depot approximately 17.0 miles from the subdivision.

#### MAIL SERVICE

Mail for the subdivision will be by general delivery to individual lots located within the subdivision.

#### PUBLIC TRANSPORTATION

Public transportation is not available in the subdivision. The nearest public transportation is available in Clemson, South Carolina, approximately 15 miles from the subdivision.

RECREATIONAL FACILITIES

We will now discuss the recreational facilities located within the subdivision described in this report. The property owners association does not own any recreational facilities, and none of your assessments paid to the property owners association will be applied to the costs and expenses of maintaining the private recreational facilities described below.

The property owners association will not own or contribute to the construction or maintenance of the recreational facilities described in this section. Memberships to use the recreational facilities described below are available to lot owners only and are not available for public use. The facilities will be owned and operated by The Cliffs at Keowee Falls South Golf and Country Club, LLC (the "Club"), which is currently an affiliated entity.

**THE CLIFFS AT KEOWEE FALLS SOUTH GOLF & COUNTRY CLUB**

THE RECREATIONAL FACILITIES TO BE LOCATED IN THE SUBDIVISION WILL BE OWNED AND OPERATED BY THE CLIFFS AT KEOWEE FALLS SOUTH GOLF & COUNTRY CLUB, LLC, A PRIVATE, NON-EQUITY CLUB OWNED BY AN AFFILIATE OF THE DEVELOPER. THE FACILITIES WILL BE AVAILABLE SOLELY TO ITS MEMBERS. YOUR PURCHASE OF A LOT IN THIS SUBDIVISION GIVES YOU NO RIGHT TO USE THE FACILITIES OF THE CLUB UNLESS YOU ARE A MEMBER. THERE IS NO ASSURANCE THAT YOUR APPLICATION FOR MEMBERSHIP WILL BE ACCEPTED. THE INITIAL COST OF A MEMBERSHIP AND SUBSEQUENT ANNUAL DUES WILL BE SUBSTANTIAL. AT PRESENT, THE INITIAL COST OF A FULL "KEOWEE FALLS SOUTH FULL GOLF MEMBERSHIP" IS ESTIMATED TO BE SEVENTY-FIVE THOUSAND AND NO/100 (\$75,000) DOLLARS, AND THE ANNUAL DUES ARE ESTIMATED TO START AS HIGH AS FOUR THOUSAND EIGHT HUNDRED AND NO/100 (\$4,800.00) DOLLARS. THE COST OF A MEMBERSHIP WILL BE SUBSTANTIAL AND NO REFUND OF THE PURCHASE PRICE OF YOUR LOT WILL BE MADE IF YOU DO NOT BECOME A MEMBER OF THE PRIVATE CLUB. A MEMBERSHIP IN THE CLUB IS NOT TRANSFERABLE EXCEPT TO THE CLUB AND PURSUANT TO STRINGENT REQUIREMENTS SET FORTH IN THE CLUB DOCUMENTS. ANY PERSON TO WHOM YOU SELL YOUR LOT WILL HAVE TO APPLY FOR MEMBERSHIP AND BE ACCEPTED FOR MEMBERSHIP, AND PAY AN INITIATION DEPOSIT AND ANNUAL DUES, WHICH ARE OR MAY BE SUBSTANTIAL. YOUR FAILURE OR THE FAILURE OF THE PERSON TO WHOM YOU SELL YOUR LOT TO BECOME A MEMBER MAY ADVERSELY AFFECT THE VALUE OF YOUR LOT. YOU SHOULD CAREFULLY CONSIDER YOUR PURCHASE OF A LOT IN THIS SUBDIVISION IF IT IS BASED UPON THE ASSUMPTION THAT A MEMBERSHIP IN THE CLIFFS AT KEOWEE FALLS SOUTH GOLF & COUNTRY CLUB WILL BE AVAILABLE TO YOU OR TO ANYONE TO WHOM YOU SELL YOUR LOT. FURTHERMORE, EVEN THOUGH THE CLUB FACILITIES ARE LOCATED IN THE SUBDIVISION, NO IMPLICATION IS INTENDED OR SHOULD BE DRAWN THAT THE CLUB FACILITIES ARE MAINTAINED FOR LOT OWNERS WITHIN THE SUBDIVISION.

The following chart lists the facilities of The Cliffs at Keowee Falls South Golf & Country Club, LLC, which lists the estimated date of the start of construction, the percentage of construction now complete, the estimated date of availability, financial assurance of completion and the estimated annual cost or assessment.

Facility	Percentage of construction now complete	Estimated date start of construction (month/year)	Estimated date available for use (month/year)	Financial assurance of completion	Buyer's annual cost or assessments
					The use of these facilities is dependent upon separate membership agreements between the lot owner and the owner of the facilities. No cost for the use of these facilities is assessed against Lot purchasers by the owners' association.
Golf Course	0%	April, 2005	April, 2007*	None	
Clubhouse	0%	April, 2005	April, 2007*	None	
Wellness Center	0%	April, 2006*	April, 2008*	None	
<p>* The estimated completion date for the golf course and clubhouse has been amended to April, 2007 because the Club has advised us it is unable to achieve development goals required for the earlier estimated construction completion date of September, 2006. The estimated start date for the wellness facilities has been amended to April, 2006 because the Club is unable to achieve its development goals required for an earlier estimated start date of April, 2005, and has, as a result, amended the estimated completion date from April, 2007 to April, 2008.</p>					

-WARNING-

**WE DO NOT OWN THE RECREATIONAL FACILITIES; THEREFORE, WE CANNOT ASSURE THEIR CONTINUED AVAILABILITY**

#### CONSTRUCTING THE FACILITIES

The Club is responsible for the construction of the facilities described above. Lot purchasers are not required to contribute to the construction costs of the facilities.

#### MAINTAINING THE FACILITIES

The Club will operate and be responsible for maintenance of the facilities.

**TRANSFER OF FACILITIES**

The Club will own the facilities. The recreational facilities of the Club are subject to transfer at the discretion of the Club, and are not common areas as described in the restrictive covenants.

**PERMITS**

The permits to construct the recreational facilities are not in place at this time; therefore, there is no assurance that members of the Club will be able to use the facilities.

**WHO MAY USE THE FACILITIES**

Membership in the Club is available only to lot owners and is not available to the public. Social Athletic Memberships are available to lot owners who make application for such memberships. A Social Athletic membership in the Club entitles lot owners to use the recreational facilities of the Club, except for the golf course. Subject to availability, lot owners may become eligible to utilize the golf facilities of the Club by acquiring a Golf Membership in the Club within 30 days from closing the acquisition of a lot. Until the Club's facilities are completed within the subdivision, Club members will have only reciprocal use privileges at affiliated Cliffs golf and country club facilities. Unless the initial lot owner elects to purchase a Golf Membership, future lot owners may not be able to use the facilities or acquire such memberships. Upon the resale of your lot you are required to resign all your memberships in the Club and receive a refund of 100% of the amount you paid for the membership at closing. The purchaser of your lot may be required to purchase a membership at the then current purchase price. See your contract of sale for more information regarding the terms and conditions of membership and use of the recreational facilities.

### SUBDIVISION CHARACTERISTICS AND CLIMATE

In this section, we will discuss the basic terrain of this subdivision, its climate, and any nuisance or hazards in this area.

#### GENERAL TOPOGRAPHY

The general topography of the land within Keowee Falls South is a combination of gently rolling hills and valleys.

Approximately sixteen percent (16%) of the subdivision will remain as natural open space.

None of the lots in this subdivision contains any steep slopes, rock, outcropping, unstable or expansive soil conditions that could necessitate the use of special construction techniques to build.

#### WATER COVERAGE

None of the lots or portions of lots are covered by water at any time during the year.

#### DRAINAGE AND FILL

None of the lots require draining or fill prior to being used for the construction of residences.

#### FLOOD PLAIN

The subdivision is not located within a flood plain or an area designated by any federal, state or local agency as being prone to flooding. Flood insurance is available, but is not customarily required in connection with financing for improvements on lots.

#### FLOODING AND SOIL EROSION

We will provide temporary and permanent control measures within the subdivision which will aggressively control storm water, erosion and sediment control, including sodding and seeding in areas of heavy grading or cut and fill, along with construction of diversion ditches and sediment control basins as necessary. The overall program is under development and is expected to be complete as each phase is completed. There is no financial assurance for completion of the program.

The measures to be exercised by the architectural control committee in the subdivision will include the requirement that each lot owner and/or builder furnish and comply with a temporary and permanent plan for controlling storm water, erosion and sediment during and after construction on a lot.

#### NUISANCES

We know of no land uses in close proximity of the subdivision that would adversely affect the subdivision.

## HAZARDS

We are not aware of any unusual safety factors or hazards that affect the subdivision or any proposed plans for construction that may create a future nuisance or safety hazard. You should understand, however, that some lots in the subdivision are or will be adjacent or in close proximity to a golf course and other club facilities located in the subdivision, and that you might consider the flight and landing of golf balls, the noise of club recreational and maintenance activities, the spraying of chemicals and pesticides (in accordance with regulations applicable thereto) and other similar activities incident to the normal operation of a private club to be a nuisance or hazard.

YOU SHOULD CAREFULLY CONSIDER YOUR PURCHASE, IF IT IS BASED UPON AN ASSUMPTION THAT NORMAL RECREATIONAL AND MAINTENANCE ACTIVITIES INCIDENT TO OPERATIONS OF THE RECREATIONAL FACILITIES OWNED BY THE PRIVATE CLUB AND LOCATED WITHIN THE CLIFFS AT KEOWEE FALLS SOUTH MAY NEVER IMPACT AN OWNER'S USE AND ENJOYMENT OF A LOT IN THE SUBDIVISION.

The lots covered by this Property Report are not subject to unusual natural hazards, and no federal, state or local agency has formally identified the area as one subject to the frequent occurrence of natural hazards.

The South Carolina Department of Insurance has established a rating system for fire hazards based on the availability of water, the capability of the fire department and emergency communications systems. The rating for the subdivision is nine (9) on a scale from one to ten with ten representing the minimum recognized protection.

## CLIMATE

The average temperature ranges for the area in which the subdivision is located are as follows:

	<u>Summer</u>	<u>Winter</u>
<u>High</u>	<u>88.2°</u>	50.0°
Low	68.3°	30.0°
Mean	78.2°	40.0°

The average rainfall is 51.27 inches per year. The average snowfall is 5.9 inches per year.

## OCCUPANCY

There are currently no homes occupied on a full time basis as of the date of this Report.

exercise architectural control over construction and landscaping within the subdivision through our establishment of an architectural review committee ("ARC") and the appointment of its members. We reserve the right, but shall not have the obligation until 3 years following the expiration of our Declarant Control Period, to assign the ARC powers to the Association.

The projected income from assessments is estimated to be adequate; however, until there are sufficient owners to maintain the required level of funds, The Cliffs at Keowee Falls South, LLC will subsidize the property owners associations as necessary.

**(TAXES)**

Your obligation to pay taxes begins upon transfer of title. Taxes are paid to the Oconee County Tax Assessor. Taxes on an unimproved lot after transfer of title to you are based on 2003 ad valorem taxes, \$20.50 for every \$100.00 of assessed value, and unimproved lots are assessed at 6% of fair market value. Therefore, you would expect to be taxed \$1.23 for each \$100 of fair market value, based upon 2003 ad valorem taxes.

**RESALE OR EXCHANGE PROGRAM**

The restrictive covenants require that any sign, including "for sale" signs, must be approved by the ARC prior to posting.

As a developer, we have no program to assist you in the resale of your lot. An on-site broker will be available for your use in reselling your lot should you so choose.

We currently offer a Lot Exchange and Priority Selection Agreement. The exchange program is a trade-up program whereby the buyer entering into such agreement will be given at least one opportunity on a priority basis commensurate with a priority number issued by us in the order in which such agreements are fully executed, to choose among select lots offered by us in a future development phase. A buyer wishing to trade up must choose, from among the select lots offered by us, a lot that exceeds by \$100,000 or more the amount paid for the owned lot offered in trade, and the buyer will be given credit for the purchase price of the trade-in lot against the price of the chosen lot into which the buyer would trade. There are no currently subdivided lots set aside by us to meet a future demand by each and every person that may enter into a Lot Exchange and Priority Selection Agreement, but with a total of 2,200 acres comprising our property that we anticipate developing in future development phases and adding to the subdivision, at full development planned for 950 lots, we are confident of our ability to develop the requisite number of lots necessary to satisfy each person entering into a Lot Exchange and Priority Selection Agreement and with whom we will be contractually obligated to offer such an exchange lot.

**WARNING**

**WE HAVE NOT SET ASIDE OR RESERVED ANY SPECIFIC LOTS FOR FUTURE EXCHANGE OPPORTUNITIES, AND WE DO NOT HAVE ANY OTHER PROGRAM THAT GUARANTEES THAT YOU WILL BE ABLE TO EXCHANGE YOUR LOT FOR ANOTHER.**

EQUAL OPPORTUNITY IN LOT SALES

We are in compliance with Title VII of the Civil Rights Act of 1968 in that we do not directly or indirectly discriminate on the basis of race, religion, sex, or national origin in any of the following general areas: lot marketing and advertising, rendering of lot services, and requiring terms and conditions on lot sales and leases.

LISTING OF LOTS

THE CLIFFS AT KEOWEE FALLS SOUTH				
PHASE 1				
Lot Number	Plat Book	Pages	Plat Recording Date	Mortgage Holder
2-3, 49-56	A928	5-10	March 19, 2003	NBSC
9-11, 21, 34-35, 39, 43, 46, 48	A912	1-6	Nov. 18, 2002	NBSC
18	A912	1-6	Nov. 18, 2002	Cannon & Saad & Wachovia
23, 27	A912	1-6	Nov. 18, 2002	Martin & Wachovia
28, 29	A912	1-6	Nov. 18, 2002	Cannon & Saad & Wachovia
32	A912	1-6	Nov. 18, 2002	Martin & Wachovia
37, 38, 41	A912	1-6	Nov. 18, 2002	S&C & Wachovia
TOTAL REGISTERED PHASE 1 LOTS:			29	
TOTAL REGISTERED PHASE 1 LOTS ACRES:			44.340	

EMERALD BAY LOTS 11-82 (FORMERLY PHASE 1A)				
Lot Number	Plat Book	Pages	Plat Recording Date	Mortgage Holder
13-14, 22, 24, 26-34, 39-58, 60-61, 63, 65-66, 68-70, 72-73, 76-78, 80	A933	5-10	April 4, 2003	Regions Bank
11-12, 15-21, 23, 25, 35-38, 59, 62, 64, 67, 71, 74-75, 79, 81-82	A948	5-10	June 30, 2003	Regions Bank
TOTAL REGISTERED EMERALD BAY LOTS 11-82:			72	
TOTAL REGISTERED EMERALD BAY LOTS 11-82 ACRES:			104.710	

EMERALD BAY LOTS 101-103				
Lot Number	Plat Book	Pages	Plat Recording Date	Mortgage Holder
101-103	A959	9 & 10	August 26, 2003	Regions Bank
TOTAL REGISTERED EMERALD BAY LOTS 101-103:				3
TOTAL REGISTERED EMERALD BAY 101-103 ACRES:				4.200

LAUREL POINTE LOTS 2-50, 61-89				
Lot Number	Plat Book	Pages	Plat Recording Date	Mortgage Holder
2-8, 11-13, 18-19, 24-25, 28-32	A959	5-6	August 26, 2003	Regions Bank
9-10, 14-17, 20-23, 26-27	A971	5-6	October 30, 2003	Regions Bank
33-34, 37, 40-50	A959	7-8	August 26, 2003	Regions Bank
35-36, 38-39	A971	7-8	October 30, 2003	Regions Bank
71-73, 76-83, 86-89	A960	1-2	August 26, 2003	Regions Bank
61-66, 67A, 67B, 68-70, 74-75, 84, 85A, 85B	A971	9-10	October 30, 2003	Regions Bank
TOTAL REGISTERED LAUREL POINTE LOTS 2-50, 61-89:				80
TOTAL LAUREL POINTE 2-50, 61-89 ACRES:				139.910

JASMINE COVE LOTS 1-42				
Lot Number	Plat Book	Pages	Plat Recording Date	Mortgage Holder
1-17	993	4-5	March 19, 2004	Regions Bank
18-42	993	6-7	March 19, 2004	Regions Bank
TOTAL REGISTERED JASMINE COVE 1-42:				42
TOTAL REGISTERED JASMINE COVE 1-42 ACRES:				74.390

EMERALD BAY LOTS 83-93				
Lot Number	Plat Book	Pages	Plat Recording Date	Mortgage Holder
83-93	993	8-9	March 19, 2004	Regions Bank
TOTAL REGISTERED EMERALD BAY LOTS 83-93:				11
TOTAL REGISTERED EMERALD BAY 83-93 ACRES:				23.070

COST SHEET, SIGNATURE OF SENIOR EXECUTIVE OFFICER

COST SHEET

In addition to the purchase price of your lot, there are other expenditures that must be made. Listed below are the major costs. All costs are subject to change.

Cash Price of Lot	<u>Sales Price</u>	\$ _____
	<u>Estimated One-Time Charges</u>	
1. Water Tap Fee		\$ <u>550.00</u>
2. Water Service Deposit		\$ <u>25.00</u>
3. Electric connection fee		\$ _____
4. Installation charge for telephone (connection)		\$ _____
5. Architectural Review Fee		\$ <u>1,000.00</u>
6. Architectural review Construction Deposit -		\$ <u>5,000.00</u>
7. Septic Permit		\$ <u>105.00</u>
8. Septic Tank Costs (\$3,000 - \$30,000)		\$ _____
9. Capitalization of property owners association		\$ <u>100.00</u>
Total of estimated sales price and one-time charges		\$ _____
	<u>Estimated annual charges, exclusive of utility use fees</u>	
1. Taxes -- Average unimproved lot after sale to purchaser		\$ _____
2. The Cliffs at Keowee Falls South Owners' Association		\$ _____

The information contained in this Property Report is an accurate description of our subdivision and development plans.

Keowee Falls Investment Group, LLC

By: \_\_\_\_\_  
James B. Anthony  
Title: President

RECE    AGENT CERTIFICATION, AND CANCELLATION PAGE

PURCHASER RECEIPT  
IMPORTANT -- READ CAREFULLY

Name of Subdivision: The Cliffs at Keowee Falls South

ILS Number: 30856

Date of Report: May 3, 2004

We must give you a copy of this Property Report and give you an opportunity to read it before you sign any contract or agreement. By signing this receipt, you acknowledge that you have received a copy of our Property Report.

Received by: \_\_\_\_\_ Date: \_\_\_\_\_

Street Address: \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

If any representations are made to you, which are contrary to those in this Report, please notify:

Office of Interstate Land Sales Registration  
HUD Building, 451 Seventh Street, S. W.  
Washington, D. C. 20410

AGENT CERTIFICATION

I certify that I have made no representations to the person(s) receiving this Property Report, which are contrary to the information contained in this Property Report.

Lot 31 Section 1C

Name of Salesperson: D. Scott

Signature: \_\_\_\_\_ Date: 6-20-05

PURCHASER CANCELLATION

If you are entitled to cancel your purchase contract and wish to do so, you may cancel by personal notice or in writing. If you cancel in person or by telephone, it is recommended that you immediately confirm the cancellation by certified mail. You may use the form below:

Name of Subdivision: The Cliffs at Keowee Falls South

Date of Contract: \_\_\_\_\_

This will confirm that I/we wish to cancel our purchase contract.

Purchaser(s) signature: \_\_\_\_\_ Date: \_\_\_\_\_

### THE CLIFFS COMMUNITIES REAL ESTATE SALE AND PURCHASE AGREEMENT

THIS REAL ESTATE SALE AND PURCHASE AGREEMENT (the "Agreement") made by and between the below-named seller (the "Seller") identified on the Seller's signature page below (the "Seller"), whose mailing address is as set forth on page 6, and the below-named purchaser (the "Purchaser") identified on the Purchaser's signature page below.

#### Part I. Identifications

A. The Lot and What is Included in Price. The property to be purchased (the "Lot") is located in Section JC, Lot 32, Cliffs at Keowee Falls South

The Lot is listed for sale for \$ 1,140,000.00

The purchase of the Lot does not include a membership in the Golf and Country Club (the "Club"), which is reserved solely to its members in accordance with the use rights conferred by the Club Membership Plan for the categories and classifications of membership offered. Seller does not operate the Club. The Club is operated by The Cliffs Golf & Country Club, Inc. Seller will, however, discount the list price of the Lot by \$35,000 if Purchaser agrees to acquire a membership, and Purchaser will pay that amount at Closing toward a membership.

Check one of the following:

FKM  
(Initial)

If checked and initialed, Purchaser wishes to acquire a membership in the Club, either a Cliffs Family Membership or a Cliffs Golf Membership, and wishes to receive a \$35,000 discount and apply it toward the required membership deposit, and has attached hereto a signed Club Membership Addendum. While Purchaser is guaranteed the availability of a golf membership under the Membership Plan only if Purchaser acquires one within 30 days following Purchaser's Closing, Purchaser will receive the discount only if the membership is acquired at the Closing. If this paragraph is checked and initialed, the Purchase Price in Paragraph B below is net of the discount.

FKM  
(Initial)

If checked and initialed, Purchaser does not wish to acquire a membership in the Club at this time. Purchaser understands that membership is subject to availability at the time Purchaser may wish to acquire one, and is not guaranteed. Purchaser will NOT receive any discount off the listed Purchase Price because Purchaser elects not to receive a membership.

Payment of Purchase Price. The "Purchase Price" is calculated and payable as follows:

FKM  
(Initial)

Total Purchase Price: \$ 1,105,000.00

FKM  
(Initial)

Discount Applied to Membership Deposit. If checked and initialed, Purchaser has checked the first box in A above and wishes to acquire Full Family Membership privileges, paying at the Closing \$35,000. \$ 35,000.00

Golf Membership, Initiation Deposit Add-on. If checked and initialed, Purchaser has checked the first box in A above and wishes to upgrade to a Golf Membership by paying at the Closing an additional sum of \$40,000. \$ 40,000.00

FKM  
(Initial)

(iii) SUB-TOTAL, Purchase Price of Lot plus Membership Deposit Due at Closing ? \$ 1,180,000.00

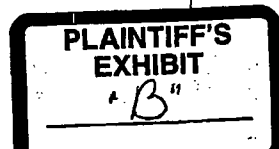
(iv) Initial Earnest Money Deposit. An Earnest Money Deposit paid to Escrow Agent herewith \$ 5,000.00

(v) Additional Deposit Due. An additional Earnest Money Deposit due Escrow Agent within 0 days of the Effective Date hereof. \$ 0.00

(Initial)

(vi) Balance at Closing. The balance required at Closing in cash or certified funds (not including all of Purchaser's closing costs, prepaids, and escrow deposits) \$ 1,175,000.00

FKM  
(Initial)



- C. Escrow Agent. The "Escrow Agent" is Olson, Smith, Jordan & Cox, Attorneys at Law, whose address is set forth in Section 9.4 of Part II below; and all deposits to Escrow Agent should be made payable to Olson, Smith, Jordan & Cox Escrow Account.

Part II.  
Terms and Conditions

For and in consideration of the Purchase Price set forth in Part I hereof and the mutual promises contained in this Agreement, Purchaser agrees to buy and Seller agrees to sell the Lot, conditioned upon there having not been a sale to a third party prior to the receipt of this Agreement by Seller, properly executed by Purchaser, together with the Earnest Money Deposit as provided in Part I, and execution hereof by Seller.

1. **The Purchase Price.** Purchaser will pay the Purchase Price of the Lot set forth in Paragraph B of Part I of this Agreement.

1.1 **Earnest Money Deposit.** The Escrow Agent will receive the Earnest Money Deposit set forth in Paragraph B of Part I, and will deposit said sums in its non-interest bearing escrow account, to be held by the Escrow Agent as the Earnest Money Deposit to be disbursed in accordance with this Part II. In the event of a termination of this Agreement under this Part II, except in the event of Purchaser's default (in which event the Earnest Money Deposit will be paid over to Seller as herein provided), all of the Earnest Money Deposit will be refunded to Purchaser without interest.

1.2 **Payments at Closing.** The Purchase Price, together with all of Purchaser's Closing costs, prepaids, and Closing escrow deposits, less the sum of Purchaser's Earnest Money Deposit, will be paid by Purchaser in cash or by certified, collected funds at the Closing hereinafter referred to.

2. **Financing**

2.1 **No Financing Contingency.** Purchaser acknowledges that this Agreement is not contingent upon Purchaser obtaining financing for the purchase of the Property. Seller makes no representations as to the availability or terms of financing, and the duties of Purchaser and Seller hereunder are not contingent upon Purchaser obtaining financing, or obtaining financing with any specific terms or conditions.

2.2 **Purchaser's Responsibility.** Purchaser is responsible for obtaining desired financing for the purchase of the Lot. By suggesting a source of financing and/or providing the application for such financing, Seller will not be deemed to have assumed any responsibility for obtaining such financing for Purchaser or to represent or warrant that such financing will be available to Purchaser. Purchaser represents that Purchaser has the financial means to purchase the Lot. Purchaser shall fully cooperate with Seller in procuring any evidence Seller reasonably requests that Purchaser has the financial means to pay the balance of the Purchase Price. Purchaser hereby gives Seller or Seller's designated agent permission to obtain one or more credit reports on Purchaser prior to the Closing Date. If Purchaser elects to obtain financing for the purchase of the Lot, Purchaser shall promptly apply for such financing and promptly deliver a loan commitment from an institutional lender to Seller. If Purchaser is not financing the purchase of the Lot, Purchaser shall promptly deliver account verifications to Seller upon Seller's request. If Seller determines, at any time prior to the Closing Date, in Seller's sole but reasonable discretion, that it is unlikely that Purchaser will be able to pay the balance of the Purchase Price on the Closing Date, Seller may terminate this transaction, and the Earnest Money Deposit shall be returned to Purchaser.

3. **Completion of Infrastructure Improvements**

3.1 **Completion of Infrastructure.** Seller agrees to provide roads and water service, and public utilities will provide electrical service and telephone service at no cost to Purchaser, as outlined in our Department of Housing and Urban Development ("HUD") Property Report made effective May 3, 2004, which is incorporated herein and made a part hereof by this reference. In all events, Seller agrees that Seller will complete the water and road infrastructure to Purchaser's Lot within the periods of time set forth in the Property Report, or, (a) in the case of water supply installation, on or before issuance of a certificate of occupancy for Purchaser's residence; and (b), in the case of paved roads to Purchaser's Lot, within sixty (60) days following Purchaser's notice to Seller that Purchaser has received a final certificate of occupancy for Purchaser's residence, whichever respective date occurs first. Seller will, at Seller's sole cost and

expense, provide on-site water for construction of Purchaser's residence if water service is not then available at Purchaser's Lot. Seller's obligation to complete the roads, water service, and electrical and telephone services within the time provided in the HUD Property Report is subject only to circumstances beyond Seller's control, such as acts of God, strikes, material shortages and other occurrences which are sufficient to constitute impossibility of performance under South Carolina law. In the event of such occurrences, Seller will proceed to completion within a reasonable time after the abatement of the event causing delay. In case the survey by which Seller will convey the Lot to Purchaser required bonding pursuant to Oconee County ordinance, Seller has posted a cash or surety bond or an irrevocable letter of credit issued on Seller's behalf to Oconee County, South Carolina, guaranteeing the completion of those roads and other infrastructure requiring bonding. If the approval of the survey by which Seller will convey the Lot to Purchaser did not require bonding by Oconee County ordinance, Seller has established one or more completion escrow accounts to assure completion of the water service and roads to the lots shown on that survey. Seller reserves the right to furnish Purchaser temporary easements for ingress and egress during development, and upon completion of permanent roads or rights-of-way providing ingress and egress, the temporary easements will automatically expire.

(a) **Installation of Infrastructure to Boundary of Lot.** With respect to completion of installation of roads and water service, as well as the installation of electrical and telephone services, Seller covenants these utilities and improvements will be brought to the boundary of Purchaser's Lot, not within the Lot lines to Purchaser's home. Therefore, all costs to connect such utilities or improvements to Purchaser's home will be Purchaser's sole obligation, and the electric utility company charges a set-up fee in conjunction with setting utility meters.

(b) **Septic System.** Purchaser will be responsible for installing and maintaining a septic tank system on the Lot when a dwelling is built on it. Purchaser will be required to make all arrangements for the permitting, governmental approval and installation of a septic tank system. In the event the Lot has not been previously tested and approved by the South Carolina Department of Health and Environmental Control for the installation of an individual sewage disposal system, and if Seller is then not able to resolve the issue within sixty (60) days following notice thereof, Seller will refund to Purchaser the Purchase Price and Purchaser will convey the Lot back to Seller, and thereafter, each of Seller and Purchaser will be fully released from any further liability to the other.

**3.2 Completion of Other Infrastructure; Conveyance or Turnover to a Property Owners' Association.** In addition to the infrastructure we are obligated to complete, as provided in Section 3.1 above, Seller agrees to complete construction and installation of approximately 25 miles of roads, including an overpass, constructed to governmentally-approved standards; drainage systems; water system storage tanks and water delivery booster stations, as well as pipes leading to Purchaser's Lot; and main electrical power feeds to the project, which will allow those public utilities serving Purchaser's Lot to extend service to the Lot; and manned and unmanned gate houses accessing the project; and approximately 10 miles of hiking and nature trails. The utility facilities will be turned over to the applicable utility company upon completion of construction and issuance of operating permits therefore, if any, and the constructed roads, drainage systems, gates and gatehouses, and hiking and nature trails described in this Section 3.2 will be conveyed or turned over to the Keowee Falls South Owners' Association on or before the expiration of two years from completion of construction, as set forth in the Declaration of Covenants, Conditions and Restrictions for the Cliffs at Keowee Falls South; provided, however, the obligation for maintenance, repair and replacement of the Common Areas will become the responsibility of the Keowee Falls South Owners' Association and its Members the date all required certificates or permits of occupancy or use are issued therefore, or the date such improvements may be used in the manner and for the purposes for which they are constructed, whichever is earlier.

#### **4. Recorded Covenants.**

**4.1 The Declaration of Covenants & Property Owners' Association.** The Lot will be conveyed subject to the Declaration of Covenants, Conditions and Restrictions for the Cliffs at Keowee Falls South recorded in the Office of Register of Deeds for Oconee County, as the same may be amended from time to time (herein, sometimes referred to as the "Declaration"), which includes the obligation that Purchaser pay regular and special assessments when levied for the common facilities and services of the Keowee Falls South Owners' Association (herein, sometimes referred to as the "Association") commencing with the date Seller conveys title to the Lot. Purchaser hereby acknowledges having received a copy of the Declaration, with appended Bylaws of the Association.

**4.2 Architectural Review.** Purchaser hereby acknowledges that any improvement to the Lot, including landscape improvements, will be subject to the architectural guidelines established, from time to time, pursuant to the

Declaration, and the prior written approval thereof by the architectural review committee established thereunder. Purchaser and Purchaser's builder will be solely responsible for the completion of construction of all improvements on the Lot and for proper drainage during and after house construction, as well as the published fee payable to architectural review committee for review and approval, prior to construction, of all construction and design plans with respect to any improvements to be placed on Purchaser's Lot. Purchaser will be responsible for paying a fee to the Architectural Review Committee for review and approval, prior to construction, of all construction and design plans with respect to any improvements to be placed on the Lot. Either Purchaser or Purchaser's contractor will also be responsible for posting a bond prior to commencing construction.

4.3 **Size of Residence.** Purchaser also acknowledges that the Declaration requires minimum square footages for residences constructed within Keowee Falls South based upon the area in which Purchaser's Lot is located. See Declaration and applicable amendments, if any, with respect to the application of such minimums.

5. **The Golf & Country Club.** Purchaser acknowledges the plan of development for the various Cliffs communities includes the Club's operation of various commercial, private golf and country club facilities. Purchaser further acknowledges that the Club's recreational facilities are operated by The Cliffs Golf & Country Club, Inc., a related third party of Seller, as a commercial business, and not as a non-profit enterprise, that Purchaser will have a license to use the facilities as herein described if Purchaser acquires a membership to do so, and that neither Purchaser nor any property owner association of which Purchaser may be a member has or will receive any ownership interest in the Club's facilities by virtue of Purchaser's acquisition of the Lot or membership in any such property owner association. The Club may, but will not be required to, add additional recreational facilities in the future. The Club operates and offers membership opportunities pursuant to a published Membership Plan, which the Club may supplement, amend, delete and change in its sole discretion at any time. If Purchaser wishes to become a member, Purchaser should take the time to read the Membership Plan prior to acquiring a membership. Purchaser acknowledges receiving a summary of The Cliffs Club membership opportunities. Such information is summary only, and Purchaser should refer to the Membership Plan for the actual terms and condition applicable to membership in the Club.

6. **Closing.** The sale and purchase contemplated by this Agreement will be closed by delivery to Purchaser of a properly executed and acknowledged general warranty deed, in proper, recordable form, in exchange for payment to Seller of the Purchase Price as hereinabove provided. Notwithstanding any provisions herein to the contrary, the legal description for Purchaser's Lot will be in accordance with and based upon the approved, bonded plat for the subdivision of which the Lot is a part (the "Plat").

6.1 **Deed to Lot.** The general warranty deed will convey to Purchaser a good and marketable or insurable (at regular rates), fee simple title to the Lot subject to matters of record, including, but not limited to, taxes and assessments not yet due, all special easements, restrictions and conditions shown and noted on the Plat, licenses and easements for utilities serving the property, the Declaration and the Bylaws of the Association, applicable ordinances and all other easements, rights-of-way, restrictive or utility easements, restrictions, covenants, affirmative obligations and conditions of record in the office of Register of Deeds.

If a title insurance company which is a member of the American Land Title Association will issue a binder to issue an owner's title insurance policy at Purchaser's expense, insuring the title to the Lot at regular rates in an amount equal to the Purchase Price (which owner's title insurance policy will have as exceptions only standard exceptions and those exceptions as are herein agreed and set forth), Seller will be deemed to be able to convey a marketable title in fee simple. If, at the Closing, Seller cannot deliver a general warranty deed to the Lot subject to the exceptions above, Seller will have the right to extend the Closing for an additional thirty (30) days to comply with the terms of the title policy.

6.2 **Closing Date and Time.** Closing will be conducted in the manner provided hereinafter, on the "Closing Date" set forth on Purchaser's signature page below, at the location set forth in Section 6.3 and at a time selected by Seller. Provided that Seller has fulfilled all of its obligations to Purchaser pursuant to this Agreement, Purchaser's failure or refusal to close at the time, place and date provided may, at Seller's option, be deemed a default by Purchaser.

6.3 **Closing Location.** Tender of the deed by Seller and the performance of Seller's requirements will be made at the Closing location designated by Seller on or before 10 days prior to the scheduled Closing. In no event will delivery of the deed exceed one hundred eighty (180) days from the date of Purchaser's execution of this Agreement. The Closing may take place in escrow, with Purchaser participating by making all deliveries required to be made by mail to

the Closing attorney prior to the Closing date, instead of in person; provided that all funds to be received from Purchaser on the Closing date, whether in person or by mail, must be in cash or certified, collected funds.

6.4 **Closing Costs.** Seller will pay for the preparation of the deed and the deed transfer fee required to record the deed, and Seller's attorney's fees. Purchaser shall pay for any and all other Closing costs, including but not limited to, loan service and origination fees, credit report and underwriting fees, appraisal expenses, recording fees, prepaid items, and title insurance premiums, and Purchaser's attorney's fees. A working capital contribution equal to two-months' Association assessments shall be paid to the Association, as provided in the Declaration.

(a) **Prorations at Closing.** Taxes and the Association's assessments will be prorated between Seller and Purchaser as of the date of closing, based upon information then available. Seller and Purchaser agree to adjust any such prorations following the Closing, as may be required by receipt of final bills therefor.

## 7. Defaults.

7.1 **Default by Purchaser.** In the event Purchaser defaults in the performance of any of Purchaser's obligations pursuant to this Agreement and Seller is not in default, Seller will have the right to specifically enforce this Agreement according to its terms and/or to pursue any and all other remedies available to Seller at law or in equity, or Seller will, at Seller's election, be released from any further obligations to Purchaser pursuant to this Agreement and in such event will be entitled to retain the Earnest Money Deposit (but not exceeding 10% of the Purchase Price) as agreed liquidated damages, it being the intention and agreement of Seller and Purchaser that the amount of such Earnest Money Deposit will act as a fair measure of compensation for actual damages incurred by Seller as a result of Purchaser's default. However, notwithstanding the provisions of this Section 7.1, Seller expressly agrees that Seller will give Purchaser written notification of Purchaser's default or breach of contract and the opportunity to correct the default or breach within twenty (20) days following the receipt of Seller's notice.

7.2 **Default by Seller.** If Seller defaults in the performance of any of Seller's obligations as set forth in this Agreement and such default is not cured within twenty (20) days after written notice of default is given to Purchaser by Seller, Purchaser's sole remedy will be to rescind this Agreement and receive the immediate return of Purchaser's Earnest Money Deposit, pay Purchaser's reasonable attorney's fees for any title examination by Purchaser's attorney and for such other reasonable closing expenses which Seller agrees, in its sole discretion, to pay; provided, however, that in the event of a non-material breach of any term or condition of this Agreement, Purchaser's remedies will not include termination of this Agreement.

8. **Real Estate Commission.** It is understood that Seller has by separate agreement appointed Cliffs Real Estate, Inc. as the exclusive real estate agent for sales of Lots within Cliffs at Keowee Falls South. Purchaser warrants and represents that, except as set forth to the contrary on the signature page of Purchaser, Purchaser has not dealt with any other real estate agent who may be entitled to claim a real estate commission in this transaction.

## 9. Miscellaneous.

9.1 **Seller's Reserved Easements; Construction Setbacks.** Purchaser acknowledges that Seller reserves the right to grant and/or reserve, in its reasonable discretion, various easements for ingress and egress, maintenance and use on and over the Lot and the remainder of the Cliffs at Keowee Falls South development. No such easement will materially reduce the value or the usefulness of Purchaser's Lot. Furthermore, Purchaser's Lot is subject to front, rear and side lot line easements shown on the Plat and/or set forth in the Declaration, which also constitute construction setback limits.

9.2 **Seller's Adjacent Development.** Except as otherwise provided herein and notwithstanding any statements contained in this Agreement or otherwise to the contrary, Seller does not warrant in any manner whatsoever the development of any other properties which are owned by Seller in Pickens County or Oconee County, South Carolina, whether or not in the general vicinity of Purchaser's Lot, and Seller reserves the right to develop such properties, if developed, in any manner whatsoever without interference from any subsequent grantee of the Purchaser's Lot, notwithstanding any plans, renderings or drawings which may have been brought to the Purchaser's attention through public zoning hearings, documents filed for zoning purposes, public or private showings or proposed or preliminary development plans or references therein in any recorded covenants. There is no assurance that any facilities or amenities

shown for planning or proposed development purposes will ever be constructed, except only those which Seller herein covenants to complete or which are disclosed to be completed in the HUD Property Report for the Lot.

9.3 **As-is Condition.** Except as otherwise provided herein, Purchaser is purchasing and Seller is selling the Lot in an "AS IS" condition.

9.4 **Notices.** Any and all notices or other communication provided for in this Agreement will be given in writing and delivered by personal delivery or by registered or certified mail, first class postage prepaid, or by facsimile transmission. Any notice mailed in accordance with this Section 9.4 will be deemed received upon actual receipt thereof or after the expiration of five (5) days, whichever is earlier. Notice sent by facsimile transmission will be deemed received on the date of its transmission, provided transmission occurs prior to 5:00 p.m., Eastern Time, and the sender retains proof of its transmittal and receipt without error. Notice will be addressed as follows:

If to Seller: Keowee Falls Investment Group, LLC  
301 Beaver Dam Road  
Travelers Rest, SC 29690  
Attention: Marty Ritsch  
FAX: 864-836-8176

If to the Escrow Agent: Olson, Smith, Jordan & Cox  
PO Box 1633  
Clemson, South Carolina 29633  
Attention: Chris Olson, Esq.  
FAX: 864-654-3696

Notices, if to Purchaser: As set forth on Purchaser's signature page of this Agreement

The notice requirements of this Section 9.4 do not apply to the Purchaser's right to cancel this Agreement as provided on page 8 below and in accordance with the Interstate Land Sales Full Disclosure Act.

9.5 **Purchaser's Acknowledgment Concerning Representations.** Purchaser understands that any sales associate or other person representing Seller in this transaction does not have the authority to make any statements in conflict with or in addition to the information contained in this Agreement, and any other documents received from Seller, including without limitation, any representation made regarding the resale of Purchaser's Lot or its rental or investment potential, and that Seller, for itself and in behalf of any such agent, specifically disclaims any responsibility for such statements. Further, if any such statements were made, Purchaser acknowledges that by execution of this Agreement, Purchaser affirms that Purchaser has not relied upon any such statements, if any, and waives any rights that Purchaser might have as a result of such statements unless they are incorporated in this Agreement.

9.6 **Documents Received By Purchaser.** Purchaser further acknowledges having received and reviewed prior to the execution of this Agreement the following:

- (a) Copy of the Declaration, as supplemented and amended to the date hereof, together with appended By-Laws of the Association.
- (b) Copy of Plat.
- (c) Design and Construction Guidelines.
- (d) The checked documents or instruments listed on the Purchaser's signature page below.

9.7 **Time is of the essence.** It is expressly understood and agreed that **TIME IS OF THE ESSENCE** as to all obligations hereunder, including the Purchaser obligation to obtain a mortgage commitment and provide the Lender with all information requested if Purchaser is acquiring financing, even though such financing is not a contingency hereof.

... enforceable at  
... hereby

9.8 **Entire Agreement.** Seller and Purchaser covenant and agree with each other that this written instrument, executed in duplicate originals, expresses the entire agreement between them and there is no other agreement, oral or otherwise, varying or modifying the terms of this Agreement.

9.9 **Modification of Agreement.** This Agreement may not be otherwise changed or modified, in whole or in part, by any subsequent written instrument executed by both Seller and Purchaser.

9.10 **Interpretation Presumption.** Seller and Purchaser represent and warrant to one another that each has been advised by counsel or otherwise, actively participated in the finalization of this Agreement, and in the event of a dispute concerning the interpretation of this Agreement, each hereby waives the doctrine that an ambiguity should be interpreted against the party which has drafted the document.

9.11 **Binding Effect; Assignment.** This Agreement is binding upon the parties' respective heirs, devisees, personal representatives, successors and assigns; provided however, this Agreement and any of Purchaser's rights hereunder may not be assigned by Purchaser.

9.12 **Resale Or Exchange Of Property.** Seller has no program or provision for the sale or exchange of any Lots in the Cliffs at Keowee Falls South. There is no program, which assures that Purchaser will be able to exchange the Lot for other property.

9.13 **Unenforceable Provisions.** Should any provision of this Agreement be void or become unenforceable at law or in equity, the remaining provisions will remain in full force and effect and will not in any manner be thereby affected or impaired.


9.14 **Survival.** This Agreement and all the terms and conditions hereof will survive the Closing of the transaction contemplated hereby and will thereafter continue to bind the parties to this Agreement.

9.15 **Counterpart Execution of Agreement.** This Agreement may be signed by each of the parties upon a separate copy, and in such case one counterpart of this Agreement will consist of enough of such copies to reflect the signature of each. For purposes of this Agreement, a telecopy of an executed counterpart will constitute an original. Any person delivering an executed counterpart of this Agreement by telecopy will also deliver an original, executed counterpart of this Agreement, but the failure to deliver an original, executed counterpart will not affect the validity of this Agreement. This Agreement may also be executed in two or more counterparts, each of which will be deemed an original; but for purposes of proving the Agreement, it will not be necessary to produce or account for more than one such counterpart.

9.16 **Effective Date.** This Agreement will become effective, and the term "Effective Date" herein will mean, the last date executed by a party to be bound hereby.

9.17 **Receipt of Agency Disclosure.** RECEIPT AND EXPLANATION OF THE AGENCY DISCLOSURE FORM IS HEREBY ACKNOWLEDGED BY PURCHASER'S INITIALS BELOW THIS SECTION AND BY PURCHASER'S EXECUTION OF THIS AGREEMENT.

PURCHASER'S INITIALS HERE TO EVIDENCE HAVING RECEIVED THE AGENCY DISCLOSURE FORM REFERENCED ABOVE

  
CER  
For Purchaser

(BALANCE OF PAGE PURPOSELY BLANK)

9.8 Entire Agreement. Seller and Purchaser covenant and agree with each other that this written instrument, executed in duplicate originals, expresses the entire agreement between them and there is no other agreement, oral or otherwise, varying or modifying the terms of this Agreement.

9.9 Modification of Agreement. This Agreement may not be otherwise changed or modified, absent some subsequent written instrument executed by both Seller and Purchaser.

9.10 Interpretation Presumption. Seller and Purchaser represent and warrant to one another that each has, by counsel or otherwise, actively participated in the finalization of this Agreement, and in the event of a dispute concerning the interpretation of this Agreement, each hereby waives the doctrine that an ambiguity should be interpreted against the party which has drafted the document.

9.11 Binding Effect; Assignment. This Agreement is binding upon the parties' respective heirs, devisees, personal representatives, successors and assigns; provided however, this Agreement and any of Purchaser's rights hereunder may not be assigned by Purchaser.

9.12 Resale Or Exchange Of Property. Seller has no program or provision for the sale or exchange of any Lots in the Cliffs at Keowee Falls South. There is no program, which assures that Purchaser will be able to exchange the Lot for other property.

9.13 Unenforceable Provisions. Should any provision of this Agreement be void or become unenforceable at law or in equity, the remaining provisions will remain in full force and effect and will not in any manner be thereby affected or impaired.

9.14 Survival. This Agreement and all the terms and conditions hereof will survive the Closing of the transaction contemplated hereby and will thereafter continue to bind the parties to this Agreement.

9.15 Counterpart Execution of Agreement. This Agreement may be signed by each of the parties upon a separate copy, and in such case one counterpart of this Agreement will consist of enough of such copies to reflect the signature of each. For purposes of this Agreement, a telecopy of an executed counterpart will constitute an original. Any person delivering an executed counterpart of this Agreement by telecopy will also deliver an original, executed counterpart of this Agreement, but the failure to deliver an original, executed counterpart will not affect the validity of this Agreement. This Agreement may also be executed in two or more counterparts, each of which will be deemed an original; but for purposes of proving the Agreement, it will not be necessary to produce or account for more than one such counterpart.

9.16 Effective Date. This Agreement will become effective, and the term "Effective Date" herein will mean, the last date executed by a party to be bound hereby.

9.17 Receipt of Agency Disclosure. RECEIPT AND EXPLANATION OF THE AGENCY DISCLOSURE FORM IS HEREBY ACKNOWLEDGED BY PURCHASER'S INITIALS BELOW THIS SECTION AND BY PURCHASER'S EXECUTION OF THIS AGREEMENT.

PURCHASER'S INITIALS HERE TO EVIDENCE HAVING RECEIVED THE AGENCY DISCLOSURE FORM REFERENCED ABOVE

*Jhp*  
For Purchaser

(BALANCE OF PAGE PURPOSELY BLANK)

9.15 Counterpart Execution of Agreement. This Agreement may be signed by each of the parties upon a separate copy, and in such case one counterpart of this Agreement will consist of enough of such copies to reflect the signature of each. For purposes of this Agreement, a telecopy of an executed counterpart will constitute an original. Any person delivering an executed counterpart of this Agreement by telecopy will also deliver an original, executed counterpart of this Agreement, but the failure to deliver an original, executed counterpart will not affect the validity of this Agreement. This Agreement may also be executed in two or more counterparts, each of which will be deemed an original; but for purposes of proving the Agreement, it will not be necessary to produce or account for more than one such counterpart.

Additional Documents Received By Purchaser. Pursuant to Section 9.6, the Purchaser acknowledges having received and reviewed prior to the execution of this Agreement the following (if none, leave blank):

- HUD
- CCR
- PLATT
- 

PURCHASER'S INITIAL HERE TO EVIDENCE HAVING RECEIVED THE DOCUMENTS LISTED ABOVE

*J. Scott*  
For Purchaser

YOU HAVE THE OPTION TO CANCEL YOUR CONTRACT OR AGREEMENT OF SALE BY NOTICE TO THE SELLER UNTIL MIDNIGHT OF THE SEVENTH DAY AFTER YOU HAVE RECEIVED A FULLY SIGNED COPY OF THE CONTRACT OR AGREEMENT.

IF YOU DID NOT RECEIVE A PROPERTY REPORT PREPARED PURSUANT TO THE RULES AND REGULATIONS OF THE OFFICE OF INTERSTATE LAND SALES REGISTRATION, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, IN ADVANCE OF YOUR SIGNING THE CONTRACT OR AGREEMENT, THE CONTRACT OR AGREEMENT OF SALE MAY BE CANCELLED AT YOUR OPTION FOR TWO YEARS FROM THE DATE OF SIGNING.

IN WITNESS WHEREOF, Purchaser and the Seller have each caused this instrument to be executed on the day and year set forth below their respective names.

WITNESS:

Purchaser:

*J. Scott*  
(Signature)

(Signature)

6 20 2005  
Month Day Year

PURCHASER'S DATE

The "Closing Date" is: July 20, 2005

~~YOU HAVE THE OPTION TO CANCEL YOUR CONTRACT OR AGREEMENT OF SALE BY NOTICE TO THE SELLER UNTIL MIDNIGHT OF THE SEVENTH DAY AFTER YOU HAVE RECEIVED A FULLY SIGNED COPY OF THE CONTRACT OR AGREEMENT.~~  
~~IF YOU DID NOT RECEIVE A PROPERTY REPORT PREPARED PURSUANT TO THE RULES AND REGULATIONS OF THE OFFICE OF INTERSTATE LAND SALES REGISTRATION, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, IN ADVANCE OF YOUR SIGNING THE CONTRACT OR AGREEMENT, THE CONTRACT OR AGREEMENT OF SALE MAY BE CANCELLED AT YOUR OPTION FOR TWO YEARS FROM THE DATE OF SIGNING.~~

Telephone (Work): \_\_\_\_\_  
Telephone (Home): \_\_\_\_\_  
FAX Number: \_\_\_\_\_  
E-mail Address: \_\_\_\_\_

Name in Which to Title Property: Kevin R. McCarthy & Courtney E. Rountree  
(Insert the name or names to which Purchaser wishes title to the Lot to be deeded)

WITNESS: Name of Real Estate Agent(s): Jay Scott  
(Insert the name or names of both the Cliffs Real Estate agent representing Seller and any outside agent representing Purchaser)

(BALANCE OF PAGE PURPOSELY BLANK)

DATE OF SIGNING  
DATE MAY BE

Additional Documents Received By Purchaser. Pursuant to Section 9.6, the Purchaser acknowledges having received and reviewed prior to the execution of this Agreement the following (if none, leave blank):

- HUD
- CCR
- PLATT
- 

PURCHASER'S INITIAL HERE TO EVIDENCE HAVING RECEIVED THE DOCUMENTS LISTED ABOVE

J. Scott  
For Purchaser

YOU HAVE THE OPTION TO CANCEL YOUR CONTRACT OR AGREEMENT OF SALE BY NOTICE TO THE SELLER UNTIL MIDNIGHT OF THE SEVENTH DAY AFTER YOU HAVE RECEIVED A FULLY SIGNED COPY OF THE CONTRACT OR AGREEMENT.

IF YOU DID NOT RECEIVE A PROPERTY REPORT PREPARED PURSUANT TO THE RULES AND REGULATIONS OF THE OFFICE OF INTERSTATE LAND SALES REGISTRATION, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, IN ADVANCE OF YOUR SIGNING THE CONTRACT OR AGREEMENT, THE CONTRACT OR AGREEMENT OF SALE MAY BE CANCELLED AT YOUR OPTION FOR TWO YEARS FROM THE DATE OF SIGNING.

IN WITNESS WHEREOF, Purchaser and the Seller have each caused this instrument to be executed on the day and year set forth below their respective names.

WITNESS:  
\_\_\_\_\_  
\_\_\_\_\_

Purchaser:  
Courtney Rountree  
(Signature)

Month Day Year  
6 20 2005

The "Closing Date" is: July 20, 2005

Print or Type:  
Name: Kevin McCarthy  
Name: Courtney Rountree  
Address: 604 A Tim Valley Road

Courtney Rountree into:  
Telephone (Work): (704) 715-1484  
Telephone (Home): (704) 819-8749  
FAX Number: (704) 382-6538  
E-mail Address: ~~cc@cliffs.com~~ rountreec@bellsouth.net

Name in Which to Title Property. Courtney E. Rountree  
(Insert the name or names to which Purchaser wishes title to the Lot to be deeded)

Name of Real Estate Agent(s): Jay Scott  
(Insert the name or names of both the Cliffs Real Estate agent representing Seller and any outside agent representing Purchaser)

(BALANCE OF PAGE PURPOSELY BLANK)

Seller:

Keovee Park Investment Group, LLC

By

Its:

*Marty Petuk*

TREASURER

07	06	05
Month	Day	Year

Property: Section: Jasmine Cove, Lot 32

Lot Purchase

Price: \$ 1,105,000.00

Membership: \$ 75,000.00

Total: \$ 1,180,000.00

(BALANCE OF PAGE PURPOSELY BLANK)



DATE \_\_\_\_\_  
 COMPILED/TYPED BY \_\_\_\_\_  
 MAILED BY \_\_\_\_\_  
 HAND DELIVERED BY \_\_\_\_\_  
 AUTHOR/SENIOR AUTHOR \_\_\_\_\_  
 (INITIALS)

July 18, 2005

Mr. Donald H. Nickell, Jr., P.E.  
 The Cliffs Communities, Inc.  
 301 Beaver Dam Road  
 Travelers Rest, South Carolina 29690

**FILE COPY**  
 THIS DOCUMENT DOES NOT HAVE FILE

Reference: **SUBSURFACE EXPLORATION FINDINGS**  
**Cliffs Keowee Falls South - Lot #31 Jasmine Cove**  
 Oconee County, South Carolina  
 S&ME Project No. 1261-05-423A

Dear Don:

S&ME, Inc. is pleased to submit this Subsurface Exploration Findings letter for Lot #31 (Jasmine Cove) at the Cliffs Keowee Falls South development. Our work for the property included an exploration of subsurface conditions, analysis, opinions regarding the cause of unusual features on the property and our geotechnical engineering recommendations regarding supporting residential structures. This letter presents a brief confirmation of our understanding of the project, the exploration results, and our geotechnical conclusions and recommendations regarding the above considerations.

Lot #31 fronts Lake Keowee along its western shoreline. The lot slopes upward away from the lake at a visually estimated inclination on the order of about 4 horizontal to 1 vertical. There are approximately three "scarp" areas across the site, each approximately paralleling the water surface and the contour of the lots. These surface features are very unique.

The lot was explored with two soil testing borings (L-1 and L-2) performed below the main "scarp" area and one boring (L-3) above the main "scarp" area. Additionally, three trackhoe excavated test pits were performed at similar locations as the borings. At each test pit and boring location, soils that appear to be residual in nature and common to the Piedmont Geologic Province were encountered to termination or refusal depths of 20 to

S&ME, Inc.  
 155 Tradd Street  
 Spartanburg, South Carolina 29301

(864) 574-2360  
 (864) 576-8730 fax  
 (864) 232-8987 Greenville

www.smetr.com



30 feet below the ground surface. The residual soils generally consist of silty sand or sandy silt; however, an upper layer of sandy clay was present in boring L-1. The Standard Penetration Resistance (N) values in the residual soils varied from 2 to 31 blows per foot with the majority of the values in the 2 to 5 blows per foot range. These values indicate a very soft to soft consistency for silts and clays, and a very loose to loose relative density for sands.

The boring data indicates that the lot contains some unique surface and subsurface anomalies. Although the boring data indicates very low consistency soils extend well below the ground surface, it did not indicate that the exposed "scarp" areas are the result of lateral movements or surface sloughing. The surface features could be terraced alluvium deposited during past geologic events or possibly old road cuts created during construction of Lake Keowee.

Based on the subsurface data and our experience, it is our opinion that residential structures can be supported on-site with some modification to improve the foundation soils. Several options are available for soil improvement, but we would recommend undercut and replacement or rammed aggregate piers as the most practical. The undercut area would include the building limits and an area extending at least 15 feet outside the building limits, and would extend 5 to 7 feet.

Rammed Aggregate Piers are a patented system consisting of drilling vertical holes (typically 30-inches in diameter) and filling them in layers with compacted crushed stone to the foundation bearing level. Rammed Aggregate Piers are stiffer than the surrounding soil and support a disproportionate share of the foundation load while reducing foundation settlement. After Rammed Aggregate Pier construction, foundations and/or floor slabs may be constructed conventionally.

For planning purposes, the cost of undercutting soils, replacing them with off-site borrow soils, and wasting the undercut soils off site is typically about \$12 to \$15 per cubic yard. However, a majority of the undercut soils would most likely be suitable for reuse as structural fill. As for the Rammed Aggregate Piers, we estimate that approximately 50 to

75 piers would be required to support the structure and floor slab. The piers could be installed in 4 to 5 days (including a modulus load test) with an anticipated cost on the order of \$550 to \$600 per pier. However, this cost will vary depending on project specific variables. We can provide additional design and cost information as the project is further advanced.

We appreciate the opportunity to work with The Cliffs Communities, Inc. by providing the geotechnical engineering for this project. Should any questions arise regarding the information in this report or when we may be of further service, please contact us.

Sincerely,  
S&ME, Inc.

  
Michael Revis, P.E.  
Project Engineer  
[mrevis@smelnc.com](mailto:mrevis@smelnc.com)

  
Howard Perry, P.E.  
Senior Engineer  
[hperry@smelnc.com](mailto:hperry@smelnc.com)



**WHITAKER LABORATORY, INC.**

P.O. Box 7078 2500 Tremont Road Savannah, Georgia 31418  
(912) 234-0696 Fax (912) 233-5061

June 21, 2011

Mr. T.S. Stern Jr., Esquire  
COVINGTON, PATRICK, HAGINS, STERN & LEWIS, PA  
P.O. Box 2343  
Greenville, SC 29601

RE: Residence of Mr. & Mrs. Jack R. Harrell  
Lot 31 Jasmine Cove  
The Cliffs at Lake Keowee Falls South  
Salem, SC

Dear Mr. Stern:

You have requested that I review preconstruction and sales documents provided by you, as well as the geotechnical site investigations and post construction monitoring data on this lot. I have read and considered all of the documents you provided to me, and I have placed particular interest in these documents listed below:

S&ME, Inc. **SUBSURFACE EXPLORATION FINDINGS** - July 18, 2005  
S&ME, Inc. **Site Observations** - June 3, 2008  
S&ME, Inc. **Subsurface Exploration Harrell Residence** - May 15, 2009  
S&ME, Inc. **SUBSURFACE EVALUATION** - Feb 10, 2010  
S&ME, Inc. **SUBSURFACE EXPLORATION Jasmine Pt Cul-de-Sac** - Mar. 5, 2010  
BLE, Inc. **Data Report of Slope Inclinator Surveys** - October 25, 2010  
BLE, Inc. **Report of Site Observations 235 Jasmine Point** - March 1, 2010  
BLE, Inc. **Data Report of Slope Inclinator Surveys** - April 11, 2011  
Resort Custom Homes, **Topo and Tree Survey for Lot 31 CKFS-JC-031** - Aug 25, 2008

In addition to reviewing the documents, I have met with Mr. William Matthews, PE of BLE, Inc. on June 2, 2011, and on June 3, 2011, visited the project site, and the adjacent lots 30 & 32, accompanied by you and Mr. Matthew Vogt, the home builder.



The S&ME report for lot 31 dated July 18, 2005 for The Cliffs Communities, SUBSURFACE EXPLORATION FINDINGS, Lot 31 Jasmine Cove provides ---“ *our understanding of the project, the exploration results, and our geotechnical conclusions and recommendations regarding the above considerations.*”

Of significant interest to me, are statements regarding their observations of “ - - *scarp areas across the site, each approximately paralleling the water surface and the contour of the lots. These surface features are very unique.*” Please note that the copy of the report furnished to me did not include the logs of the reported borings numbers L1, L2, & L3, and therefore I have not reviewed these data.

Further this July 18 report states, “*Although the boring data indicates very low consistency soils extend well below the ground surface, it did not indicate that the expose “scarp” areas are the result of lateral movement or surface sloughing. The surface features could be terraced alluvium deposited during past geologic events or possible old road cuts created during the construction of Lake Keowee.*”

Still further the report states, “*Based on the subsurface data and our experience, it is our opinion that residential structures can be supported on-site with some modification to improve the foundation soils. Several options are available for soil improvement, but we would recommend undercut and replacement or rammed aggregate piers as the most practical.*”

Based on a subsequent S&ME, Inc. report on this lot #31, dated June 3, 2008, I understand that a building pad area was undercut and refilled with compacted soils in order to prepare the site for the construction of a home. I further understand a house was never built at this prepared location.

In September of 2008, Mr. and Mrs. Jack Harrell purchased the lot from Keowee Falls Investment Group, LLC and subsequently entered into a contract with Resort Custom Homes (Mr. Matthew W. Vogt, Principal) for the construction of a home on the lot. Mr. Vogt then commissioned S&ME Inc to conduct an additional geotechnical exploration of the site to include specifically a different area being considered for the house location.

For this additional exploration (S&ME report dated May 15, 2009) four more test borings were drilled. The CONCLUSIONS AND RECOMMENDATIONS (page 4) of this additional exploration report state “*Foundations for the residential structure can be designed as spread footings bearing in the residual soils and new, well compacted fill.*” And in the Foundation Design – Bearing Pressure and Settlement (page 6) section of the report, is stated “*Foundations for the residence can be designed as spread footings bearing in new, well compacted fill and residual soils. A net maximum allowable bearing pressure of 2000 psf should not be exceeded. We advise a bearing pressure of 1500 psf not be exceeded for the fire place and chimney.*”

The S&ME, Inc. report dated March 5, 2010, SUBSURFACE EXPLORATION Jasmine Point Cul-De-Sac is presented as the “*results of a subsurface exploration for the Jasmine Point cul-de-sac and its embankment.*” and “*The report presents information regarding our understanding of a water line separation and the stability of an embankment for the cul-de-sac.*”

The report says *"the water line crossing the road separated at a joint, -- -- the pavement dropped down about 4 inches -- -- This crack is primarily vertical."* The photographs included with the copy of the report appear to me to be visual indicators of a scarp resulting from a slope shear failure. The photographs show that the failure surface runs across the cul-de-sac and into the adjacent driveway. The report S&ME states (page 3) *"From our visual observations, we did not observe indications that the cul-de-sac embankment has moved laterally."* Note that this statement refers to the cul-de-sac embankment. This report further states on page 3 *"Based on the information above, it is our opinion the most likely time of events is that the water line separated first, rather than the slope moving and causing the water line to separate."* It is unfortunate that the instability of the hillside site was again not identified. It is my opinion that the existing slope instability along lots 30, 31, & 32 was the cause of the embankment movement and thus the cause of the water line separation. Evidences of continued movement of the hillside slope are seen in the semi-circular cracks in the new asphalt concrete driveway for lot 31. (SEE Photos 1- a & 1- b; page 5)

Conversations with the home builder, Mr. Matt Vogt indicate his recollections of this event resulted in a vertical distance at the failure crack across the cul-de-sac of "about a foot".

On February 26, 2010, Mr. Bill Matthews, PE of BLE, Inc. met with a landscape contractor working on adjacent lot to observe distress in the driveway of lot 29. A report entitled Report of Site Observations BLE Project No J10-6933-01 dated March 1, 2010 was prepared after this visit. The report states in part *"The differential settlement was relatively abrupt and was estimated to be up to approximately two feet (vertically) on lot 32. Based on our limited observations, it is our opinion that the differential movement is associated with an active slope failure. The semi-circular shape and abrupt movement is a classic indication of a failure scarp that develops at the upper limits of a slope failure. The observed scarp appears to encompass all or parts of Lots 29, 30, 31, and 32."*

In the winter of 2010, after construction on the Harrell's home was underway, S&ME, Inc prepared a third report on Lot 31, SUBSURFACE EVALUATION HARRELL RESIDENCE dated February 12, 2010. This report was prepared for Resort Custom Homes to investigate the causes of movement of the foundation floor slab. The CONCLUSIONS AND RECOMMENDATIONS sections of this report state, *"From our understanding of construction, the sequence of events, and the subsurface data, it is difficult to discern the actual cause of the slab movement."* and further on page 4, *"Because we are not certain of the mechanism's causing slab movement, we suggest that movement of the slabs and other parts of the structure be monitored for as long as practical."*

Also as a result of this slab movement, Mr. Vogt (the home builder) contacted GEBAU, Inc, Consulting Structural Engineers in Boulder Colorado for assistance in foundation remediation and improvements. GEBAU produced a design drawing dated 2/18/2010 for the redesign of portions of the house foundation to include the addition of helical piers. Subsequent to this design, a number of helical piers were installed in the foundation. The drawing produced by GEBAU for the project did not have a Professional Engineers seal nor a SC Certificate of Authorization seal affixed. I do not know the depth of these piers, but it is my opinion that they will be ineffective in long term stabilization of movement of the structure or the slope. Significant continuing movement of the ground beneath the patio slab is now evident, as is some lateral movement of the southeastern-most porch column. (SEE Photos 2-c & 2-d; page 6)

In early summer 2010, The Cliffs Communities engaged BLE, Inc to begin Inclinometer surveys of the area (including Lots 30, 31, and 32). Two reports, dated October 25 2010, and April 11, 2011, report the observations and inclinometer data concerning continuing movement of the property. The opinion of BLE, Inc. as stated in the October 25, 2010 report is, "*Based on our site observations and the inclinometer data obtained to date, it is our opinion that there is an active, deep-seated slope failure occurring at the site.*" And in the BLE, Inc. report dated April 11, 2011 the opinion is stated "*As previously reported, it is our opinion that there is an active, deep seated slope failure occurring at the site.*" From conversations with Mr. William Matthews, PE I understand the term "the site" in his report includes Lot #31 (Harrell's) and adjacent properties.

On June 3, 2011, I made a visual inspection of this Lake Keowee property, including the adjacent lots 30 & 32. Based on my engineering experience, my site visit, my meeting with BLE, Inc and my review of the geotechnical investigations conducted for this site, it is my opinion that the Harrell's property, and immediately adjacent properties are experiencing an on-going shear failure of the hillside. This shear failure, and slope instability extends up into the cul-de-sac area of Jasmine Cove.

It is further my opinion that this state of failure existed in advance of the first investigation by S&ME, Inc. Visual observations of scars from this state of failure are acknowledged in the July 2005 S&ME Inc report; however the significance of these observations is not acknowledged. Today, the shear failure scars (scarps) remain visible on this and adjacent properties. (SEE Photos 3-c and 3-a; page 7). Also visible today are the leaning trees across portions of the site that are standing records of earlier slope movement. (SEE Photos 4-a thru 4-h; pages 8 & 9)

I do not believe that this slope instability has been caused by any man made improvements or activities on the properties. At this time, I cannot recommend a permanent remedial solution for stabilizing this hillside that I believe would be feasible. There could be some short term mitigation by minimizing the landscape irrigation on the developed areas. With the benefit of a detailed topographic survey, that extends well down across the lake bottom, preliminary stability analyses could be conducted that would give an indication of the practicality of attempting to stabilize the mass. I believe, that without effective, permanent slope stabilization, erratic down slope movement will continue, and at some point in time, extensive damage to the structure and hillside is to be expected.

Respectfully submitted;



Carroll L. Crowther, PE  
SC Registered Engineer # 10666



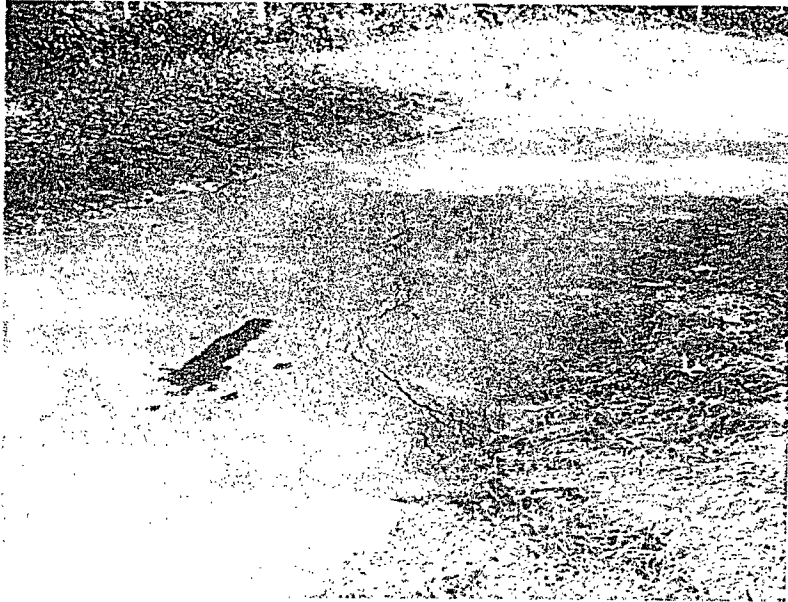


Photo 1 - a  
June 3, 2011



Photo 1- b  
June 3, 2011

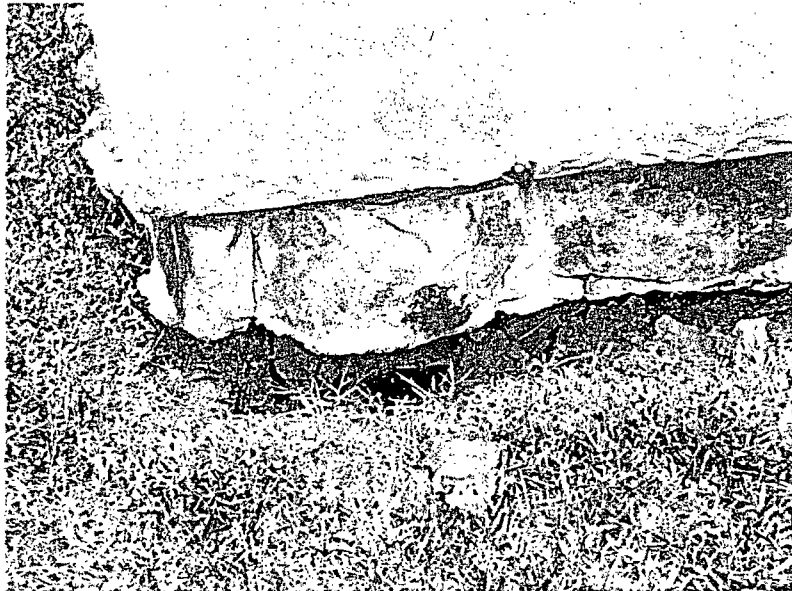


Photo 2- c  
June 3, 2011



Photo 2- d  
June 3, 2011



Photo 3 – c  
June 3, 2011



Photo 3 – a  
June 3, 2011



Photo 4 - a  
June 3, 2011



Photo 4 - b  
June 3, 2011



Photo 4 - f  
June 3, 2011



Photo 4 - h  
June 3, 2011



# WHITAKER LABORATORY, INC.

P.O. Box 7078 2500 Tremont Road Savannah, Georgia 31418  
(912) 234-0696 Fax (912) 233-5061  
[ccrowther@islc.net](mailto:ccrowther@islc.net)

August 8, 2011

Mr. Thomas E. Dudley III, Esquire  
Kenison, Dudley, & Crawford, LLC  
704 E. McBee Ave  
Greenville, SC 29601

Re: Lot 32 Jasmine Cove, The Cliffs at Lake Keowee Falls South

Dear Tom:

On behalf of your client Mr. Kevin McCarthy, you have requested my opinions of the geologic and engineering stability of Lot 32, Jasmine Cove. Complying with your request, on August 1, 2011, I visited this site with you. Subsequently we met at the site with Mr. McCarthy and Mr. Channon Chambers, Building Codes Division Manager for Oconee County SC.

First I refer you to the attached sketch entitled, "Figure 2 - Slide Nomenclature". This sketch shows the components of an unstable hillside undergoing a shear failure, or "landslide". (From US Department of Commerce LANDSLIDE INVESTIGATIONS ; US Govt Printing Office July 1961)

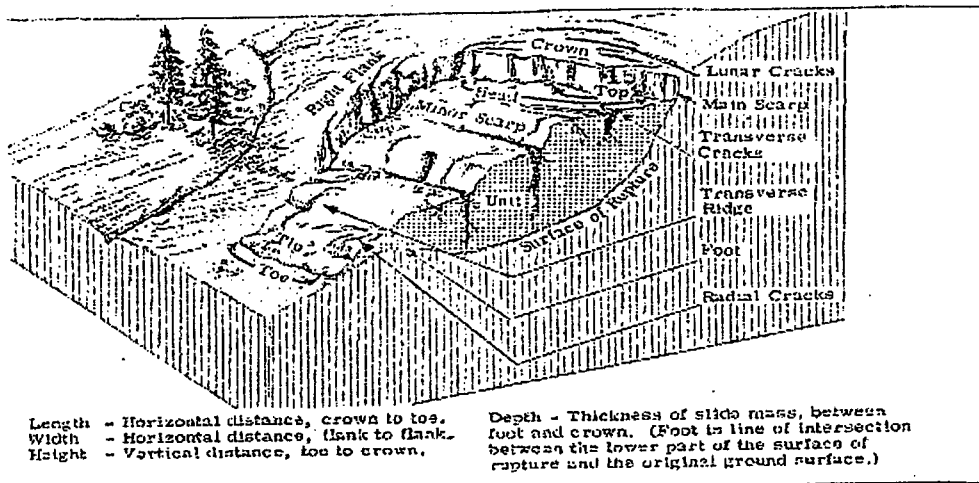


Figure 2.—Slide nomenclature.



The topography of this waterfront lot (#32) includes at least 3 readily discernable plateaus, (5 or more if you consider the upper level at the cul-de-sac and the lower levels at the lake front). These plateaus are the top surfaces of unit blocks of the original hillside that have sheared off, moving outward and downward toward the lake. The steep banks landward of the plateaus are the shear surface scars (scarps) of the past failures. See attached photos # 768, 769, 772.



Photo #768

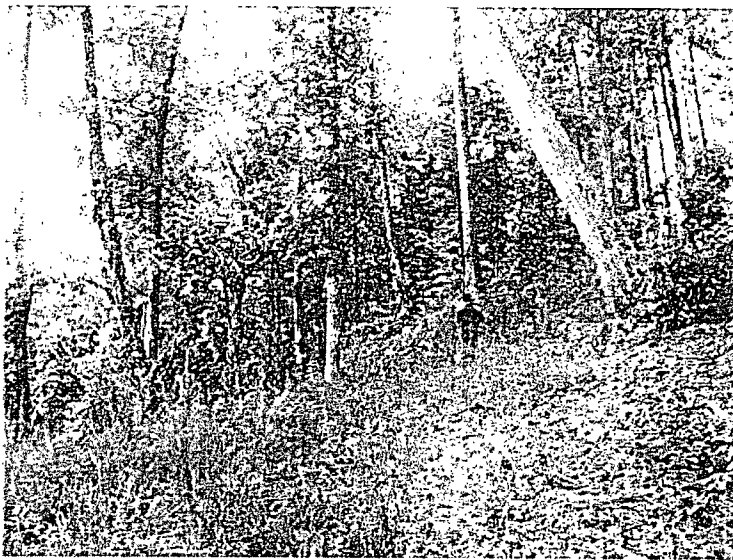


Photo #769



Photo #772

Also observed were numerous cracks in the ground surface, roughly paralleling the scarps. The leaf and other surface debris tends to cover these cracks, but minimal clearing of the surface makes the cracks readily visible. See attached photos # 768, 771, 774. These cracks are evidence of the continuing movement and shearing failures of this hillside. This area encompasses at least portions of lots 32, 31, and 30.



Photo # 771



Photo # 774

I also observed the 2 inclinometer casings installed on this lot by BLE, Inc at the request of the developer of the project. The data obtained by BLE, Inc from the inclinometers shows the ground to continue to move down slope. (See three BLE, Inc. reports attached dated March 1, 2010, October 25, 2010, & April 11, 2011)

It is my opinion that this hillside area is very unstable, and is undergoing an active shear failure or "landslide", and will continue to do so. The bent and leaning standing timber indicates this instability has existed, and has been ongoing for years. (See examples in Photos # 768, 769, 772).

Stabilization of this lot sufficient for construction of a house would be very expensive, if even possible. I would recommend that your client not consider building on this lot, due to the unstable soils. It is further my opinion that the unstable soils associated with this active shear failure make the site unsuitable for a septic system. Witness the recent rupture/failure of the Town of Salem water line in the Jasmine Point cul-de-sac in December 2009. Mr. McCarthy told us yesterday that he saw a vertical drop of 10 or more inches of the cul-de-sac pavement at the time of this water line failure. Note the BLE, Inc. site observations on February 26, 2010 (Report dated March 1, 2011) reports a estimated vertical drop of 2 feet. A failed septic system, due to earth movement could be very unpleasant and unhealthy for this lakeside community.

I am enclosing excerpts from technical publications that should help you and your client understand the severity of these conditions. (Homeowners Guide to Landslides (FEMA))

If I can be of further service, please call.

Respectfully submitted,  
WHITAKER LABORATORY, Inc.

Carroll L. Crowther, PE  
SC Registered Engineer # 10666

**ATTACHMENTS:**

*Homeowners Guide to Landslides: FEMA / Portland State University*

*BLE. Inc. Data Report of Slope Inclinometer Surveys, dated April 11, 2011*

*BLE. Inc. Data Report of Slope Inclinometer Surveys, dated October 25, 2010*

*BLE. Inc. Report of Site Observations, dated March 1, 2010*

**IBLE**<sup>INC.</sup>  
**BUNNELL-LAMMONS ENGINEERING, INC.**  
GEOTECHNICAL, ENVIRONMENTAL AND CONSTRUCTION MATERIALS CONSULTANTS

March 1, 2010

Mr. Lance Yuda  
Zone 7 Nursery  
[lance@zone7nursery.com](mailto:lance@zone7nursery.com)

Subject:       **Report of Site Observations**  
                  **235 Jasmine Point**  
                  **The Cliffs @ Keowee Falls South**  
                  **Oconee County, South Carolina**  
                  **BLE Project No. J10-6933-01**

Gentlemen:

As requested, our Mr. Bill Mathews met with Mr. Yuda at the above referenced site to observe distress to the driveway and offer an opinion as to the likely cause based on limited site observations. The driveway is constructed from masonry pavers and has exhibited differential settlement along a section of the driveway. We understand that repairs were made to the driveway but the differential settlement returned a short time later. Mr. Yuda indicated that a water main in the road had recently failed and was repaired.

At the time of our site visit on February 26, 2010, we observed the distress in the driveway of 235 Jasmine Point (Lot 29). However, it appears that the problem is much more widespread. The distress observed in the driveway was part of a line of differential movement that extended in a semi-circular manner across the cul-de-sac and into Lot 32 on the other side of the street. The differential settlement was relatively abrupt and was estimated to be up to approximately two feet (vertically) on Lot 32. Based on our limited site observations, it is our opinion that the differential movement is associated with an active slope failure. The semi-circular shape and abrupt movement is a classic indication of a failure scarp that develops at the upper limits of a slope failure. The observed scarp appears to encompass all or parts of Lots 29, 30, 31 and 32. Please refer to the attached aerial photograph which identifies the approximate location of the observed scarp.


It is our opinion that repairs to the driveway of Lot 29 would be a temporary measure and that damage would soon return unless measures are undertaken to stabilize the apparent slope failure. A detailed geotechnical exploration, laboratory testing and engineering analysis would be required to determine the extent and depth of the soil involved in the failure and to develop a stabilization plan. At the time of our site visit, we observed what appeared to be evidence of recent soil test borings that may have been

**BLE**

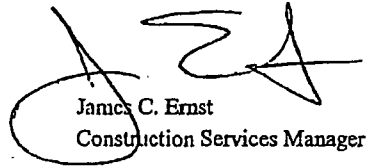
performed in the cul-de-sac near the failure scarp. It is possible that the developer may have already retained an engineering firm to evaluate the movement.

We suggest that you contact the developer to determine whether there is an existing engineering evaluation being performed. If requested, BLE could prepare a proposal to evaluate the apparent slope failure. However, since access to all of the affected lots would be required, such a proposal would likely have to be requested by and coordinated through the developer. We appreciate the opportunity to provide our professional services on this project. If you have any questions or require additional assistance, please call.

Sincerely;  
BUNNELL-LAMMONS ENGINEERING, INC.

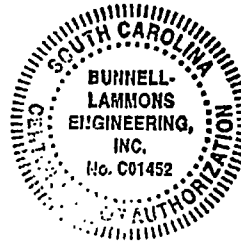
  
William A. Mathews, P.E.  
Chief Engineer  
Registered, SC #14039

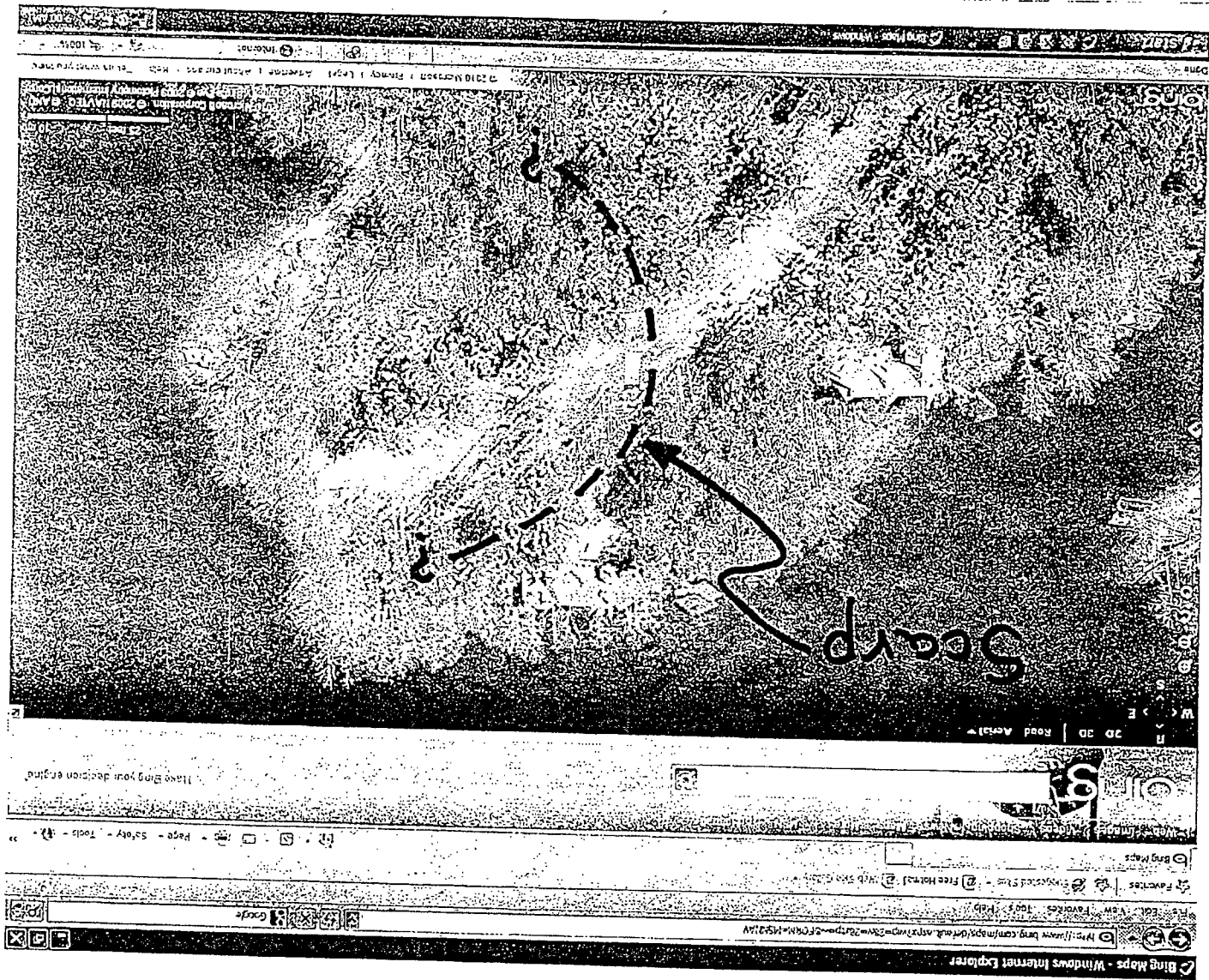


  
James C. Ernst  
Construction Services Manager

Attachment

c:\public pc033\projects\235 jasmine point the cliffs at keowee falls south.doc





**IBLE**<sup>INC.</sup>  
**BUNNELL-LAMMONS ENGINEERING, INC.**  
GEOTECHNICAL, ENVIRONMENTAL AND CONSTRUCTION MATERIALS CONSULTANTS

October 25, 2010

The Cliffs Communities  
Post Office Box 1519  
Travelers Rest, South Carolina 29690

Attention: Mr. Donald H. Nickell, Jr.  
[dnickell@cliffscommunities.com](mailto:dnickell@cliffscommunities.com)

Subject: Data Report of Slope Inclinometer Surveys  
October 1, 2010 Readings  
Jasmine Point – Cliffs at Keowee Falls South  
Oconee County, South Carolina  
BLE Project No. J10-7112-01

Gentlemen:

We are pleased to submit this data report of the surveys obtained from the slope inclinometers installed at Jasmine Point in the Cliffs at Keowee Falls South development. The data presented herein includes the latest round of readings obtained on October 1, 2010. The data included in this report is referenced to baseline data obtained on June 25, 2010. There are six inclinometers installed on Lots 30, 31 and 32 as indicated in the following table.

Inclinometer Number	Location
SI-1	Lot 30 upper
SI-2	Lot 30 lower
SI-3	Lot 31 upper
SI-4	31 Lot 32 lower > JK
SI-5	Lot 32 upper
SI-6	Lot 32 lower

Note: Locations identified as upper represent inclinometers installed on the upper side of the lots near the road, lower represents inclinometers installed on the lower side of the lots near the lake.

The inclinometers were installed into soil test borings (ASTM D 1586) that were drilled between May 27, 2010 and June 8, 2010. Subsurface conditions that were encountered at each boring location are identified on the attached boring logs. The borings are identified as B-1 through B-6 and the boring numbers correspond with the inclinometer numbers (i.e. inclinometer SI-1 was

6004 PONDERS COURT  
GREENVILLE, SOUTH CAROLINA 29615

PHONE (864) 288-1265  
FAX (864) 288-4430

## **IBLE**

*Data Report of Slope Inclinometer Surveys  
Jasmine Point – Cliffs at Keowee Falls South*

*October 25, 2010  
BLE Project No. J10-7112-01*

installed in boring B-1 and so on). The attached aerial photograph identifies the locations of the inclinometers that was produced by tagging the inclinometer locations with a handheld GPS and inputting the coordinates into Google Earth.

The attached graphs present information on each of the inclinometers. Where the attached graphs identify two axes (A-axis and B-axis), the A-axis is oriented in a generally uphill-downhill direction and the B-axis is oriented in a generally cross slope direction. Movement in the negative direction on the A-axis represents downslope (direction of potential failure) movement. There are three graphs for each inclinometer as follows:

1. Cumulative Displacement vs. Depth
2. Incremental Displacement vs. Depth
3. Cumulative Displacement vs. Time (A-axis)

**Cumulative displacement vs. depth** is a plot of movement. Displacements on these plots may appear abrupt because the horizontal scale is not proportional to the vertical scale, which makes it easier to identify displacements. **Incremental displacement vs. depth** is a plot of movement at each reading interval. A spike in these graphs indicates significant movement. Growth in the spike over time indicates continued movement. **Cumulative displacement vs. time** provides an indication as to the rate of movement.

### EVALUATION

A review of the Cumulative Displacement vs. Depth plots indicate that movement is occurring in five of the six inclinometers. Inclinometers SI-1, SI-2, SI-4 and SI-6 indicate an apparent failure plane developing at depths ranging from approximately 35-ft to 53-ft below the ground surface. A review of the accompanying boring logs indicates that the failure plane appears to be developing at or near the interface between residual soils and partially weathered rock (or dense residual soils). Inclinometers SI-4 and SI-6 are the only two inclinometers that have indicated significant movement since the August 30, 2010 readings were collected. However, it should be noted there has been little precipitation during this period and it should be expected that additional movement may occur in the remaining inclinometers during wet weather cycles.

The plots from inclinometer SI-5 indicate that the movement appears to be occurring at or below the bottom of the inclinometer casing at this location. A review of boring B-5 indicates partially weathered rock was encountered at a depth of approximately 64 feet. Therefore, it is our opinion that there may be a failure plane developing near the interface with the partially weathered rock similar to that observed in the inclinometers discussed above. Inclinometer SI-3 has not indicated movement based on the inclinometer readings taken thus far.



Data Report of Slope Inclinometer Surveys  
Jasmine Point - Cliffs at Keowee Falls South

October 25, 2010  
BLE Project No. J10-7112-01


**RECOMMENDATIONS**

Based on our site observations and the inclinometer data obtained to date, it is our opinion that there is an active, deep-seated slope failure occurring at the site. The rate at which movement occurs can be expected to vary over time and with environmental factors. However, it should be expected that movement will continue unless provisions to stabilize the slope are performed. Additional exploration, testing and analysis will be required to evaluate suitable methods for stabilizing the slope, which are beyond the scope of services for which we are currently authorized. If requested, we can prepare a proposal to provide additional engineering services required to develop conceptual stabilization methods.

As of this data submittal, we have completed the scope of services authorized for this project. We recommend that you retain a surveyor to develop a detailed topographic survey of the area. The topographic survey would be used in conjunction with the borings and inclinometer data to evaluate methods that could be used to stabilize the slope.

We appreciate the opportunity to provide our professional services on this project. If you have any questions or require additional information, please call.

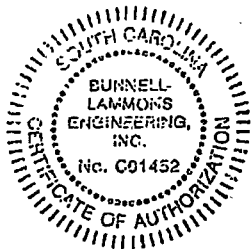
Sincerely;  
BUNNELL-LAMMONS ENGINEERING, INC.

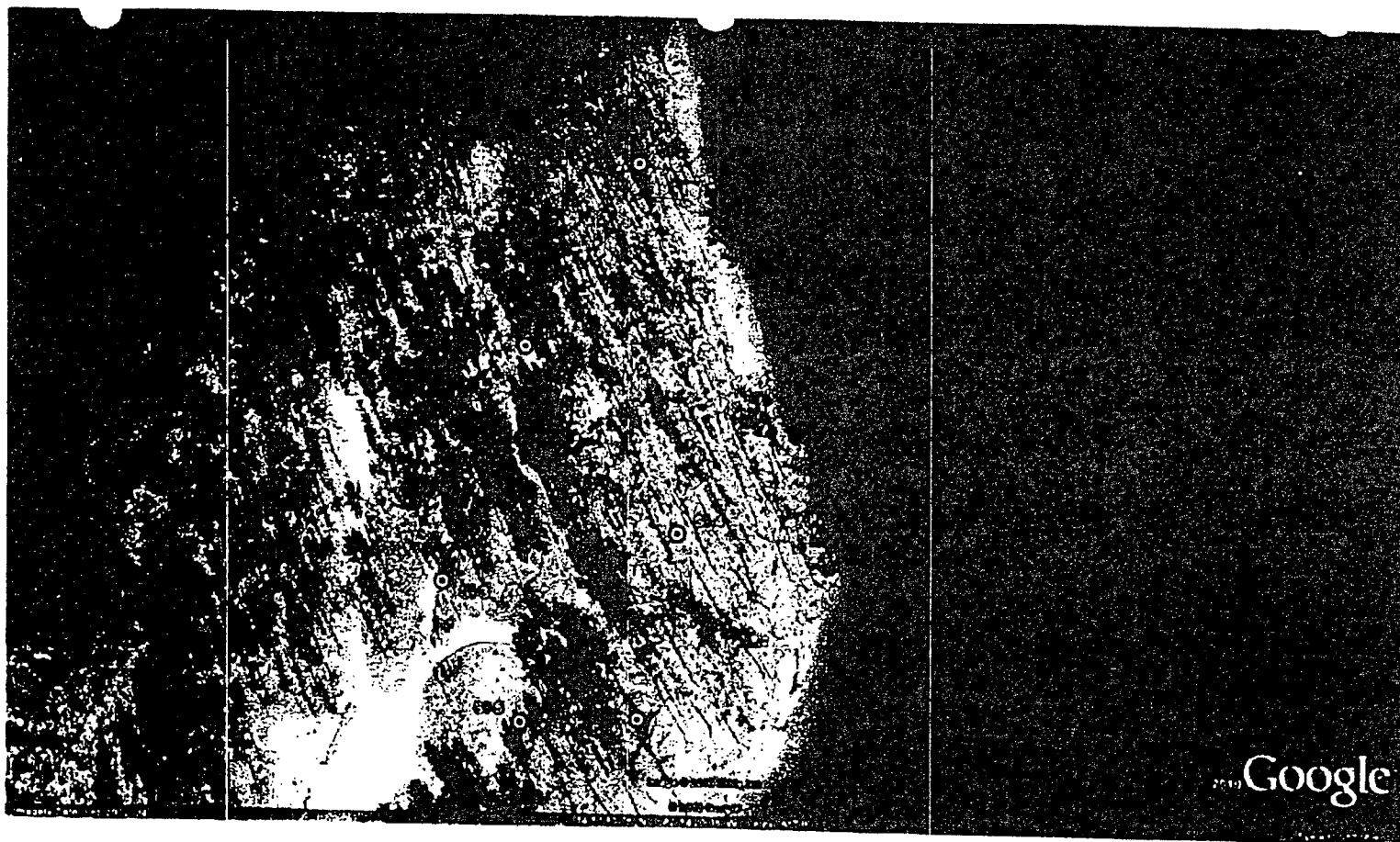
  
William A. Mathews, P.E.  
Chief Engineer  
Registered, SC #14039



  
James C. Ernst  
Construction Services Manager

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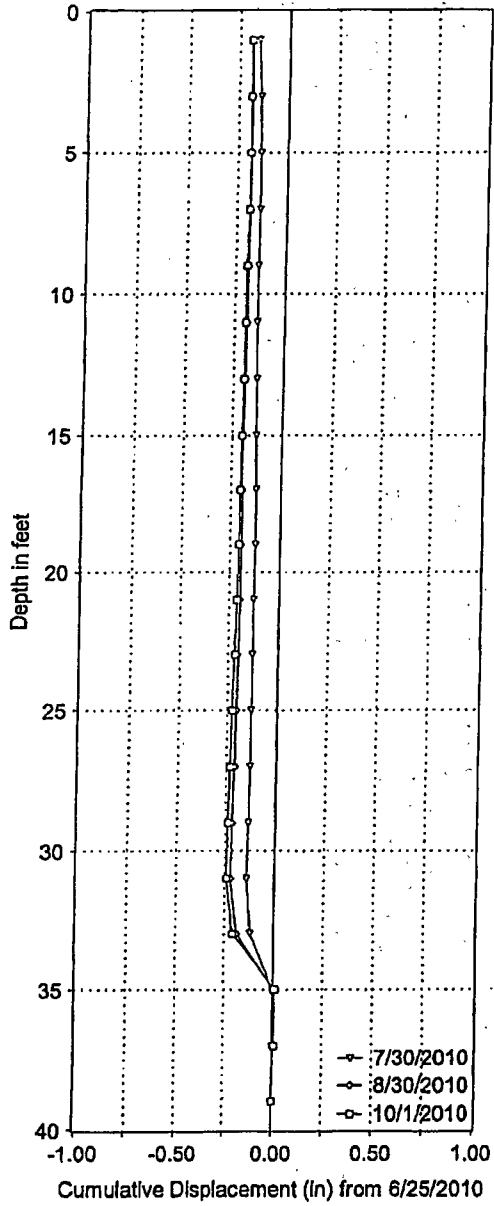




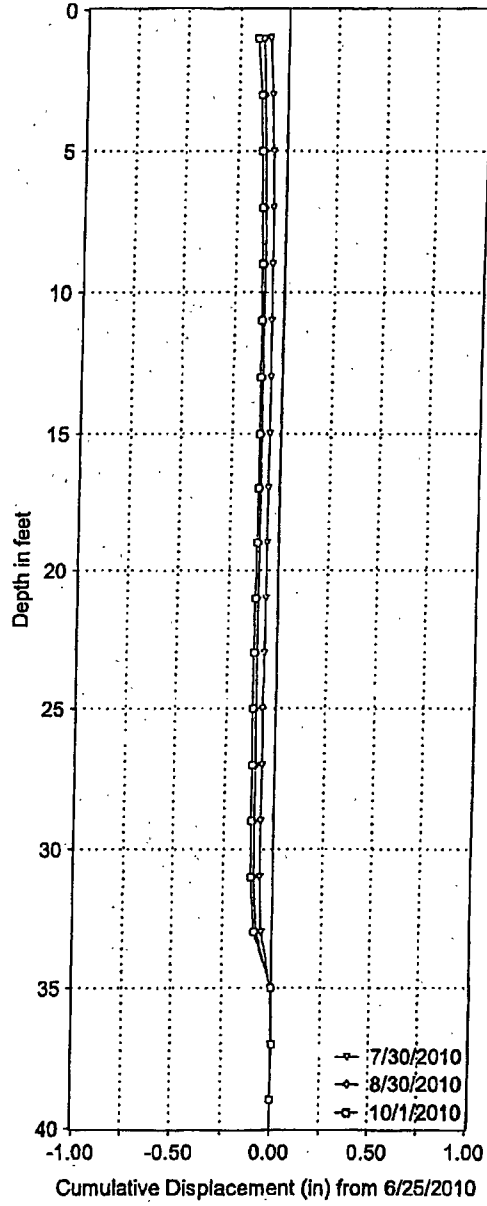
Jasmine Point  
Cliffs @ Keowee Falls South

Inclinometer Locations  
BLE Project No. J10-7112-01

Jasmin SI-1, A-Axis



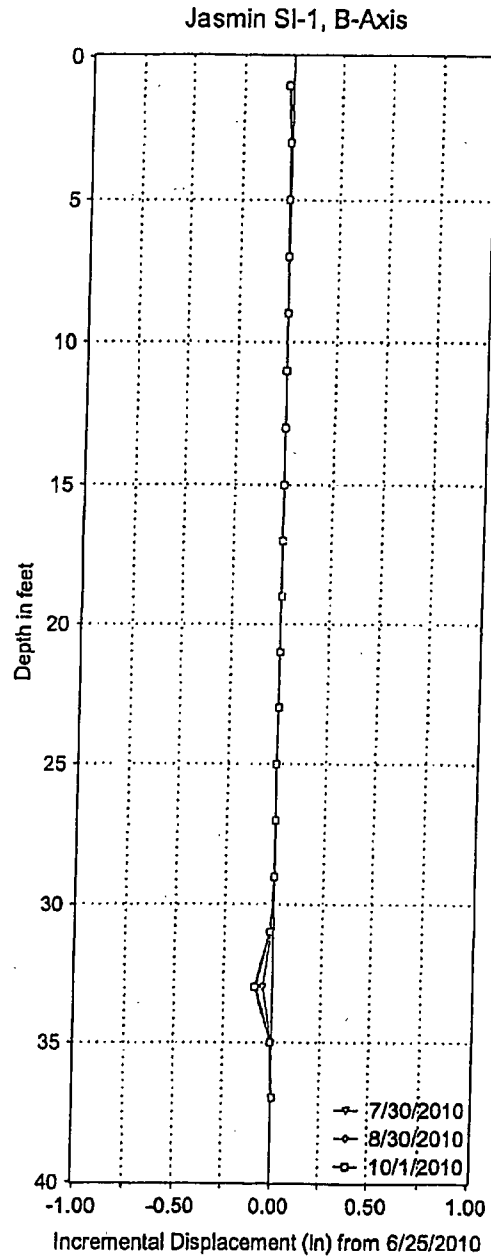
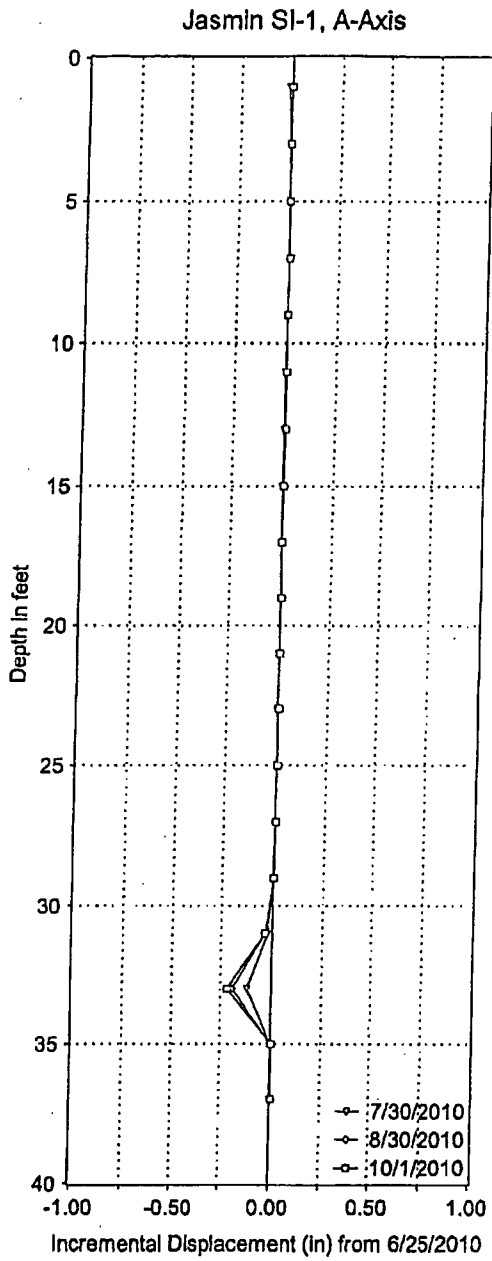
Jasmin SI-1, B-Axis



Jasmine Point

BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

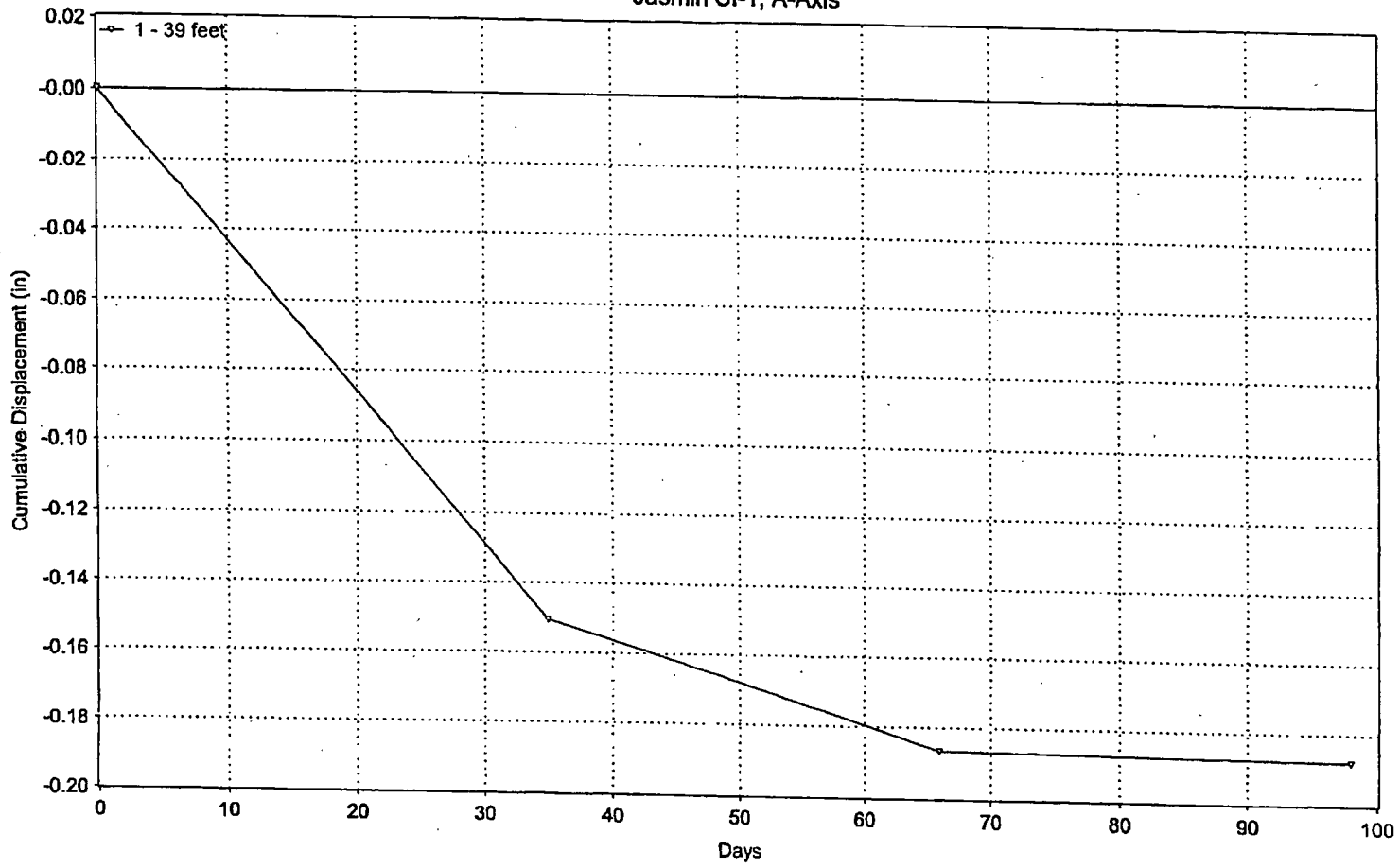


Jasmine Point

BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

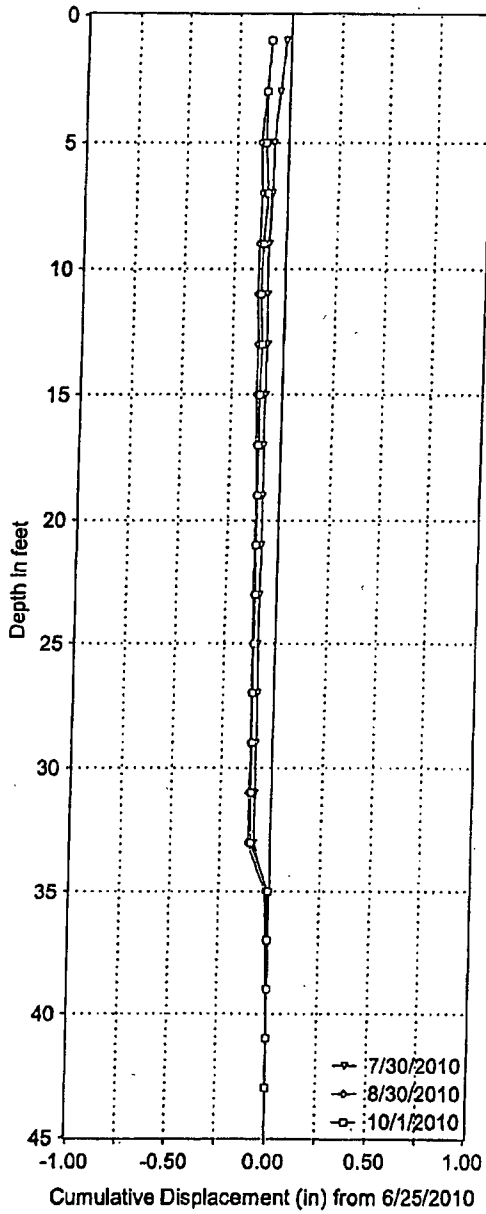
Jasmin SI-1, A-Axis



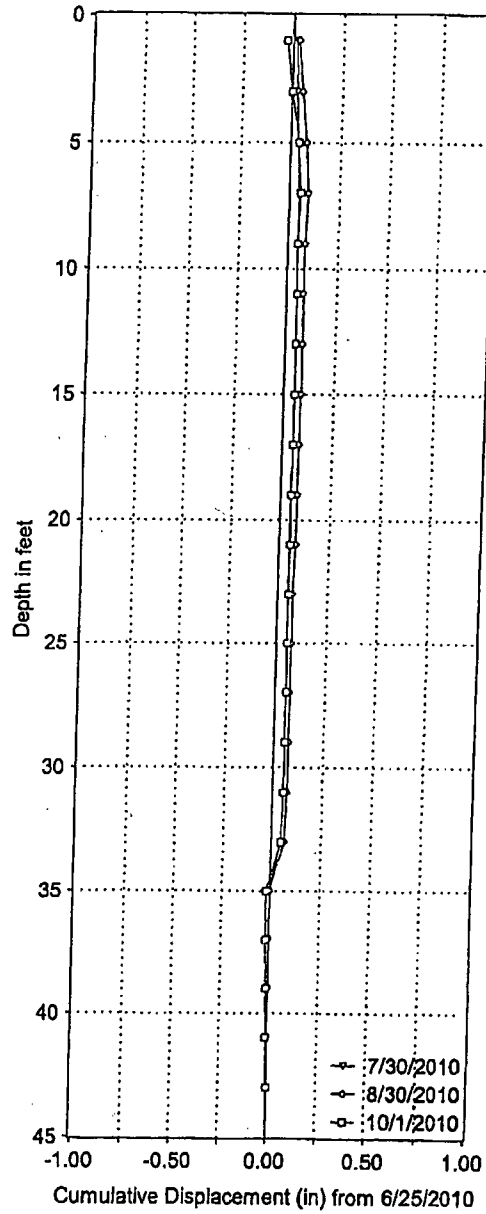
Jasmine Point  
Cliffs at Keowee Falls South

BLE Project No. J10-7112-01

Jasmin SI-2, A-Axis



Jasmin SI-2, B-Axis

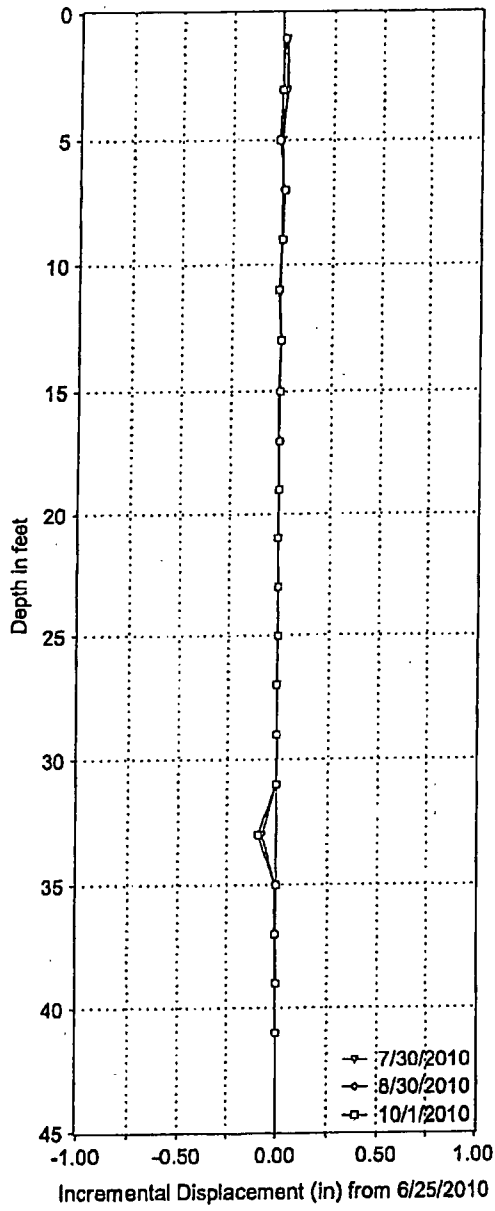


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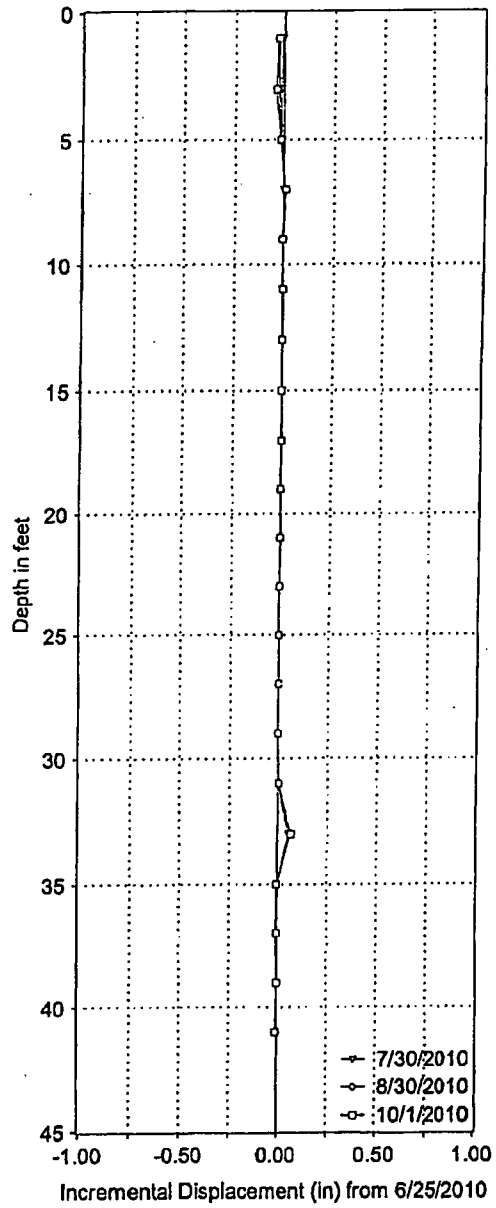
BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

Jasmin SI-2, A-Axis



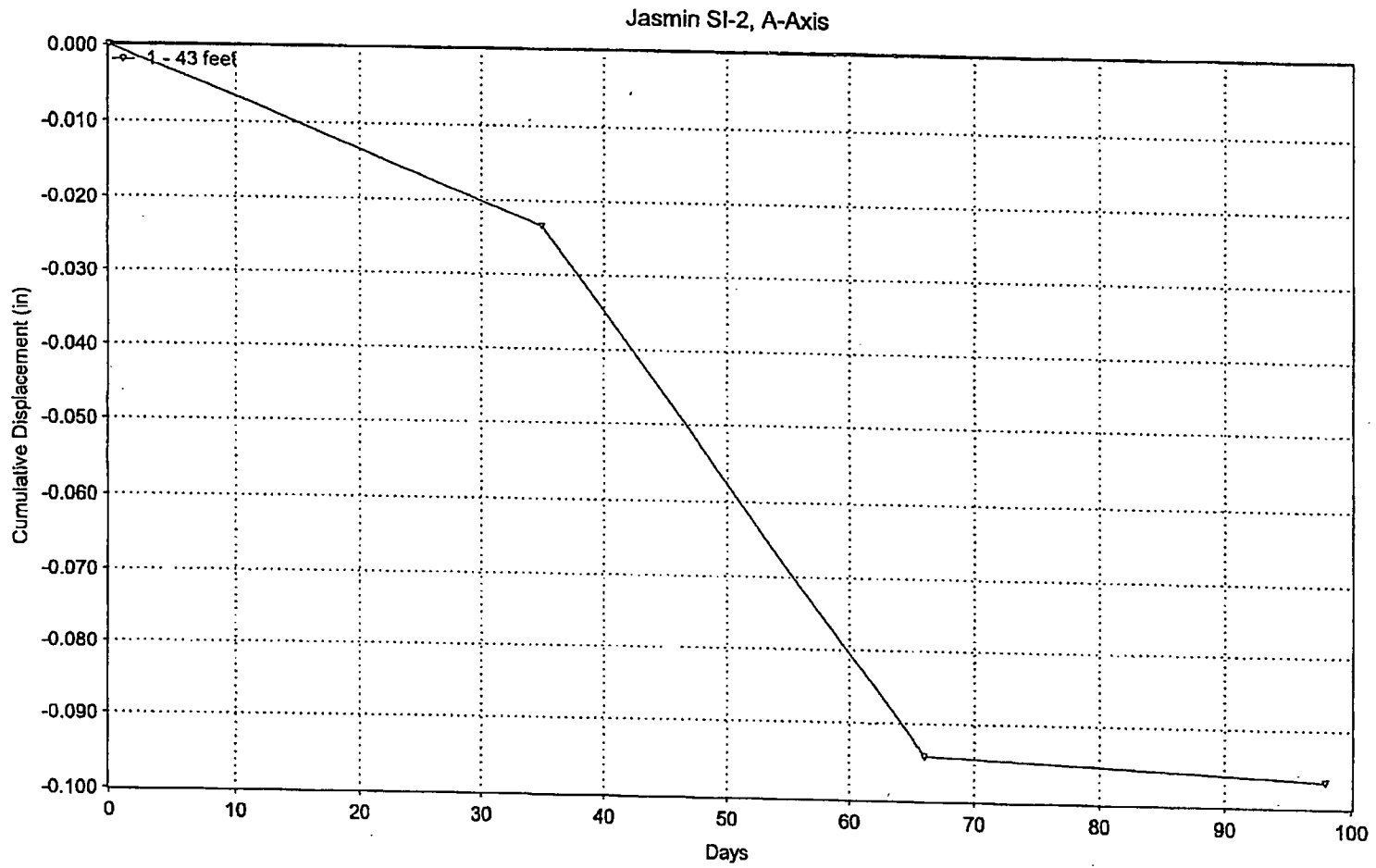
Jasmin SI-2, B-Axis



Jasmine Point

BLE Project No. J10-7112-01

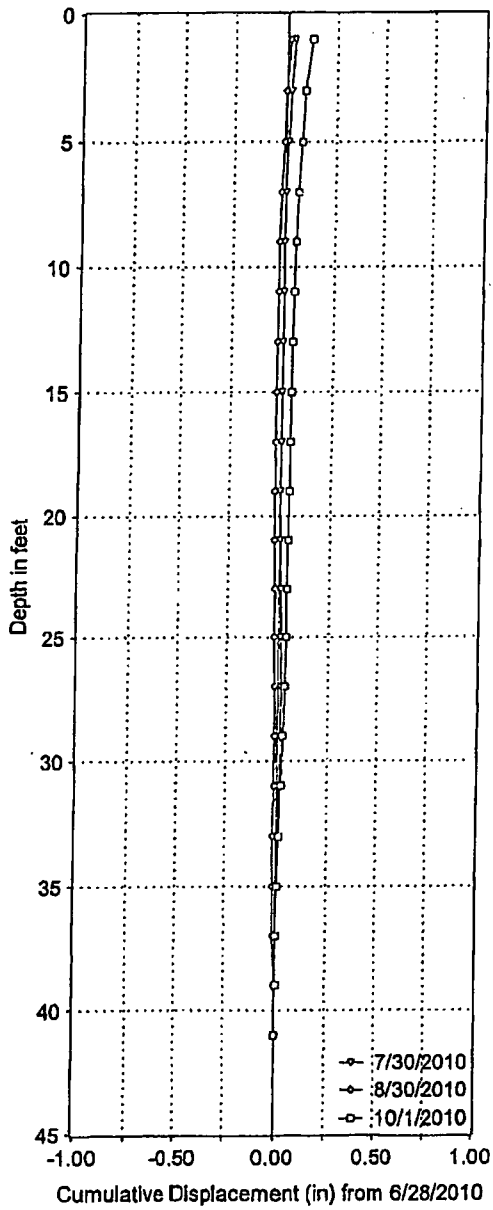
Cliffs at keowee Falls South



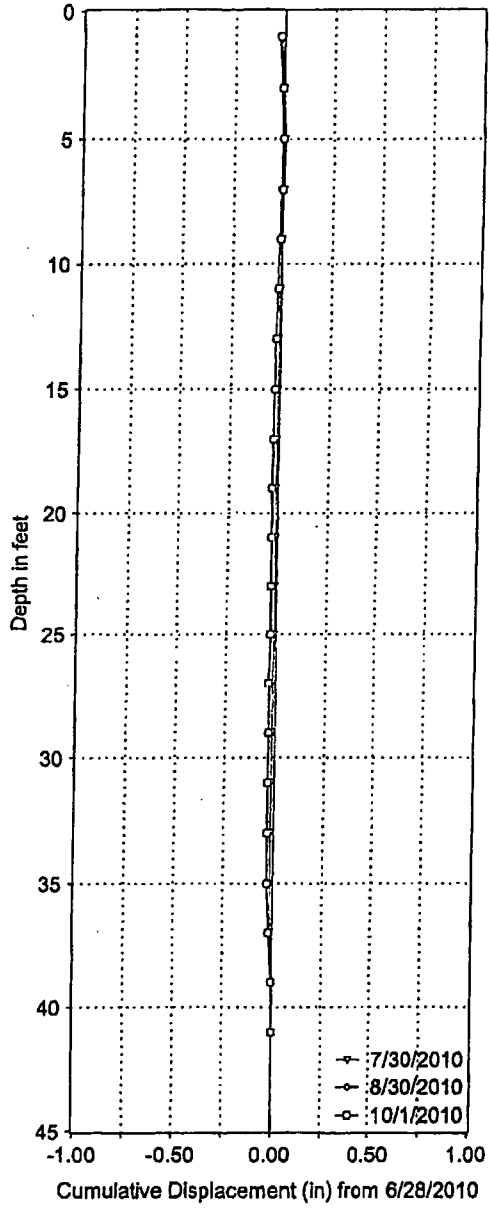
Jasmine Point  
Cliffs at Keowee Falls South

BLE Project No. J10-7112-0

Jasmin SI-3, A-Axis

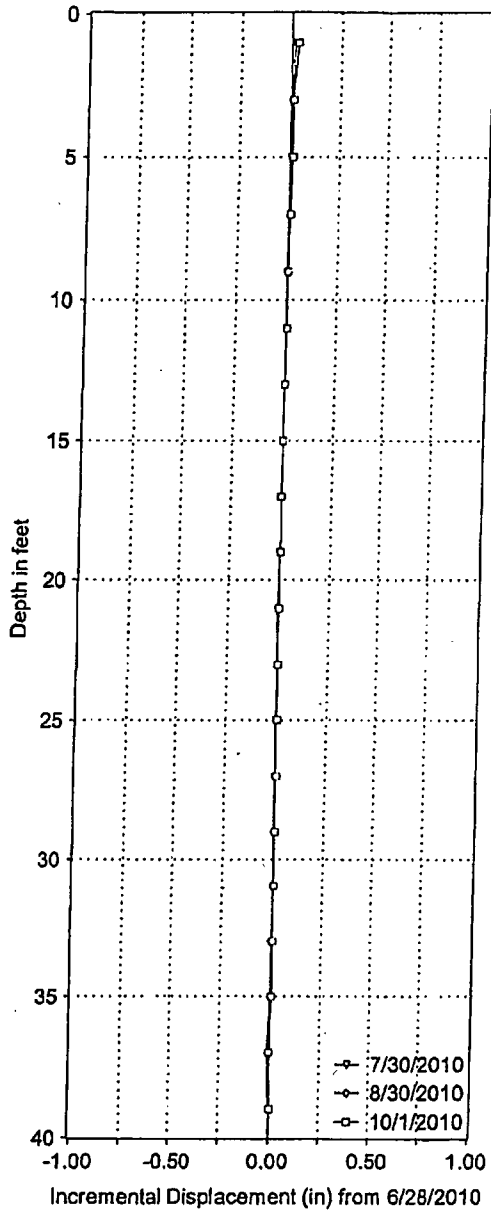


Jasmin SI-3, B-Axis

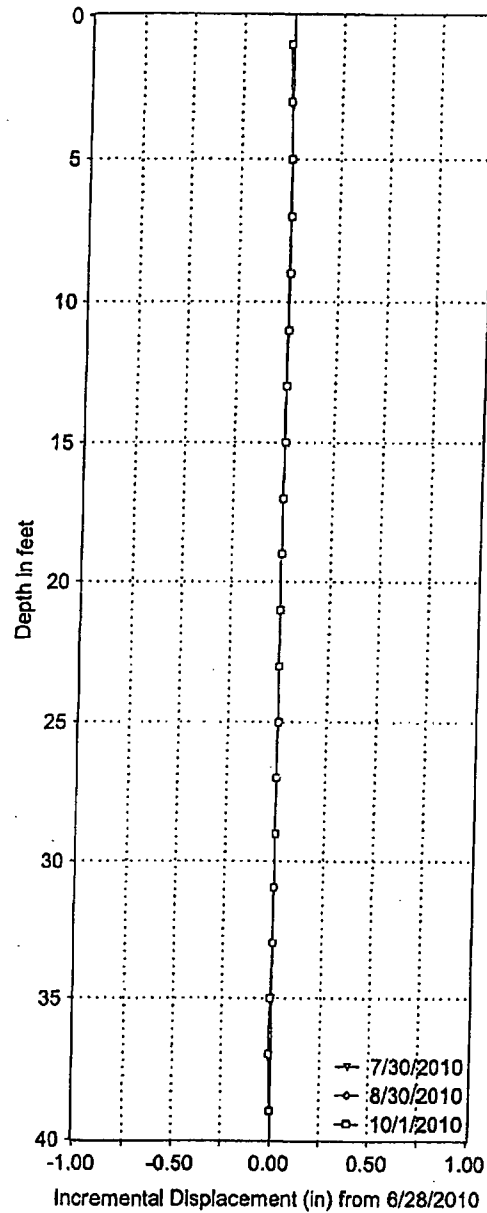


Jasmine Point	BLE Project No. J10-7112-01
Cliffs at Keowee Falls South	

Jasmin SI-3, A-Axis



Jasmin SI-3, B-Axis

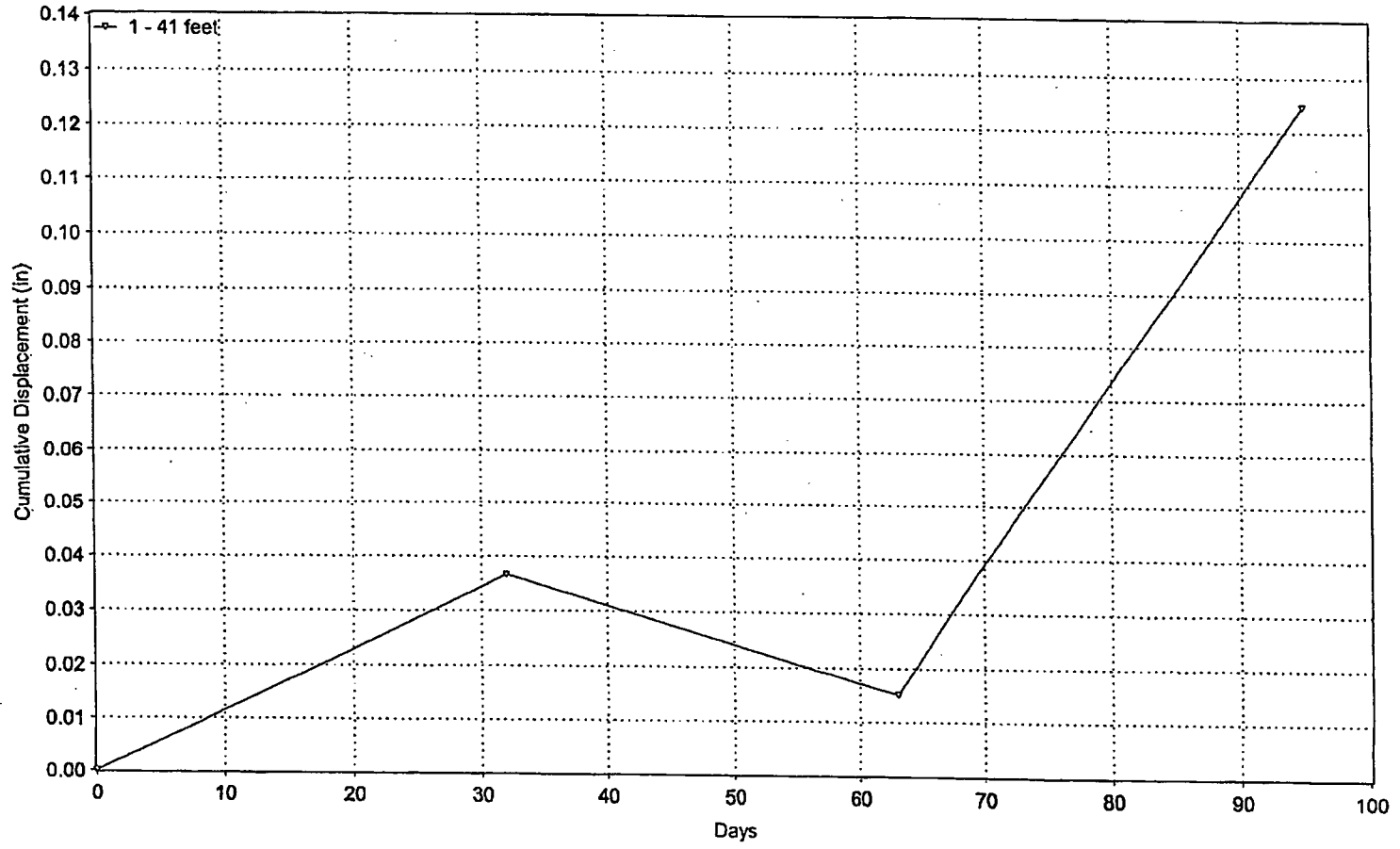


Jasmine Point

BLE Project No. J10-7112-01

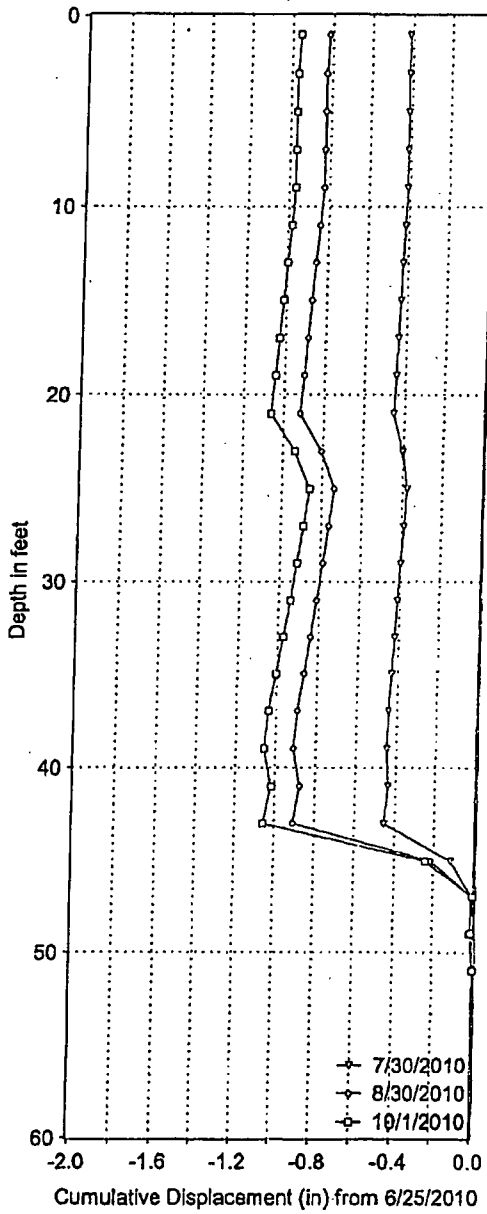
Cliffs at Keowee Falls South

Jasmin SI-3, A-Axis

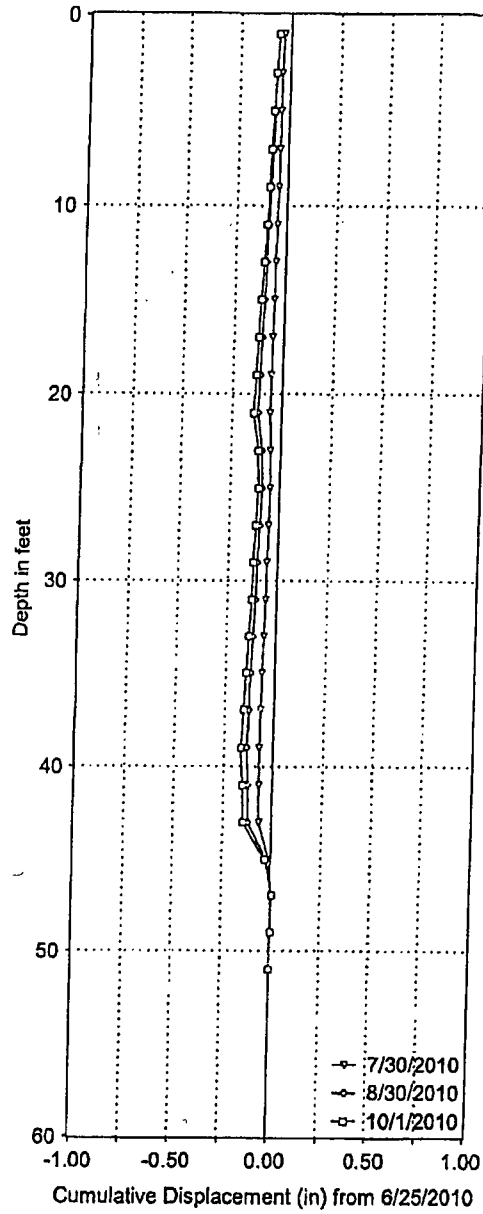


Jasmine Point  
Cliffs at Keowee Falls South  
BLE Project No. J10-7112-01

Jasmin SI-4, A-Axis



Jasmin SI-4, B-Axis

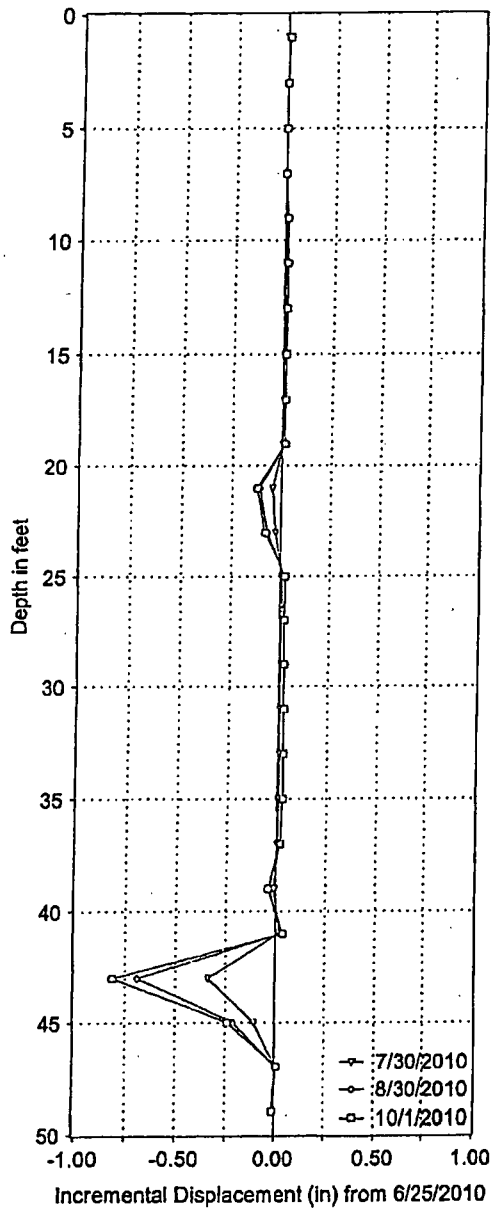


Jasmine Point

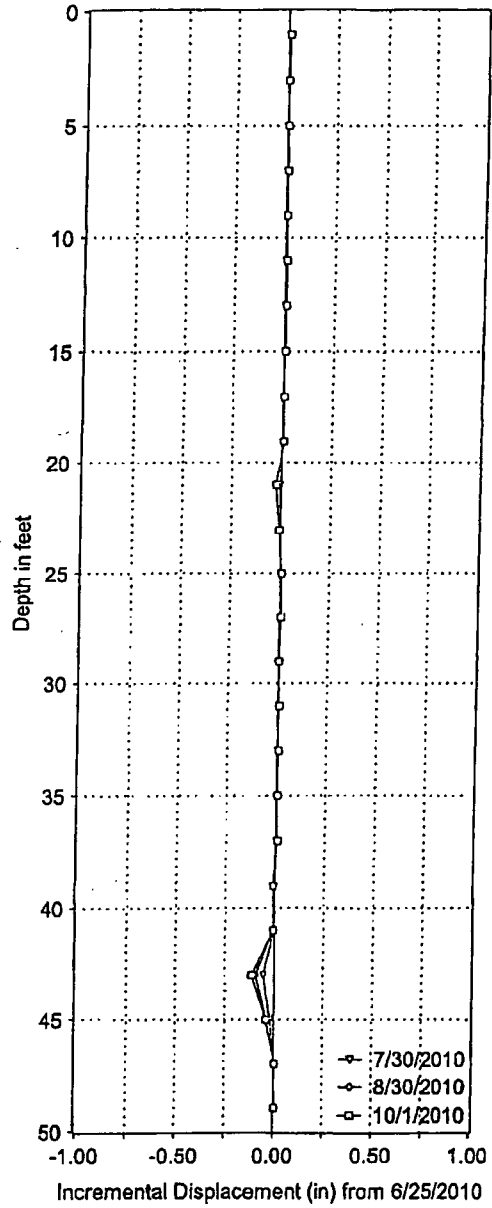
BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

Jasmin SI-4, A-Axis



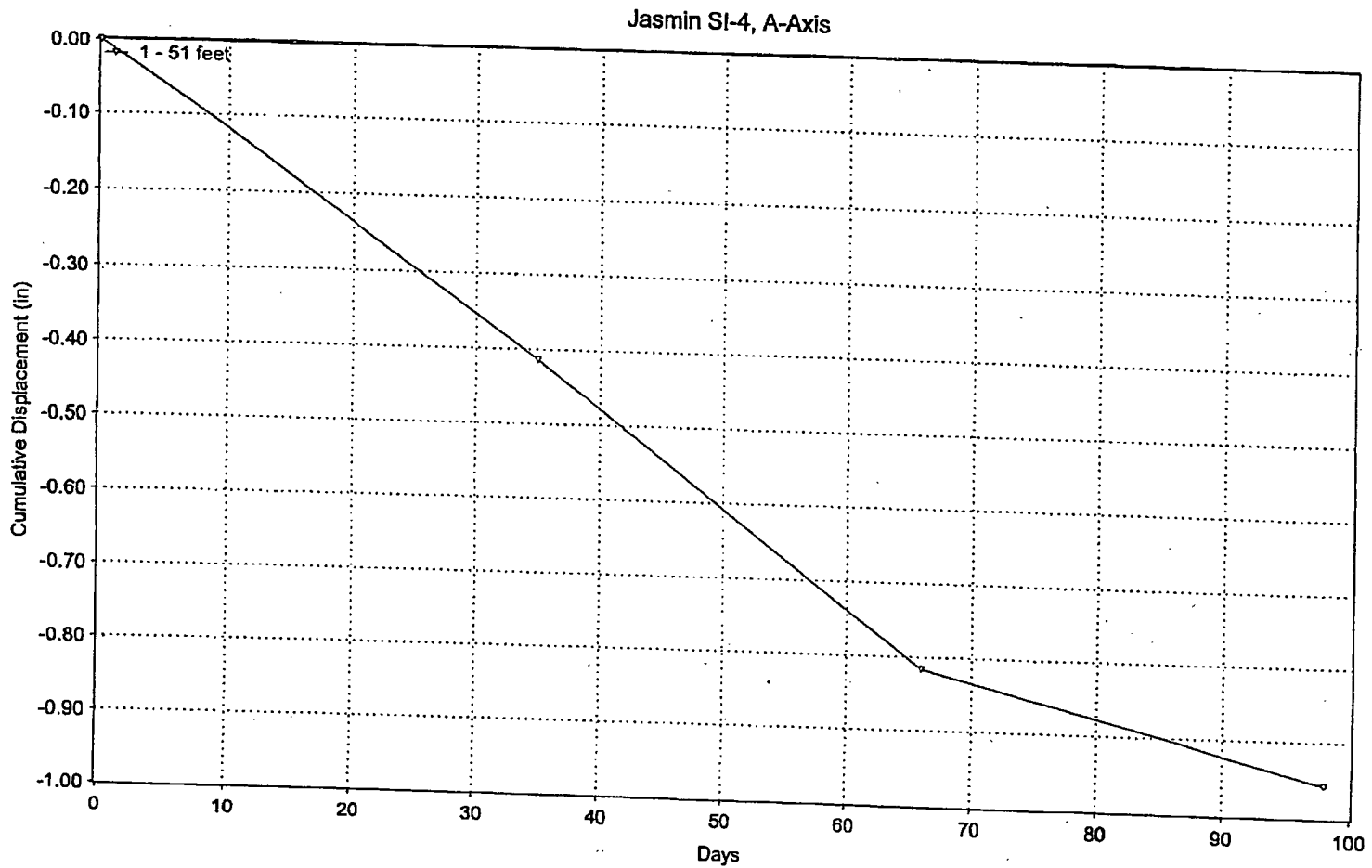
Jasmin SI-4, B-Axis



Jasmine Point

BLE Project No. J10-7112-01

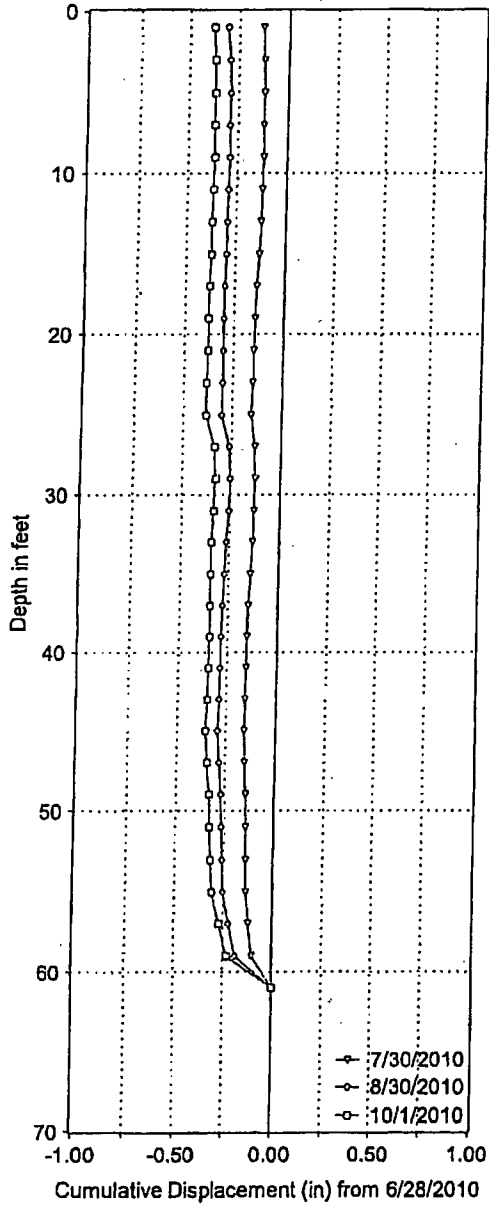
Cliffs at Keowee Falls South



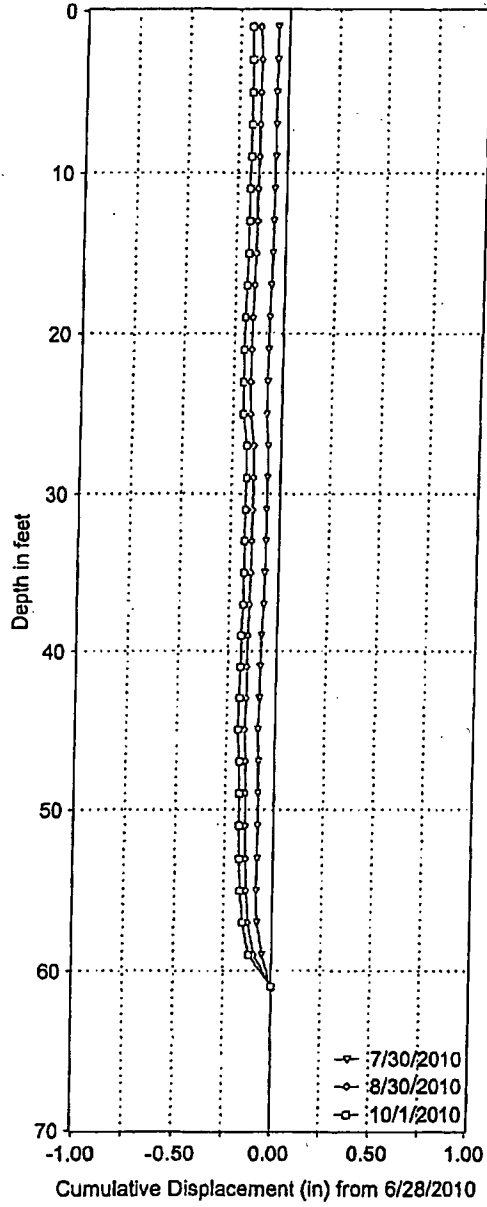
Jasmine Point  
Cliffs at Keowee Falls South

BLE Project No. J10-7112-01

Jasmin SI-5, A-Axis



Jasmin SI-5, B-Axis

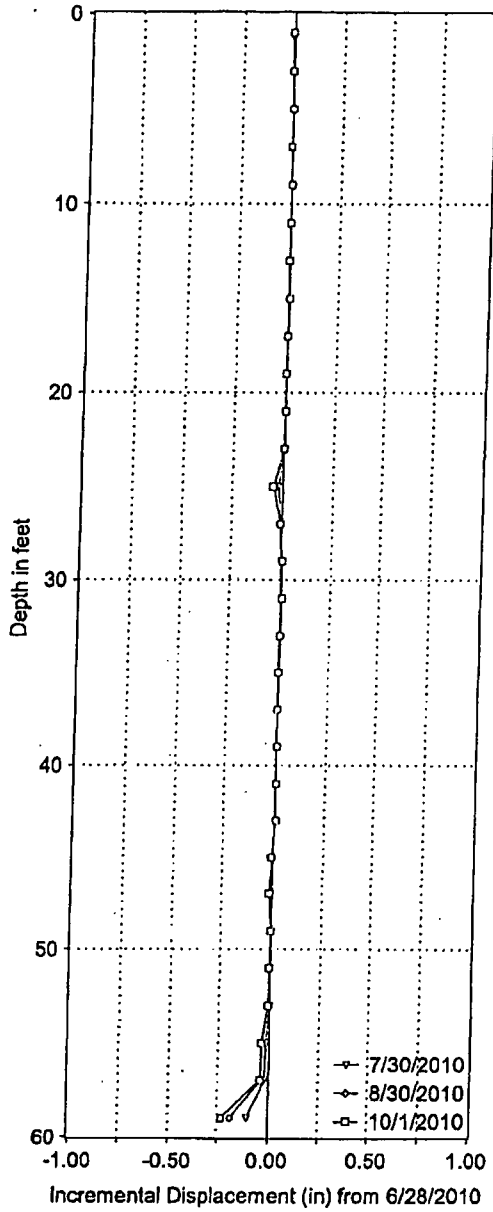


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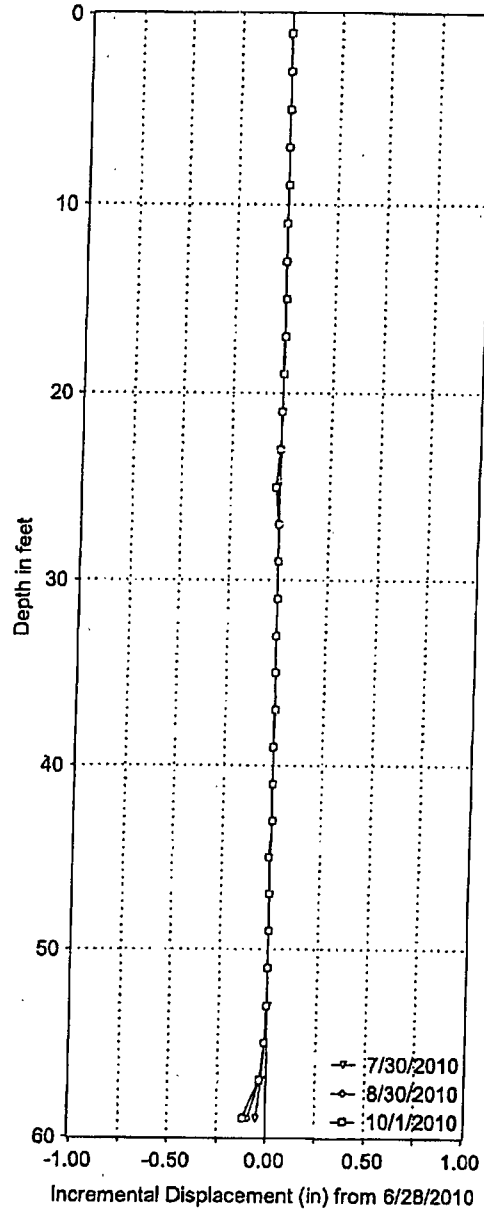
BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

Jasmin SI-5, A-Axis



Jasmin SI-5, B-Axis

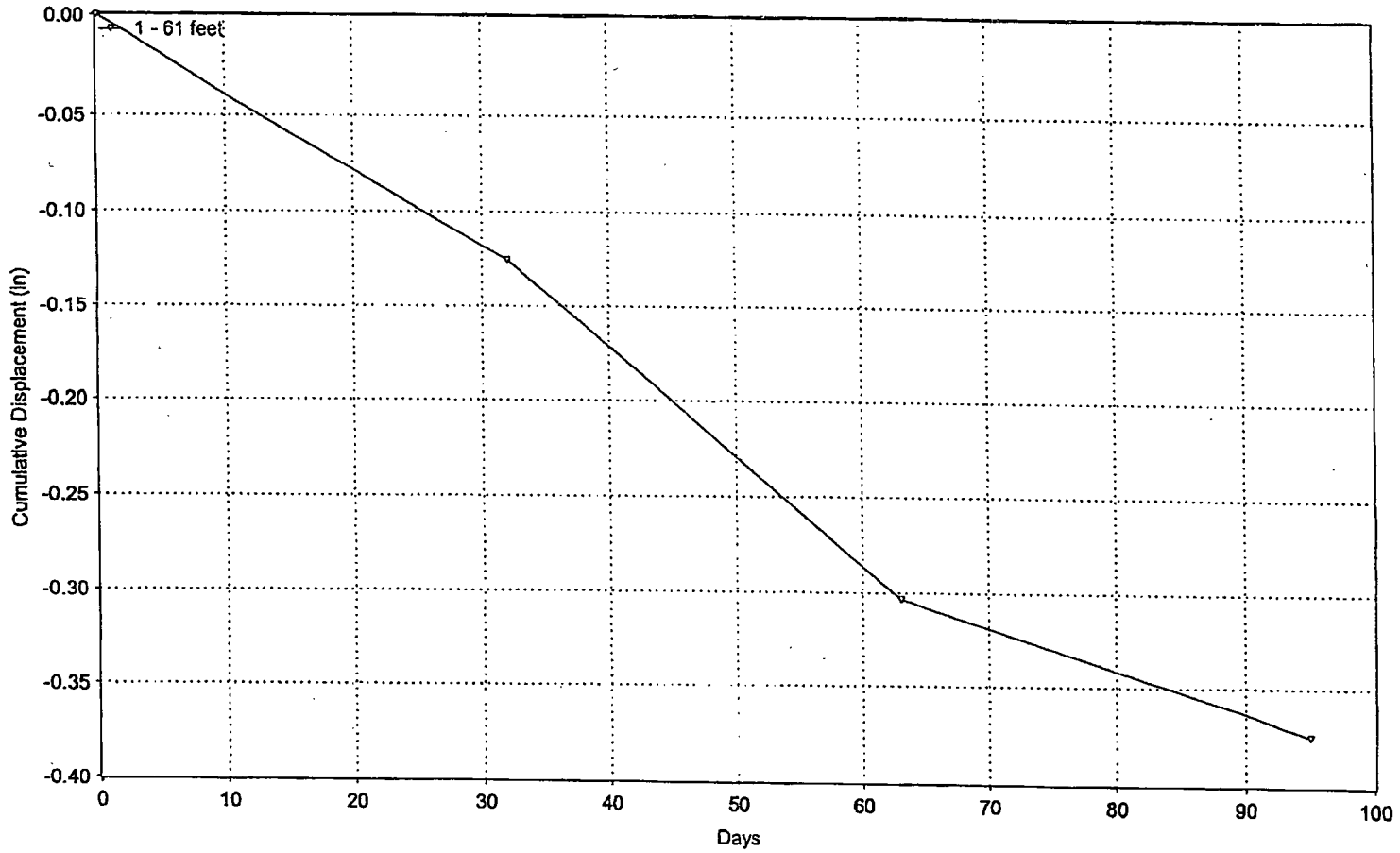


Jasmine Point

BLE Project No. J10-7112-01

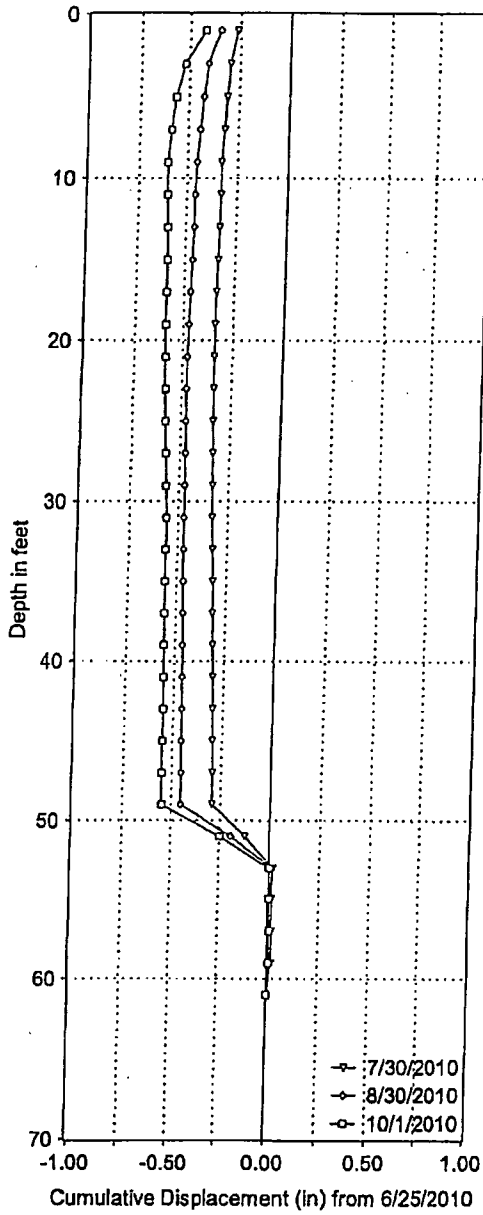
Cliffs at Keowee Falls South

Jasmin SI-5, A-Axis

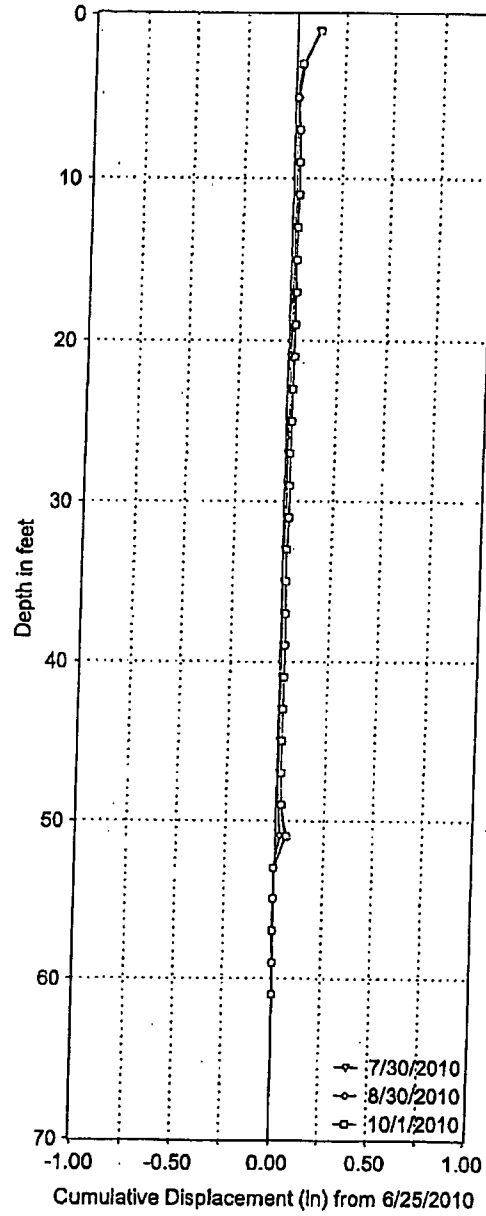


Jasmine Point  
Cliffs at Keowee Falls South  
BLE Project No. J10-7112-01

Jasmin SI-6, A-Axis



Jasmin SI-6, B-Axis

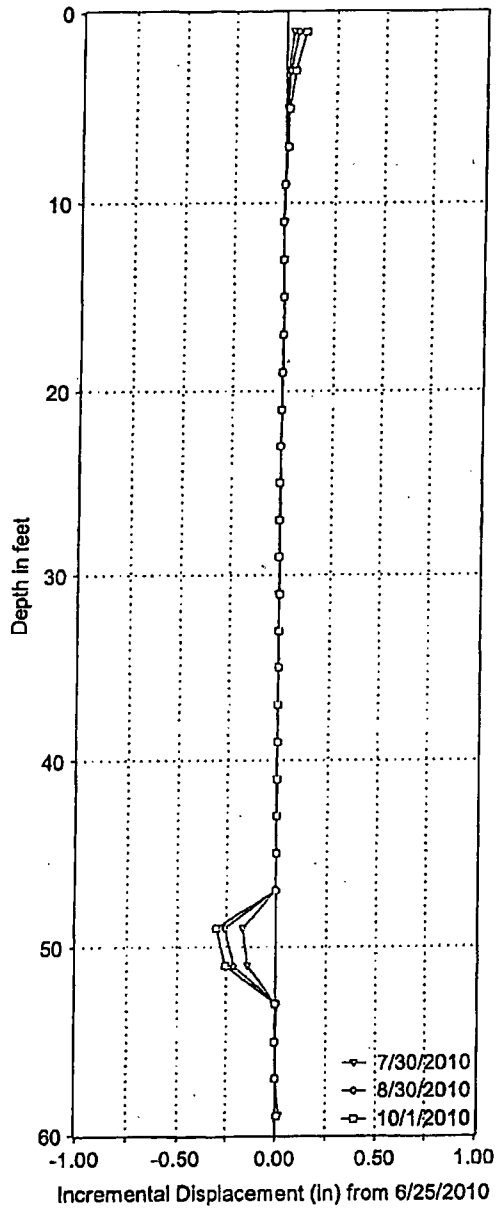


Jasmine Point

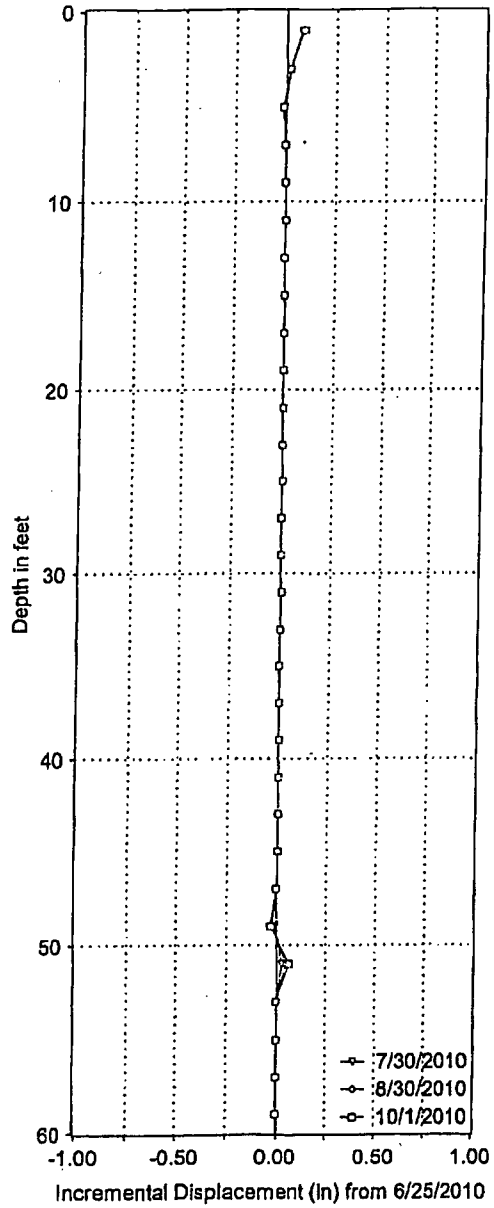
BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

Jasmin SI-6, A-Axis



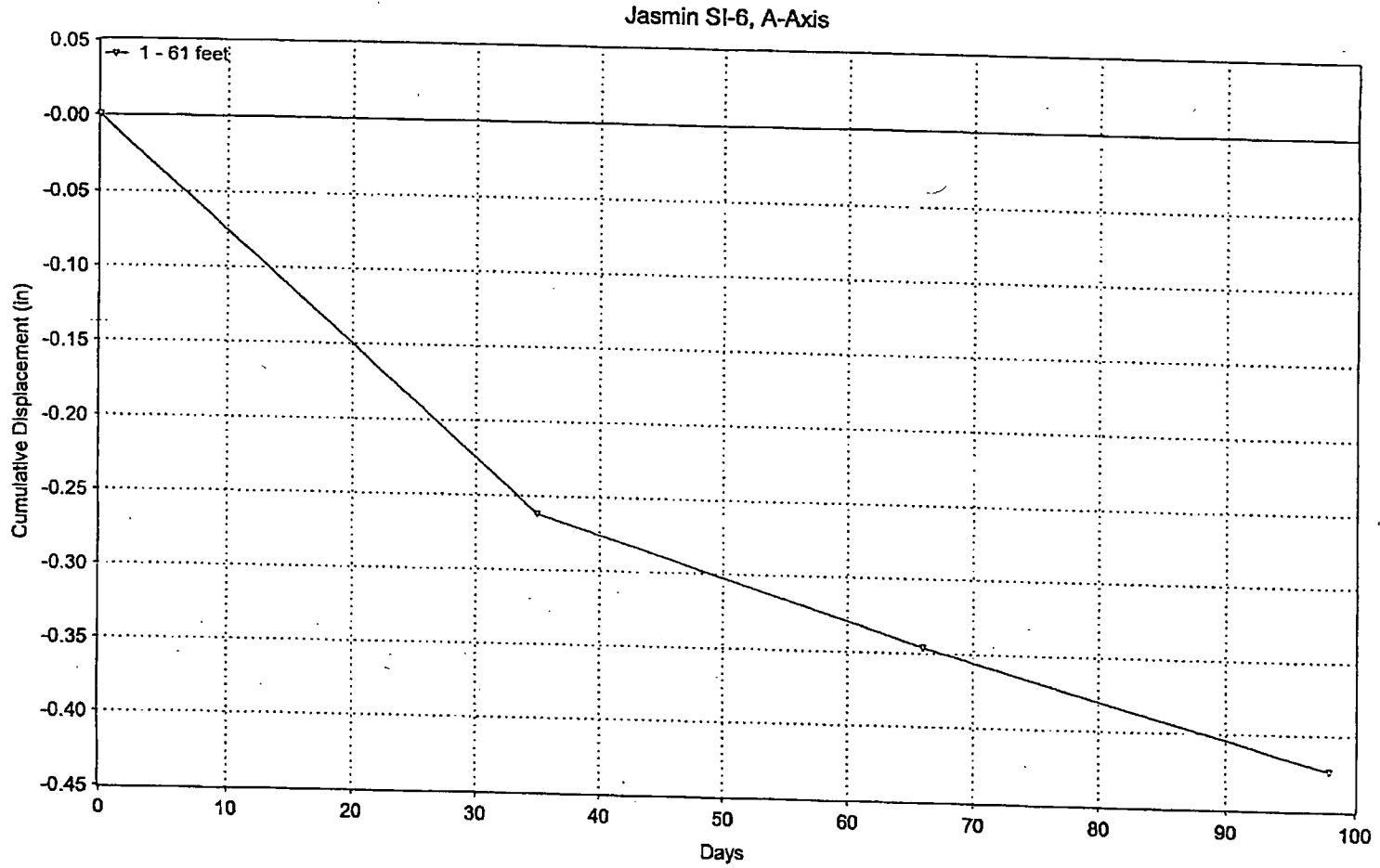
Jasmin SI-6, B-Axis



Jasmine Point

BLE Project No. J10-7112-01

Cliffs at Keowee Falls South



Jasmine Point  
Cliffs at Keowee Falls South

BLE Project No. J10-7112-01



**BUNNELL-LAMMONS ENGINEERING, INC.**  
GEOTECHNICAL, ENVIRONMENTAL AND CONSTRUCTION MATERIALS CONSULTANTS

April 11, 2011

The Cliffs Communities  
Post Office Box 1519  
Travelers Rest, South Carolina 29690

Attention: Mr. Donald H. Nickell, Jr.  
[dnickell@cliffscommunities.com](mailto:dnickell@cliffscommunities.com)

Subject: Data Report of Slope Inclinometer Surveys  
April 8, 2011 Readings  
Jasmine Point - Cliffs at Keowee Falls South  
Oconee County, South Carolina  
BLE Project No. J10-7112-01

Gentlemen:

We are pleased to submit this data report of the surveys obtained from the slope inclinometers installed at Jasmine Point in the Cliffs at Keowee Falls South development. The data presented herein includes the latest round of readings obtained on April 8, 2011. The data included in this report is referenced to baseline data obtained on June 25, 2010. There are six inclinometers installed on Lots 30, 31 and 32 as indicated in the following table.

Inclinometer Number	Location
SI-1	Lot 30 upper
SI-2	Lot 30 lower
SI-3	Lot 31 upper
SI-4	<i>Lot 31</i> Lot 32 lower
SI-5	Lot 32 upper
SI-6	Lot 32 lower

Note: Locations identified as upper represent inclinometers installed on the upper side of the lots near the road, lower represents inclinometers installed on the lower side of the lots near the lake.

The inclinometers were installed into soil test borings (ASTM D 1586) that were drilled between May 27, 2010 and June 8, 2010. Subsurface conditions that were encountered at each boring location are identified on the attached boring logs. The borings are identified as B-1 through B-6 and the boring numbers correspond with the inclinometer numbers (i.e. inclinometer SI-1 was



*Data Report of Slope Inclinometer Surveys  
Jasmine Point – Cliffs at Keowee Falls South*

*April 11, 2011  
BLE Project No. J10-7112-01*

installed in boring B-1 and so on). The attached aerial photograph identifies the locations of the inclinometers that was produced by tagging the inclinometer locations with a handheld GPS and inputting the coordinates into Google Earth.

The attached graphs present information on each of the inclinometers. Where the attached graphs identify two axes (A-axis and B-axis), the A-axis is oriented in a generally uphill-downhill direction and the B-axis is oriented in a generally cross slope direction. Movement in the negative direction on the A-axis represents downslope (direction of potential failure) movement. There are three graphs for each inclinometer as follows:

1. Cumulative Displacement vs. Depth
2. Incremental Displacement vs. Depth
3. Cumulative Displacement vs. Time (A-axis)

Cumulative displacement vs. depth is a plot of movement. Displacements on these plots may appear abrupt because the horizontal scale is not proportional to the vertical scale, which makes it easier to identify displacements. Incremental displacement vs. depth is a plot of movement at each reading interval. A spike in these graphs indicates significant movement. Growth in the spike over time indicates continued movement. Cumulative displacement vs. time provides an indication as to the rate of movement.

## EVALUATION

A review of the Cumulative Displacement vs. Depth plots indicate that movement is occurring in five of the six inclinometers. Inclinometers SI-1, SI-2, SI-4 and SI-6 indicate an apparent failure plane developing at depths ranging from approximately 35-ft to 53-ft below the ground surface. A review of the accompanying boring logs indicates that the failure plane appears to be developing at or near the interface between residual soils and partially weathered rock (or dense residual soils). In our report dated October 25, 2010 we indicated that only two of the inclinometers (SI-4 and SI-6) had indicated significant movement since the August 30, 2010 readings were collected. We noted that there had been little precipitation during that period and that it should be expected that additional movement may occur in the remaining inclinometers during wet weather cycles. Since that time there has been considerable precipitation, particularly in the month preceding the current readings and, as expected, five of the six inclinometers have indicated movement since October. The only inclinometer that does not appear to have indicated movement is SI-3, which has not indicated any appreciable movement since installation.

The plots from inclinometer SI-5 indicate that the movement appears to be occurring at or below the bottom of the inclinometer casing at this location. A review of boring B-5 indicates partially



Data Report of Slope Inclinometer Surveys  
Jasmine Point - Cliffs at Keowee Falls South

April 11, 2011  
BLE Project No. J10-7112-01

weathered rock was encountered at a depth of approximately 64 feet. Therefore, it is our opinion that there may be a failure plane developing near the interface with the partially weathered rock similar to that observed in the inclinometers discussed above.

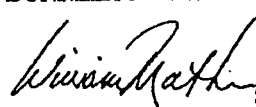
**RECOMMENDATIONS**

As previously reported, it is our opinion that there is an active, deep-seated slope failure occurring at the site. The rate at which movement occurs can be expected to vary over time and with environmental factors. However, it should be expected that movement will continue unless provisions to stabilize the slope are performed. Additional exploration, testing and analysis will be required to evaluate suitable methods for stabilizing the slope, which are beyond the scope of services for which we are currently authorized. If requested, we can prepare a proposal to provide additional engineering services required to develop conceptual stabilization methods.

This data submittal was the result of an extension of our scope of services as requested by Mr. Nickell in email correspondence with our Mr. Bill Mathews. Unless requested to collect additional inclinometer readings, we have completed the scope of services authorized for this project. We recommend that you retain a surveyor to develop a detailed topographic survey of the area. The topographic survey would be used in conjunction with the borings and inclinometer data to evaluate methods that could be used to stabilize the slope.

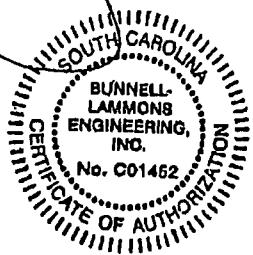
We appreciate the opportunity to provide our professional services on this project. If you have any questions or require additional information, please call.

Sincerely,  
BUNNELL-LAMMONS ENGINEERING, INC.

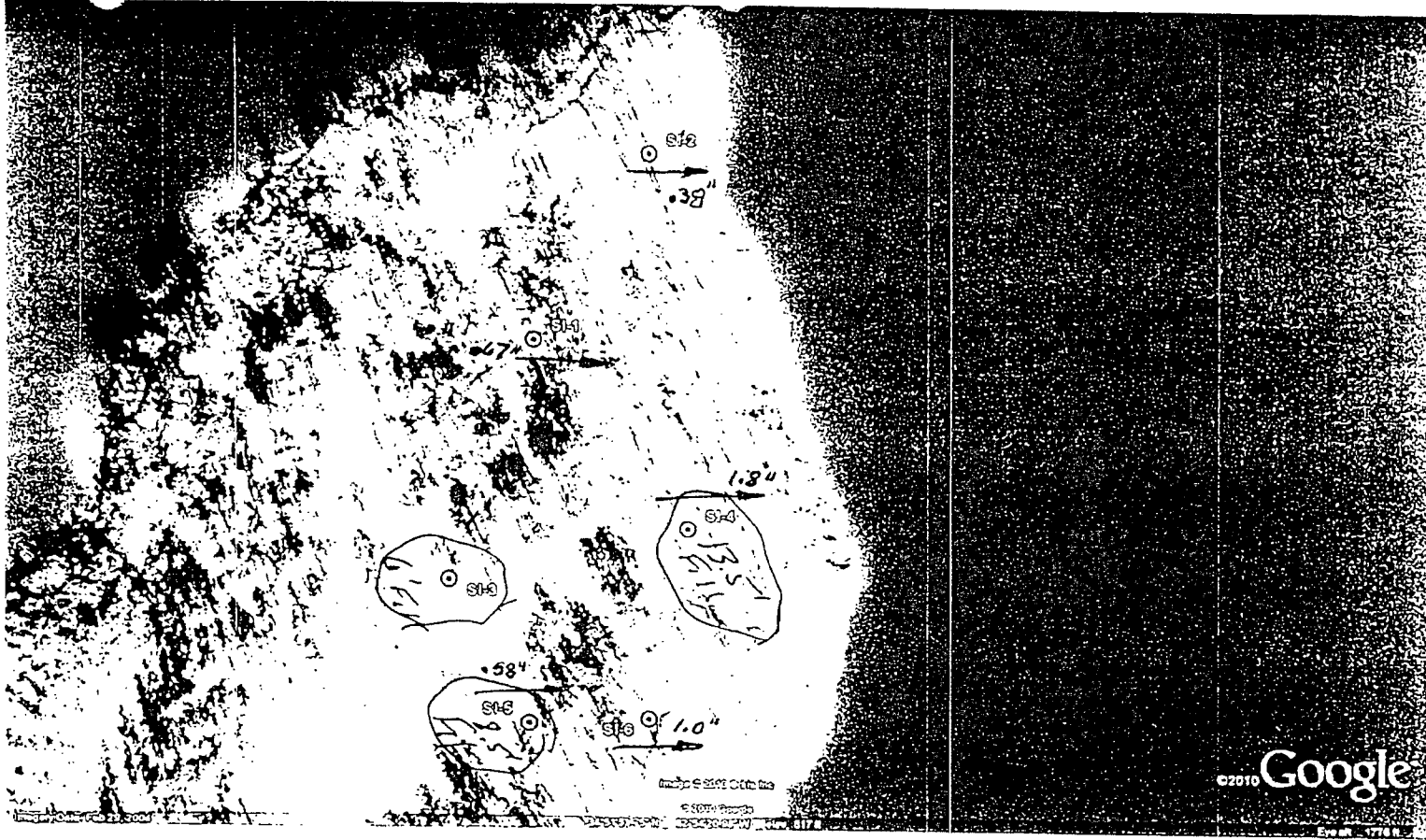
  
William A. Mathews, P.E.  
Chief Engineer  
Registered, SC #14039



  
James C. Ernst  
Construction Services Manager



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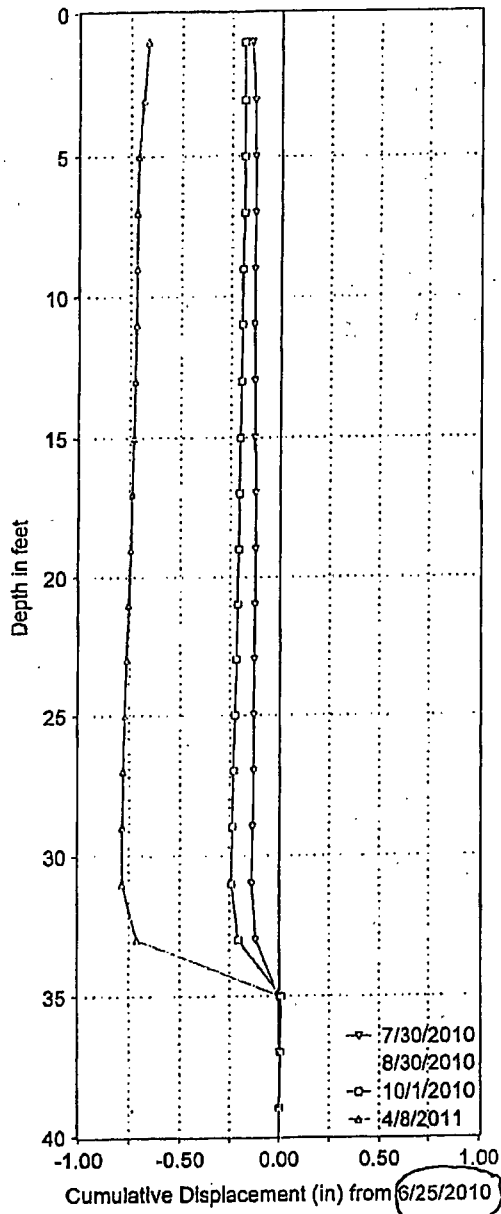


Jasmine Point  
Cliffs @ Keowee Falls South

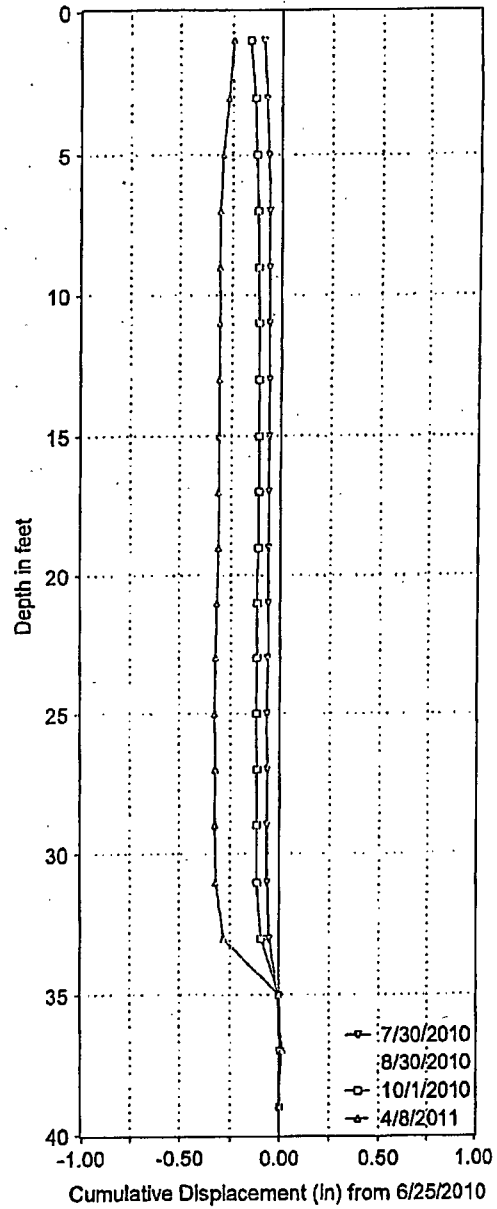
Inclinometer Locations  
BLE Project No. J10-7112-01

→ DOWN Slope  
movement as of 5 Apr 2011

Jasmin SI-1, A-Axis



Jasmin SI-1, B-Axis

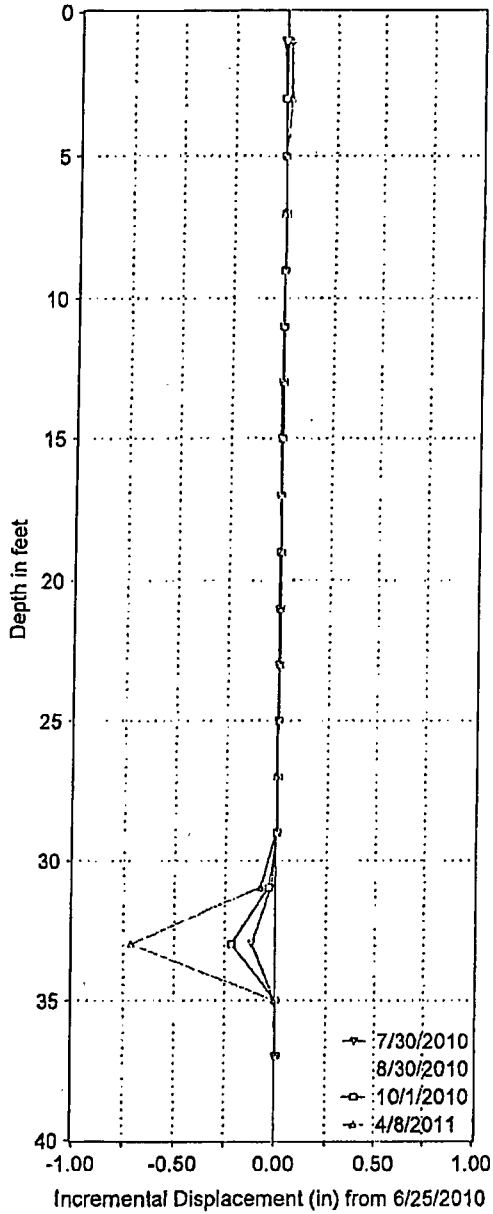


Jasmine Point

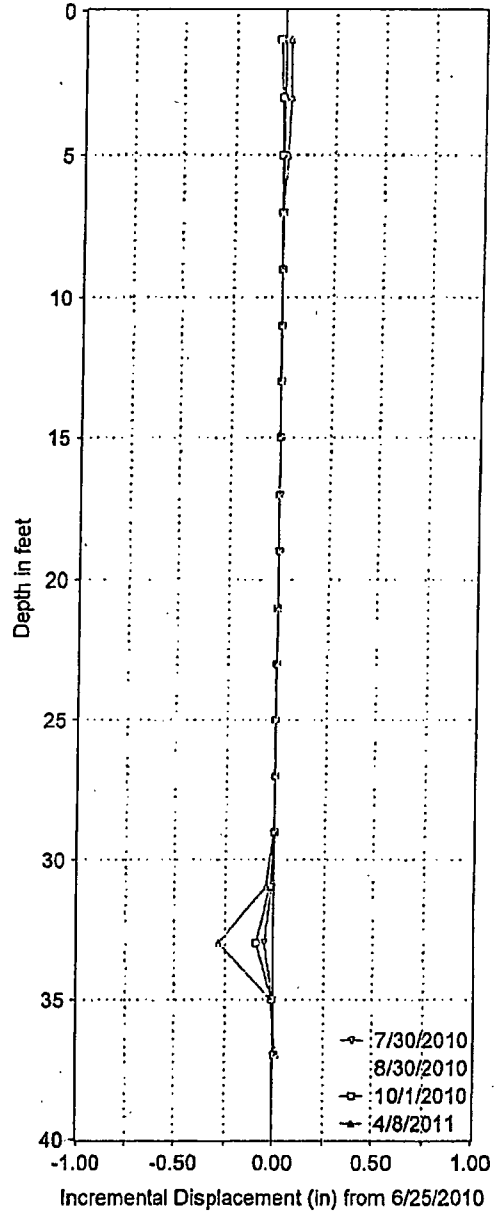
BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

Jasmin SI-1, A-Axis



Jasmin SI-1, B-Axis

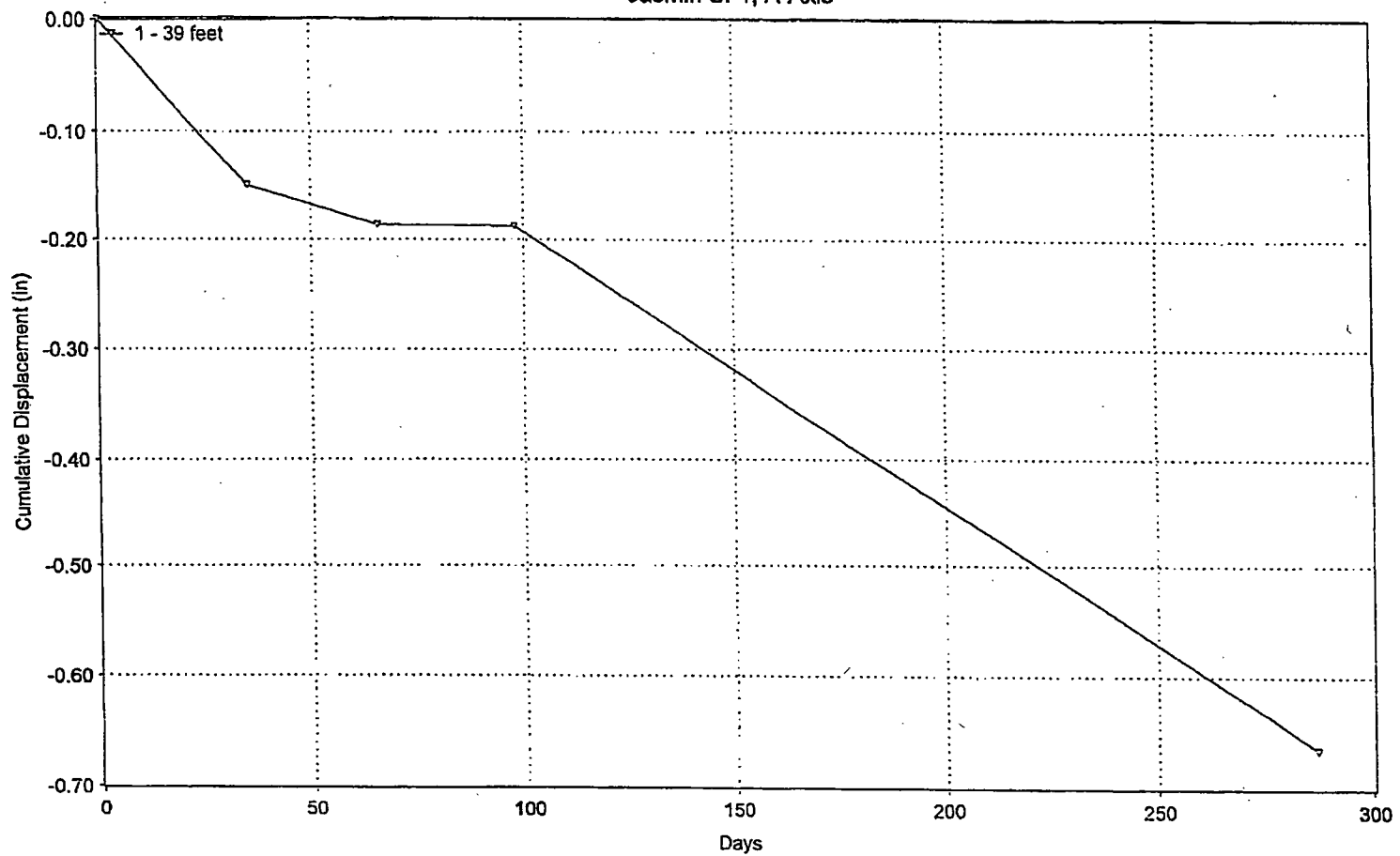


Jasmine Point

BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

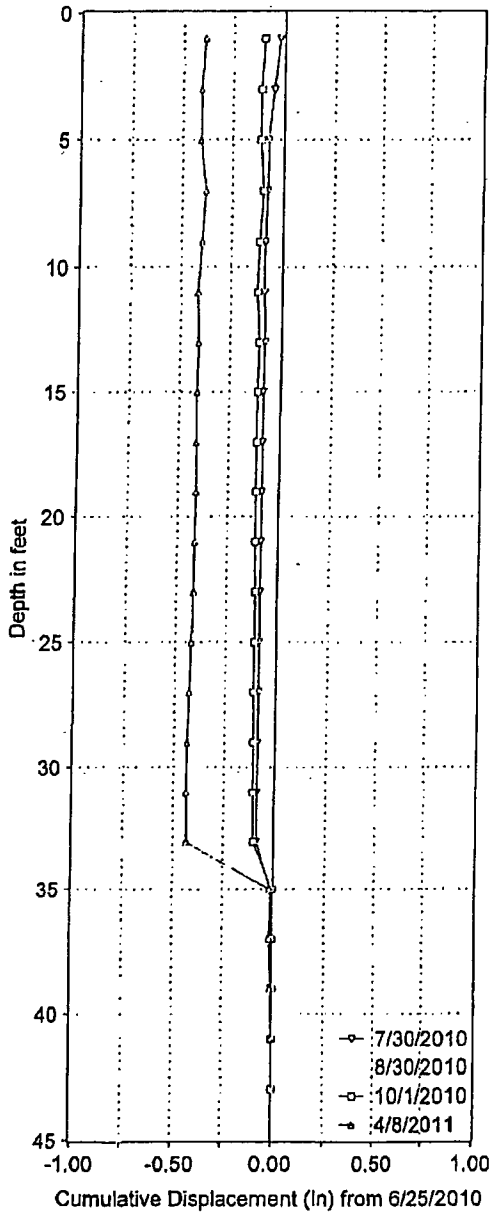
Jasmin SI-1, A-Axis



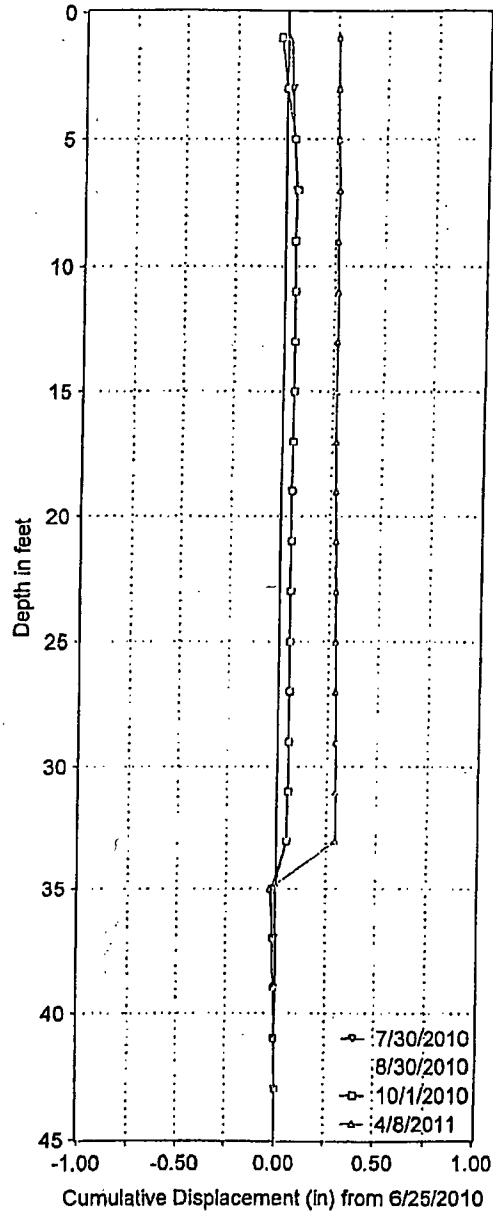
Jasmine Point  
Cliffs at Keowee Falls South

BLE Project No. J10-7112-01

Jasmin SI-2, A-Axis



Jasmin SI-2, B-Axis

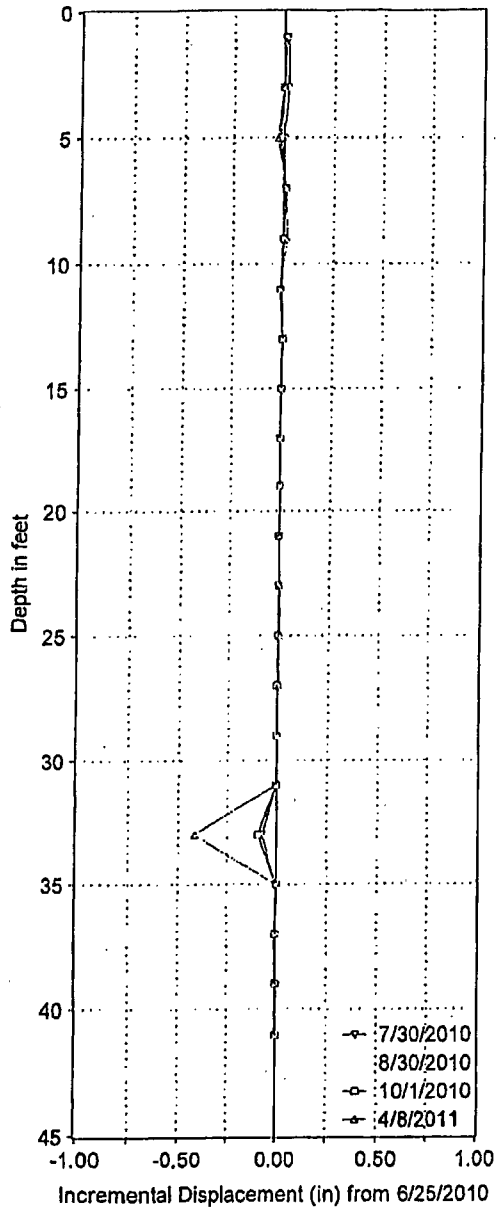


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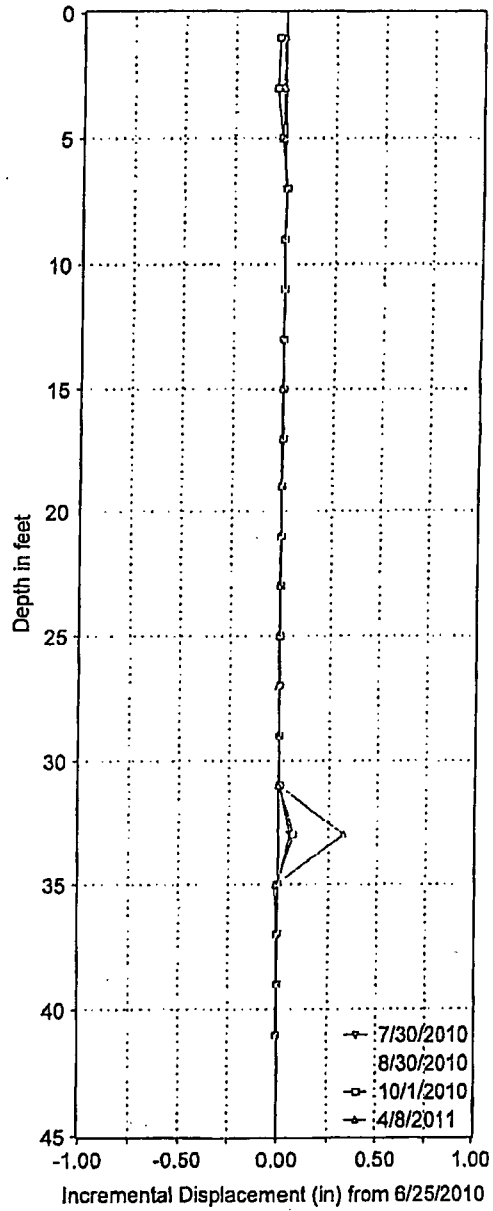
BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

Jasmin SI-2, A-Axis



Jasmin SI-2, B-Axis

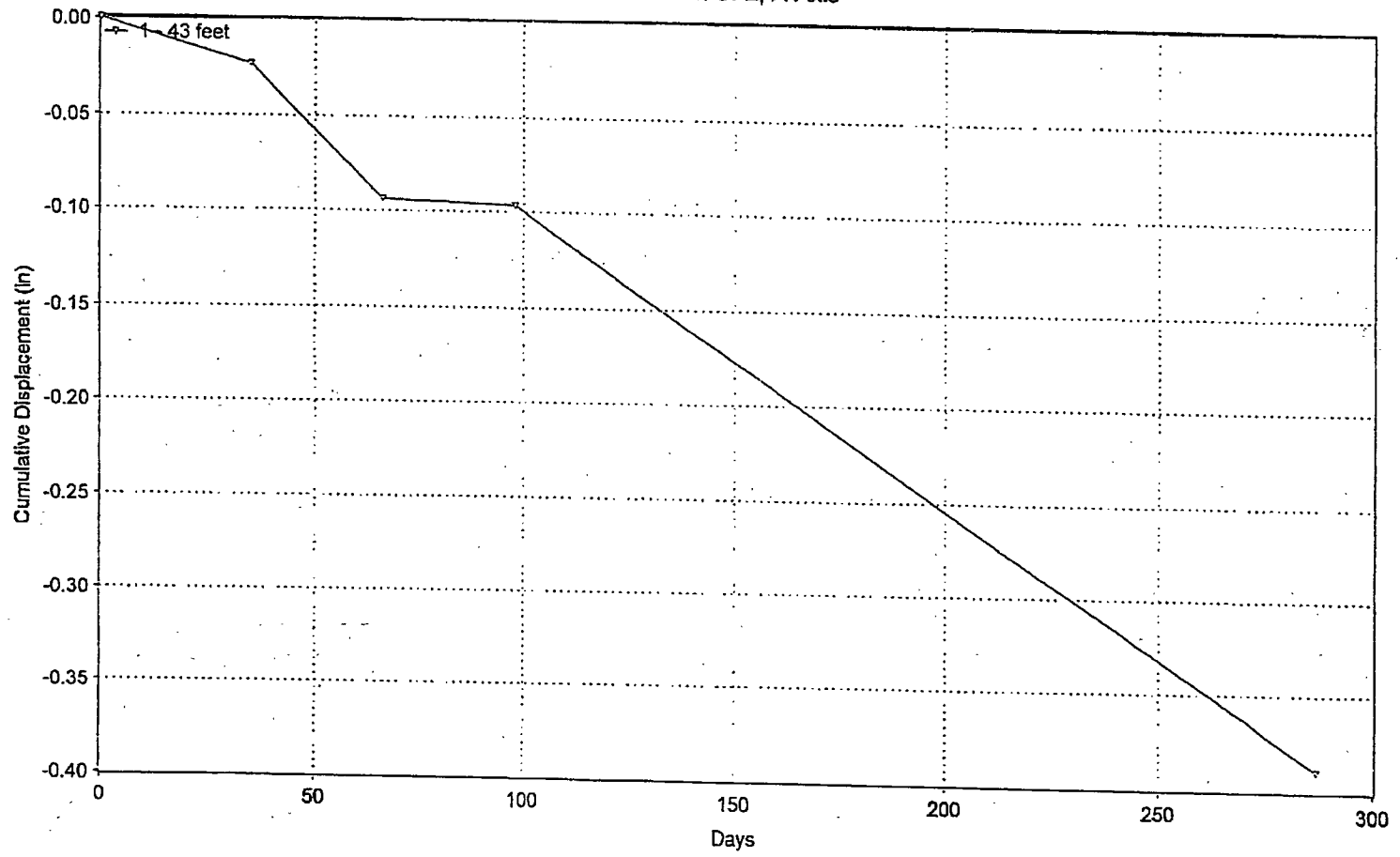


Jasmine Point

BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

Jasmin SI-2, A-Axis

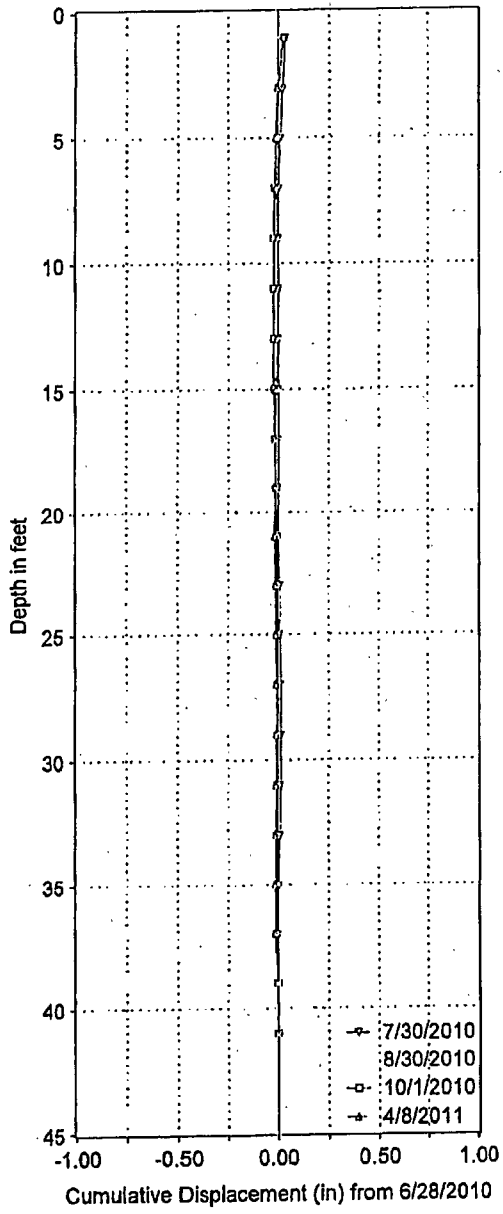


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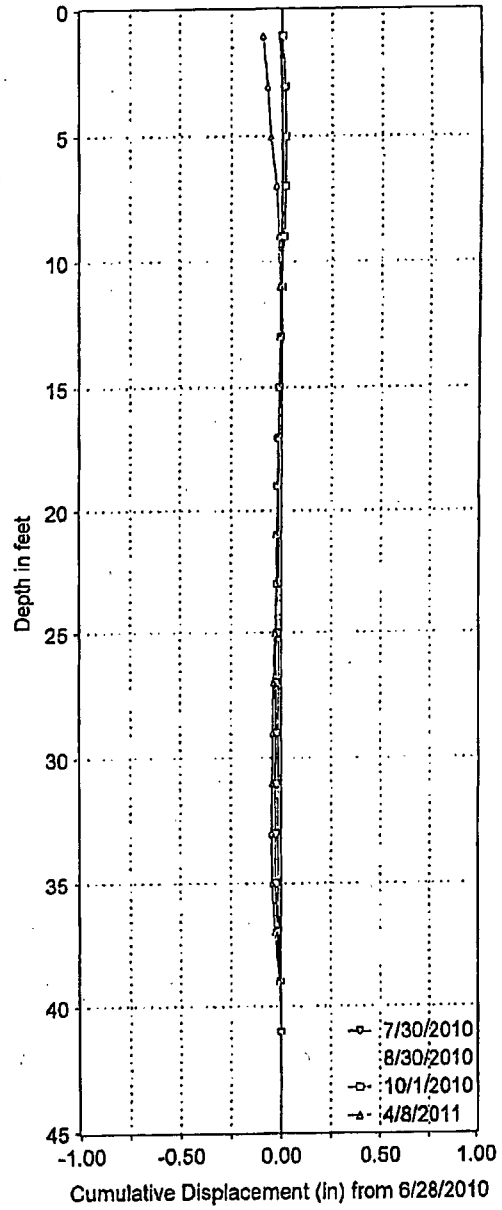
Cliffs at Keowee Falls South

BLE Project No. J10-7112-01

Jasmin SI-3, A-Axis



Jasmin SI-3, B-Axis

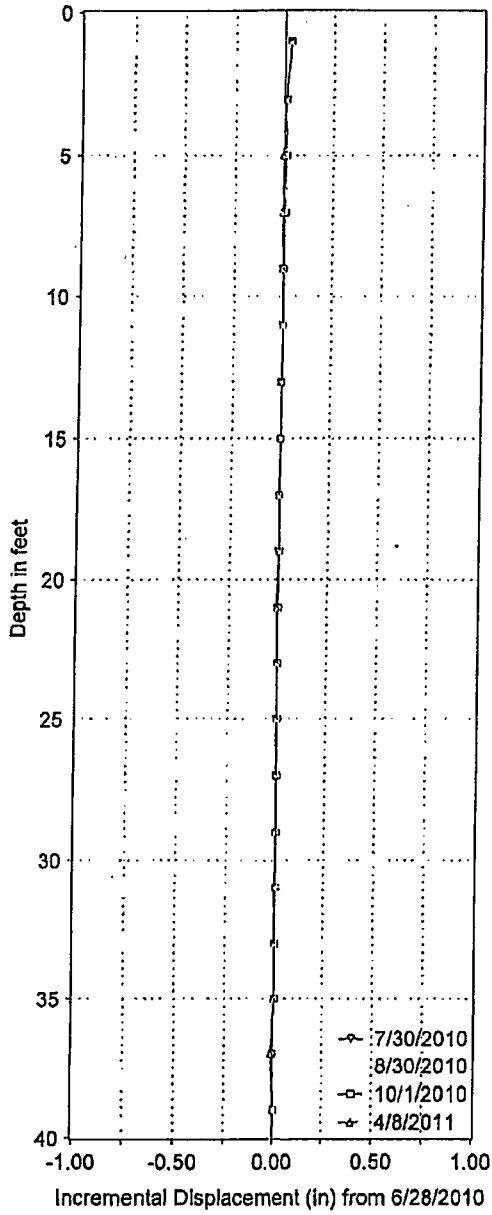


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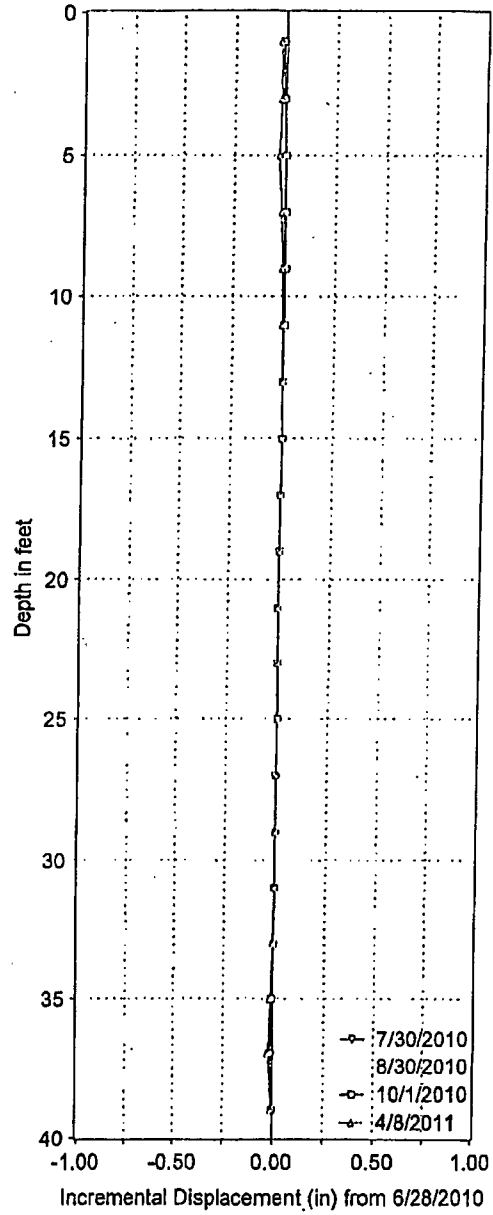
BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

Jasmin SI-3, A-Axis



Jasmin SI-3, B-Axis

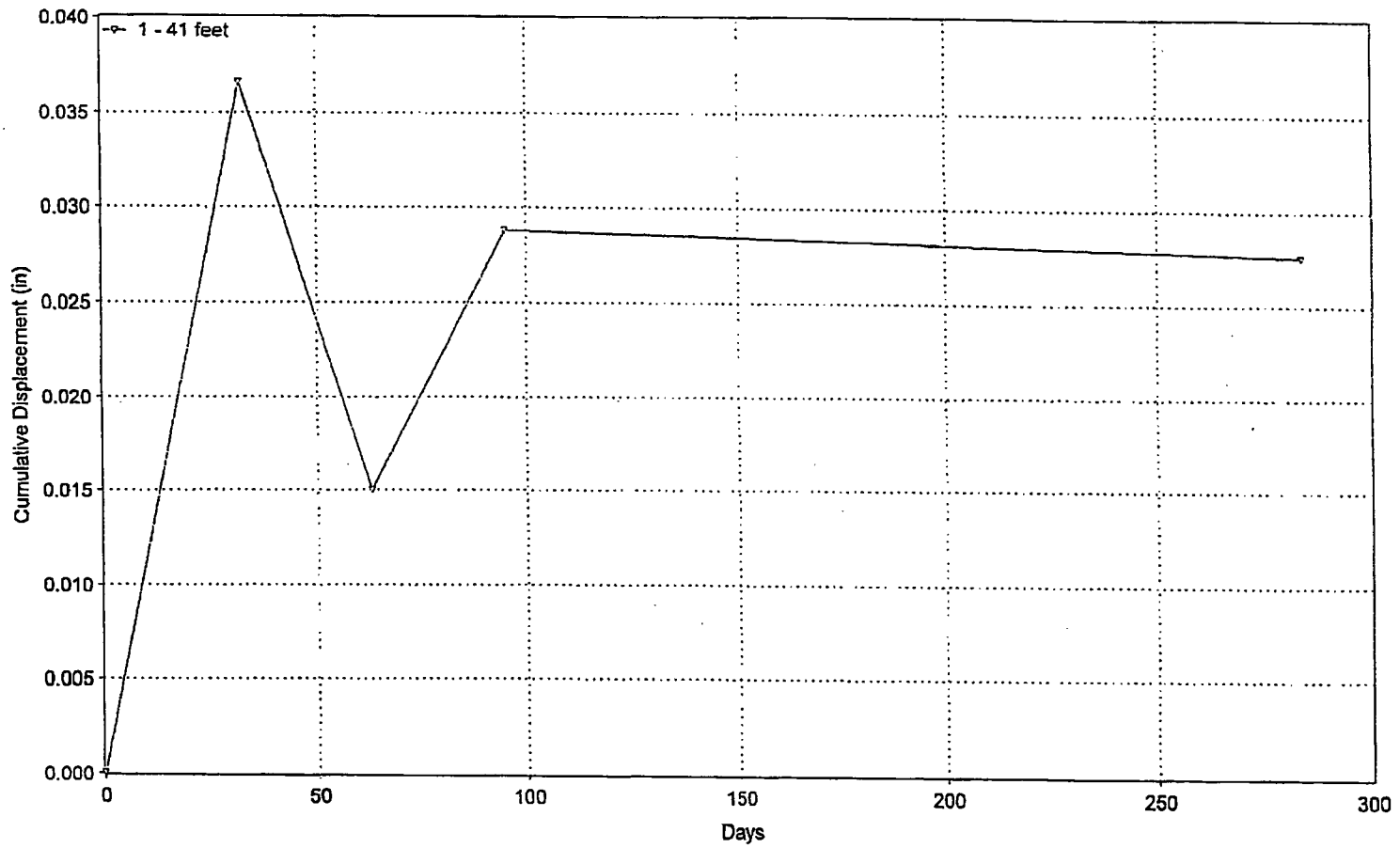


Jasmine Point

BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

Jasmin SI-3, A-Axis



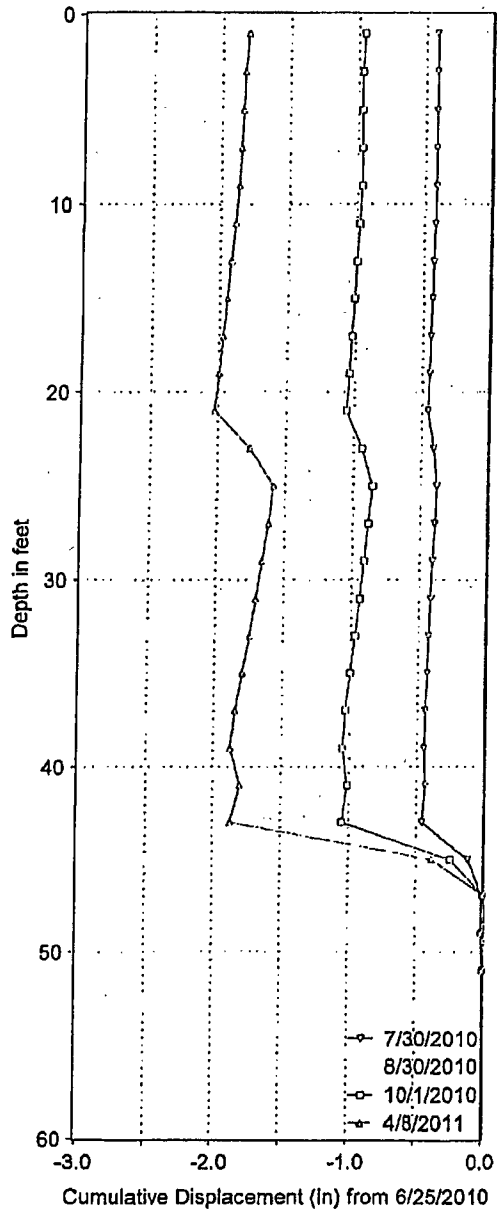
142

Jasmine Point

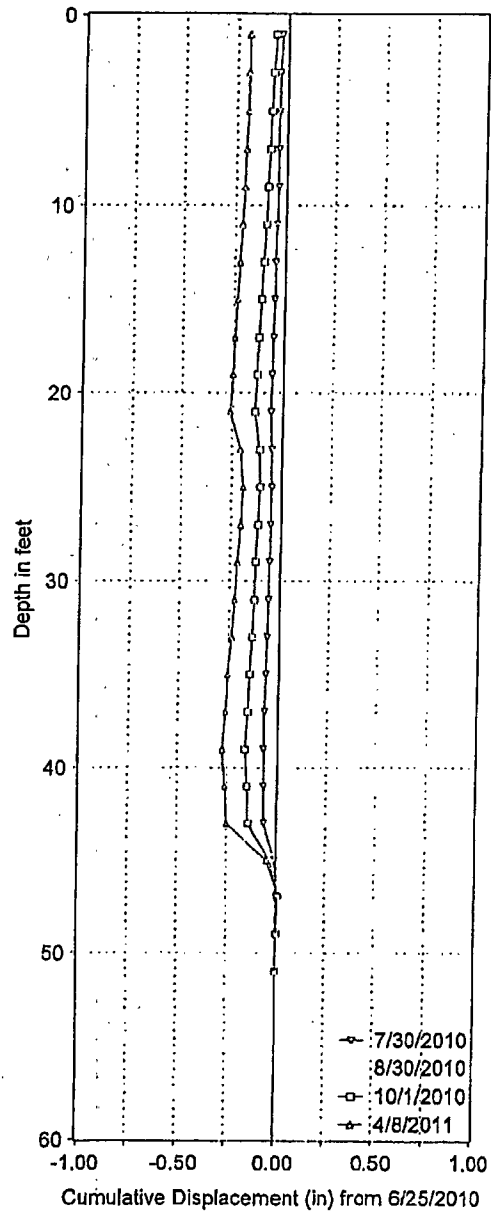
Cliffs at Keowee Falls South

BLE Project No. J10-7112-01

Jasmin SI-4, A-Axis



Jasmin SI-4, B-Axis

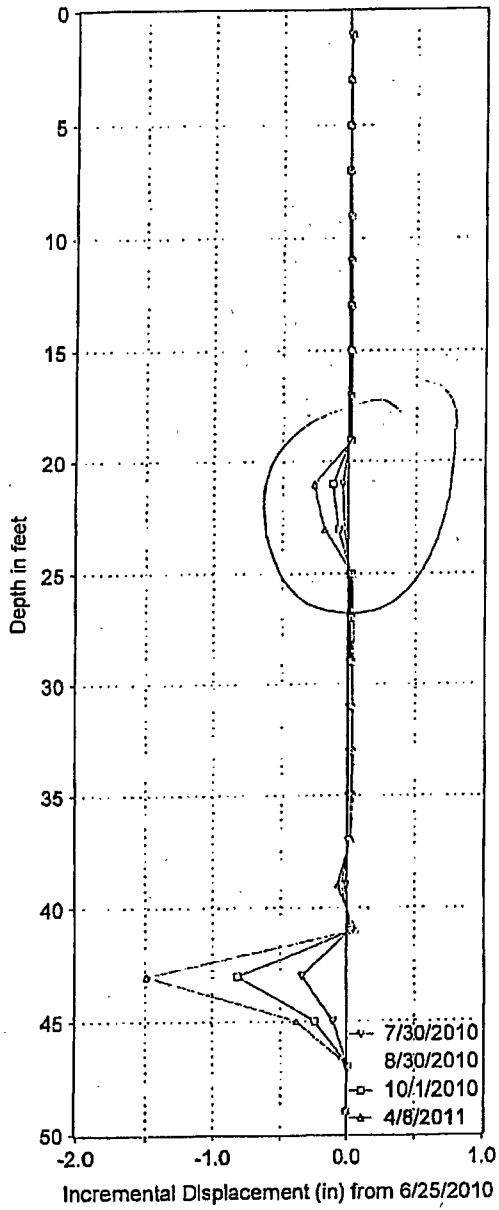


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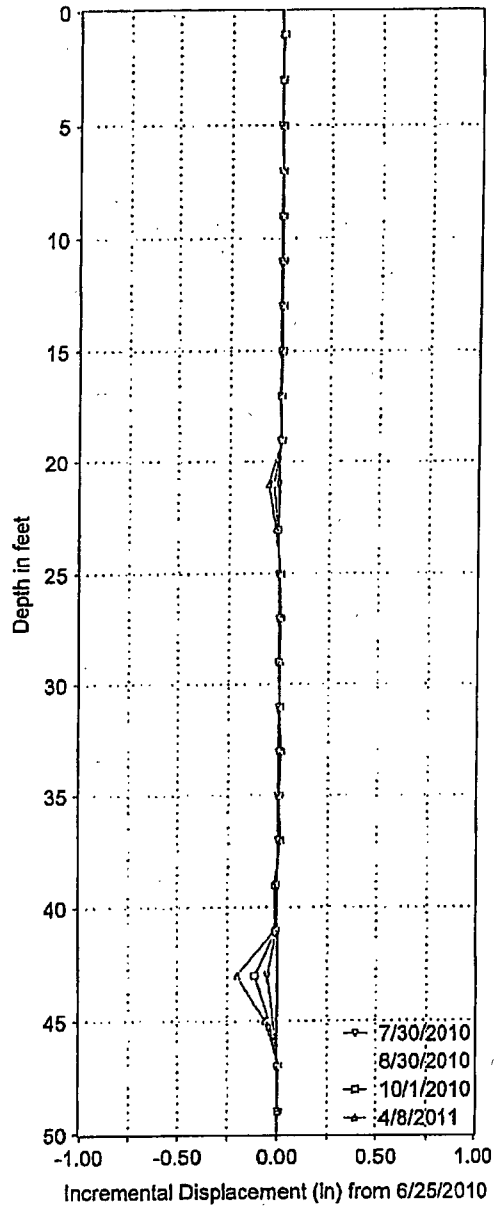
BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

Jasmin SI-4, A-Axis



Jasmin SI-4, B-Axis

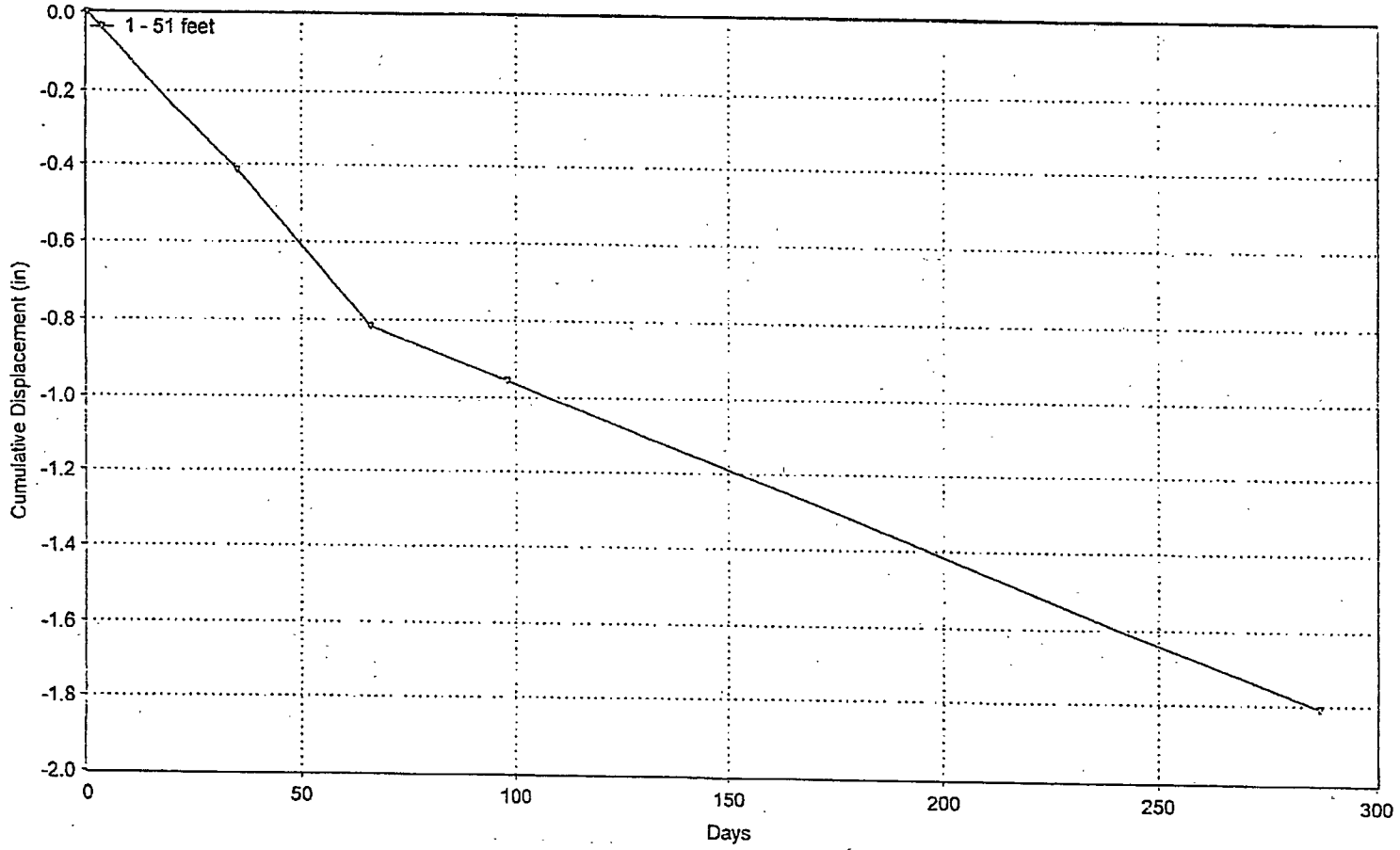


Jasmine Point

BLE Project No. J10-7112-01

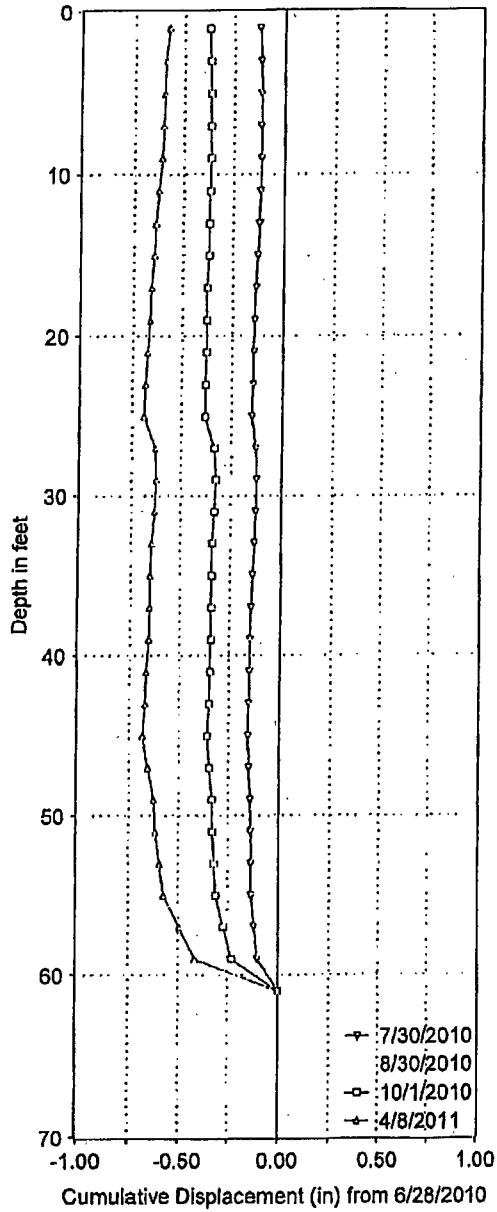
Cliffs at Keowee Falls South

Jasmin SI-4, A-Axis

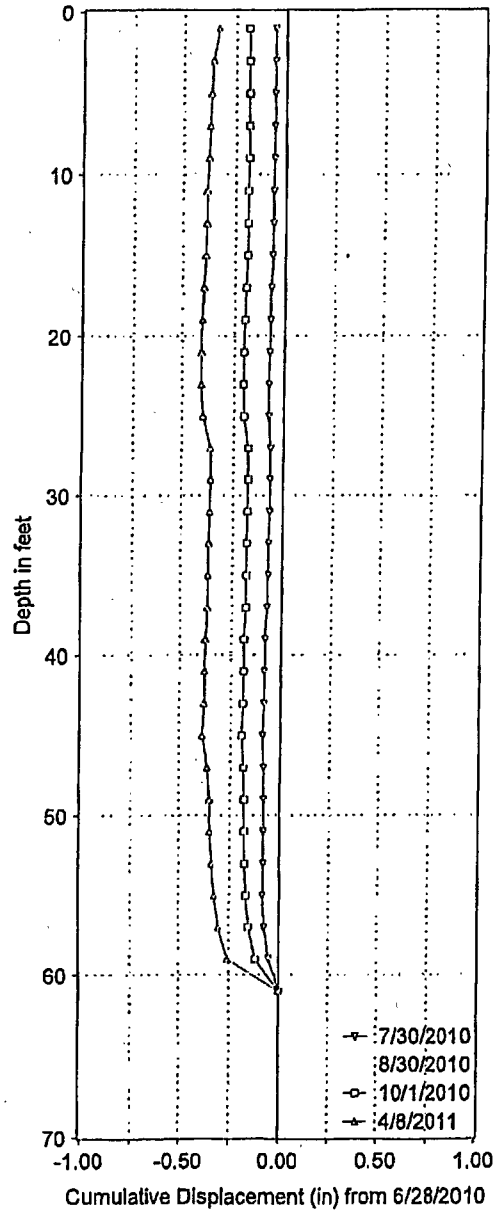


Jasmine Point  
Cliffs at Keowee Falls South  
BLE Project No. J10-7112-01

Jasmin SI-5, A-Axis



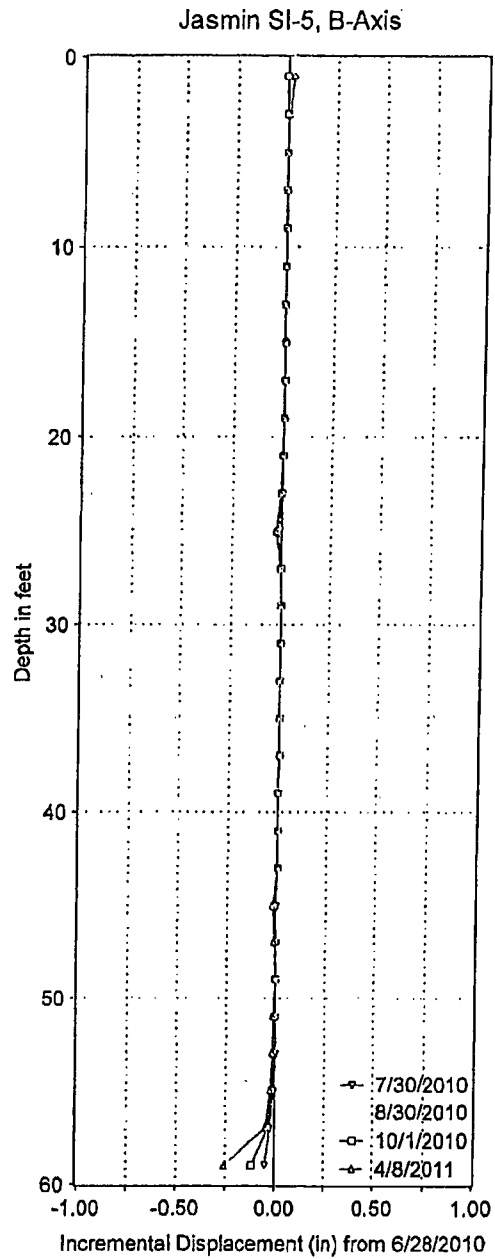
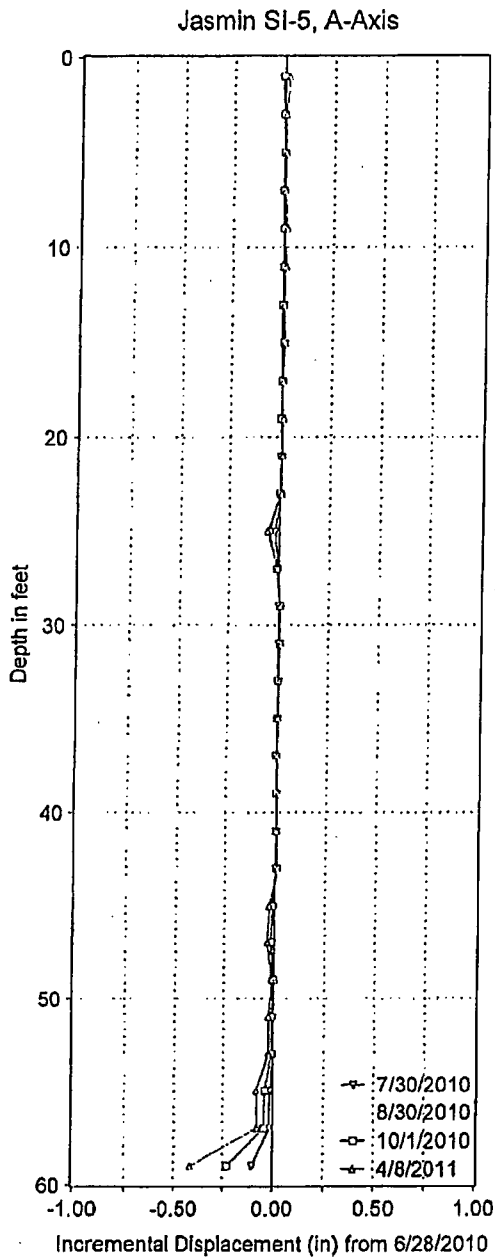
Jasmin SI-5, B-Axis



Jasmine Point

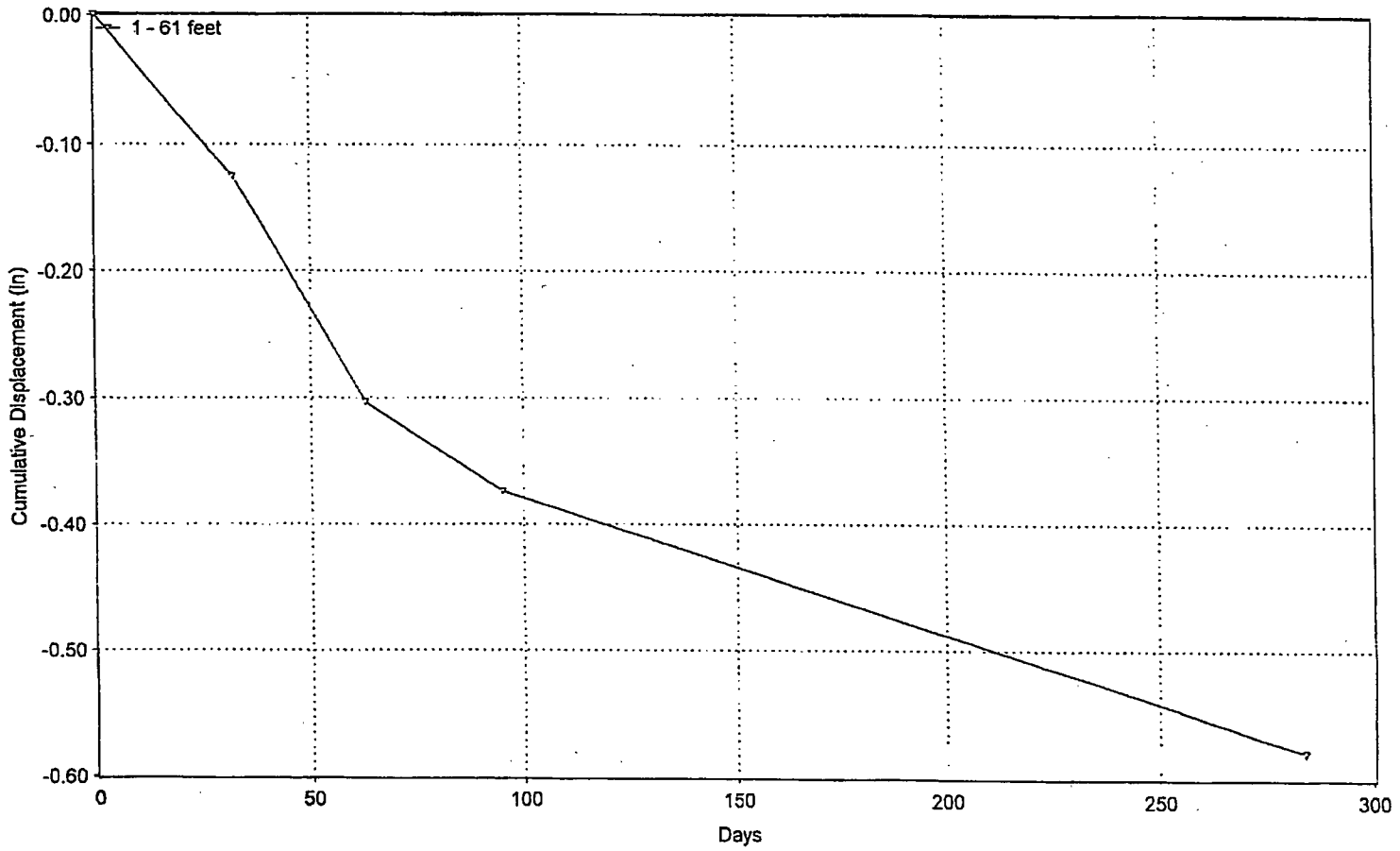
BLE Project No. J10-7112-01

Cliffs at Keowee Falls South



<p>Jasmine Point</p> <p>Cliffs at Keowee Falls South</p>	<p>BLE Project No. J10-7112-01</p>
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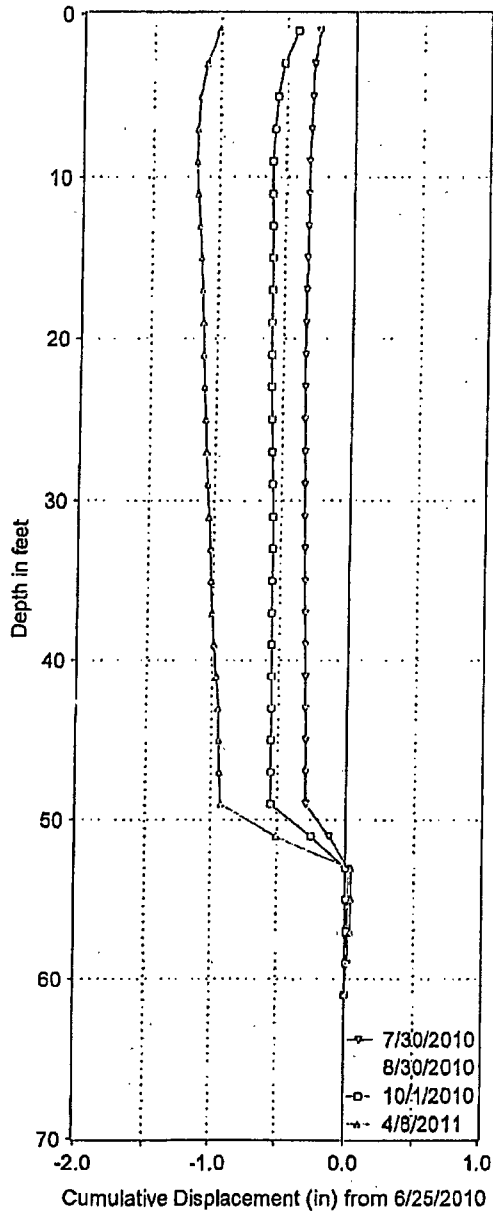
Jasmin SI-5, A-Axis



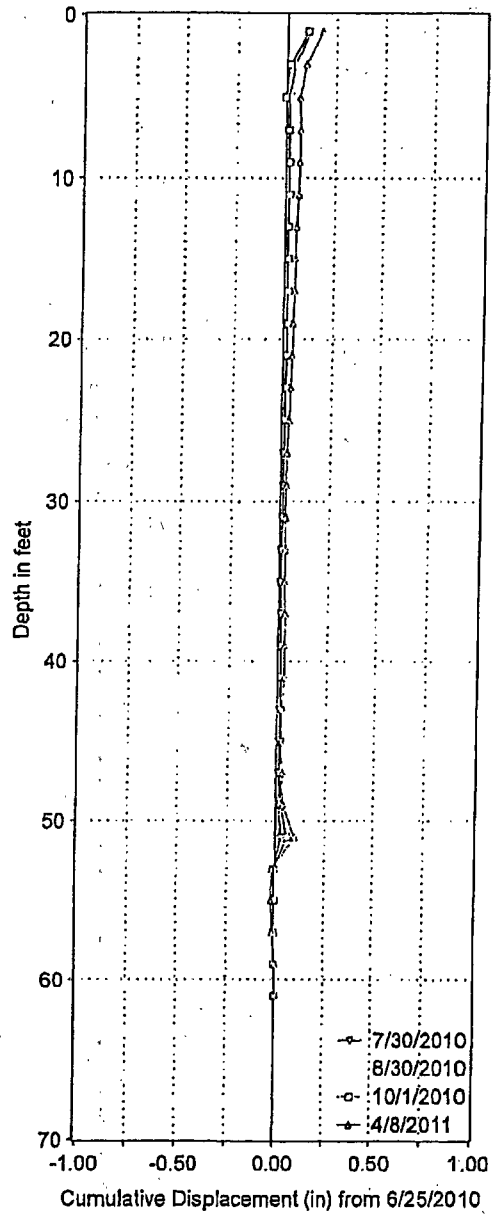
Jasmine Point  
Cliffs at Keowee Falls South

BLE Project No. J10-7112-01

Jasmin SI-6, A-Axis



Jasmin SI-6, B-Axis

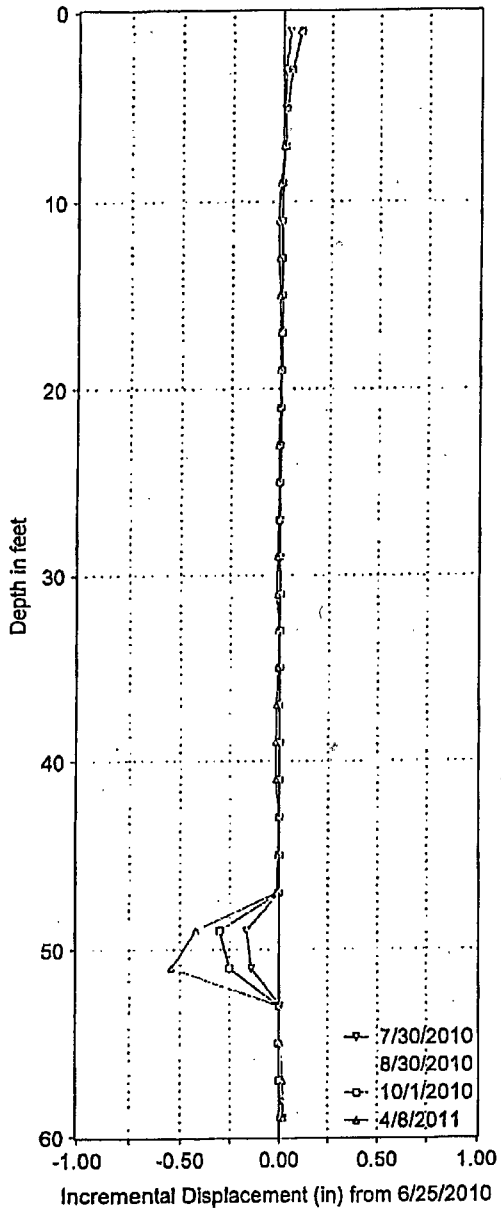


Jasmine Point

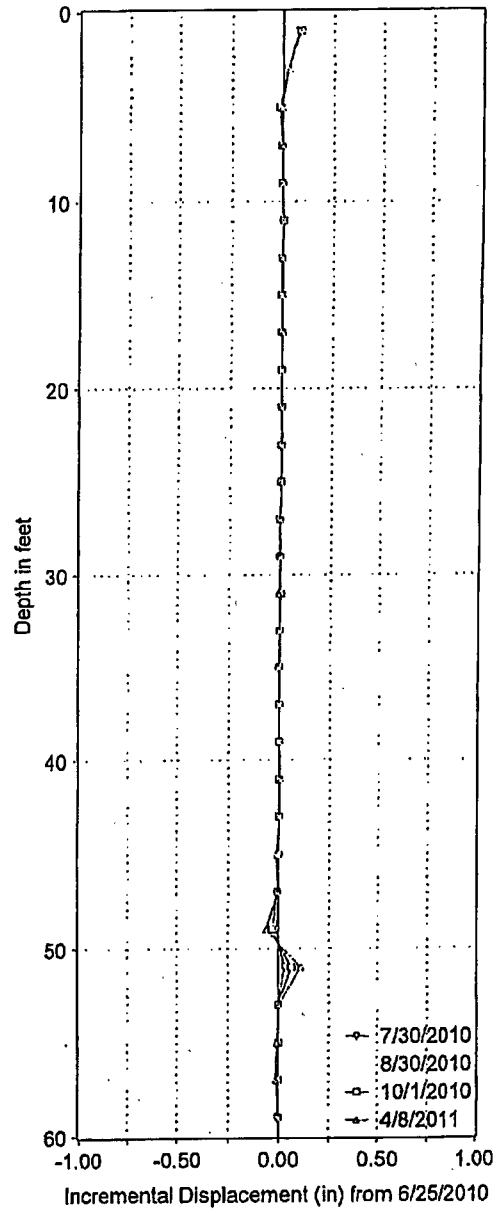
BLE Project No. J10-7112-01

Cliffs at Keowee Falls South

Jasmin SI-6, A-Axis



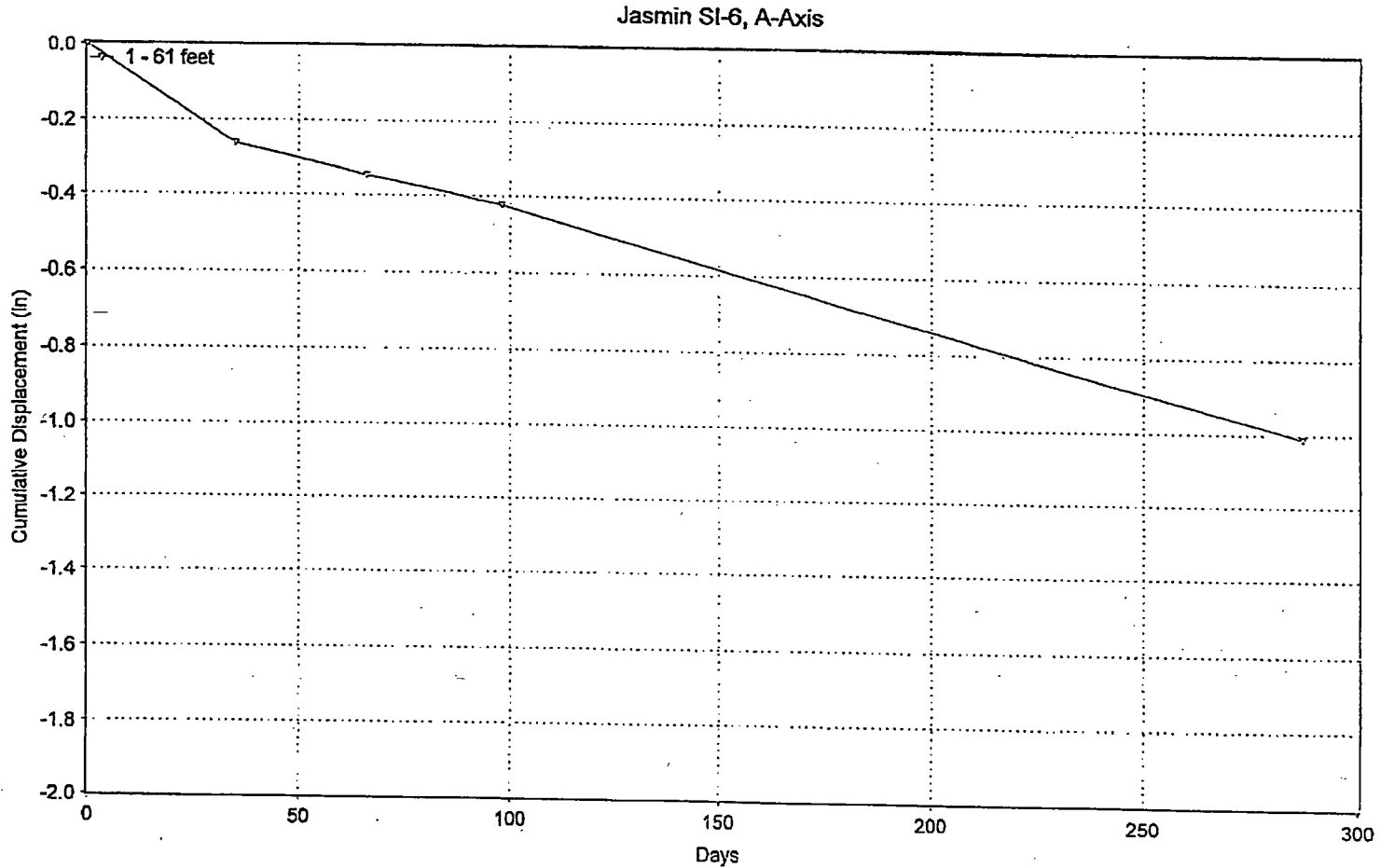
Jasmin SI-6, B-Axis



Jasmine Point

BLE Project No. J10-7112-01

Cliffs at Keowee Falls South



Jasmine Point	BLE Project No. J10-7112-01
Cliffs at Keowee Falls South	



**BUNNELL-LAMMONS  
ENGINEERING, INC.**  
GEOTECHNICAL AND ENVIRONMENTAL  
CONSULTANTS

**SOIL TEST BORING NO. B-1**

PROJECT: Jasmine Point Cliffs at Keowee Falls South  
 CLIENT: The Cliffs  
 LOCATION: Lot 30  
 DRILLER: Metro Drill, Inc., Reid and Keith  
 DRILLING METHOD: BK-51; 2-1/4 Inch ID hollow stem auger  
 DEPTH TO - WATER> INITIAL: 33.5 AFTER 24 HOURS: 28 CAVING> 50/5'

PROJECT NO.: J10-7112-01  
 START: 6-2-10 END: 6-3-10  
 ELEVATION: \_\_\_\_\_  
 LOGGED BY: D. Parkins

ELEVATION/ DEPTH (FT)	SOIL DESCRIPTION	SOIL TYPE	SAMPLES	STANDARD PENETRATION RESULTS BLOWS/FOOT																
				2	5	10	20	30	40	50	70	90								
2	2-Inches of TOPSOIL Very firm, yellowish-red with pink and white, silty, fine to coarse SAND with gravel - (residuum)		4 9 12																	
4	Very loose, yellowish-red with white, silty, fine to medium SAND		3 2 2																	
6			1 2 2																	
8	Firm, yellowish-brown, fine to medium sandy SILT		3 2 5																	
10																				
12																				
14			2 4 4																	
16																				
18	Loose, white with gray, micaceous, silty, fine to medium SAND		3 3 5																	
20																				
22																				
24	Firm, white with gray, micaceous, slightly silty, fine SAND		5 7 7																	
26																				
28	Loose, red with pink and gray, micaceous, silty, fine SAND		4 4 6																	
30																				
32																				
34	PARTIALLY WEATHERED ROCK which sampled as dark grayish-brown, micaceous, silty, fine SAND		18 50/5'																	
36	Slope Inclnometer set at 37 feet																			
38	Auger refusal at 37.5 feet. Groundwater encountered at 33.5 feet at time of drilling and at 28 feet after 24 hours.																			
40																				
42																				
44																				

GEO. NOWELL 71. GPJ 9/9/10

SOIL TEST BORING NO. B-1  
Sheet 1 of 1



**BUNNELL-LAMMONS  
ENGINEERING, INC.**  
GEOTECHNICAL AND ENVIRONMENTAL  
CONSULTANTS

**SOIL TEST BORING NO. B-2**

PROJECT: Jasmine Point Cliffs at Keowee Falls South  
 CLIENT: The Cliffs  
 LOCATION: Lot 30  
 DRILLER: Metro Drill, Inc., Reid and Kelth  
 DRILLING METHOD: BK-S1; 2-1/4 Inch ID hollow stem auger  
 DEPTH TO - WATER> INITIAL: ∇ AFTER 24 HOURS: ∇

PROJECT NO.: J10-7112-01  
 START: 6-1-10 END: 6-2-10  
 ELEVATION: \_\_\_\_\_  
 LOGGED BY: D. Parkins

CAVING: XXXX

ELEVATION/ DEPTH (FT)	SOIL DESCRIPTION	SOIL TYPE	SAMPLES	STANDARD PENETRATION RESULTS BLOWS/FOOT															
				2	5	10	20	30	40	50	70	90							
0-3	3-Inches of TOPSOIL																		
2	Loose, yellowish-red with gray, micaceous, silty, fine to coarse SAND with some small roots - (residuum)		3 4 4																
4	Loose, yellowish-red with gray and white, micaceous, silty, fine SAND		2 3 3																
6	PARTIALLY WEATHERED ROCK which sampled as gray, fine to coarse SAND		7 50/5.5'																
8	Loose, white with light gray, slightly silty, fine to medium SAND		3 4 6																
14	Stiff, yellowish-red with gray and black, micaceous, fine sandy SILT		5 5 5																
20	Firm, yellowish-red with gray and white, micaceous, silty, fine SAND with gravel		3 4 7																
24	Very firm, gray with brown, silty, fine SAND		5 9 12																
30	Dense, white with gray, silty, fine to medium SAND		5 15 30																
34	Very firm, yellowish-red with gray, silty, fine to medium SAND		10 10 12																
40	Very dense, white with pink and gray, micaceous, slightly silty, fine to coarse SAND		18 18 40																
44	Auger refusal at 43 feet. No groundwater encountered at time of drilling. Slope inclinometer set at 42.5 feet.																		

GEO. NOWELL 7. GPJ 98/10

SOIL TEST BORING NO. B-2  
Sheet 1 of 1

**IBLE** INC.

**BUNNELL-LAMMONS  
ENGINEERING, INC.**  
GEOTECHNICAL AND ENVIRONMENTAL  
CONSULTANTS

**SOIL TEST BORING NO. B-3**

PROJECT: Jasmine Point Cliffs at Keowee Falls South  
 CLIENT: The Cliffs  
 LOCATION: Lot 31  
 DRILLER: Metro Drill, Inc., Reid and Keith  
 DRILLING METHOD: BK-51; 2-1/4 inch ID hollow stem auger  
 DEPTH TO - WATER INITIAL:  $\nabla$  38.5 AFTER 24 HOURS:  $\nabla$  38.5

PROJECT NO.: J10-7112-01  
 START: 6-8-10 END: 6-8-10  
 ELEVATION: \_\_\_\_\_  
 LOGGED BY: D. Parkins

ELEVATION/ DEPTH (FT)	SOIL DESCRIPTION	SOIL TYPE	SAMPLES	STANDARD PENETRATION RESULTS BLOWS/FOOT														
				2	5	10	20	30	40	50	70	80						
2	2-inches of TOPSOIL		2															
2	Loose, yellowish-red, micaceous, silty, fine to medium SAND - (fill)		3															
4	Loose, yellowish-red with gray, silty, fine to coarse SAND - (fill)		3															
6	Loose to firm, yellowish-brown with white, micaceous, silty, fine to medium SAND - (residium)		3															
8			3															
10			3															
12			3															
14			3															
16			3															
18			3															
20			3															
22			3															
24			3															
26			3															
28			3															
30			3															
32			3															
34			3															
36			3															
38			3															
38	Firm, yellowish-red with gray and white, very micaceous, fine sandy SILT with some gravel		6															
40	Boring terminated at 40 feet. Groundwater encountered at 38.5 feet at time of drilling. Slope inclinometer set at 39 feet.		5															
40			10															
42																		
44																		

GEO. NOWELL, T1. 3PJ 88/10

SOIL TEST BORING NO. B-3  
Sheet 1 of 1



**BUNNELL-LAMMONS  
ENGINEERING, INC.**  
GEOTECHNICAL AND ENVIRONMENTAL  
CONSULTANTS

**SOIL TEST BORING NO. B-4**

PROJECT: Jasmine Point Cliffs at Keowee Falls South  
 CLIENT: The Cliffs  
 LOCATION: Lot 31  
 DRILLER: Metro Drill, Inc., Reid and Kelth  
 DRILLING METHOD: BK-51; 2-1/4 inch ID hollow stem auger  
 DEPTH TO - WATER> INITIAL: ∇ AFTER 24 HOURS: ∇

PROJECT NO.: J10-7112-01  
 START: 5-27-10 END: 5-27-10  
 ELEVATION: \_\_\_\_\_  
 LOGGED BY: D. Parkins

ELEVATION/ DEPTH (FT)	SOIL DESCRIPTION	SOIL TYPE	SAMPLES	STANDARD PENETRATION RESULTS BLOWS/FOOT																
				2	5	10	20	30	40	50	70	90								
2	Stiff, red, fine to medium sandy SILT - (fill)		4 4 6																	
4	Firm, red with gray, silty, fine to medium SAND with gravel - (fill)		8 8 8																	
6	Firm, red with yellowish-brown, micaceous, silty, fine to medium SAND - (fill)		3 5 7																	
8	Stiff, red, fine to medium sandy SILT - (fill)		2 4 5																	
10																				
12																				
14	Loose, yellowish-red with gray, silty, fine to medium SAND - (residuum)		2 2 5																	
16																				
18																				
20																				
22																				
24	Loose, gray, micaceous, slightly silty, fine to medium SAND		2 3 5																	
26																				
28																				
30	Loose, gray with white, micaceous, slightly silty, fine SAND		4 3 4																	
32																				
34	Firm, reddish-brown with gray and white, micaceous, silty, fine to coarse SAND		2 4 7																	
36																				
38																				
40																				
42																				
44	Firm, white with gray and brown, micaceous, silty, fine to coarse SAND with gravel		4 7																	

GEOT. NOVELL 71 3PJ 88/10

SOIL TEST BORING NO. B-4  
Sheet 1 of 2



### SOIL TEST BORING NO. B-4

**BUNNELL-LAMMONS  
ENGINEERING, INC.**  
GEOTECHNICAL AND ENVIRONMENTAL  
CONSULTANTS

PROJECT: Jasmine Point Cliffs at Keowee Falls South  
CLIENT: The Cliffs  
LOCATION: Lot 31  
DRILLER: Metro Drill, Inc., Rold and Keith  
DRILLING METHOD: BK-51; 2-1/4 inch ID hollow stem auger  
DEPTH TO - WATER> INITIAL: ∇ AFTER 24 HOURS: ∇

PROJECT NO.: J10-7112-01  
START: 5-27-10 END: 5-27-10  
ELEVATION: \_\_\_\_\_  
LOGGED BY: D. Parkins

CAVING>

ELEVATION/ DEPTH (FT)	SOIL DESCRIPTION	SOIL TYPE	SAMPLES	STANDARD PENETRATION RESULTS BLOWS/FOOT																
				2	5	10	20	30	40	50	70	90								
46	Firm, white with gray and brown, micaceous, silty, fine to coarse SAND with gravel		12																	
48	PARTIALLY WEATHERED ROCK - no return		4																	
50	Boring terminated at 50 feet. No groundwater encountered at time of drilling. Slope inclinometer set at 49 feet.		7																	
52			60/0"																	
54																				
56																				
58																				
60																				
62																				
64																				
66																				
68																				
70																				
72																				
74																				
76																				
78																				
80																				
82																				
84																				
86																				
88																				

CEOT, NOWELL 7  
CPI 95/10



**SOIL TEST BORING NO. B-5**

**BUNNELL-LAMMONS  
ENGINEERING, INC.**  
GEOTECHNICAL AND ENVIRONMENTAL  
CONSULTANTS

PROJECT: Jasmine Point Cliffs at Keowee Falls South PROJECT NO.: J10-7112-01  
 CLIENT: The Cliffs START: 6-7-10 END: 6-7-10  
 LOCATION: Lot 32 ELEVATION: \_\_\_\_\_  
 DRILLER: Metro Drill, Inc., Reid and Kelth LOGGED BY: D. Parkins  
 DRILLING METHOD: BK-51: 2-1/4 Inch ID hollow stem auger  
 DEPTH TO - WATER> INITIAL: ∇ 53.5 AFTER 24 HOURS: ∇ CAVING> XXXX

ELEVATION/ DEPTH (FT)	SOIL DESCRIPTION	SOIL TYPE	SAMPLES	STANDARD PENETRATION RESULTS BLOWS/FOOT															
				2	5	10	20	30	40	50	70	90							
2	Firm, yellowish-red, fine to medium sandy SILT - (residuum)		4 4 4																
4	Firm, yellowish-red with gray, silty, fine to medium SAND		4 5 7																
6	PARTIALLY WEATHERED ROCK - no recovery		50/1"																
8																			
10	Firm, yellowish-red with white and gray, fine to coarse sandy SILT with gravel		3 3 4																
12																			
14	Loose, reddish-yellow with white and gray, micaceous, silty, fine to coarse SAND		3 4 3																
16																			
18																			
20			4 4 5																
22																			
24	Loose to very firm, yellowish-brown with white and gray, micaceous, silty, fine to medium SAND		3 5 4																
26																			
28																			
30			8 11 13																
32																			
34			8 9 10																
36																			
38																			
40	Firm, yellowish-brown with white and gray, micaceous, silty, fine to medium SAND with gravel		5 8 9																
42																			
44	Firm, grayish-brown with white and gray, micaceous, silty, fine to medium SAND		6 7																

GEOT. NOVELL 71 ... GPJ BSH10

SOIL TEST BORING NO. B-5  
Sheet 1 of 2



**BUNNELL-LAMMONS  
ENGINEERING, INC.**

GEOTECHNICAL AND ENVIRONMENTAL  
CONSULTANTS

**SOIL TEST BORING NO. B-5**

PROJECT: Jasmine Point Cliffs at Keowee Falls South

PROJECT NO.: J10-7112-01

CLIENT: The Cliffs

START: 6-7-10 END: 6-7-10

LOCATION: Lot 32

ELEVATION: \_\_\_\_\_

DRILLER: Metro Drill, Inc., Reid and Kalth

LOGGED BY: D. Parkins

DRILLING METHOD: BK-51; 2-1/4 inch ID hollow stem auger

DEPTH TO - WATER> INITIAL: 53.5 AFTER 24 HOURS: 53.5

CAVING> 53.5

ELEVATION/ DEPTH (FT)	SOIL DESCRIPTION	SOIL TYPE	SAMPLES	STANDARD PENETRATION RESULTS BLOWS/FOOT																
				2	5	10	20	30	40	50	70	90								
46	Firm, grayish-brown with white and gray, micaceous, silty, fine to medium SAND		10																	
48	Very firm, grayish-brown with white and gray, very micaceous, silty, fine to medium SAND with some gravel		9																	
50			11																	
52			13																	
54	Firm to dense, yellowish-red with white, gray and yellowish-brown, very micaceous, silty, fine to medium SAND		7																	
56	PARTIALLY WEATHERED ROCK which sampled as yellowish-brown with gray, micaceous, silty, fine to coarse SAND		9																	
58			11																	
60			10																	
62			18																	
64	Auger refusal at 66 feet. Groundwater encountered at 53.5 feet at time of drilling. Slope inclinometer set at 59 feet due to hole caving. Boring offset 5 feet.		21																	
66			50/2"																	
68																				
70																				
72																				
74																				
76																				
78																				
80																				
82																				
84																				
86																				
88																				

GEOI. NOVELL, T. GPJ 9811D

SOIL TEST BORING NO. B-5  
Sheet 2 of 2

**IBLE** INC.

**BUNNELL-LAMMONS  
ENGINEERING, INC.**  
GEOTECHNICAL AND ENVIRONMENTAL  
CONSULTANTS

**SOIL TEST BORING NO. B-6**

PROJECT: Jasmine Point Cliffs at Keowee Falls South  
 CLIENT: The Cliffs  
 LOCATION: Lot 32  
 DRILLER: Metro Drill, Inc., Reid and Keith  
 DRILLING METHOD: BK-51; 2-1/4 inch ID hollow stem auger  
 DEPTH TO - WATER> INITIAL: 33.5 AFTER 24 HOURS: 33.5 CAVING> XXXX

PROJECT NO.: J10-7112-01  
 START: 6-3-10 END: 6-3-10  
 ELEVATION: \_\_\_\_\_  
 LOGGED BY: D. Parkins

ELEVATION/ DEPTH (FT)	SOIL DESCRIPTION	SOIL TYPE	SAMPLES	STANDARD PENETRATION RESULTS BLOWS/FOOT									
				2	5	10	20	30	40	50	70	90	
2	Firm, red, micaceous, fine to medium sandy SILT - (fill)		3 4 5			•							
4	Loose, yellowish-red, silty, fine to medium SAND - (fill)		2 3 4			•							
6			3 3 3			•							
8			2 3 3			•							
10	Firm, yellowish-red, fine to medium sandy SILT with tiny roots - (residium)		2 3 3			•							
14	Loose, white with gray, fine to coarse SAND		3 4 5			•							
18			3 3 5			•							
20	Loose, white with pink and light brown, fine to coarse SAND		3 3 5			•							
24	Firm, yellowish-brown with white, very micaceous, silty, fine to coarse SAND		4 6 7			•							
30			5 7 7			•							
34	Loose, brown with gray, very micaceous, silty, fine SAND		3 4 6			•							
38			4 5 7			•							
40	Firm, grayish-brown, very micaceous, silty, fine to medium SAND		4 5 7			•							
44			5 7			•							

GEOT. NOVELL 7; .GPI 9/9/10

SOIL TEST BORING NO. B-6  
Sheet 1 of 2



### SOIL TEST BORING NO. B-6

**BUNNELL-LAMMONS  
ENGINEERING, INC.**  
GEOTECHNICAL AND ENVIRONMENTAL  
CONSULTANTS

PROJECT: Jasmine Point Cliffs at Keowee Falls South  
CLIENT: The Cliffs  
LOCATION: Lot 32  
DRILLER: Metro Drill, Inc., Reid and Kelth  
DRILLING METHOD: BK-51; 2-1/4 Inch ID hollow stem auger  
DEPTH TO - WATER> INITIAL: 33.5 AFTER 24 HOURS: 33.5 CAVING> 33.5

PROJECT NO.: J10-7112-01  
START: 6-3-10 END: 6-3-10  
ELEVATION: \_\_\_\_\_  
LOGGED BY: D. Parkins

ELEVATION/ DEPTH (FT)	SOIL DESCRIPTION	SOIL TYPE	SAMPLES	STANDARD PENETRATION RESULTS BLOWS/FOOT																
				2	5	10	20	30	40	50	70	90								
46	Firm, grayish-brown, very micaceous, silty, fine to medium SAND		9																	
48	Dense, white with yellow and gray, micaceous, silty, fine to coarse SAND with gravel		14																	
50			17																	
52			21																	
54	PARTIALLY WEATHERED ROCK which sampled as gray with pink, silty, fine to medium SAND		10																	
56	Auger refusal at 59 feet. Groundwater encountered at 33.5 feet at time of drilling and at 33.5 feet after 24 hours. Slope Inclnometer set at 59 feet.		29																	
58			50/4"																	
58			50/2.5"																	
60																				
62																				
64																				
66																				
68																				
70																				
72																				
74																				
76																				
78																				
80																				
82																				
84																				
86																				
88																				

GEOT. NOVELL 31.GPJ 9/2/10

SOIL TEST BORING NO. B-6  
Sheet 2 of 2

## KEY TO SOIL CLASSIFICATIONS AND CONSISTENCY DESCRIPTIONS

BUNNELL-LAMMONS ENGINEERING, INC.  
GREENVILLE, SOUTH CAROLINA

### Penetration Resistance\* Blows per Foot

SANDS

0 to 4  
5 to 10  
11 to 20  
21 to 30  
31 to 50  
over 50

### Relative Density

Very Loose  
Loose  
Firm  
Very Firm  
Dense  
Very Dense

### Particle Size Identification

Boulder: Greater than 300 mm  
Cobble: 75 to 300 mm  
Gravel:  
Coarse - 19 to 75 mm  
Fine - 4.75 to 19 mm  
Sand:  
Coarse - 2 to 4.75 mm  
Medium - 0.425 to 2 mm  
Fine - 0.075 to 0.425 mm  
Silt & Clay: Less than 0.075 mm

### Penetration Resistance\* Blows per Foot

SILTS and CLAYS

0 to 2  
3 to 4  
5 to 8  
9 to 15  
16 to 30  
31 to 50  
over 50

### Consistency

Very Soft  
Soft  
Firm  
Stiff  
Very Stiff  
Hard  
Very Hard

\*ASTM D 1586

## KEY TO DRILLING SYMBOLS



Grab Sample



Split Spoon Sample



Undisturbed Sample

NR = No reaction to HCL

NA = Not applicable

NS = No sample



Groundwater Table at Time of Drilling



Groundwater Table 24 Hours after Completion of Drilling

## KEY TO SOIL CLASSIFICATIONS



Well-graded Gravel  
GW



Low Plasticity Clay  
CL



Clayey Silt  
MH



Silty Sand  
SM



Poorly-graded Gravel  
GP



Sandy Clay  
CLS



Sandy Silt  
MLS



Topsoil  
TOPSOIL



Partially Weathered Rock  
BLDRCBBL



Silty Clay  
CL-ML



Sand  
SW



Trash  
MUCKPEAT



High Plasticity Clay  
CH



Silt  
ML



Clayey Sand  
SC



FILL  
FILL



Poorly Graded Sand  
SP



Bedrock  
BEDROCK



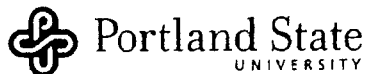
Limestone  
LIMESTONE



# ***H*OMEOWNER'S GUIDE *to* LANDSLIDES**

RECOGNITION, PREVENTION, CONTROL,  
*and* MITIGATION

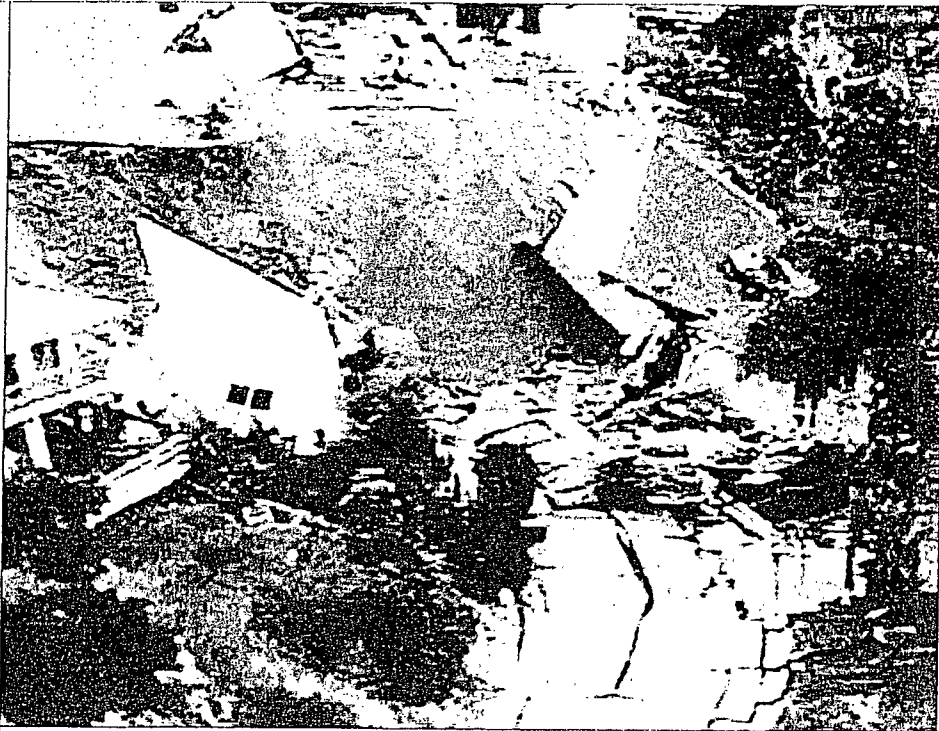
Compiled by  
Dr. Scott F. Burns  
Tessa M. Harden  
Carin J. Andrew



Federal Emergency  
Management Agency  
Region 10



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Laguna Beach, California (2007). Photo credit: USGS [www.usgs.gov](http://www.usgs.gov).

### **If you are in immediate danger:**

- EVACUATE IMMEDIATELY
- Inform your neighbors
- Call the police or fire department
- Call a registered engineering geologist or a geotechnical engineer

### **Warning signs include:**

- House is making noises
- Walls and floors are tilting
- Cracks in house are actively opening
- Cracks in ground are appearing
- Water in drainages becomes irregular or stops

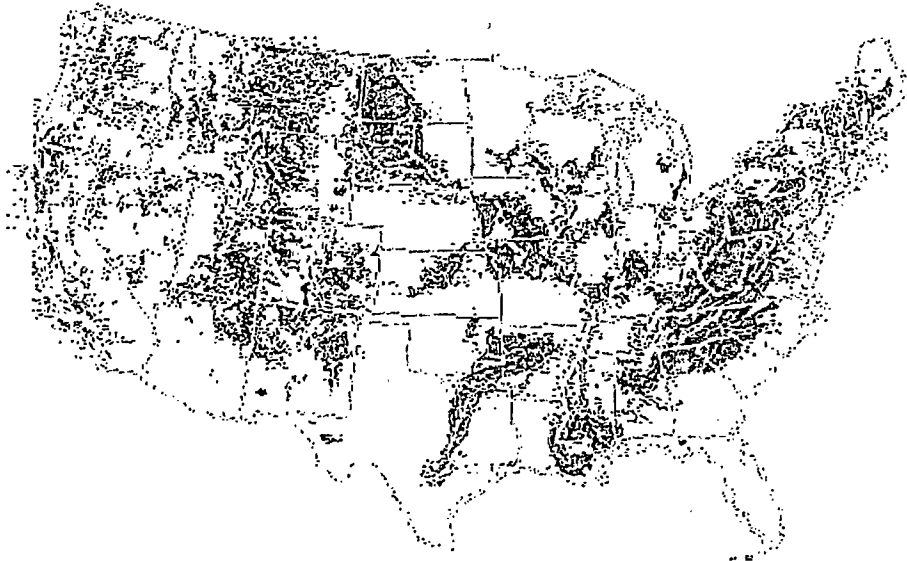
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**Cover:** Kelso, Washington (1998), site of America's second largest landslide disaster involving homes where 60 homes were destroyed. **Photo credit:** Scott Burns.

## I. DEFINITION

Landslides occur when masses of rock, soil, or debris move down a slope under the force of gravity. The term landslide includes a wide range of ground movement such as rockfalls, mud and debris flows, and surface failures called slumps, earthflows, and translational slides. Landslides can occur in a matter of seconds or over the course of weeks and longer.



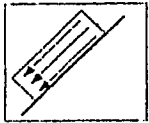
Landslide potential map - colors represent different levels of activity with red being highest, yellow moderate, green low, and white very low. Credit: USGS [www.usgs.gov](http://www.usgs.gov).

## II. U.S. LANDSLIDE FACTS

- Landslides can occur in all 50 states
- Damages total approximately \$3.5 billion/year
- Landslides cause an average of 25-50 deaths/year
- Landslides reduce real estate value
- Landslides are generally not covered on homeowner's insurance policies

### III. TYPES OF LANDSLIDES

#### SLIDES (translational or planar)



Down-slope movement of soil and/or rock on a plane of weak material can occur on relatively moderate to steep slopes, especially in weak geologic materials.

#### ROCKFALLS



Rapid, near vertical, movement of rocks that involves free-falling, bouncing, and rolling; often occurs in areas with near vertical exposures of rock.

#### SLUMPS (rotational)



Unconsolidated materials (such as soil and debris) move down-slope in a distinctive rotational motion, usually occurs on moderate to steep slopes.

#### EARTH FLOWS



Unchannelized flow of water, soil, rock, and vegetation that moves down-slope, occurs on steep slopes. No failure surface at bottom.

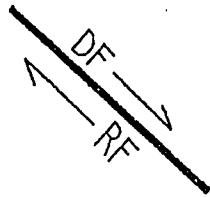
#### DEBRIS/ MUD FLOWS



Rapidly moving, channelized slurry flow of water, soil, rock, and vegetation; occurs mainly in drainage channels.

## IV. CAUSES OF LANDSLIDES

Two forces affecting landslides are:



- 1) Driving Forces (DF) cause the slope to move
- 2) Resisting Forces (RF) stabilize the slope and prevent movement

When the driving forces exceed the resisting forces, landslides occur. To prevent or mitigate landslides, increase resisting forces or decrease driving forces.

**Factors increasing driving forces:**

- 1) Over-steepened slopes
- 2) Adding water to slope from landscape irrigation, roof downspouts, broken sewer and water lines, and poor stormwater drainage
- 3) Heavy rainfall and/or rapid snowmelt
- 4) Loading extra material at the top of the slope

Earthquakes and heavy precipitation can also trigger landslides on susceptible slopes.

**Factors increasing resisting forces:**

- 1) Removing excess water from slopes
- 2) Adding buttress material at base of a slope
- 3) Building retaining walls

# V. LANDSLIDE RECOGNITION BEFORE YOU BUILD

## SIGNS OF LANDSLIDE POTENTIAL OR ACTIVITY

**Steep slopes** – problems often occur on slopes steeper than 10-15 degrees.

**Suspect landforms** may indicate past ground movement. Landforms such as steep, curved scarps are common at the top of landslides. Hummocky (lumpy and bumpy) ground often indicates a former landslide. Trees that lean in different directions or have bent lower tree trunks (trees with knees) are also indicators.



Suspect landforms include: Scarps, sunken or down-dropped roads, and 'trees with knees'.  
Top left scarp photo credit: USGS [www.usgs.gov](http://www.usgs.gov). Middle road and trees top right photo credits: Scott Burns.

**To learn where landslides have occurred** in your area contact local officials, state geologic surveys, departments of natural resources, or university geosciences departments.  
***Slopes where landslides have occurred in the past have a higher likelihood of movement in the future.***

## **WHEN YOU BUILD**

Buildings should be located away from high risk areas such as steep slopes, rivers and streams (perennial or ephemeral), and fans at the mouth of mountain channels.

**Consult** a certified or licensed engineering geologist (**CEG** or **LEG**) or a registered/licensed geologist (**RG**) or a professional geotechnical engineer (**PE**) if you plan on building on a location that is a **high risk** area.

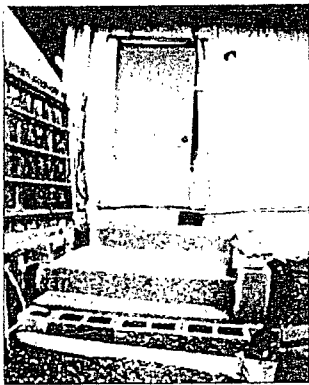
## **AREAS PRONE TO LANDSLIDES INCLUDE:**

- Areas where previous landslides have occurred
- Steep natural slopes particularly in weak geologic materials
- Canyons and areas in or around drainages
- Developed hillsides where landscapes are irrigated
- Below cliffs or hills with outcrops of fractured rocks
- Steep slopes where surface runoff is directed onto the slope
- Areas where wildfires or human modification have removed vegetation from the slopes

# VI. MONITORING YOUR HOUSE AND SURROUNDING PROPERTY

## SIGNS OF LANDSLIDE ACTIVITY

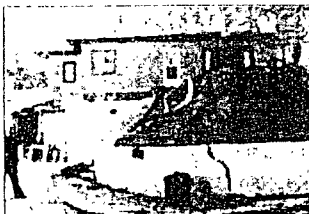
### STRUCTURES:



House cracks. Photo credit: Scott Burns.

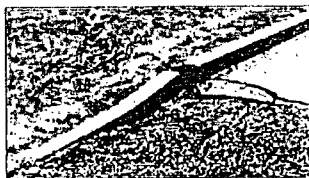
- Newly cracked pavement, foundation, support walls, sidewalks
- Tilted or cracked chimney
- Doors or windows that stick or jam for the first time
- Outside walls, walkways, or stairs start pulling away from the house
- Soil moves away from the foundation
- Plumbing or gas lines develop leaks

### PROPERTY:



Foundation cracks. Photo credit: FEMA [www.fema.gov](http://www.fema.gov).

- Bulging ground at base of slope
- Leaning fence posts or retaining walls
- Springs, seeps, or saturated soil in areas that have been typically dry
- Cracks in the ground
- Tilted trees or utility poles



Street and ground cracks. Photo credit: Scott Burns.

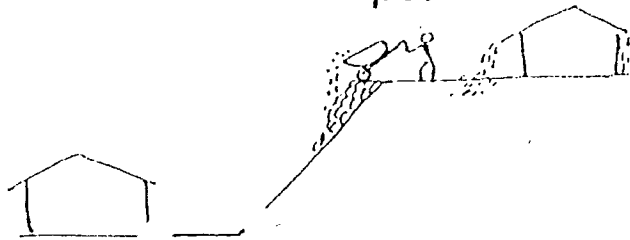
*If you have some of the above signs, your land may be slowly creeping. It may be an old landslide that has started to reactivate. Call a registered/licensed professional.*

9

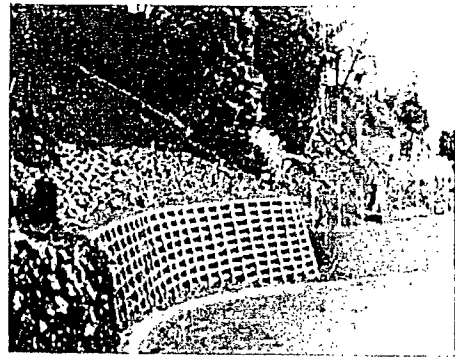
## VII. REDUCE THE LIKELIHOOD OF A LANDSLIDE

- Minimize irrigation on slopes
- Make sure water and sewer lines do not leak
- Avoid removing material from the base of slopes

- **Avoid adding material or excess water to the top of slopes**



- Drain water from surface runoff, down-spouts, and driveways well away from slopes and into storm drains or natural drainages
- Plant ground cover with deep roots on slopes
- Build retaining walls at the base of the slope
- In debris/mud flow prone areas, in valley bottoms or on fans at the mouths of canyons, contact qualified professionals to determine how to best build channels and/or deflection walls to direct the flow around buildings (keeping in mind your neighbors)



Retaining wall at bottom of a slope.  
Photo credit: Scott Burns.

## VIII. QUICK GUIDE TO ASSESS LANDSLIDE POTENTIAL

- Have there been landslides in the area in the past?
- Is the house or site on or near a steep slope?
- Is there a cliff nearby?
- Is the ground cracked?
- Are there any old scarps on the slope?
- Is there a spring, seep or ponding water close by?
- Is there a drainage channel nearby?
- Are there any tilted or leaning trees, fences, or utility poles nearby?
- Do the trees have bent tree trunks?
- Is there any sign of cracking, or patched cracks in the walls or foundations
- Is the driveway or sidewalk cracked, patched, or down-dropped?
- Are any retaining walls cracked, tilted or off-set?
- Have any structures such as concrete steps moved away from the house?

**If you have any of these signs your house could be susceptible to a landslide.**

11

## **IX. ADDITIONAL INFORMATION**

Federal Emergency Management Agency (FEMA) [www.fema.gov](http://www.fema.gov)  
1-800-621-FEMA (3362)

United States Geological Survey (USGS) [www.usgs.gov](http://www.usgs.gov)

National Landslide Info Center <http://landslides.usgs.gov>  
1-800-654-4666

### **Important local phone numbers and agencies:**

(Oregon) Nature of the Northwest Information Center: carries landslide hazard maps and other reports <http://www.naturenw.org> (503) 872-2750

Oregon Department of Geology and Mineral Industries (DOGAMI): maps landslides and issues reports [www.oregongeology.com](http://www.oregongeology.com) (971) 673-1555

Oregon Department of Forestry Debris flow Warning System: provides current forecasts and warnings <http://egov.oregon.gov/ODF>

Oregon: to check licensing for engineers (Oregon State Board of Examiners for Engineering and Land Surveying): <http://osbeels.org/>  
(503) 566-2837

Oregon: to get lists of licensed geologists (Oregon State Board of Geology Examiners) [www.oregon.gov/OSBGE/registrants](http://www.oregon.gov/OSBGE/registrants) (503) 566-2837

Washington State Department of Natural Resources: landslide information [www.dnr.wa.gov/geology/hazards/lsides.htm](http://www.dnr.wa.gov/geology/hazards/lsides.htm)

Washington State Department of Natural Resources: general information inquiries (360) 902-1000

Washington State Department of Licensing: to check professional license status [www.dol.wa.gov/business/checkstatus.html](http://www.dol.wa.gov/business/checkstatus.html)

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STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
Kevin McCarthy and Courtney E. McCarthy,	)	C.A. No.: 2011-CP-23-____
	)	
Plaintiffs,	)	<b>AFFIDAVIT OF</b>
	)	<b>CARROLL L. CROWTHER, P.E.</b>
vs.	)	
	)	
Keowee Falls Investment Group, LLC and S&ME,	)	
	)	
Defendants.	)	

PERSONALLY APPEARED BEFORE ME, the undersigned officer duly authorized to administer oaths, Carroll L. Crowther, who, after being duly sworn, states as follows:


1. I am a citizen and resident of the State of South Carolina, County of Beaufort, and I am over the age of twenty-one years.
2. I have a Bachelor of Science in Civil Engineering degree from The Citadel (1961) and a Master of Science in Civil Engineering degree from The Georgia institute of Technology (1963).
3. I currently hold active Professional Engineer licenses in the States of Georgia and South Carolina.
4. I am employed by Whitaker Laboratories, Inc. of Savannah, Georgia and have been since 1997. My current position is as a Senior Consultant in Geotechnical Engineering. My responsibilities include report generation and review, and advice, analysis and consultation to the engineering and management staff in all areas of geotechnical engineering.




5. The information and statements contained in this Affidavit are based upon my knowledge, skill, experience, training and education in the field of geotechnical engineering. I am also familiar with the standards of care in the field of geotechnical engineering.
6. By virtue of my knowledge, skill, experience, training and education in the field of engineering I am qualified to review the reports, drawings and work of other engineers for errors and omissions contained in those reports, drawings, and work.
7. I was retained by Mr. Kevin McCarthy to review the engineering reports prepared by others concerning Lots 30, 31 and 32, Jasmine Point, The Cliffs, Salem, South Carolina
8. I have read and considered all of the documents listed below:
  - S&ME Inc. Report dated July 18, 2005 – signed by Michael Revis, P.E. and Howard Perry, P.E.
  - S&ME Inc. Report dated June 3, 2008 – signed by Jason Vaughn, E.I.T. and Mike Revis, P.E.
  - S&ME Inc. Report dated May 15, 2009 – signed and stamped by Walker Birdsong, P.E. and David Swoap, P.E.
  - S&ME Inc. Report dated February 12, 2010 – signed and stamped by Walker Birdsong, P.E. and David Swoap, P.E.
  - S&ME Inc. Report dated March 5, 2010 – signed and stamped by Walker Birdsong, P.E. and David Swoap, P.E.
  - BLE, Inc. Report dated 1 March 2010, prepared on this site.
  - BLE, Inc. Report dated 25 October 2010, prepared on this site.
  - BLE, Inc. Report dated 11 April 2011, prepared on this site.
  - IMZ Waterfront mitigation plan and photos of Lot 32 prepared by TUI/Shorescapes of Easley SC.
9. In addition to reviewing the above documents, I made a visual inspection of this Lot 32 on August 1, 2011. I earlier had made visual inspection of the adjacent properties on this Lake Keowee development, including the Lots 30 & 31 on June 3, 2011.

10. Based on my engineering experience, my site visits, my review of the geotechnical investigations conducted for this site, it is my opinion that the McCarthy's property, and immediately adjacent properties are experiencing an on-going shear failure of the hillside. This shear failure, and slope instability extends up into the cul-de-sac area of Jasmine Cove.
11. It is further my opinion that this state of failure existed in advance of the first, and all subsequent, geotechnical investigations by S&ME, Inc. Visual observations of scars from this state of failure are acknowledged in the July 2005 S&ME Inc report; however the significance of these observations is not acknowledged.
12. Based upon my investigation as hereinabove described, I believe that S&ME's conduct fell below the standard of care in the field of geotechnical engineering and was negligent in at least the following respects:
- By failing to recognize the visual indications of an active slope failure during the preparation of five separate geotechnical reports on the adjacent lot 31.
  - By failing to recognize the extension of the failure zone to adjacent lots 30 and 32.
  - By failing to provide timely warning to the developer of these properties of the existence of an active slope failure on the site.
  - By failing to pursue investigations into the site instability that would have further identified the risks to the developer and subsequent purchasers of the property.

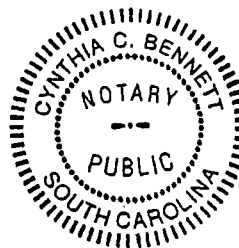
Further, Affiant Sayeth Naught.

  
 CARROLL L. CROWTHER, P.E.

Sworn to before me this 22<sup>nd</sup>  
 day of September, 2011.

  
 Notary Public, State of South Carolina  
 My Commission Expires: March 2, 2014

My Commission Expires  
 March 2, 2014



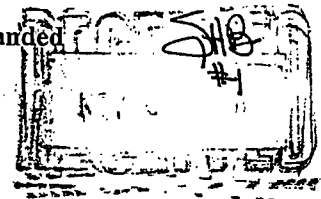
STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Kevin McCarthy and Courtney E. McCarthy, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 Keowee Falls Investment Group, LLC, The )  
 Cliffs Communities, LLC d/b/a The Cliff at )  
 Keowee Falls South, Cliffs Real Estate, Inc., )  
 The Cliffs Golf and Country Club, Inc., and )  
 S&ME, Inc., )  
 )  
 Defendants: )

IN THE COURT OF COMMON PLEAS

ANSWER OF S&ME, INC.

C.A. No.: 2011-CP-23-6376

Jury Trial Demanded



Defendant S&ME, Inc. ("S&ME"), answering the Complaint of Plaintiffs, would respectfully allege and show unto the Court as follows:

**FOR A FIRST DEFENSE**

1. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 1 of the Complaint and therefore denies same.
2. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 2 of the Complaint and therefore denies same.
3. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 3 of the Complaint and therefore denies same.
4. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 4 of the Complaint and therefore denies same.
5. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 5 of the Complaint and therefore denies same.

6. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 6 of the Complaint and therefore denies same.

7. In response to the allegations contained in paragraph 7 of the Complaint, S&ME admits that it is a North Carolina corporation and that it maintains an office in Greenville County, South Carolina. S&ME admits that it performed certain geotechnical services relating to property in the Cliffs at Keowee Falls development. S&ME denies the remaining allegations contained in paragraph 7 of the Complaint.

SFB  
#2

8. In response to the allegations contained in paragraph 8 of the Complaint, S&ME admits that this Court has jurisdiction but denies that Plaintiffs are entitled to any relief against S&ME.

9. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 9 of the Complaint and therefore denies same.

10. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 10 of the Complaint and therefore denies same.

11. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 11 of the Complaint and therefore denies same.

12. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 12 of the Complaint and therefore denies same.

13. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 13 of the Complaint and therefore denies same.

14. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 14 of the Complaint and therefore denies same.

15. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 15 of the Complaint and therefore denies same.

16. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 16 of the Complaint and therefore denies same.

17. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 17 of the Complaint and therefore denies same.

18. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 18 of the Complaint and therefore denies same.

19. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 19 of the Complaint and therefore denies same.

20. S&ME denies the allegations contained in paragraph 20 of the Complaint.

21. To the extent that the allegations contained in paragraph 21 require a response, they are denied.

22. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 22 of the Complaint and therefore denies same.

23. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 23 of the Complaint and therefore denies same.

24. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 24 of the Complaint and therefore denies same.

25. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 25 of the Complaint and therefore denies same.

26. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 26 of the Complaint and therefore denies same.

SIB  
#3

27. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 27 of the Complaint and therefore denies same.

28. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 28 of the Complaint and therefore denies same.

29. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 29 of the Complaint and therefore denies same.

SAB  
#4

30. To the extent that the allegations contained in paragraph 30 require a response, they are denied.

31. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 31 of the Complaint and therefore denies same.

32. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 32 of the Complaint and therefore denies same.

33. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 33 of the Complaint and therefore denies same.

34. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 34 of the Complaint and therefore denies same.

35. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 35 of the Complaint and therefore denies same.

36. To the extent that the allegations contained in paragraph 36 require a response, they are denied.

37. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 37 of the Complaint and therefore denies same.

38. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 38 of the Complaint and therefore denies same.
39. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 39 of the Complaint and therefore denies same.
40. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 40 of the Complaint and therefore denies same.
41. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 41 of the Complaint and therefore denies same.
42. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 42 of the Complaint and therefore denies same.
43. To the extent that the allegations contained in paragraph 43 of the Complaint require a response, they are denied.
44. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 44 of the Complaint and therefore denies same.
45. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 45 of the Complaint and therefore denies same.
46. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 46 of the Complaint and therefore denies same.
47. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 47 of the Complaint and therefore denies same.
48. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 48 of the Complaint and therefore denies same.

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+5

49. To the extent that the allegations contained in paragraph 49 require a response, they are denied.

50. S&ME denies the allegations contained in paragraph 50 of the Complaint.

51. In response to the allegations contained in paragraph 51 of the Complaint, S&ME admits that it issued certain geotechnical reports. S&ME denies the remaining allegations contained in paragraph 51 of the Complaint.

52. S&ME denies the allegations contained in paragraph 52 of the Complaint.

53. S&ME denies the allegations contained in paragraph 53 of the Complaint.

54. S&ME denies the allegations contained in paragraph 54 of the Complaint.

55. S&ME denies the allegations contained in paragraph 55 of the Complaint.

56. S&ME denies the allegations contained in paragraph 56 of the Complaint.

57. S&ME denies the allegations contained in paragraph 57 of the Complaint.

58. In response to the allegations contained in paragraph 58 of the Complaint, S&ME admits that an affidavit of Carroll L. Crowther is attached to the Complaint. S&ME denies the remaining allegations contained in paragraph 58 of the Complaint.

59. S&ME denies the allegations contained in paragraph 59 of the Complaint.

60. To the extent that the allegations contained in paragraph 60 of the Complaint require a response, they are denied.

61. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 61 of the Complaint and therefore denies same.

62. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 62 of the Complaint and therefore denies same.

SIB  
#6

63. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 63 of the Complaint and therefore denies same.
64. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 64 of the Complaint and therefore denies same.
65. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 65 of the Complaint and therefore denies same.
66. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 66 of the Complaint and therefore denies same.
67. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 67 of the Complaint and therefore denies same.
68. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 68 of the Complaint and therefore denies same.
69. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 69 of the Complaint and therefore denies same.
70. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 70 of the Complaint and therefore denies same.
71. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 71 of the Complaint and therefore denies same.
72. To the extent that the allegations contained in paragraph 72 require a response, they are denied.
73. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 73 of the Complaint and therefore denies same.

SIB  
+7

74. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 74 of the Complaint and therefore denies same.

75. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 75 of the Complaint and therefore denies same.

76. S&ME lacks sufficient information to form a belief concerning the truth of the allegations contained in paragraph 76 of the Complaint and therefore denies same.

77. Except as specifically admitted hereinabove, S&ME denies each and every allegation of Plaintiffs' Complaint.

SJB  
#8

**FOR A SECOND DEFENSE**

78. S&ME incorporates herein the allegations of its first defense that are consistent with this defense.

79. Plaintiffs' complaint fails to state facts sufficient to constitute a cause of action and it should be dismissed.

**FOR A THIRD DEFENSE**

80. S&ME incorporates herein the allegations of its first defense which are consistent with this defense.

81. Plaintiffs' claims are barred by the economic loss rule and must be dismissed.

**FOR A FOURTH DEFENSE**

82. S&ME incorporates herein the allegations of its first defense that are consistent with this defense.

83. Plaintiffs' claims are barred by the applicable statute of limitations.

**FOR A FIFTH DEFENSE**

84. S&ME incorporates herein the allegations of its first defense that are consistent with this defense.

85. S&ME alleges that any damages sustained by Plaintiffs were the direct and proximate result of careless, negligent, grossly negligent, reckless, willful and wanton conduct or other fault on the part of Plaintiffs in failing to exercise a degree of care and caution to be used by a reasonable and prudent person under the circumstances then and there existing.

86. The careless, negligent, grossly negligent, reckless, willful and wanton conduct and other fault of Plaintiffs as may be demonstrated in and through discovery, contributed more than fifty percent (50%) to the cause of the damages allegedly sustained by Plaintiffs and accordingly, Plaintiffs' claims are barred regardless of any fault by S&ME, which is specifically denied.

V/B  
#9

**FOR A SIXTH DEFENSE**

87. S&ME incorporates herein the allegations of its first defense which are consistent with this defense.

88. S&ME is entitled to a determination as to the percentage of careless, negligent, grossly negligent, reckless, willful or wanton conduct or other fault of Plaintiffs that contributed to Plaintiffs' alleged damages and to a reduction of any award to Plaintiffs by an amount equal to such percentage which the careless, negligent, grossly negligent, reckless, willful or wanton conduct or other fault of Plaintiffs contributed to Plaintiffs' alleged injuries and damages.

**FOR A SEVENTH DEFENSE**

89. S&ME incorporates herein the allegations of its first defense which are consistent with this defense.

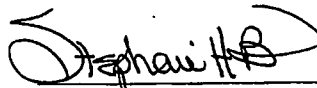
90. The injuries and damages of Plaintiffs, if any, are the proximate result of the intervening and superseding acts of third parties over whom S&ME had no authority, responsibility or control and S&ME pleads such intervening and superseding acts as a complete defense.

**FOR AN EIGHTH DEFENSE**

91. S&ME incorporates herein the allegations of its first defense that are consistent with this defense.

92. Plaintiffs have failed to mitigate their damages and S&ME pleads failure to mitigate as a defense.

WHEREFORE, having fully answered the Complaint of Plaintiffs, Defendant S&ME, Inc. prays that same be dismissed with costs and for such further and other relief as this Court shall deem just and proper.



---

Stephanie H. Burton (#13089)  
GIBBES BURTON, LLC  
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Telephone: (864) 327-5000  
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Attorneys for Defendant S&ME, Inc.

November 7, 2011  
Spartanburg, South Carolina

**DEFENDANTS DEMAND A TRIAL BY JURY.**

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF GREENVILLE )

IN THE COURT OF COMMON PLEAS  
NOV 1 4 2011  
Civil Action No. 2011-CP-23-6376

KEVIN MCCARTHY AND COURTNEY )  
R. MCCARTHY, )

Plaintiffs, )

vs. )

THE CLIFFS COMMUNITIES, LLC )  
D/B/A THE CLIFFS AT KEOWEE FALLS )  
SOUTH; KEOWEE FALLS )  
INVESTMENT GROUP, LLC; CLIFFS )  
REAL ESTATE, INC., THE CLIFFS )  
GOLF AND COUNTRY CLUB, INC.; )  
AND S&ME, INC., )

Defendants. )

**ANSWER**  
**(Jury Trial Demanded)**

Now come the Defendants The Cliffs Communities, Inc. ("The Cliffs"), improperly identified as The Cliffs Communities LLC d/b/a The Cliffs at Keowee Falls South, Keowee Falls Investment Group, LLC ("KFIG"), Cliffs Real Estate, Inc. ("CRE") and The Cliffs Golf and Country Club, Inc. ("CGC&C"), collectively referred to as Defendants, in answer to the Plaintiffs' Complaint responding as follows:

**FOR A FIRST DEFENSE**  
**(General Denial)**

1. Each and every allegation not hereinafter specifically admitted is denied and strict proof thereof is demanded.
2. Defendants lack sufficient knowledge and information to form a belief as to the truth of the allegations in Paragraph 1 of the Complaint, and therefore deny the same.

3. Defendants deny Paragraph 2 of the Complaint as alleged and would show that The Cliffs Communities, Inc. has been improperly identified as The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South.

4. With regard to Paragraph 3 of the Complaint, Defendants admit that KFIG is a limited liability company existing under the laws of the State of South Carolina with its primary place of business in Greenville County, South Carolina and would show that The Cliffs are the sole member of KFIG. Defendants deny the remaining allegations in said paragraph.

5. With regard to Paragraph 4 of the Complaint, Defendants admit that "CRE" is a corporation existing under the laws of the State of South Carolina and has its primary place of business in Greenville County, South Carolina. Defendants deny the remaining allegations of said paragraph.

6. With regard to Paragraph 5 of the Complaint, Defendants admit that "CGC&C" is a corporation existing under the laws of the State of South Carolina with its primary place of business in Greenville County, South Carolina and that it was a party to the Real Estate Sale and Purchase Agreement and was paid monies. Defendants deny the remaining allegations of said paragraph.

7. Defendants deny Paragraph 6 of the Complaint as alleged.

8. Defendants admit Paragraph 7 of the Complaint.

9. With regard to Paragraph 8 of the Complaint, Defendants admit that jurisdiction and venue are proper in this Court, but deny that they are liable for any allegations in the Complaint.

10. With regard to Paragraph 9 of the Complaint, Defendants deny that J. Scott was an employee of the Cliffs Defendants. Defendants lack sufficient knowledge and information to

form a belief as to the truth of the remaining allegations in said paragraph, and therefore demand strict proof thereof.

11. With regard to Paragraph 10 of the Complaint, Defendants admit only that they gave the HUD report of May 5, 2004 to the Plaintiffs and attached it to the contract for purchase of Lot 32 and crave reference to the terms and language contained in the HUD report and deny any allegations inconsistent therewith.

12. With regard to Paragraph 11 of the Complaint, Defendants admit that the Plaintiffs executed a Real Estate Sale and Purchase Agreement and deny the remaining allegations of said paragraph.

13. With regard to Paragraph 12 of the Complaint, Defendants crave reference to the terms of the contract referenced in said paragraph and deny any allegations inconsistent therewith. Defendants also lack sufficient knowledge and information as to the truth or falsity of the allegations regarding the Plaintiffs' intentions, and, therefore deny the same.

14. With regard to Paragraph 13, Defendants crave reference to the terms and language contained in the HUD report and contract for purchase of Lot 32 and deny any allegations inconsistent therewith.

15. With regard to Paragraph 14, Defendants crave reference to the terms and language contained in the contract and deny any allegations inconsistent therewith.

16. With regard to Paragraph 15, Defendants crave reference to the terms and language contained in that contract and deny any allegations inconsistent therewith.

17. Defendants lack sufficient knowledge and information to form a belief as to the truth of the allegations in Paragraph 16 of the Complaint, and therefore deny the same.

18. Defendants lack sufficient knowledge and information to form a belief as to the truth of the allegations in Paragraph 17 of the Complaint, and therefore deny the same.

19. With regard to Paragraph 18, Defendants lack sufficient knowledge and information to form a belief as to the truth of the allegations regarding the hiring of Carroll L. Crowther and his investigation of Plaintiffs' lot, and therefore deny the same. Defendants admit that they received a report from Carroll L. Crowther, P.E. attached as Exhibit "E" to Plaintiffs' Complaint and that he made opinions in said report. Defendants deny the remaining allegations of said paragraph.

20. With regard to Paragraph 19, Defendants crave reference to that report for the specific language and terms of the report. Defendants deny the remaining allegations of said paragraph.

21. Defendants deny Paragraph 20 of the Complaint.

22. With regard to Paragraph 21 of the Complaint, Defendants repeat the preceding paragraphs as if set forth verbatim herein.

23. With regard to Paragraph 22 of the Complaint Defendants admit that the Plaintiff entered into a contract for the purchase of Lot 32, Jasmine Cove in The Cliffs at Keowee Falls South subdivision, but deny the remaining allegations of said paragraph.

24. With regards to Paragraphs 23, 24 and 25 of the Complaint, Defendants crave reference to the contract attached to the Complaint and deny any allegations inconsistent therewith. Defendants deny the remaining allegations in said paragraphs.

25. Defendants deny Paragraphs 26, including subparts (i) through (v), 27, 28 and 29 of the Complaint.

26. With regard to Paragraph 30 of the Complaint, Defendants repeat the preceding paragraphs as if set forth verbatim herein.

27. Defendants deny Paragraphs 31, 32, 33, 34 and 35 of the Complaint.

28. With regard to Paragraph 36 of the Complaint, Defendants repeat the preceding paragraphs as if set forth verbatim herein.

29. Defendants deny Paragraphs 37, 38, 39, 40, 41 and 42 of the Complaint.

30. With regard to Paragraph 43 of the Complaint, Defendants repeat the preceding paragraphs as if set forth verbatim herein.

31. Defendants deny Paragraphs 44, 45, 46, 47, and 48 of the Complaint.

32. With regard to Paragraph 49 of the Complaint, Defendants repeat the preceding paragraphs as if set forth verbatim herein.

33. The allegations in Paragraphs 50, 51, 52, 53, 54, 55, 56, 57, 58 and 59 of the Complaint are not directed at these Defendants and therefore no response is required. To the extent a response is required, Defendants deny any liability based on the allegations in said paragraphs.

34. With regard to Paragraph 60 of the Complaint, Defendants repeat the preceding paragraphs as if set forth verbatim herein.

35. Paragraphs 61 and 62 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendants deny that they are liable to Plaintiffs for any allegations in said paragraphs.

36. With regard to Paragraph 63 of the Complaint, the allegations regarding the Plaintiffs being purchasers within the provisions of the Act state legal conclusions to which no response is required. To the extent a response is required, Defendants deny that they are liable to Plaintiffs for any allegations in said paragraphs. Defendants deny that "the Defendants" referenced in said paragraph, collectively and individually, were the "Developer" or agents of the "Developer" within the context of the Act. Defendants lack sufficient knowledge and

information to form a belief as the truth or falsity of the allegations regarding where Mr. and Ms. McCarthy resided at the time of the sale, and therefore, deny the same.

37. Paragraph 64 of the Complaint states legal conclusions to which no response is required. To the extent a response is required, Defendants deny that they are liable to Plaintiffs for any allegations in said paragraph.

38. With regard to Paragraph 65 of the Complaint, the allegations that the subject Lot is not considered "exempt," as defined in the Act states legal conclusions to which no response is required. To the extent a response is required, Defendants deny that they are liable to Plaintiffs for any allegations in said paragraph. Defendants deny the remaining allegations of said paragraph.

39. Paragraph 66 of the Complaint states legal conclusions to which no response is required. To the extent a response is required, Defendants deny that they are liable to Plaintiffs for any allegations in said paragraph.

40. Defendants deny Paragraph 67 of the Complaint.

41. Paragraphs 68 and 69 of the Complaint state legal conclusions to which no response is required. To the extent a response is required, Defendants deny that they are liable to Plaintiffs for any allegations in said paragraphs.

42. Defendants deny Paragraphs 70 and 71 of the Complaint.

43. With regard to Paragraph 72 of the Complaint, Defendants repeat the preceding paragraphs as if set forth verbatim herein.

44. Defendants deny Paragraphs 73, 74, 75 and 76 of the Complaint.

45. Defendants deny Plaintiffs' Prayer for Relief, including subparts (a) through (j).

**FOR A SECOND DEFENSE**  
**(Failure to State a Claim)**

46. Plaintiffs' Complaint fails to state sufficient facts to constitute a cause of action against these Defendants, and therefore, the Complaint should be dismissed.

**FOR A THIRD DEFENSE**  
**(Statute of Limitations)**

47. Plaintiffs' Complaint is barred by the applicable statute of limitations and statutes of repose.

**FOR A FOURTH DEFENSE**  
**(Waiver, Estoppel, & Laches)**

48. Plaintiffs' claims against Defendants may be barred in whole or in part by the equitable doctrines of waiver, estoppel and/or laches.

**FOR A FIFTH DEFENSE**  
**(Others' Acts and Omissions)**

49. The alleged damages about which the Plaintiffs complain arose as a result of acts or omissions of others over whom Defendants had no control.

**FOR A SIXTH DEFENSE**  
**(Mitigation of Damages)**

50. The Plaintiffs have failed to mitigate their damages and such failure to mitigate is a complete defense.

**FOR A SEVENTH DEFENSE**  
**(Economic Loss)**

51. Defendants plead the economic loss rule as a complete bar to recovery.

**FOR AN EIGHTH DEFENSE**  
**(Comparative Negligence)**

52. Defendants plead the comparative negligence of the Plaintiffs and on this basis request a reduction of any judgment against them in an amount proportionate to the amount of negligence on the part of the Plaintiffs. Alternatively, to the extent that the negligence of the

Plaintiffs exceeds that of Defendants, if any, the claims are barred. This defense includes not only the negligence of the Plaintiffs, but also any gross negligence and willfulness on the part of the Plaintiffs.

**FOR A NINTH DEFENSE**  
**(South Carolina Code §15-38-15)**

53. Defendants would show that in the event that they are adjudged at fault in contributing to Plaintiffs' injuries and damages, which is expressly denied, Defendants are entitled to a special verdict pursuant to South Carolina Code §15-38-15 awarding damages based on the degree of fault of Defendants alone, after reduction of total damages based upon the comparative fault of Plaintiffs or co-defendants and any settlements reached with any other alleged tortfeasors.

**FOR A TENTH DEFENSE**  
**(Reliance Upon Others)**

54. Defendants would show that they in good faith relied on the professional advice they received from the co-defendant S&ME with regard to allegations in the Complaint, and therefore, they are not liable for claims asserted in the Complaint.

**FOR AN ELEVENTH DEFENSE**  
**(Punitive Damages)**

55. An award of punitive damages against Defendants will violate the rights guaranteed to them by the Constitution of the State of South Carolina for the following reasons:

- a) Any award of punitive damages violates the prohibition against excessive fines found in Article I, Section 15 of the Constitution of South Carolina; and
- b) Any award of punitive damages violates the guarantee of due process found in Article I, Section 3 of the Constitution of the State of South Carolina because of the lack of objective guidelines on which a jury might base its award and, further, that such guidelines as do exist are arbitrary and void for vagueness.

**FOR A TWELFTH DEFENSE**  
**(Punitive Damages)**

56. An award of punitive damages against Defendants will violate the rights guaranteed to them by the Constitution of the United States because any award of punitive damages violates the prohibition against excessive fines found in the Eighth Amendment of the Constitution of the United States as applied to the States by way of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

**FOR A THIRTEENTH DEFENSE**  
**(Reservation)**

57. Defendants reserve and do not waive any additional or further defenses as they may be revealed by discovery in this action.

WHEREFORE, having fully answered, Defendants pray that the Complaint be dismissed, for the costs of defending this action, and for such other relief as the Court and jury deem just and proper.

MCANGUS GOUDELOCK & COURIE, L.L.C.

  
\_\_\_\_\_

Elizabeth M. McMillan  
Post Office Box 2980  
75 Beattie Place, Suite 300 (29601)  
Greenville, South Carolina 29602  
(864) 239-4000

ATTORNEYS FOR DEFENDANTS  
THE CLIFFS COMMUNITIES, LLC

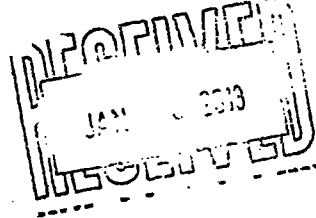
November 10, 2011

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Kevin McCarthy and Courtney E. )  
 McCarthy, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 Keowee Falls Investment Group, LLC, The )  
 Cliffs Communities, LLC d/b/a The Cliffs at )  
 Keowee Falls South, Cliffs Real Estate, Inc., )  
 The Cliffs Golf and Country Club, Inc., and )  
 S&ME, Inc., )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS

**DEFENDANT S&ME, INC.'S  
 MOTION FOR SUMMARY JUDGMENT**

C.A. No.: 2011-CP-23-6376



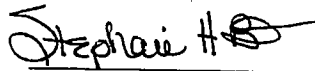
TO: THOMAS E. DUDLEY, III, ATTORNEYS FOR PLAINTIFFS AND ELIZABETH M. MCMILLAN, ATTORNEY FOR DEFENDANTS KEOWEE FALLS INVESTMENT GROUP, LLC AND THE CLIFFS COMMUNITIES, LLC D/B/A THE CLIFFS AT KEOWEE FALLS SOUTH, CLIFFS REAL ESTATE, INC., AND THE CLIFFS GOLF AND COUNTRY CLUB, INC.:

Defendant S&ME, Inc. ("S&ME") will move the Court, at such date and time as the Court shall direct, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, for an order granting summary judgment in its favor as a matter of law. This motion is based upon the following grounds:

1. There is no genuine issue as to any material fact.
2. There is no evidence that S&ME owed Plaintiffs any duty of care.
3. There is no evidence that any alleged professional negligence of S&ME proximately caused the damages claimed by Plaintiffs.
4. Plaintiffs' negligence claim is barred by the economic loss rule.

5. There is no evidence that S&ME acted in a willful or wanton manner or in reckless disregard to Plaintiffs' rights.
6. Plaintiffs have not asserted any legal claim which would entitle them to an award of attorney's fees against S&ME.
7. Plaintiffs cannot recover the purchase price of the lot because the evidence establishes that a repair is feasible.
8. Plaintiffs cannot recover for any loss of investment opportunity because their claims are unduly speculative.
9. S&ME is entitled to an order granting summary judgment in its favor as a matter of law.

This motion is based upon the pleadings filed in this action, the affidavit of Walker Birdsong filed herewith, upon the excerpts of depositions attached hereto, and upon applicable common and statutory law.



---

Stephanie H. Burton (#13089)  
Gibbes Burton, LLC  
308 East St. John Street  
Spartanburg, South Carolina 29302  
sburton@gibbesburton.com  
Telephone: 864-327-5000  
Facsimile: 864-327-5001

Attorneys for Defendant S&ME, Inc.

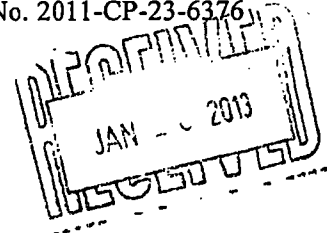
January 15, 2012  
Spartanburg, South Carolina

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Kevin McCarthy and Courtney E. )  
 McCarthy, )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 Keowee Falls Investment Group, LLC, The )  
 Cliffs Communities, LLC d/b/a The Cliffs at )  
 Keowee Falls South, Cliffs Real Estate, )  
 Inc., The Cliffs Golf and Country Club, )  
 Inc., and S&ME, Inc.. )  
 )  
 Defendants. )  
 )

IN THE COURT OF COMMON PLEAS

**AFFIDAVIT OF  
 WALKER BIRDSONG, P.E.**

C.A. No. 2011-CP-23-6376



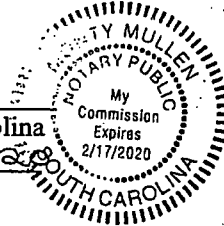
Personally appeared before me, Walker Birdsong, who being duly sworn, states as follows:

1. I am currently and I have been employed by S&ME, Inc. since 1982. I am familiar with the services provided by S&ME, Inc. at the Cliffs at Keowee Falls South, Jasmine Cove.
2. In 2005, S&ME, Inc. was retained by the Cliffs Communities, Inc. to perform certain geotechnical investigation services. By agreement with Cliffs Communities, Inc., S&ME, Inc. performed those services only on lot 31 at of the Cliffs at Keowee Falls South, Jasmine Cove. S&ME, Inc. provided its report concerning its services to the Cliffs Communities, Inc. A true and accurate copy of that report is attached as Exhibit A.
3. S&ME has never been asked by anyone to investigate the subsurface conditions of Lot 32 of the Cliffs at Keowee Falls South, Jasmine Cove.

*Walker Birdsong*  
Walker Birdsong

SWORN to before me this 14<sup>th</sup> day  
of January, 2013

*Mindy Muller*  
Notary Public for the State of South Carolina  
My Commission Expires: 2/17/2020



# EXHIBIT A

---

03.01.12 000009



DATE 7-12-05  
COMPILED/TYPED BY SC  
MAILED BY \_\_\_\_\_  
HAND DELIVERED BY \_\_\_\_\_  
AUTHOR/SENIOR AUTHOR \_\_\_\_\_  
(INITIALS)

July 18, 2005

Mr. Donald H. Nickell, Jr., P.E.  
The Cliffs Communities, Inc.  
301 Beaver Dam Road  
Travelers Rest, South Carolina 29690

**FILE COPY**  
THIS DOCUMENT DOES NOT LEAVE FILE

Reference: **SUBSURFACE EXPLORATION FINDINGS**  
**Cliffs Keowee Falls South - Lot #31 Jasmine Cove**  
Oconee County, South Carolina  
S&ME Project No. 1261-05-423A

Dear Don:

S&ME, Inc. is pleased to submit this Subsurface Exploration Findings letter for Lot #31 (Jasmine Cove) at the Cliffs Keowee Falls South development. Our work for the property included an exploration of subsurface conditions, analysis, opinions regarding the cause of unusual features on the property and our geotechnical engineering recommendations regarding supporting residential structures. This letter presents a brief confirmation of our understanding of the project, the exploration results, and our geotechnical conclusions and recommendations regarding the above considerations.

Lot #31 fronts Lake Keowee along its western shoreline. The lot slopes upward away from the lake at a visually estimated inclination on the order of about 4 horizontal to 1 vertical. There are approximately three "scarp" areas across the site, each approximately paralleling the water surface and the contour of the lots. These surface features are very unique.

The lot was explored with two soil testing borings (L-1 and L-2) performed below the main "scarp" area and one boring (L-3) above the main "scarp" area. Additionally, three trackhoe excavated test pits were performed at similar locations as the borings. At each test pit and boring location, soils that appear to be residual in nature and common to the Piedmont Geologic Province were encountered to termination or refusal depths of 20 to

S&ME, Inc.  
155 Trodd Street  
Spartanburg, South Carolina 29301

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(864) 232-8987 Greenville

[www.smeinc.com](http://www.smeinc.com)

07.12.11 S&ME 000102

Subsurface Exploration Findings—Cliffs Keowee Falls South  
Lot #31 Jasmine Cove, Oconee County, SC

S&ME Project No. 1261-05-423A  
July 2005

30 feet below the ground surface. The residual soils generally consist of silty sand or sandy silt; however, an upper layer of sandy clay was present in boring L-1. The Standard Penetration Resistance (N) values in the residual soils varied from 2 to 31 blows per foot with the majority of the values in the 2 to 5 blows per foot range. These values indicate a very soft to soft consistency for silts and clays, and a very loose to loose relative density for sands.

The boring data indicates that the lot contains some unique surface and subsurface anomalies. Although the boring data indicates very low consistency soils extend well below the ground surface, it did not indicate that the exposed "scarp" areas are the result of lateral movements or surface sloughing. The surface features could be terraced alluvium deposited during past geologic events or possibly old road cuts created during construction of Lake Keowee.

Based on the subsurface data and our experience, it is our opinion that residential structures can be supported on-site with some modification to improve the foundation soils. Several options are available for soil improvement, but we would recommend undercut and replacement or rammed aggregate piers as the most practical. The undercut area would include the building limits and an area extending at least 15 feet outside the building limits, and would extend 5 to 7 feet.

Rammed Aggregate Piers are a patented system consisting of drilling vertical holes (typically 30-inches in diameter) and filling them in layers with compacted crushed stone to the foundation bearing level. Rammed Aggregate Piers are stiffer than the surrounding soil and support a disproportionate share of the foundation load while reducing foundation settlement. After Rammed Aggregate Pier construction, foundations and/or floor slabs may be constructed conventionally.

For planning purposes, the cost of undercutting soils, replacing them with off-site borrow soils, and wasting the undercut soils off site is typically about \$12 to \$15 per cubic yard. However, a majority of the undercut soils would most likely be suitable for reuse as structural fill. As for the Rammed Aggregate Piers, we estimate that approximately 50 to

Subsurface Exploration Findings- Cliffs Keowee Falls South  
Lot #31 Jasmine Cove, Oconee County, SC

S&ME Project No. 1261-05-423A  
July 2005

75 piers would be required to support the structure and floor slab. The piers could be installed in 4 to 5 days (including a modulus load test) with an anticipated cost on the order of \$550 to \$600 per pier. However, this cost will vary depending on project specific variables. We can provide additional design and cost information as the project is further advanced.

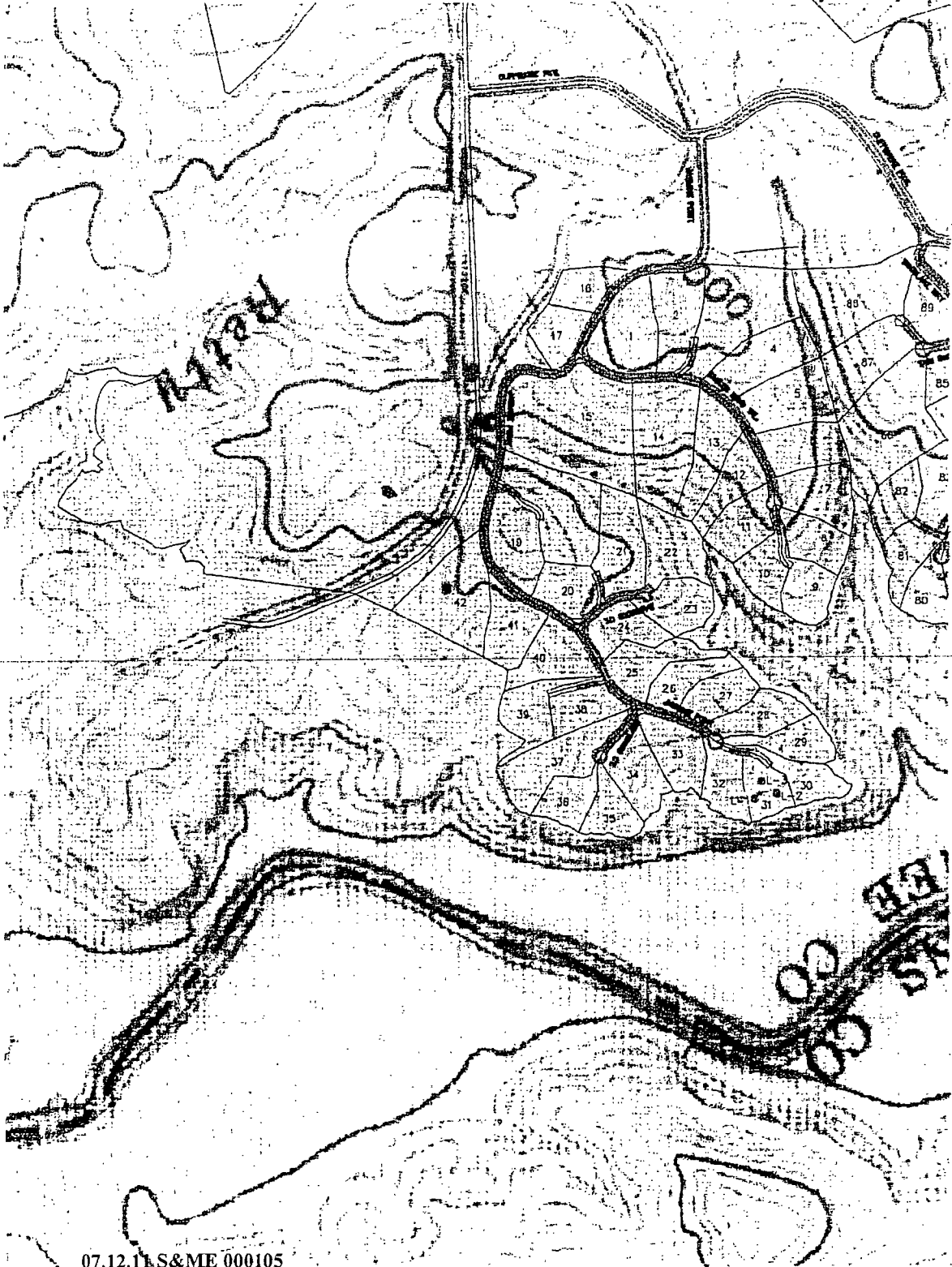
We appreciate the opportunity to work with The Cliffs Communities, Inc. by providing the geotechnical engineering for this project. Should any questions arise regarding the information in this report or when we may be of further service, please contact us.

Sincerely,  
S&ME, Inc.

  
Michael Revis, P.E.  
Project Engineer  
[mrevis@smeinc.com](mailto:mrevis@smeinc.com)

  
Howard Perry, P.E.  
Senior Engineer  
[hperry@smeinc.com](mailto:hperry@smeinc.com)

03.01.12 000012



07.12.11 S&ME 000105

PROJECT:		Cliffs Keowee Falls South - Lot #31 Oconee County, South Carolina S&ME Project No. 1261-05-423		BORING LOG L-1							
DATE DRILLED: 6/28/05		ELEVATION:		NOTES:							
DRILLING METHOD: 3/4" H.S.A.		BORING DEPTH: 23.0									
LOGGED BY: M. Revis		WATER LEVEL: Not Encountered @ TOB									
DRILLER: Millwood & Walker		DRILL RIG: Dledrlich D-50									
DEPTH (feet)	GRAPHIC LOG	MATERIAL DESCRIPTION	WATER LEVEL	ELEVATION (feet)	SAMPLE NO. SAMPLE TYPE	STANDARD PENETRATION TEST DATA (blows/ft)				N VALUE	
						10	20	30	60 80		
0-1		Organic Laden Topsoil (1")			1						7
1-5		Residuum - Firm to soft red-orange silty fine to medium sandy CLAY with roots			2						3
5-10		Very loose tan and white silty fine to coarse SAND			3						3
10-15		Firm brown micaceous fine sandy SILT			4						5
15-20		Medium dense brown and black silty fine to coarse SAND with rock fragments (moist at 20 feet)			5						20
20-23		AUGER REFUSAL AT 23 FEET			6						12

BORING LOG 6105423.GPJ S&ME.GDT 7/19/05

**NOTES:**

1. THIS LOG IS ONLY A PORTION OF A REPORT PREPARED FOR THE NAMED PROJECT AND MUST ONLY BE USED TOGETHER WITH THAT REPORT.
2. BORING, SAMPLING AND PENETRATION TEST DATA IN GENERAL ACCORDANCE WITH ASTM D-1586.
3. STRATIFICATION AND GROUNDWATER DEPTHS ARE NOT EXACT.
4. WATER LEVEL IS AT TIME OF EXPLORATION AND WILL VARY.



PROJECT: Cliffs Keowee Falls South - Lot #31 Oconee County, South Carolina S&ME Project No. 1261-09-423		BORING LOG L-2									
DATE DRILLED: 6/28/05	ELEVATION:	NOTES:									
DRILLING METHOD: 3/4" H.S.A.	BORING DEPTH: 20.0										
LOGGED BY: M. Revis	WATER LEVEL: Not Encountered @ TOB										
DRILLER: Millwood & Walker	DRILL RIG: Diedrich D-50										
DEPTH (feet)	GRAPHIC LOG	MATERIAL DESCRIPTION	WATER LEVEL ELEVATION (feet)	SAMPLE NO. SAMPLE TYPE	STANDARD PENETRATION TEST DATA (blows/ft)					N VALUE	
					10	20	30	60	80		
		Organic Laden Topsoil (6")		1							4
5		Residuum - Soft to firm brown-orange micaceous fine sandy SILT with roots		2							4
				3							5
10		Very loose brown highly micaceous silty fine SAND		4							4
				5							7
15		Loose tan-white silty fine to medium SAND									
				6							9
20		Loose brown and tan micaceous silty fine SAND									
		BORING TERMINATED AT 20 FEET									

BORING LOG 6105413.GPJ S&ME.GDT 7/13/05

**NOTES:**

1. THIS LOG IS ONLY A PORTION OF A REPORT PREPARED FOR THE NAHEED PROJECT AND MUST ONLY BE USED TOGETHER WITH THAT REPORT.
2. BORING, SAMPLING AND PENETRATION TEST DATA IN GENERAL ACCORDANCE WITH ASTM D-1586.
3. STRATIFICATION AND GROUNDWATER DEPTHS ARE NOT EXACT.
4. WATER LEVEL IS AT TIME OF EXPLORATION AND WILL VARY.



PROJECT:		Cliffs Keowee Falls South - Lot #31 Oconee County, South Carolina S&ME Project No. 1261-05-423		BORING LOG L-3								
DATE DRILLED: 6/28/05		ELEVATION:		NOTES:								
DRILLING METHOD: 3 1/2" H.S.A.		BORING DEPTH: 30.0										
LOGGED BY: M. Revis		WATER LEVEL: Not Encountered @ TOB										
DRILLER: Millwood & Walker		DRILL RIG: Diedrich D-50										
DEPTH (feet)	GRAPHIC LOG	MATERIAL DESCRIPTION	WATER LEVEL	ELEVATION (feet)	SAMPLE NO.	SAMPLE TYPE	STANDARD PENETRATION TEST DATA (blows/ft)				N VALUE	
							10	20	30	60 80		
0-3	[Symbol]	Organic Laden Topsoil (3")			1	[Symbol]						3
3-5	[Symbol]	Residuum - Soft red-brown to orange-brown fine to medium sandy SILT with roots (moist)			2	[Symbol]						4
5-10	[Symbol]	Dense to medium dense multi-colored silty fine to coarse SAND			3	[Symbol]						40
10-15	[Symbol]		5	[Symbol]								18
15-20	[Symbol]		6	[Symbol]								17
20-25	[Symbol]		7	[Symbol]								13
25-30	[Symbol]	Medium dense brown micaceous silty fine to medium SAND			8	[Symbol]						14
30-30	[Symbol]	Medium dense tan and white silty fine to coarse SAND				[Symbol]						20
		BORING TERMINATED AT 30 FEET										

BORING LOG 6105423.GPJ S&ME.GDT 7/13/05

**NOTES:**

1. THIS LOG IS ONLY A PORTION OF A REPORT PREPARED FOR THE NAMED PROJECT AND MUST ONLY BE USED TOGETHER WITH THAT REPORT.
2. BORING, SAMPLING AND PENETRATION TEST DATA IN GENERAL ACCORDANCE WITH ASTM D-1586.
3. STRATIFICATION AND GROUNDWATER DEPTHS ARE NOT EXACT.
4. WATER LEVEL IS AT TIME OF EXPLORATION AND WILL VARY.



STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GREENVILLE )  
 )  
 Kevin McCarthy and Courtney E. McCarthy, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 Keowee Falls Investment Group, LLC, The )  
 Cliffs Communities, LLC d/b/a The Cliff at )  
 Keowee Falls South, Cliffs Real Estate, Inc., )  
 The Cliffs Golf and Country Club, Inc., and )  
 S&ME, Inc., )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS

**PLAINTIFF'S MOTION  
 TO AMEND ITS COMPLAINT**

C.A. No. 2011-CP-23-6376

FILED CLERK OF COURT  
 GREENVILLE, CO. S.C.  
 PAUL B. WILKINSON  
 2013 JAN 21 P 8:44

**TO: DEFENDANTS KEOWEE FALLS INVESTMENT GROUP, LLC, THE CLIFFS COMMUNITIES, LLC D/B/A THE CLIFF AT KEOWEE FALLS SOUTH, CLIFFS REAL ESTATE, INC., THE CLIFFS GOLF AND COUNTRY CLUB, INC., AND S&ME, INC. AND THEIR COUNSEL**

WILL YOU PLEASE TAKE NOTICE that by motion of the Plaintiffs, Kevin McCarthy and Courtney E. McCarthy, ("McCarthy"), by and through their undersigned counsel, hereby moves this honorable Court on the tenth (10<sup>th</sup>) day hereafter, or as soon thereafter as counsel might be heard, for leave of Court to amend its Complaint, pursuant to South Carolina Rules of Civil Procedure Rule 15(a). In support its Motion to Amend, McCarthy would show the following:

1. Plaintiff is amending the Statement of Facts based upon information obtained during discovery.
2. Plaintiff is amending the Complaint to add an additional Cause of Action against the Cliffs based upon information obtained during discovery.

3. Plaintiff is amending the Complaint to add an additional Cause of Action against S&ME based upon information obtained during discovery.

4. Plaintiff is amending its Professional Negligence Cause of Action against S&ME based upon information obtained during discovery.

5. Defendants would suffer no prejudice from McCarthy being granted leave to amend its Complaint to add causes of action based upon answers obtained during deposition and expert designation provided.

6. The proposed Amended Complaint is attached as Exhibit 1 (without Exhibits as there were no new Exhibits or changes to the Exhibits).

7. Everything that is new is in red.

This Motion of the Plaintiff is without the consent of the Defendants. The Plaintiff requested consent of the Defendants but they would not consent.

Plaintiff So Moves:



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Thomas E. Dudley, III (SC Bar No. 66154)  
KENISON, DUDLEY & CRAWFORD, LLC  
704 E. McBee Avenue  
Greenville, South Carolina 29601  
Phone: (864) 242-4899  
Fax: (864) 242-4844  
*Attorneys for the Plaintiff*

Greenville, South Carolina  
March 20, 2013

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF GRENVILLE )  
 )  
 Kevin McCarthy and Courtney R. )  
 McCarthy, )  
 )  
 Plaintiffs, )  
 )  
 vs. )  
 )  
 The Cliffs Communities, LLC d/b/a The )  
 Cliffs at Keowee Falls South; Keowee )  
 Falls Investment Group; LLC; Cliffs )  
 Real Estate, Inc.; The Cliffs Golf and )  
 Country Club, Inc.; and S&ME, Inc.; )  
 )  
 Defendants. )  
 )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON PLEAS

C.A. No.: 2011-CP-23-6376

**AMENDED COMPLAINT  
 (Jury Trial Demanded)**

Plaintiffs, Kevin McCarthy and Courtney R. McCarthy (collectively "Plaintiffs"), complaining of the Defendants The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Investment Group, LLC; Cliffs Real Estate, Inc.; The Cliffs Golf and Country Club, Inc. (Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. collectively hereinafter "Cliffs Defendants"); and S&ME, Inc. ("S&ME") (collectively "Defendants"), would show unto this Court as follows:

1. Plaintiffs are citizens and residents of the State of North Carolina and are the record owners of the property subject to this dispute.
2. Upon information and belief, Defendant The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South is a limited liability company existing under the laws of the State of South Carolina with its primary place of business in Greenville



County, South Carolina, and has as a subsidiary Defendant Keowee Falls Investment Group, LLC. The Cliffs Communities, LLC does business as The Cliffs at Keowee Falls South.

3. Upon information and belief, Defendant Keowee Falls Investment Group, LLC is a limited liability company existing under the laws of the State of South Carolina with its primary place of business in Greenville County, South Carolina. Upon information and belief, Keowee Falls is controlled by The Cliffs Communities.

4. Upon information and belief, Defendant Cliffs Real Estate, Inc. is a corporation existing under the laws of the State of South Carolina with its primary place of business in Greenville County, South Carolina, and who acted as the dual real estate agent for the Plaintiffs and Cliffs Defendants for the sale of the subject Lot to the Plaintiffs and for a subsequent listing agreement with Plaintiffs.

5. Upon information and belief, Defendant The Cliffs Golf and Country Club, Inc. is a corporation existing under the laws of the State of South Carolina with its primary place of business in Greenville County, South Carolina who was a party to the subject Real Estate Sale and Purchase Agreement and was paid monies, and has continued to be paid monies, in consideration of the Plaintiffs entering said contract.

6. The Cliffs Defendants were all involved, as seller- and/or as agents of the seller- in the acts surrounding the sale described herein to Plaintiffs of Lot 32, Jasmine Point, said Lot being located in the subdivision known as The Cliffs at Keowee Falls South in the County of Greenville, State of South Carolina (the "Lot").

7. Upon information and belief, Defendant S&ME is a North Carolina corporation doing business in South Carolina, maintaining a place of business in

Greenville, South Carolina, and operating an engineering firm that conducted investigations and offered professional opinions related to property in The Cliffs at Keowee Falls South subdivision, including Plaintiffs' Lot.

8. The Court has Jurisdiction over the parties and subject matter in this action, and Venue is proper in this Court.

### STATEMENT OF THE FACTS

9. Prior to June 6, 2005, Plaintiffs toured the Cliffs at Keowee Falls South subdivision with a Cliffs Defendants' employee, J. Scott. Plaintiffs desired to purchase the vacant Lot, which is the subject of this action.

10. Prior to purchasing the subject Lot, the Cliffs Defendants gave the Plaintiffs a H.U.D. Report dated May 5, 2004 (a copy of said HUD Report is attached hereto and incorporated herein by reference as **Exhibit "A"**). The report contained express representations about the subdivision, including the build-ability of the lots in the subdivision (including the Lot at issue) and that unsuitable subsurface conditions were not present that would warrant the use of special construction techniques to build on the lots (including the Lot at issue). In this report, the Cliffs acknowledge its responsibility to construct and install water lines to the lots including the Lot at issue.

11. As evidenced by the terms of said contract, the Cliffs Defendants understood that the Plaintiffs, in consideration of purchasing the Lot, intended to build a house on the Lot for use as a second home, or that if Plaintiffs sold the Lot, that purchaser would be able to build a residence on it.

12. The H.U.D. Report and the contract with the Cliffs Defendants contained an express representation that if DHEC had not previously approved the installation of

a septic system on the Lot, or the Plaintiffs were unable to obtain a septic permit, and if the Cliffs is unable to secure such approval, the Cliffs Defendants would refund Plaintiffs' purchase price.

13. The contract also included a provision whereby the Defendant Cliffs Real Estate, Inc. was paid a portion of the sales price as its purported commission for selling the Lot to Plaintiffs upon the express premise (and understandings described herein) that the Lot be suitable for residential construction.

14. The contract also obligated the Plaintiffs to, *inter alia*, pay monies to Defendant The Cliffs Golf and Country Club, Inc. for a membership to the Cliffs Golf and Country Club based on the Plaintiffs purchase of the subject Lot- the basis of said Lot purchase (suitability for residential construction) being known to the Cliffs Golf and Country Club, Inc. by virtue of its inclusion as a party in the subject contract.

15. Sometime in April or May of 2011, Plaintiffs were contacted by an adjacent property owner, Jack Harrell ("Harrell") about a subsurface condition that was affecting Harrell's lot and the *cul de sac* which is located above and adjacent to both the Plaintiffs' Lot and Harrell's lot.

16. Harrell shared with Plaintiffs an engineer's report dated July 2005 from Defendant S&ME that was submitted to the Cliffs Defendants concerning abnormal geological conditions on Harrell's lot (a copy of said S&ME report is attached hereto and incorporated herein by reference as **Exhibit "C"**). Later, Harrell also shared the results of his own engineer's investigation which identified evidence of a geological condition known as slope failure that was occurring on not only Harrell's lot, but on both of Harrell's neighboring lots, including the Lot owned by Plaintiffs. (See copy of Carroll L

Crowther, P.E.'s engineering report ["Harrell Report"], attached hereto and incorporated herein by reference as **Exhibit "D"**).

17. Carroll L. Crowther, P.E. ("C. Crowther"), also the Harrell's expert, was hired by Plaintiffs and conducted a site investigation on Plaintiffs' Lot. C. Crowther determined the scarp or slope failure caused an unstable soil condition on Plaintiffs' Lot. C. Crowther determined that normal, reasonable construction techniques could not be used to build a house on Plaintiffs' Lot ("McCarthy Report"). (See copy of Carroll L. Crowther, P.E.'s McCarthy Report attached hereto and incorporated herein by reference as **Exhibit "E"**).

18. C. Crowther opined that the slope failure on Plaintiffs' Lot made the site unsuitable for a septic system (See **Exhibit "E"**).

19. Based on C. Crowther's findings, Plaintiffs are unable to build a house on their Lot because of the unstable soil conditions located thereon. Further, Plaintiffs understand they would not be able to sell the Lot for a value comparable to the amount they paid for the Lot because no house can be built on it.

20. It was later discovered that back in 2005 while the McCarthy's were considering the purchase of Lot 32, the Cliffs had received a report from a professional geologist with Alpha Environmental Science ("AES") for the then owners of Lot 31. AES identified evidence of a slope failure on Lot 31 and extending into the adjacent lots north and south of Lot 31 (this included Lot 32). AES recommended Lot 31 not be used for residential construction. AES also stated that it was possible that no construction should take place on Lots 30 and 32.

21. As a result of the AES report, the Cliffs agreed to switch lots with the then owner of Lot 31. The Cliffs began the process of accepting a deed back from the

owner of Lot 31 and giving the owner another lot in Keowee Falls South. The Cliffs never disclosed the AES report or the lot swap with the McCarthy's despite this being material information, prior to the McCarthy's signing the contract on lot 32.

22. On or about June 20, 2005, the Plaintiffs and the Cliffs Defendants executed a "Real Estate Sale and Purchase Agreement" (a copy of said contract is attached hereto and incorporated herein by reference as **Exhibit "B"**). At this time, the McCarthy's had a contractual property interest in Lot 32.

23. The Cliffs Communities, Inc., while working on taking back the deed to Lot 31, asked S&ME to review the AES report and offer a second opinion. S&ME reviewed the AES report then submitted a proposal to investigate and report on the three lots referenced in the AES report. In making the proposal, someone from S&ME went and walked the three lots (Lots 30, 31 and 32). S&ME describes observing three "sloughs" on the lots and submitted a proposal to conduct a geotechnical investigation on all here lots.

24. It appears the Cliffs directed, and S&ME allowed the Cliffs, to limit the proposed investigation of three lots to only Lot 31 and not the lots adjacent to Lot 31 that AES identified as experiencing the same slope failure as Lot 31.

25. At the time the McCarthy's signed the contract to purchase Lot 32, the only report the Cliffs had was the AES report. In fact, when the McCarthy's signed the contract for Lot 32, the Cliffs did not have the S&ME proposal to investigate the three lots.

26. On July 18, 2005, a month after the McCarthy's signed the contract to purchase Lot 32 at the Cliffs but before closing, S&ME submitted its report on Lot 31 to

the Cliffs. The report identified three "scarp" areas across Lot 31, but did not describe that this condition continued into Lots 30 and 32 as the AES report did and as they had previously noted in the proposal. The S&ME report indicated that Lot 31 contained "some unique surface and subsurface abnormalities" but did not mention that this condition continued onto the adjacent lots or that this condition might extend to the adjacent lots like the AES report did. The S&ME report did not mention the conditions it observed affecting the three lots that it referenced in its proposal to the Cliffs.

27. The S&ME report also noted, "[b]ased on the subsurface data and our experience, it is our opinion that residential structures can be supported on-site with some modifications to improve the foundation soils." S&ME then discussed a process of installing rammed aggregate piers at an estimated cost of nearly \$50,000. This was significant and material information that potential purchasers, such as the Plaintiffs, would want to know, especially having a contractual interest in the adjacent lot.

28. At the time of the S&ME report on Lot 31, S&ME knew that a professional geologist with AES had recommended no residential structures be built on Lot 31 and perhaps the lots adjacent to Lot 31, which included Lot 32.

29. S&ME had done business for the Cliffs prior to 2005 and was working on a Cliffs project at Keowee Falls when the Cliffs asked it to look at the AES report and make its proposal. S&ME was also aware that the Cliffs marketed the lots in Keowee Falls South for residential construction. S&ME knew, or should have known, that the soil condition on Lot 31 was also present on Lots 30 and 32 by virtue of its own reference to three "sloughs" on all of the lots in its proposal to the Cliffs.

30. When hired to perform an analysis of, and issue a report on, the geotechnical features and conditions of a particular piece of land, it is industry standard for geotechnical engineers fully identify the particular geological features located thereon regardless of whether such features extend beyond the boundaries of that particular piece of land and onto adjacent lands.

31. After filing suit, the Cliffs Defendants and S&ME have both represented to the Plaintiffs that a water line in the cul de sac adjacent to the Lot broke in 2009.

32. The Cliffs had the water line installed as a part of infrastructure for the development. In the 2004 HUD disclosure, the Cliffs represented that the water line was available for Plaintiff to tap into. Specifically, the Cliffs represented it was "responsible for the construction and installation costs of extending water service to your lot" (**Exhibit A**, p. 11 2004 HUD disclosure).

33. The Defendant S&ME has taken the position that the 2009 water line break resulted in the uncontrolled flow of thousands of gallons of water onto the Lot and the other lots adjacent to the cul-de-sac.

34. After the water line break, the Cliffs hired BLE to install inclinometers on Lots 30, 31 and 32. Plaintiff was unaware that inclinometers had been placed on their Lot. The purpose of the inclinometers was to measure if the earth on the lots was moving.

35. The Cliffs Defendants and S&ME acknowledge that inclinometer data collected by BLE, Inc. shows movement of the soil on Lot 32 and Lots 30 and 31 has occurred since this water line break occurred in 2009.

36. S&ME alleges that the movement shown in the BLE inclinometers that has occurred on the Lot since 2009 is a direct and proximate result of the water line break. Plaintiff's expert disagrees.

**FOR A FIRST CAUSE OF ACTION**  
**(Breach of Contract — The Cliffs Defendants)**

37. The allegations of the preceding paragraphs are incorporated herein by reference.

38. Plaintiffs entered into a contract with the Cliffs Defendants for the purchase of Lot 32, Jasmine Cove in the Cliffs at Keowee Falls South subdivision (See Exhibit "B").

39. The Cliffs Defendants expressly warranted that no unstable soils were on the Lot such that the use of any special construction techniques would not be required to build a residence thereon.

40. The Cliffs Defendants also expressly warranted that if DHEC would not approve of an individual sewage treatment system on the Lot, then the Cliffs Defendants would refund the purchase price in exchange for Plaintiffs deeding the Lot back to Defendant Cliffs.

41. The Cliffs Defendants also expressly warranted that there were no unusual natural hazards on the Lot.

42. The Cliffs Defendants breached the contract in one or more of the following particulars:

- (i) the Lot contains unstable soils such that no residence can be reasonably built thereon, or at a minimum, special construction techniques would be required;
- (ii) a DHEC permit for an individual sewage treatment system will not be

possible because of the unstable soils on the Lot;

(iii) despite the Cliffs Defendants' knowledge of the Plaintiffs inability to obtain a permit for an individual sewage treatment system, the Cliffs Defendants have not agreed to refund the purchase price as they were required under the contract;

(iv) the Lot contains an unusual natural hazard; and

(v) the Cliffs failed to disclose the knowledge they had about the unstable soil condition on the Lot from 2005-2011.

40. Because of the nature of the unstable soil condition, it effectively nullifies any value having been transferred by the Cliffs Defendants to the Plaintiffs. In consideration of the representations made by the Cliffs Defendants, the Plaintiffs and the Cliffs Defendants entered into the subject contract with the mutual understanding and agreement that the value paid by the Plaintiffs to the Cliffs Defendants was representative of the Plaintiffs' ability to reasonably build a house on the Lot, was representative of the Lot's suitability for normal residential construction techniques, and, regardless of whether the Plaintiffs ever built a house on the Lot, was representative of the marketability of the Lot upon which the Plaintiffs could rely in transferring it for comparable value to any potential grantees of the Plaintiffs. These representations made by the Cliffs Defendants being false are further breaches of the contract.

41. Because of the nature of the Cliffs Defendants' breaches of the contract, the Plaintiffs seek rescission of the contract, the value paid by Plaintiffs for the Lot, all other monies paid by the Plaintiffs to the Cliffs Defendants and all direct and consequential damages, plus attorneys' fees, costs and interest.

42. As an additional, alternative request for relief, the Plaintiffs seek a refund of the purchase price pursuant to the provisions of the above referenced H.U.D. Report and contract, which provide for the refund of Plaintiffs' purchase price, and other costs,

plus attorneys' fees, since the Lot cannot be permitted for an individual sewage treatment system nor can a residence be built without using special construction techniques.

**FOR A SECOND CAUSE OF ACTION**  
**(Negligence — The Cliffs Defendants)**

43. The allegations of the preceding paragraphs are incorporated herein by reference.

44. The Cliffs Defendants, The Cliffs Communities, LLC d/b/a The Cliffs of Keowee Falls South and Keowee Falls Investment Group, LLC, owed a duty to the lot owners within the Cliffs at Keowee Falls South, including the Plaintiffs, to construct and install the water lines within the Cliffs at Keowee Falls South in a manner suitable for its intended use such that the water lines would not break and cause property damage to the lots within the Cliffs at Keowee Falls South, including the Lot at issue.

45. According to S&ME and its expert, the Cliffs Defendants breached that duty when a water line adjacent to the Lot broke in 2009 and spilled allegedly 100,000 gallons of water onto the lots adjacent to the cul de sac. S&ME asserts the water line broke and caused the water to escape onto the lots. S&ME's allegation, if true, means the water line was defectively constructed and maintained by the Cliffs Defendants failed in its intended use causing property damages to not only the water line itself but also resulting in property damage to the surrounding areas, including property damages to the Lot. According to S&ME and its expert, it is this water line break that is causing the inclinometers on Lot 32 to show movement. The data from the inclinometers, according to the Plaintiff's expert, renders the property economically unbuildable. Further,

this information has damaged the marketability of the lot and cast a shadow on its value. Therefore, the movement shown on Lot 32 constitutes property damage. This alleged faulty construction and maintenance and the damages resulting therefrom constitute an occurrence as such damages were unintended, unforeseen, fortuitous and/or injurious in nature.

46. The damages from the Cliffs Defendants' alleged failures have resulted in the Lot's continued exposure to harmful conditions causing inclinometer to show the Lot is moving.

47. The actions and/or inactions of the Cliffs Defendants have directly and proximately caused the Plaintiffs to incur unexpected occurrences resulting in property damage to the Lot.

48. As a direct, proximate and consequential result of the Cliffs Defendants' negligent construction and maintenance of the water line, the Plaintiffs have suffered and will continue to suffer damages in an amount to be determined by a jury, for which the Plaintiffs hereby sue, together with consequential, special and punitive damages in an amount to be determined by a jury, and costs, attorneys' fees and interest. It is noted that Plaintiff's expert does not agree with S&ME's assertion.

**FOR A THIRD CAUSE OF ACTION**  
**(Fraud — The Cliffs Defendants)**

49. The allegations of the preceding paragraphs are incorporated herein by reference.

50. The Cliffs Defendants were aware in July of 2005 that an unusual subsurface condition existed on several lots in the subject subdivision, including the

Plaintiffs' Lot, the existence of which could effect the construction of a residence on Plaintiffs' Lot and, therefore, the marketability of that Lot. Yet, the Cliffs Defendants never disclosed this information to Plaintiffs prior to (during, or anytime after) the closing on the Plaintiffs' Lot in August of 2005.

51. Further, despite knowledge of the conditions affecting the subject Lot, the Cliffs Defendants did not require S&ME to further investigate the "scarps" to determine the extent it impacted the Plaintiffs' Lot and the value of said Lot. Had such investigation taken place, the scarps would have been identified on Plaintiffs' Lot and that a slope failure was continuing, materially affecting the sales contract.

52. The Cliffs Defendants either knew of the falsity of its material misrepresentations or recklessly disregarded the truth or falsity of the misrepresentations.

53. The failure of the Cliffs Defendants to disclose this material information was a material misrepresentation that the Cliffs Defendants intended for the Plaintiffs to act upon, for which the Plaintiffs were completely ignorant of and, pursuant to their right to rely thereon, did rely thereon in consummating the purchase of the Lot that is now worthless,

54. As a consequential and proximate result of Plaintiffs acts in reliance on the Cliffs Defendants' misrepresentations, the Plaintiffs suffered actual, consequential, special and punitive damages in an amount to be determined by a jury, together with costs, attorneys' fees and interest.

**FOR A FOURTH CAUSE OF ACTION**  
**(Negligent Misrepresentation — The Cliffs Defendants)**

55. The allegations of the preceding paragraphs are incorporated herein by reference.

56. The Cliffs Defendants were aware in July of 2005 that an unusual subsurface condition existed on several lots in the subject subdivision, including the Plaintiffs' Lot, the existence of which could affect the construction of a residence on Plaintiffs' Lot and, therefore, the marketability of the Lot. Yet, the Cliffs Defendants never disclosed this information to Plaintiffs prior to (during, or anytime after) the closing on the Plaintiffs' Lot in August of 2005.

57. Further, despite knowledge of the conditions affecting the subject Lot, the Cliffs Defendants did not require an engineer to further investigate the "scarps" to determine the extent it impacted Plaintiffs' Lot 32 and the value of said Lot. Had such investigation taken place, the scarp would have been identified on Plaintiffs' Lot and that a slope failure was continuing, materially affecting the sale contract.

58. The failure of the Cliffs Defendants to disclose this material information was a material misrepresentation that the Plaintiffs justifiably relied upon in consummating the purchase of the Lot that is now worthless.

59. The Cliffs Defendants had a pecuniary interest in making the misrepresentation to the Plaintiffs, and the Cliffs Defendants owed a duty of care to see that truthful information was communicated to the Plaintiffs.

60. The Cliffs Defendants breached its duty by failing to exercise due care.

61. The Plaintiffs suffered a pecuniary loss as a direct and proximate result of

their reliance on the Cliffs Defendants' misrepresentations in an amount of consequential, special and punitive damages to be determined by a jury, together with costs, attorneys' fees and interest for which it hereby sues.

**FOR A FIFTH CAUSE OF ACTION**  
**(Constructive Fraud — The Cliffs Defendants)**

62. The allegations of the preceding paragraphs are incorporated herein by reference.

63. The Cliffs Defendants were aware in July of 2005 that an unusual subsurface condition existed on several lots in the subject subdivision, including the Plaintiffs' Lot, the existence of which could affect the construction of a residence on Plaintiffs' Lot and, therefore, the marketability of the Lot. Yet, the Cliffs Defendants never disclosed this information to Plaintiffs prior to (during, or anytime after) the closing on the Plaintiffs' Lot in August of 2005, materially affecting the sales contract.

64. Further, despite knowledge of the conditions affecting the subject Lot, the Cliffs Defendants did not require an engineer to further investigate the "scarps" to determine the extent it impacted Plaintiffs' Lot 32 and the value of said Lot. Had such investigation taken place, the scarp would have been identified on Plaintiffs' Lot.

65. The Cliffs Defendants ought to have known of the falsity of its material misrepresentations.

66. The failure of the Cliffs Defendants to disclose this material information was a material misrepresentation that the Cliffs Defendants intended for the Plaintiffs to act upon, for which the Plaintiffs were completely ignorant of; and, pursuant to the Plaintiffs right to rely thereon, did rely thereon in consummating the purchase of

the Lot that is now worthless.

67. As a consequential and proximate result of Plaintiffs acts in reliance on the Cliffs Defendants' misrepresentations, the Plaintiffs suffered consequential, special and punitive damages in an amount to be determined by a jury, together with costs, attorneys' fees and interest for which it hereby sues.

**FOR A SIXTH CAUSE OF ACTION**  
**(Professional Negligence - S&ME)**

68. The allegations of the preceding paragraphs are incorporated herein by reference.

69. Defendant S&ME was engaged by the Cliffs Defendants to investigate subsurface conditions affecting the (Harrell's) lot adjacent to Plaintiffs' Lot for the purpose of accurately reporting subsurface conditions in light of the affect of same on the suitability of the property for residential construction, recommending proper testing, and recommending proper methods of remediation, if any.

70. Defendant S&ME issued a report identifying that there was abnormal geological conditions (the scarp) on Harrell's lot and that there was evidence of three "scarps" existed on Harrell's lot.

71. Upon information and belief, S&ME's professional opinion was sought as a second opinion by the Cliffs after it received the Alpha Environmental report recommending no structures be built on Lot 31 and possibly the adjacent Lots. S&ME was to determine whether residential construction could reasonably take place on the property next to Plaintiffs (Lot 31) and the lots adjacent to Lot 31. Based on S&ME's conclusions regarding the existence and location of the "scarp" features

together with S&ME's knowledge of its purpose in issuing a professional opinion, S&ME knew or should have known that the "scarp" features would materially impact the viability of residential construction on the surrounding property, to include the property of the Plaintiffs. S&ME clearly understood this since it recommended that it was necessary to install \$50,000 worth of work to stabilize the site before construction could be performed.

72. When hired to perform an analysis of, and issue a report on, the geotechnical features of a particular piece of land, it is industry standard for geotechnical engineers to fully identify the particular geological features located on the property and the extent to which they are evident on other property regardless of whether such features extend beyond the boundaries of that particular piece of land and onto adjacent lands.

73. S&ME owed a duty of care to the owner of the three lots they were originally asked to investigate and those that had a current interest in the lots, including Plaintiffs. At the time, the Cliffs owned all three lots as it was in the process of obtaining the deed back on Lot 31. When S&ME issued its report, it had seen the AES report and had walked all three lots. S&ME had a special relationship to the Cliffs as owner and also the McCarthy's by virtue of their pending contract with the Cliffs to purchase Lot 32. S&ME's duty extended to McCarthy by virtue of Plaintiff's current contract and property interest in Lot 32. S&ME discovered the "scarps", recognized what caused them and should have performed further testing, or recommended additional testing on adjacent lots, and/or to inform the Cliffs of S&ME's knowledge regarding the "scarps", and that the "scarps" extended into the adjacent lots and the

material impact these features could have on the viability, or lack thereof, of reasonable, residential construction taking place on said properties and the impact these features could have on the value of the property. Since S&ME knew it was being asked for a second opinion on the AES report, S&ME's recommendation of \$50,000 in modifications to the soil on Lot 31 operated as an acknowledgement that such recommendation extended to the adjacent lots since the same conditions were observed by S&ME on those lots. S&ME's failure to specifically state this is a violation of its duty.

74. The standard duty of care owed by S&ME precluded them from putting professional blinders on and ignoring their responsibilities to fully and accurately identify the geological features present across the entire area in which the subject lots are located to include the recommendation of soil modification necessary on the other lots and to issue a full and accurate report regarding same, regardless of any possible motives the Cliffs Defendants may have had in instructing them to exercise such ignorance and regardless of any possible motives S&ME may have had in agreeing to do so.

75. Upon information and belief, Defendant S&ME did not further investigate, or recommend additional investigation, the extent in which the scarps were evidence of a slope failure affecting the Plaintiffs' Lot. S&ME did not describe the extent of the geological condition that could apply to the adjacent lots and that it recommended a soil modification that would also apply to those lots or otherwise notify the owners of said properties of the abnormal geological conditions and the impact the same could have on the value of the property and the viability of reasonable, residential

construction taking place on the property.

76. Defendant S&ME, without conducting any further meaningful tests on the Harrell lot or on the Plaintiffs' Lot and without otherwise notifying the owners of the potential significance of the abnormal geological conditions, simply opined that a residence could be built on the Harrell lot with its recommended soil modifications.

77. Defendant S&ME's silence as to Plaintiffs' Lot amounted to a material omission as to a condition known to Defendant S&ME that could materially effect the use of, value of, and the viability of reasonable residential construction on the Plaintiffs' Lot.

78. All of the above violates the standard of care of Geotechnical Engineers in South Carolina, particularly in the Upstate of South Carolina, where Plaintiffs' Lot is located.

79. In compliance with S.C. Code Ann. 15-26-100, *et. seq.* Plaintiff is filing as a part of this Complaint an affidavit based on the available evidence at the time of the filing of the affidavit. This affidavit, executed by Carroll L. Crowther, P.E. is attached hereto and incorporated herein by reference as **Exhibit "F"**.

80. As a consequential and proximate result of Defendant S&ME's failure to adhere to the standard of care, Plaintiffs have been damaged as they paid over \$1 million dollars for a Lot that cannot be used as represented, for which the Plaintiffs hereby sue, together with consequential, special and punitive damages in an amount to be determined by a jury, and costs, attorneys' fees and interest.

**FOR A SEVENTH CAUSE OF ACTION**  
**(Negligent Misrepresentation — S&ME)**

81. The allegations of the preceding paragraphs are incorporated herein by reference.

82. When it issued its report on July 18, 2005, S&ME had a special relationship with Plaintiffs by virtue of Plaintiff's contractual property interest in Lot 32; a lot S&ME proposed to investigate.

83. S&ME knew that when hired to perform an analysis of, and issue a report on, the geotechnical features of a particular piece of land, it is industry standard for geotechnical engineers to be responsible for fully identifying the particular geological features located thereon regardless of whether such features extend beyond the boundaries of that particular piece of land and onto adjacent lands. It is industry standard for geotechnical engineers to fully describe the extent of geological features even if they extend into adjacent property.

84. Likewise, S&ME knew that when it was hired to do this work for the Cliffs Defendants that the purpose of the Cliffs Defendants hiring S&ME to do this work was for the purpose of the Cliffs Defendants to use the results of S&ME's work, including any reports issued by S&ME, in the Cliffs Defendants' efforts to resolve an outstanding dispute between the Cliffs Defendants and the owner of lot 31 regarding the build-ability of lot 31.

85. S&ME also knew that when it was hired to do this work for the Cliffs Defendants, the lots adjacent to lot 31 were vacant residential lots that had been marketed and/or sold as lots upon which a residence could be built, were owned by the

Cliffs and were being offered for sale. In fact, the McCarthy's had signed a contract for Lot 32 at that time. S&ME also knew that AES had noted that construction might not be suitable on Lots 30 and 32. S&ME had also observed the same condition affected Lots 30 and 32, as noted in its proposal.

86. Upon S&ME's investigation of, and report on, the unusual subsurface conditions existing on Lot 31 in the Jasmine Cove area, S&ME knew or should have known that this subsurface condition existed on other similarly situated lots in the subject subdivision, including the Plaintiffs' Lot, the existence of which could affect the construction of a residence on Plaintiffs' Lot and, therefore, the marketability of the Lot. S&ME was at least aware that a professional geologist had identified the unique subsurface failure extending into lots adjacent to Lot 31. S&ME's own proposal described "sloughs" on all three lots.

87. Despite the knowledge of S&ME and its industry-wide standard of care and responsibility requiring it to fully identify the particular geological features located on a specific tract of land regardless of whether such features extend beyond the boundaries of that particular piece of land and onto adjacent lands, S&ME failed to fully and accurately report on the unusual surface and/or subsurface conditions that existed on the lots within the Jasmine Cove area, including the Lot at issue or identify that the recommended soil modification it made on Lot 31 would also apply to the adjacent lots since the same conditions were present on those lots.

88. S&ME knew or should have know that its failure would allow the Cliffs Defendants to improperly market and/or sell the adjacent lots, including the Lot at issue, while prohibiting owners and those under contract for those lots at the time S&ME

made its report, including the Plaintiffs, from being fully, adequately and accurately notified of the pre-existing unusual surface and/or subsurface conditions existing on the Lot - conditions and the recommendations for soil modification that the Cliffs Defendants and S&ME knew or should have know existed at the time.

89. Yet, S&ME never disclosed this information in its report to the Cliffs Defendants and neither S&ME nor the Cliffs Defendants ever disclosed this information to Plaintiffs prior to (during, or anytime after) the closing on the Plaintiffs' Lot in August of 2005, despite Plaintiff's having an contractual property interest in the property at the time S&ME provided its report.

90. The failure of S&ME to properly disclose this material information was a material misrepresentation that the Plaintiffs justifiably relied upon in consummating the purchase of the Lot that is now worthless.

91. S&ME had a pecuniary interest in making the misrepresentation to the Cliffs Defendants and Plaintiffs, and S&ME, by virtue of a special relationship to Plaintiffs, owed a duty of care to see that truthful information was communicated to the Cliffs Defendants and Plaintiffs.

92. S&ME breached its duty by failing to exercise due care.

93. The Plaintiffs suffered a pecuniary loss as a direct and proximate result of their reliance on S&ME's misrepresentations in an amount of consequential, special and punitive damages to be determined by a jury, together with costs, attorneys' fees and interest for which it hereby sues.

**FOR AN EIGHTH CAUSE OF ACTION**  
**(Violation of the Interstate Land Sales Full Disclosure Act,**  
**15 U.S.C.A. § 1701, et. seq. (the "Act")**  
**— The Cliffs Defendants)**

94. The allegations of the preceding paragraphs are incorporated herein by reference.

95. This cause of action is brought by Plaintiffs against all Cliffs Defendants under the provisions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. §§ 1701, et. seq., for rescission, compensatory damages, as well as interest, court costs, attorneys' fees, independent expert fees, and all travel costs to and from the Lot.

96. This Court has jurisdiction over this claim pursuant to 15 U.S.C.A. § 1719, which provides concurrent non-removable jurisdiction on actions brought under the Act that are filed in state court. State courts have concurrent jurisdiction over suits in equity and actions at law brought to enforce any liability or duty created by this title. In accordance with the Act, "Any suit or action may be brought ... in the district where the offer or sale took place, if the Defendant participated therein... No case arising under this chapter and brought in any

97. State court of competent jurisdiction shall be removed to any court of the United States".

98. The Plaintiffs are "purchasers" within the provisions of the Act. The Defendants, as defined above, collectively and individually are the "Developer", or agents of the "Developer" within the context of the Act. At the time of the sale, Mr. McCarthy resided in Georgia and Ms. McCarthy resided in North Carolina.

99. The Act prohibits the sale or lease of "lots" in a "subdivision" using any means of interstate commerce, unless the lots are either exempt or registered with the United States Department of Housing and Urban Development ("HUD"). The Act applies, if, by means of interstate commerce (e.g. print media, television, Internet, etc.) are used to solicit offers to buy or to make offers to sell, regardless of whether the owner/developer has engaged in any advertising or other marketing or sales activities directed outside the state where the property is located.

100. The subject Lot is located in a subdivision and was sold by the Cliffs Defendants using means of interstate commerce such that the Act applies to the Lot. Furthermore, the subject Lot is not considered "exempt", as defined in the Act,

101. Unless a particular sale or lease is exempt from the registration requirements, the Act requires preparation and filing of a "Statement of Record" with HUD's Office of Interstate Land Sales Registration. The Statement of Record consists of two parts: a detailed disclosure document referred to as the Property Report, and an Additional Information and Documentation section (or "AID") that provides additional information and documentation to support the representations made in the Property Report.

102. Upon information and belief, the Cliffs Defendants did not provide the Plaintiff a full Statement of Record, but only a Property Report.

103. Pursuant to the Act, the Cliffs Defendants were to provide a statement of record that included, *inter alia*, an accurate statement of the topography of the subdivision, a statement of the existence of any unusual conditions relating to safety which affect the subdivision and are known to the developer, and such other

information and documents as being reasonably necessary or appropriate for the protection of the purchasers. Moreover, the Act required the Cliffs Defendants to provide the Plaintiffs with a Property Report that contained information necessary or appropriate in the public interest of for the protection of the purchasers such as the Plaintiffs.

104. Further in accordance with the Act, it shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails ... to sell or lease any lot where any part of the statement of record or the property report contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein... to employ any device, scheme, or artifice to defraud; to obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision; to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser...".

105. The Property Report provided by the Cliffs Defendants contained untrue statements of material facts and omitted to state material facts required to be stated therein. Specifically, the Cliffs Defendants failed to make any statement to the Plaintiffs regarding the abnormal geological condition of the property despite the fact that such a statement and associated facts were material and pertinent in light of the circumstances and within the context of the overall offer and sale. Moreover, the Cliffs Defendants

made the following misrepresentations in the Property Report (see **Exhibit "A"**):

**GENERAL TOPOGRAPHY**

The general topography of the land within Keowee Falls South is a combination of gently rolling hills and valleys.

...

None of the lots in the subdivision contains any steep slopes, rock, outcropping, unstable or expansive soil conditions that could necessitate the use of special construction techniques to build.

...

**DRAINAGE AND FILL**

None of the lots require draining or fill prior to being used for the construction of residences.

**FLOOD PLAIN**

The subdivision is not located within a flood plain or an area designated by any federal, state or local agency as being prone to flooding. ...

**FLOODING AND SOIL EROSION**

We will provide temporary and permanent control measures within the subdivision which will aggressively control storm water, erosion and sediment control, including sodding and seeding in areas of heavy grading or cut and fill, along with construction of diversion ditches and sediment control basins as necessary. ...

...

**HAZARDS**

We are not aware of any unusual safety factors or hazards that affect the subdivision or any proposed plans for construction that may create a future nuisance or safety hazard.

...

The lots covered by this Property Report are not subject to unusual natural hazards, and no federal, state or local agency has formally identified the area as one subject to the frequent occurrence of natural hazards.

106. The above referenced representations made by the Cliffs Defendants and their agents were misleading, and operated as a fraud and deceit upon the Plaintiffs, and were made in violation of the Act, for which the Plaintiffs hereby sue. Specifically, when the Cliffs were aware of the AES report contents, it entered into

contract with Plaintiffs.

**FOR A NINTH CAUSE OF ACTION**  
**(Violation of the S.C. Unfair Trade Practices Act — The Cliffs Defendants)**

107. The allegations of the preceding paragraphs are incorporated herein by reference.

108. The above described misrepresentations made by the Cliffs Defendants to the Plaintiffs were unfair and deceptive, as defined in the South Carolina Unfair Trade Practices Act, S.C. Code Ann. §§ 39-5-10, *et. seq.* (the "UTPA"), and have proximately caused the Plaintiffs to suffer an ascertainable loss of property and money.

109. The actions of the Cliffs Defendants affect the public interest because their actions are capable of repetition in the deception and defrauding of others, and, in fact, have been repeated in the deception and defrauding of others, to include without limitation, the Plaintiffs' neighbors. The repeated actions of the Plaintiffs affect the public's interest.

110. The actions of the Cliffs Defendants were willful within the meaning and interest of § 39-5-140 of the UTPA.

111. As a direct and proximate result of the actions of the Cliffs Defendants, the Plaintiffs paid funds greater than the actual value of the Lot. As such, the violation of the UTPA entitles Plaintiffs to treble damages and reasonable attorneys' fees, for which the Plaintiffs hereby sue.

**WHEREFORE**, Kevin McCarthy and Courtney E. McCarthy pray for the following relief:

- a) Judgment against Defendants Cliffs Investment Group, LLC; the Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the First Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- b) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Second Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- c) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Third Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- d) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Fourth Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- e) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Fifth Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- f) Judgment against Defendant S&ME, Inc. for the Sixth Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;
- g) Judgment against Defendant S&ME, Inc. for the Seventh Cause of Action in an amount to be determined by a jury, together with interest at the legal rate as determined and disbursements of this action, and for attorney's fees and costs;

- h) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Eighth Cause of Action for rescission, and judgment in an amount to be determined by a jury, compensatory damages, as well as interest, court costs, attorneys' fees, independent expert fees, and all travel costs to and from the Lot, together with interest at the legal rate as determined and disbursements of this action;
- i) Judgment against Defendants Cliffs Investment Group, LLC; The Cliffs Communities, LLC d/b/a The Cliffs at Keowee Falls South; Cliffs Real Estate, Inc.; and The Cliffs Golf and Country Club, Inc. for the Ninth Cause of Action for treble damages and attorneys' fees, together with interest at the legal rate as determined and disbursements of this action;
- j) For an award of attorneys' fees;
- k) For an award of the costs of this action; and
- l) For such other and further relief that this Court deems just and proper.

Respectfully submitted this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

KENISON, DUDLEY & CRAWFORD, LLC

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STATE OF SOUTH CAROLINA )

COUNTY OF GREENVILLE )

Kevin McCarthy and Courtney E. McCarthy, )

Plaintiffs, )

vs. )

Keowee Falls Investment Group, LLC, The )  
Cliffs Communities, LLC d/b/a The Cliff at )  
Keowee Falls South, Cliffs Real Estate, Inc., )  
The Cliffs Golf and Country Club, Inc., and )  
S&ME, Inc., )

Defendants. )

IN THE COURT OF COMMON PLEAS

**MEMORANDUM IN SUPPORT OF  
S&ME, INC.'S MOTION FOR  
SUMMARY JUDGMENT**

C.A. No.: 2011-CP-23-6376

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**I. NATURE OF THE CASE**

Plaintiffs are 2005 purchasers of lot 32 in the Jasmine Point subdivision within the Cliffs at Keowee Falls South development on Lake Keowee in Oconee County, South Carolina. They have asserted a single claim for professional negligence against Defendant S&ME, Inc. ("S&ME").

**II. FACTUAL BACKGROUND**

By deed dated December 16, 2002, for consideration of \$22,000,000.00, Keowee Falls Investment Group, LLC ("KFIG") purchased approximately 2000 acres from Crescent Resources, LLC for development. (Special Warranty Deed, B. 1256, p. 257). A portion of that land was developed as the Keowee Falls South development.

In June 2005, Plaintiff Kevin McCarthy and his then-girlfriend/now-wife Courtney Roundtree met with Jay Scott of Cliffs Real Estate, Inc. and looked at lakefront property at Lake Keowee, including lot 32 at Jasmine Point. (K. McCarthy Dep. p. 17) Plaintiffs were interested in buying a vacation property in that location. At that time, Kevin McCarthy worked as an

investment banker in Atlanta, Georgia and Courtney Roundtree lived in Charlotte, North Carolina. They considered Lake Keowee "a place that was equidistant between Atlanta and Charlotte". (K. McCarthy dep. P. 12).

After touring once with Jay Scott and walking on lot 32 perhaps only once, Plaintiffs decided to purchase lot 32. (K. McCarthy p. 25-26). On June 20, 2005, Plaintiffs each executed a Real Estate Sale and Purchase Agreement. (K. McCarthy Exh. #3). The agreement plainly identified KFIG as the Seller. Pursuant to the terms of the Agreement, Plaintiffs agreed to purchase lot 32 for a purchase price of \$1,105,000.00. (K. McCarthy Dep. Exh 3). Plaintiffs also agreed to purchase a membership in the Golf and Country Club for \$75,000.00. (K. McCarthy Dep. p. 47, Exh. 3). The Agreement also provides in relevant part:

**9.3 As-is Condition.** Except as otherwise provided herein, Purchaser is purchasing and Seller is selling the Lot in an "AS IS" condition.

**9.5 Purchaser's Acknowledgement Concerning Representations.** Purchaser understands that any sales associate or other person representing Seller in this transaction does not have the authority to make any statements in conflict with or in addition to the information contained in this Agreement, and any other documents received from Seller, including without limitation, any representation made regarding the resale of Purchaser's Lot or its rental or investment potential, and that Seller, for itself and in behalf of any such agent, specifically disclaims any responsibility for such statements. Further, if any such statements were made, Purchaser acknowledges that by execution of this Agreement, Purchaser affirms that Purchaser has not relied upon any such statements, if any, and waives any rights that Purchaser might have as a result of such statements unless they are incorporated in this Agreement.

Admittedly, Plaintiffs talked with no one other than Jay Scott before deciding to purchase lot 32. (K. McCarthy Dep. p. 20). Thereafter, without any further investigation, due diligence or other discussion, the sale closed on August 5, 2005. Kevin McCarthy testified as follows:

Q: Tell me any contacts you had with any of the folks at the Cliffs, or any entity you think was associated with The Cliffs, about Lot 32?

A: I don't recall any. Doesn't mean there weren't, but I don't recall any.

Q: Do you recall anything happening, other than you going out and getting financing, about purchasing the lot between the contract and the deed?

A: No.

(K. McCarthy Dep. p. 52).

By deed dated August 5, 2005, KFIG transferred title of lot 32 solely to Kevin McCarthy for the purchase price of \$1,105,000.00 (K. McCarthy p. 50, Exh. 9). By deed also dated August 5, 2005, Kevin McCarthy conveyed a half interest in lot 32 of Courtney Roundtree. (K. McCarthy Dep. Exh. 10). Neither Plaintiff ever met with, talked to, or had even heard of S&ME before purchasing lot 32. (K. McCarthy Dep. p. 90-91; C. McCarthy Dep. p. 47-48).

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Plaintiffs never built a house on lot 32. In November 2006, Kevin McCarthy moved to Charlotte, North Carolina thus eliminating the need for an equidistant vacation home. (K. McCarthy Dep. p. 60 -61). Building a house on lot 32 admittedly took a backseat after Plaintiffs married and Kevin McCarthy relocated. (K. McCarthy Dep. p. 62).

As a result, Plaintiffs listed lot 32 for sale in July 2008 for \$1,399,000.00. (K. McCarthy Dep. p. 68). No offers were made to purchase the land. (K. McCarthy Dep. p. 73)

Plaintiffs had no concerns about their lot until April or May 2011, when Kevin McCarthy received a telephone call from Jack Harrell, the owner of adjacent lot 31, whom he did not know. According to Kevin McCarthy, Jack Harrell advised him: "Well, I'm your neighbor down there, and we got a problem. The lots are falling into the lake." (Kevin McCarthy Dep. p. 75).

At some subsequent time, either Jack Harrell or his counsel sent Plaintiffs or their counsel a portion of a July 2005 report prepared by S&ME addressed to the Cliffs Communities, Inc. (K. McCarthy Dep. p. 89). Until 2011, Plaintiffs had never heard from S&ME. (K.

McCarthy Dep. p. 90-91). Plaintiffs have never had any relationship with S&ME. In that regard, Kevin McCarthy testified:

Q. Have you ever to this day talked to a human being about lot 32 that you thought worked with S&ME?

A. Not to my knowledge.

Q. Have you ever hired S&ME to perform any work on lot 32?

A. Not to my knowledge.

Q. Is it fair to say that your knowledge of S&ME is by obtaining documents, either from Mr. Harrell or his counsel and through the lawsuit process.

A. And their website, after being made aware of them through the lawsuit process, correct.

(K. McCarthy Dep. p. 91).

This matter is now before this Court on S&ME's motion for summary judgment. This motion is based upon the following grounds:

1. There is no genuine issue as to any material fact.
2. There is no evidence that S&ME owed Plaintiffs any duty of care.
3. There is no evidence that any alleged professional negligence of S&ME proximately caused the damages claimed by Plaintiffs.
4. Plaintiffs' negligence claim is barred by the economic loss rule.
5. There is no evidence that S&ME acted in a willful or wanton manner or in reckless disregard to Plaintiffs' rights.
6. Plaintiffs have not asserted any legal claim which would entitle them to an award of attorney's fees against S&ME.
7. Plaintiffs cannot recover the purchase price of the lot because the evidence establishes that a repair is feasible.
8. Plaintiffs cannot recover for any loss of investment opportunity because their claims are unduly speculative.

9. S&ME is entitled to an order granting summary judgment in its favor as a matter of law.

### III. ARGUMENT

#### S&ME Does Not Owe Plaintiffs Any Duty of Care

It is axiomatic that to prove their claim for professional negligence, Plaintiffs must demonstrate that S&ME owed them a legal duty. It abundantly clear that the question of whether S&ME owes a legal duty to Plaintiffs is a question for this Court. "A motion for summary judgment on the basis of the absence of a duty is a question of law for the court to determine." Oblachinski v. Reynolds, 391 S.C. 557, \_\_\_, 706 S.E.2d 844, 845 (2011) (upholding trial court's grant of summary judgment based finding that the defendant did not owe a duty of care). In an action for negligence, the court must determine whether the defendant owed a duty of care to the plaintiff. If there is no duty, the defendant is entitled to judgment as a matter of law. Huggins v. Citibank, N.A., 355 S.C. 329, \_\_\_, 585 S.E.2d 275, 276-277 (2003).

Review of South Carolina's cases demonstrates that a duty exists only if imposed by statute, contract, relationship, status, property interest, or other special circumstance. McCullough v. Goodrich & Pennington Mort. Fund, Inc., 373 S.C. 43, 47-48, 644 S.E.2d 43, 46 (2007); Hendricks v. Clemson Univ., 353 S.C. 449, 456, 578 S.E.2d 711, 714 (2003) ("An affirmative legal duty only exists if created by statute, contract, relationship, status, property interest, or some other special circumstance."); Barker v. Sauls, 289 S.C. 121, 122, 345 S.E.2d 244 ("The key inquiry is what duty, if any, is owed by the tortfeasor to the third party. It is essential to liability for negligence that the parties have some relationship recognized by law to support the duty owed by the tortfeasor.")

Plaintiffs do not allege that they retained S&ME to perform any service for them. Further, there is no evidence that S&ME ever performed any service, testing, or analysis of

Plaintiffs' lot. Despite this, Plaintiffs allege that S&ME performed services at an adjacent lot that thus owed them duties to:

- (1) Recommend that further testing be performed on Lot #32;
- (2) Perform additional testing on Lot #32; and
- (3) Inform them that there may be issues with constructing on lot 32.

(Compl. ¶ 53). Under Plaintiffs' theory, whenever an engineer sees any potential issue on adjoining land, the engineer suddenly owes legal duties to the adjoining landowners and all future adjoining landowners in perpetuity. Plaintiffs' creative legal theory is not supported by law and there is no evidence in this case of any relationship which extends any legal duty to Plaintiffs.

#### **S&ME Does Not Owe Any Duty Pursuant to Statute**

To establish a duty of care arising from a statute, a plaintiff must show: (1) that the essential purpose of the statute is to protect from the kind of harm suffered by plaintiff; and (2) that he is a member of the class of persons the statute is intended to protect. Summers v. Harrison Constr., 298 S.C. 451, 455, 381 S.E.2d 493, 496 (Ct. App. 1989) citing Rayfield v. S.C. Dept. of Corrections, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988). Plaintiffs have not pled the existence of any statute that imposes a duty of care on S&ME to them.

#### **S&ME Does Not Owe Plaintiffs a Duty Arising from Contract**

A duty may arise from an alleged tortfeasor's contractual relationship with another party. Barker v. Sauls, 289 S.C. 121, 122, 345 S.E.2d 244, 244 (1986). It is undisputed that S&ME has never entered into any contract with Plaintiffs.

South Carolina's courts have addressed what duties a consultant hired to prepare a report owes to third parties. South Carolina State Ports Authority v. Booz-Allen & Hamilton, Inc., 289

S.C. 373, 346 S.E.2d 324 (1986). See also First Fed. Savings Bank v. Knauss, 296 S.C. 136, 140, 370 S.E.2d 906, 908 (Ct. App. 1988) (applying Booz-Allen to claim for negligent preparation of appraisal).

In Booz-Allen, the Georgia Ports Authority contracted with Booz-Allen & Hamilton, a consulting firm, to prepare a report comparing the merits of the Savannah, Georgia port with the Charleston, South Carolina port. Booz-Allen, 289 S.C. at 375, 346 S.E.2d at 325. Booz-Allen failed to obtain facts and figures concerning the Charleston port from the South Carolina Ports Authority and the completed report contained false facts concerning the Charleston port, such as depth of channels and bridge clearances. Id. As a result, the completed report was highly favorable to the Savannah port. Id. The Georgia Ports Authority distributed the report to customers and potential customers, resulting in decreased traffic in the Charleston port. Id.

The Charleston Ports Authority and two unions, the Pilots Association and International Longshoremen's Association, filed a lawsuit in federal court alleging a claim for negligence against Booz-Allen. The plaintiffs argued that Booz-Allen owed them a duty because it was foreseeable that the report falsely disparaging the Charleston port would have a direct economic impact on them. Id. at 376, 346 S.E.2d at 325. The district court granted Booz-Allen's motion to dismiss as to the negligence cause of action, finding that Booz-Allen owed no duty to the plaintiffs. Id. at 375, 346 S.E.2d at 325. On appeal, the United States Court of Appeals for the District of Columbia certified the following question to the South Carolina Supreme Court:

Under South Carolina law, which, if any, of the following entities has a tort claim for negligence against a consultant who prepares a report intended for public distribution, comparing two ports, where the port authority of one port has contracted with the consultant for the report, and where the report sets forth statements of fact that reasonable investigation would have shown to be false, portraying the other port as inferior and causing traffic to avoid that port:

(a) The governmental agency responsible for the administration of the port described as inferior?

(b) The association of harbor pilots for that port?

(c) Labor unions whose members are employees servicing vessels in that port?

Id. at 375, 346 S.E.2d at 325.

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Each of the plaintiffs argued that the consultant owed each of them a duty because it was foreseeable that the negligently prepared report would injure them. Id. at 376, 346 S.E.2d at 325. The court rejected those arguments and held that “[f]oreseeability of injury, in the absence of a duty to prevent that injury, is an insufficient basis on which to rest liability.” Id.

Rather, the court held that the consultant in that case only owed a duty to “non-contracting parties who have reasonably relied on their reports in taking some action.” Id. Accordingly, the court limited the consultant’s duty to the South Carolina Ports Authority. The court found no duty owed to the other two plaintiffs because the relationship was “far too attenuated to rise to the level of a duty flowing between them.” Id. at 377, 346 S.E.2d at 326.

In other circumstances, South Carolina courts have held that a contract creates a legal duty to intended third party beneficiaries when such duties are specifically set forth in the contract. For example, in Dorrell v. South Carolina Dep’t. of Transp., the court held that a contractor hired to repave a road owed a duty to the traveling public at large to not negligently perform its work. The court’s holding was based upon contract language stating that the contractor was to perform its work in a manner to insure the safety of the public. 361 S.C. 312, \_\_\_\_\_, 605 S.E.2d 12, 15 (2004). See also Barker v. Sauls, 289 S.C. 121, 345 S.E.2d 244 (1986) (holding that an insurance broker who contracted with employer to sell workers’ compensation insurance to the employer was liable to an employee for his negligence in failing

to procure the policy because the employee was a third party beneficiary of the contract between the broker and employer).

In 2005, S&ME was hired by the Cliffs Communities, Inc. to perform certain geotechnical investigation services on adjacent Lot #31. (Birdsong Aff. ¶2). On July 18, 2005, S&ME issued its report regarding Lot 31 to the Cliffs Communities, Inc. (Birdsong Aff., Ex. 1). At that time, KFIG owned lot 32, Plaintiffs did not. It is apparent that Plaintiffs did not rely upon any report prepared by S&ME for The Cliffs Communities, Inc.; Plaintiffs admit that they were not aware of and did not see a copy of the 2005 S&ME report until six years after they purchased lot 32. (K. McCarthy Dep. p. 89). There is no contract between S&ME and Plaintiffs, and they did not rely upon S&ME's report. There is no legal basis for imposition of a duty here.

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**Plaintiffs Are Not Owed Any Duty Based on Any Legally Recognized Status**

South Carolina's courts have held that a duty may be imposed based upon a plaintiff's "status". However, the courts have limited imposition of a duty based upon "status" to cases involving premises liability claims, products liability matters, and volunteers. See Singleton v. Sherer, 377 S.C. 185, 200, 659, S.E.2d 196, 204 (Ct. App. 2008) ("The nature and scope of a duty in a premises liability action, if any, is determined based upon the status or classification of the person injured at the time of his or her injury"); Sims v. Giles, 343 S.C. 708, 715, 541 S.E.2d 857, 861 (Ct. App. 2001) (in a premises liability case the standard of care is dependent upon the plaintiff's status as an invitee, licensee, trespasser, or child); Bray v. Marathon Corp., 356 S.C. 111, 117, 588 S.E.2d 93, 95-96 (2003) (recognizing differing duties of care owed by a manufacturer to users of its products and bystanders); Miller v. City of Camden, 329 S.C. 310, 314, 494 S.E.2d 813, 815 (1997) (when an act is voluntarily undertaken, the actor may owe a

duty based on their status as a volunteer). South Carolina law does not support imposition of a duty based upon Plaintiffs' status as a future potential adjoining landowner.

#### **Plaintiffs Do Not Have a Recognized Property Interest**

Under South Carolina law, a duty may be owed to persons with certain property interests. However, a review of these decisions reveals that they apply in cases involving actions against third parties who damage property. In those instances, the courts have held that such third party may owe a duty to the holder of a secured interest in the damaged property. See McCullough v. Goodrich & Pennington Mort. Fund, Inc., 373 S.C. 43, 50-52, 644 S.E.2d 43, 47-48 (2007). In that case, the court addressed whether a holder of a security interest owed any duty to a lender's customer. In reaching its holding that Advanta did not owe the plaintiff any duty, the court differentiated prior South Carolina cases. Id. at 50-52, 644 S.E.2d at 47-48, citing Wilkes v. S. Ry. Co., 85 S.C. 346, 67 S.E. 292 (1910), Universal C.I.T. Credit Corp. v. Trapp, 232 S.C. 297, 101 S.E.2d 829 (1958). Because the plaintiff's security interest was in an intangible right to receive payment and not tangible right in personal property, the court concluded that Advanta did not owe the plaintiff any duty. Id.

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S&ME issued its 2005 report to the Cliffs Communities, Inc. regarding lot 31. Plaintiffs have never had any interest in lot 31. In fact, at that time, Plaintiffs had no legal interest in lot 32 which was then owned by KFIG and there is no duty owed by S&ME to Plaintiffs based upon their "status".

#### **There is No Special Relationship between S&ME and Plaintiffs**

South Carolina's courts have recognized that under certain circumstances, a "special relationship" may exist between professionals and third parties with whom they are not in privity of contract which creates a legal duty separate and distinct from any contractual duties.

Tommy L. Griffin Plumbing v. Jordan, 320 S.C. 49, 463 S.E.2d 85 (1995); Beachwalk Villas Condominium Assoc., Inc. v. Martin, 305 S.C. 144, 146-47,406 S.E.2d 372, 374 (1991); Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 345-46, 384 S.E.2d 730, 737 (1989); Gilliland v. Elmwood Properties, 301 S.C. 295, 391 S.E.2d 577 (1990); State Ports Auth. v. Booz-Allen & Hamilton, Inc., 289 S.C. 373, 346 S.E.2d 324 (1986). Whether a legal duty giving rise to an actionable negligence claim exists "will depend on the facts and circumstances of each case." Tommy L. Griffin, Id. at 55-56.

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In Tommy L. Griffin, the low bid contractor for a water trunk project alleged that the project engineer wrongfully closed the job for a month, made extra-contractual demands, wrote a disparaging letter to the bonding company, and incorrectly interpreted the terms of the contractor's contract with Charleston County. The court held that the engineer who designed and supervised the construction of the water trunk project owed a duty to the contractor not to negligently design or negligently supervise the project. Id. at 56. The Tommy L. Griffin court noted that it was important that the engineer designed the project, supervised the construction and had the right to inspect and halt construction. Thus, the Engineer's contract with the County which required interaction and supervision of the Contractor created a "special relationship."

In Cullum Mechanical Constr., Inc. v. South Carolina Baptist Hosp., 336 S.C. 423, 520 S.E.2d 809 (1999), the court addressed a circumstance where the design professional approved payment applications submitted by the general contractor even though it knew that the general contractor was not paying its subcontractors. In Cullum, a subcontractor alleged that the architect, whose contract was with the owner, breached its duty to the subcontractor when it

failed to ensure that proper payment was made on the project. Id. at 426. The subcontractor argued that the construction documents gave the architect effective control over all facets of the work and over all parties performing the construction, and, thus, the architect was required to use due care in the exercise of those duties.

The court noted that the subcontractor was not arguing the traditional duty of architects to design and supervise construction with due care over the project and that, unlike the engineer in Tommy L. Griffin, the architect did not have specific contractual authority to direct or halt construction. Thus, the court found no special relationship existed and upheld summary judgment in favor of the defendant architect. Id.

The South Carolina Supreme Court subsequently granted certiorari in Cullum and vacated the order for summary judgment stating:

Generally, an architect does not have a duty to assure payment to subcontractors; however, special conditions in these contract documents may have given rise to a special relationship with subcontractors, and therefore a duty of care. We find it is a factual issue whether these circumstances give rise to a special relationship between Architect and Cullum, which would give rise to a duty on the part of Architect.

Id. at 432, 544 S.E.2d at 842. It is important to note that Supreme Court did not hold that the lower court's refusal to extend Tommy L. Griffin to the architect was incorrect. Rather, Court acknowledged that there are limits to application of Tommy L. Griffin but that the complicated contractual documents needed more review. Id.

This case presents far more attenuated facts. It is undisputed that S&ME has no contractual relationship with these Plaintiffs. In fact unlike all of the South Carolina cases, S&ME performed no services on the land at issue. Plaintiffs purchased lot 32 from KFIG, an affiliate of the Cliffs Communities, Inc. S&ME performed services for Cliffs Communities, Inc.

- not KFIG - on an adjoining lot. There is no special relationship in this case and thus no duty of care.

The Federal District Court for the District of South Carolina has addressed this issue in two unpublished decisions which are directly on point. In Ross Dress for Less, Inc. v. Lauth Constr. Group, LLC et al, C.A. No, 0:10-703-CMC (2012), the Judge Cameron Currie of United States District Court for the District of South Carolina granted a motion for summary judgment filed by a geotechnical engineering firm finding that it did not owe a legal duty to a subsequent purchaser of property on which it had actually provided services. That case involved the 2005 construction of a commercial warehouse and infrastructure for Transpointe I, LLC and KTR Transpointe, LLC which owned the property. Transpointe had contracted with Lauth to serve as the general contractor for the warehouse project. Lauth subcontracted with Mactec Engineering & Consulting, Inc. to provide geotechnical engineering services for the project. Ross Stores subsequently purchased the warehouse in 2008. A dispute ensued after a sediment basin failed and Ross Stores discovered that the soil under the warehouse contained unsuitable organic materials which were causing settlement of the structure.

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Mactec filed a motion for summary judgment contending that it did not owe any legal duty to Ross Stores, a subsequent purchaser of the property. The District Court reviewed applicable South Carolina cases and found that a "special relationship" must exist between the plaintiff and defendant to create a legal duty. In Ross, the District Court found no such relationship: "the court finds that Plaintiff has not established a special relationship between MacTec and Plaintiff creating a legal duty from MacTec, as a geotechnical engineers hired by a general contractor to complete soil analysis on property for a developer, to Plaintiff, as a subsequent commercial purchaser of the property."

Similarly, in Long v. O'Reilly's Automotive Stores, Inc., et al, C.A. No., 6:12-901-MGL (S.C. Dist. Ct. 2013), the United States District Court Judge Mary Lewis granted a motion to dismiss filed by a civil engineer and his firm ruling that the engineer did not owe any duty of care to an adjacent landowner. In Long, the plaintiff alleged that the engineering defendants were responsible for all engineering aspects related to the construction of an auto parts store located adjacent to his property. The plaintiff further alleged that as a result of the defendants' civil engineering design, surface water from the auto parts store was diverted to his property and caused damage to his land and residence. Judge Lewis recognized that under South Carolina law, a duty exists only if imposed by statute, contract, relationship, status, property interest, or other special circumstance and that the plaintiff had failed to allege the existence of any type of relationship sufficient to impose a legal duty on the part of the engineers to him. Thus, Judge Lewis concluded that the mere fact that an engineer provides services for adjacent property is not legally sufficient to establish a duty of care owed to an adjacent landowner.

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Other states which have considered similar cases have likewise concluded that no duty is owed in such attenuated circumstances. For example, in Hartman v. Urban, 946 S.W.2d 546 (Tex. App. 1997), the defendant surveyor was hired by a developer to create a subdivision plat. The developer recorded the plat which incorrectly showed that one of the lots had 53.12 feet of water frontage when in fact the lot only had 41.24 feet of water frontage. Id at 547. Relying on the description in the recorded plat, the plaintiffs purchased the lot. The plaintiffs brought a negligence claim against the surveyor, alleging that the surveyor had a duty to exercise reasonable care in the preparation of the plat, that the surveyor breached that duty, and that the plaintiffs were injured because the lot was worth less than the purchase price. Affirming the trial court's grant of summary judgment, the court held that even though the surveyor knew that the

purpose of the subdivision was to sell lots to the public, the surveyor did not owe any duty to the plaintiffs. Id. at 551.

Likewise, in Essex v. Ryan, 446 N.E.2d 368 (Ind. App. Dist. 2 1983), the court rejected a similar argument. There, the plaintiff purchased a house and, relying on a survey performed for the previous owners, constructed an addition to the house. Id. at 369. However, the survey was erroneous and the addition encroached upon their neighbor's property. Id. The court quoted concerns expressed by Justice Cardozo in Ultramares Corp. v. Touche, 174 N.E. 441 (NY 1931):

If liability for negligence exists, a thoughtless slip or blunder...may expose [professionals] to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may exist in the implication of a duty that exposes to these consequences.

The court found that the surveyor did not owe the plaintiffs any duty because the plaintiffs were not in privity with the surveyor and the surveyor did not have actual knowledge that the plaintiff would rely on the survey. Essex, 446 N.E.2d. at 372-73.

There is no relationship between Plaintiffs and S&ME. There is no South Carolina law which supports imposition of a legal duty under these facts. S&ME is entitled to an order granting summary judgment in its favor as a matter of law.

#### **The Economic Loss Rule Bars Plaintiffs' Claims**

The economic loss rule is rooted in products liability law. In as early as 1965, the courts recognized that a plaintiff's failure to get the benefit of his bargain does not give rise to a tort claim. See Seely v. White Motor Co., 403 P.2d 145 (Cal. 1965). Parties frequently negotiate the terms of their agreements. Permitting a plaintiff to proceed under a tort theory allows him to abrogate the terms and conditions of his agreement.

Applying the economic loss rule, South Carolina's courts have likewise held that breach of a contractual duty does not give rise to a cause of action in tort. See e.g. Kennedy v. Columbia Lumber & Manufacturing Co., Inc., 299 S.C. 335, 347, 384 S.E.2d 730, (1989) ("Thus, a cause of action in negligence will be available where a builder has violated a legal duty, no matter the type of resulting damage. The 'economic loss' rule, will still apply where duties are created solely by contract. In that situation no cause of action in negligence will lie.").

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The South Carolina Supreme Court noted in Sapp v. Ford Motor Co., 386 S.C. 143, 147, 687 S.E.2d 47, 49 (2009), that the economic loss rule defines the line between a recovery under a tort theory and recovery under contract. Where a defendant's duties arise pursuant to contract, our courts have held that the legal claim is one for breach of contract, not negligence. On the other hand, where the duty arises by operation of law, the courts have held that the plaintiff can assert a tort claim. As noted in Sapp, absent personal injury or property damage, the economic loss rule applies. Id.

The economic loss rule is a creation of the modern law of products liability. Under the rule, there is no tort liability for a product defect if the damage suffered by the plaintiff is only to the product itself. Kennedy v. Columbia Lumber & Mfg. Co., 299 S.C. 335, 341, 384 S.E.2d 730, 734 (1989). In other words, tort liability only lies where there is damage done to other property or personal injury.

Id.

In this case, S&ME had no independent obligation to conduct a geotechnical investigation of Plaintiffs' property. Its alleged obligations flow solely from its contract with the Cliffs Communities, Inc. to perform services on lot 31. Plaintiffs likewise have suffered no personal injury or property damage. Plaintiffs simply cannot assert a tort claim against S&ME.

### No Act of S&ME Proximately Caused Plaintiffs' Damages

Negligence is not actionable unless it is a proximate cause of the injuries complained of. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 398, 237 S.E.2d 753, 757 (1977). If there is no genuine issue of material act as to whether a defendant's actions were the proximate cause of a plaintiff's injury, then summary judgment is appropriate. Singleton v. Sherer, 377 S.C. 185, 203, 659 S.E.2d 196, 206-07 (Ct. App. 2008) (upholding trial court's grant of summary judgment because there was no genuine issue of material fact as to proximate cause). Proximate cause consists of two parts: (1) causation in fact; and (2) legal cause. Oliver v. South Carolina Dep't of Hwys. & Pub. Transp., 309 S.C. 313, 316, 422 S.E.2d 128, 130 (1992). Causation in fact is proved by establishing that the plaintiff's injury would not have occurred "but for" the defendant's negligence. Id. Legal cause is proved by establishing foreseeability and that the injury occurred as a natural and probable consequence of the defendant's negligence. Vinson v. Hartley, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996).

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Plaintiffs have proffered no evidence that their damages are a proximate result of S&ME's report. The California case of Gagne v. Bertran is instructive. 43 Cal. 2d 481, 275 P.2d 15 (Cal. 1954). In that case, plaintiffs testified that they would not have purchased certain properties and constructed apartment buildings on them had they known that the presence of fill dirt was more extensive than soil tests previously revealed. Id., 43 Cal. 2d at 487. There, the court found:

Because of defendant's negligence plaintiffs erroneously believed [the property] was more suitable for their purpose than it actually was. The additional expense [in removing extra fill] they incurred, however, flowed from the condition of their land and not from defendant's report as to what that condition was.

Id. at 492; Roberts v. Karr, 178 Cal. App. 2d 535, 3 Cal. Rptr. 98 (Ct. App. 1960) (in action against surveyor who misrepresented the amount of dirt which could be removed in leveling a property, the court excluded damages related to increased leveling costs because they were caused by the condition of the land, rather than the surveyor's misrepresentation).

The Supreme Court of Maine reached a similar result in Wendward Corp. v. Group Design, Inc., 428 A.2d 57 (Me. 1981). In that case, the plaintiff contracted with the defendant to take soil samples at a site on which he planned to construct a Wendy's restaurant franchise. Defendant negligently took samples from a different site and as a result the tests failed to reveal defects in the actual site's soil which rendered it unsuitable for construction. Id. at 59. The court rejected the plaintiff's claim for excavation and removal costs because it found that the plaintiff would have incurred the costs in any event even if it had it known about the actual conditions of the property. Id. at 60. The court pointed to evidence that the site's proximity to competitive fast food restaurants and the general traffic flow in the area rendered it particularly attractive to the plaintiff, suggesting that it would have undertaken whatever work was necessary to complete construction even if he had he been informed of the defects. Id. The court thus found that the trial court properly limited damages to "those costs that the appellants incurred because of the delay in discovery of the true subsurface conditions." Id. at 61 (citing Gagne v. Bertran).

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The Supreme Court of New Hampshire similarly found that plaintiff suffered no damages resulting from an erroneous surveyor's report. Progressive Survey v. Pearson, 120 N.H. 58, 410 A.2d 1123 (1980). In that case, Progressive intended to subdivide a property and hired Pearson to provide a topographical survey and contour profile to be used in designing a road for the subdivision. The survey indicated that a straight road could be built, thus allowing Progressive to maximize the number of lots available for sale. The survey also indicated that the proposed

road would require little ledge removal and fill to meet the maximum grade regulations. Id. at 59. During construction, Progressive discovered that a brook over which the road had to pass was more than 13 feet lower in elevation than shown on defendant's plan, and that substantially more ledge removal and filling would be required to complete the road. Id.

The plaintiff argued it was entitled to recover all expenses in excess of what it expected to incur as a result of defendant's plan. Progressive also argued that had the plaintiff known the true cost of the project, it would have chosen to develop the land by using a contour road rather than a straight one. The Supreme Court of New Hampshire upheld exclusion of damages attributable to the costs that Progressive would have incurred had the original survey been correctly drawn: "Had the original contour survey been correctly drawn, plaintiff would have incurred the same expense that it ultimately did [...]. The elevation of the brook, and not defendant's erroneous survey, caused the increase in development costs." Id. at 60 (citing Gagne v. Bertran).

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An unpublished North Carolina appellate decision supports a similar result. See Mosteller Mansion, LLC v. Mactec Eng'g & Consulting, 661 S.E.2d 788 (N.C. App. 2008) (unpublished). In that case, the plaintiff planned to purchase a tract of land and construct an apartment complex. Prior to purchase, plaintiff contracted with Mactec Engineering to: (1) assess the subsurface conditions of the proposed site; (2) determine if the proposed site was suitable for construction; and (3) provide recommendations for foundation design. Mactec conducted soil tests and issued its report and recommendation. Plaintiff later sued Mactec claiming negligence and breach of contract, alleging that the soil was inconsistent with Mactec's recommendations and unsuitable for construction. Plaintiff claimed damages for removal and repair costs, as well as loss of business. In upholding the contract's limitation of liability and

indirect damages provisions, the Court noted Plaintiff's damages incurred in repairing and reconditioning the soil are "indirect and consequential, as the[y] do not flow directly and immediately from any action of Defendant." Id. at n.2 (citing Gagne v. Bertran).

Even if S&ME owned Plaintiffs some duty of care, which it did not, Plaintiffs cannot demonstrate that their damages were proximately caused by S&ME. In the first place, S&ME did not create any condition on Plaintiffs' lot. At best, Plaintiffs contend that S&ME should have discovered some underlying geologic condition on their neighbor's lot and advised the Cliffs Communities, Inc. that such condition existed. The only evidence in the record is that if there is a slope failure occurring on lot 32, it can be repaired (Chappel Dep. Exh. 4). Even if S&ME had reported to the Cliffs that there was a problem with the lot in 2005, S&ME would have had no responsibility to repair the lot. S&ME did not own the lot and did not create the condition. Instead, KFIG would have incurred the cost of repair. There is no evidence that the Cliffs would not have undertaken repair of the lot. If S&ME did not cause any defect in the property and had no obligation to incur the expense of repairing the lot in 2005, how could it possibly be the proximate cause of Plaintiffs' damages now?

In the second place, to assert a claim for negligence in preparing reports, Plaintiffs must have reasonably relied upon the report in taking some action. South Carolina State Ports Auth. v. Booz-Allen & Hamilton, 289 S.C. 373, 376, 346 S.E.2d 324, 326 (1986). It is logical that an injury arising from a negligently prepared report cannot occur "but for" the plaintiff's reliance on such report.

In Hughes v. Holt, 240 Vt. 38, 435 A.2d 687 (1981), the plaintiffs brought a claim against a bank and appraiser for negligence in the preparation of an appraisal. Specifically, the plaintiffs claimed that the appraiser failed to discover evidence of extensive termite damage at a house

they purchased. *Id.* at 39, 435 A.2d at 688. The court held that to establish a claim for negligence against the bank or the appraiser, the plaintiff had to show that the appraisal was a proximate cause of their injury and loss. *Id.* at 41, 435 A.2d at 689. However, the court held that the plaintiffs had failed to establish proximate cause because “it was the testimony, and the unquestioned fact, that the plaintiffs had executed the purchase and sale agreement before the appraisal was ever done.” *Id.* See also Williams v. United Community Bank, 724 S.E.2d 543, 549 (N.C. App. 2012) (holding that plaintiffs failed to establish a prima facie case of negligence because the evidence showed that the plaintiffs signed the purchase contracts without reviewing the allegedly negligently prepared appraisals).

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Here, the undisputed evidence shows that S&ME issued its report to the Cliffs on July 18, 2005, after Plaintiffs signed the contract to purchase Lot #32 on June 20, 2005. Admittedly, Plaintiffs did not rely on S&ME’s July 18, 2005 report; they did not even know that such a report existed until years later. Plaintiffs simply cannot demonstrate that some omission of S&ME in failing to detect a geologic feature on an adjoining lot proximately caused their damages.

#### **Plaintiffs Cannot Recover Attorney’s Fees from S&ME**

In South Carolina, “attorney’s fees are not recoverable unless authorized by contract or statute.” Baxter v. Martin Bros., Inc., 368 S.C. 510, 514, 630 S.E.2d 42, 44 (2006) (quoting Blumberg v. Nealco, Inc., 310 S.C. 492, 493, 427 S.E.2d 659, 660 (1993)); Harris-Jenkins v. Nissan Car Mart, Inc., 348 S.C. 171, 176, 557 S.E.2d 708, 710 (Ct. App. 2001) (“There is no common law right to recover attorney’s fees.”).

Here, Plaintiffs’ sole cause of action against Defendant S&ME is for professional negligence. (Compl. ¶¶ 49-59). Plaintiffs do not – and cannot – point to any contractual or statutory provision that entitles them to an award of attorney’s fees. Accordingly, Defendant

S&ME is entitled to an order granting summary judgment in its favor with respect to Plaintiffs' claim for attorney's fees.

**Plaintiffs Cannot Recover the Purchase Price of the Lot Because  
a Repair is Feasible**

Plaintiffs' injuries result solely from their purchase of Lot #32 during the summer of 2005. Plaintiffs proffer no evidence that a repair of the lot is not feasible. In fact, Plaintiffs' expert has not even performed the analysis necessary to determine if remediation is possible. (Crowther Dep. pp. 55-56). Instead, Plaintiffs baldly assert that they are entitled to a refund of the full purchase price of the lot.

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The reasonable cost of repair is the proper measure of damages for injury to real property. See Kincaid v. Landing Dev. Corp., 289 S.C. 89, 344 S.E.2d 869 (Ct. App. 1986). Diminution in value applies as an alternative measure of damages only where the cost of repairing the defect is grossly disproportionate to the value of the property, or where the defect is permanent or otherwise impractical to cure. See Yadkin Brick Co., Inc. v. Materials Recovery Co., 339 S.C. 640, 529 S.E.2d 764 (Ct. App. 2000)(diminution in value of property is proper measure of damages where the injury to real property is of a permanent nature); Scott v. Fort Roofing & Sheet Metal Works, Inc., 299 S.C. 449, 385 S.E.2d 826 (1989) ("Cost of repair or restoration is a valid measure of damages for injury to a building although compensation may be limited to the value of the building before damage was inflicted."); Joyner v. St. Matthews Builders, 263 S.C. 136, 140, 208 S.E.2d 48, 50 (1974)("In the absence of evidence of specific damages, the measure of damages for injury to real property is the difference between the value of the entire premises before and after injury thereto."); John Thurmond & Associates, Inc. v. Kennedy, 284 Ga. 469, 470, 668 S.E.2d 666, 668 (Ga. 2008)("...damages for defective construction, whether those damages are the result of a breach of contract or negligence of the contractor, are determined by

measuring the cost of repairing or restoring the damage, unless the cost of repair is disproportionate to the property's probable loss of value").

Here, Plaintiffs purchased Lot #32 for \$1,105,000.00 (K. McCarthy Dep. Exh. 3). The evidence establishes that a remediation of the lot is possible. The only estimate prepared in this case is by Defendant S&ME's expert which estimated the cost at \$679,700.00. (Chappell Dep. Exh. 4). Plaintiffs have presented no evidence that such repair is impractical. (Crowther Dep. pp. 55-56). Moreover, Plaintiffs proffer no evidence that a repair cost of \$679,700.00 is grossly disproportionate to the value of the property. Accordingly, Plaintiffs are not entitled to recover the full purchase price of Lot #32. Plaintiffs' damages, if any, are limited to the reasonable cost to repair.

Not only have Plaintiffs proffered no evidence that a repair is impractical, they have also offered no evidence that their property's value was diminished. Gagne v. Bertran, 43 Cal.2d 481, 275 P.2d 15 (Cal. 1954). In that case, plaintiffs testified that they would not have purchased certain properties and constructed apartment buildings on them had they known that the presence of fill dirt was more extensive than soil tests previously revealed. Gagne, 43 Cal.2d at 487. The court concluded that because the plaintiffs failed to prove that the lots were worth less than what they paid for them, they failed to establish damages flowing from their decision to buy. Plaintiffs here have similarly failed to prove that Lot #32 is worth less than what they paid for it. Accordingly, they cannot recover damages for diminution in the value of the property resulting from any alleged negligence of Defendant S&ME. Plaintiffs' damages, if any, are limited to the reasonable cost to repair. Plaintiffs cannot therefore recover the full purchase price of Lot #32 as a matter of law.

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### Plaintiffs Cannot Recover Lost Opportunity Damages

Plaintiffs improperly claim damages for lost investment opportunities. (See K. McCarthy Dep. Exh. 19). Plaintiffs purchased Lot #32 on August 5, 2005 for \$1,105,000.00 (K. McCarthy Dep. Exh. 3). Plaintiffs made a \$105,000.00 down payment at closing and financed the remaining \$1,000,000 purchase price, which they paid off by July 1, 2010. (K. McCarthy Dep. p.134). Plaintiffs also seek other expenses relating to the property such as golf club dues, expenses they incurred for shoreline stabilization, and property taxes. (K. McCarthy Dep. p. 140). They are apparently claiming damages equal to alleged investment returns if they had invested the these amounts in the S&P 500.

Plaintiffs' claim for lost investment opportunity is like a claim for lost profits. See Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 138-39, 697 S.E.2d 644, 651 (Ct. App. 2010). Under certain circumstances, a plaintiff may recover lost profits. See Vortex Sports & Entertainment, Inc. v. Ware, 378 S.C. 197, 208, 662 S.E.2d 444, 450 (Ct. App. 2008) (sports agency entitled to lost profits due to defendant's tortious interference with its client contracts); Petty v. Weyerhaeuser Co., 288 S.C. 349, 355, 342 S.E.2d 611, 615 (Ct. App. 1986) (owner of skating rink entitled to lost profits resulting from defective flooring manufactured by defendant). No South Carolina court has allowed recovery of lost profits in a case that did not involve business operations. See Moore v. Moore, 360 S.C. 241, \_\_\_, 599 S.E.2d 467, 474 (Ct. App. 2004) ("Proof may be established through expert testimony, economic and financial data, market surveys and analyses, **business records of similar enterprises, comparison with profit performance of businesses similar in size, nature and location, comparison with profit history of plaintiff's successor, comparison of similar businesses owned by plaintiff himself, and use of economic and financial data and expert testimony.**") (emphasis added).

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Even if the law allows for lost profit damages under these facts, Plaintiffs' claim for lost profits is speculative. To recover lost profits in a negligence case like this one, Plaintiffs must prove: (1) it is reasonably certain that such profits would have been realized except for the tort; and (2) such lost profits can be ascertained and measured from the evidence produced with reasonable certainty. Vortex Sports, 378 S.C. at 208, 662 S.E.2d at 450. Consistent with the general rule that "neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation," Gray v. Southern Facilities, Inc., 256 S.C. 558, 183 S.E.2d 438 (1971), the existence of lost profit damages may not be left to speculation or conjecture. Vortex Sports, 378 S.C. at 208, 662 S.E.2d at 450.

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In Santoro v. Schulthess, 384 S.C. 250, 681 S.E.2d 897 (Ct. App. 2009), the plaintiffs claimed that the defendant intentionally interfered with their efforts to sell their residence and as a result, the sale of the residence was delayed. Mortgage rates rose during the delay and the plaintiffs claimed damages equal to the additional two percent mortgage rate paid on the loan used to purchase their subsequent residence. Id. at 267-68, 681 S.E.2d at 906. The South Carolina Court of Appeals held that such damages were unduly speculative because the damages were based on assumptions that: (1) the plaintiffs could have found a suitable home immediately after selling their property; (2) they could have immediately obtained a suitable mortgage loan; and (3) they had personal knowledge of the interest rate that an unknown lender would charge them based on their particular circumstances. Id.

Plaintiffs testified that they intended to purchase a second home. In fact, they looked at a number of houses and lots. (K. McCarthy Dep. p. 15; C. McCarthy Dep. p. 8-9). There is no evidence that had lot 32 had not been available, they would not have purchased some other home or lot and would have invested any money in the S&P 500. In fact, Plaintiffs testified that they

wouldn't have invested money in the S&P 500 in any event. (K. McCarthy Dep. p. 136; C. McCarthy Dep. p. 52). Plaintiffs' damages for lost investment opportunity is speculative and those damages are not recoverable in this case. Accordingly, S&ME is entitled to an order granting summary judgment in its favor as a matter of law.

**Plaintiffs are not entitled to recover punitive damages from S&ME**

"[T]he highest burden of proof known to the civil law is applicable" in determining whether to award punitive damages. Mellen v. Lane, 377 S.C. 261, 290, 659 S.E.2d 236, 251 (Ct. App. 2008). Section 15-33-135 of the South Carolina Code provides that "In any civil action where punitive damages are claimed, the plaintiff has the burden of proving such damages by clear and convincing evidence." Moreover, "[p]unitive damages can only be awarded where the plaintiff proves by clear and convincing evidence the defendant's misconduct was willful, wanton, or in reckless disregard of the plaintiff's rights." Mellen, 377 S.C. at 290. The following factors are relevant to consideration of punitive damages:

- (1) The character of the defendant's acts;
- (2) The nature and extent of the harm to the plaintiff which defendant caused or intended to cause;
- (3) Defendant's degree of culpability;
- (4) The punishment that should be imposed;
- (5) Duration of the conduct;
- (6) Defendant's awareness or concealment;
- (7) The existence of similar past conduct;
- (8) Likelihood the award will deter the defendant or others from like conduct;
- (9) Whether the award is reasonably related to the harm likely to result from such conduct; and
- (10) Defendant's wealth or ability to pay.

Id. at 290 (citing Gamble v. Stevenson, 305 S.C. 104, 111-112, 406 S.E.2d 350, 354 (1991)); Welch v. Epstein, 342 S.C. 279, 306, 536 S.E.2d 408, 422 (Ct. App. 2000) ("Under Gamble, the

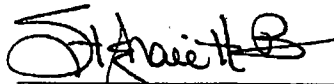
trial court is not required to make findings of fact for each factor to uphold a punitive damages award.”).

In this case, there is no evidence of any willful, wanton or reckless conduct by S&ME. In fact, there is little evidence in the record of any action by S&ME. The only evidence of S&ME’s activities in the record in this case is a portion of a 2005 report procured by Plaintiffs or their counsel and the affidavit of Walker Birdsong. Accordingly, S&ME is entitled to an order granting summary judgment in its favor as a matter of law.

#### CONCLUSION

Based upon the foregoing authorities and arguments, Defendant S&ME, Inc. respectfully submits that it is entitled to an order granting summary judgment in its favor as a matter of law.

Respectfully submitted,



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Attorneys for Defendant S&ME, Inc.

April 29, 2013  
Spartanburg, South Carolina



STATE OF SOUTH CAROLINA      IN THE COURT OF COMMON PLEAS  
COUNTY OF GREENVILLE      CA No.: 2011-CP-23-6376

Kevin McCarthy and Courtney E. McCarthy,  
Plaintiffs,

vs.

Keowee Falls Investment Group, LLC,  
The Cliffs Communities, LLC, d/b/a  
The Cliffs at Keowee Falls South,  
Cliffs Real Estate, Inc.,  
The Cliffs Golf and Country Club, Inc.,  
and S&ME, Inc.,

Defendants.

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DEPOSITION OF KEVIN MCCARTHY

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Pursuant to notice of deposition or subpoena  
or agreement in the above-entitled case, a deposition  
was taken on the 29th day of November 2012,  
commencing at approximately 9:00 a.m., attended by  
counsel as follows:

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1 with this matter. I don't know whether I found  
2 everything or not.

3 Q. If you, and I know everybody emails a lot, so it's a  
4 common communication method, if you were emailing  
5 regarding Lot 32, would you use a work email address  
6 or would you use a personal email address?

7 A. Most likely personal. Most likely personal, given  
8 the timing of this, because I would have been either  
9 at my CGW Southeast Partners in Atlanta, or back in  
10 Charlotte with Wachovia, and I likely would have not  
11 used the business addresses for those, if I was there  
12 for these kind of correspondence.

13 Q. Are you still using the same personal email  
14 account --

15 A. Yes.

16 Q. -- that you were back in '05?

17 A. Yeah.

18 Q. So if you looked for emails, you were looking at that  
19 personal email account?

20 A. Yeah.

21 Q. Would that be accurate?

22 A. Yes.

23 (Defendant's Exhibit 3 marked for  
24 identification, Kevin McCarthy  
25 deposition, 11/29/12, RAM.)

1 BY MR. BURTON:

2 Q. Mr. McCarthy, let me hand you a document I've marked  
3 as Exhibit number 3 --

4 A. Okay.

5 Q. -- to your deposition.

6 And I'll represent to you that this is also a  
7 document that was provided to us by your counsel.

8 A. Okay.

9 Q. Can you identify this document, sir?

10 A. Looks like the sales contract.

11 Q. On the left-hand side of page 1 there are a number of  
12 initials. Are those your initials?

13 A. Yes, they are.

14 Q. I thought they were. Just wanted to make sure.

15 Tell me, I want to make sure I understand the  
16 contract price. On the first page it says that the  
17 purchase price is \$1,105,000.

18 And then there's some other information, there's  
19 a Discount Applied to Membership Deposit, listed at  
20 35,000. Then there's a Golf Membership Initiation  
21 Deposit add-on at 40,000; then it looks like it has a  
22 subtotal of a-million-180; and then it shows an  
23 Earnest Money Deposit and a Balance Due at closing.

24 Do you see all that?

25 A. Um-hmm.

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1           you to buy one at the time.

2                   And they made it clear that if you didn't buy  
3           one, that the value of your property as a result,  
4           come resale, which was important to us, could be  
5           negatively impacted.

6           Q.   Okay.  you're going to have to help me a little bit.

7                   Was the purchase price of the land itself  
8           a-million-105-thousand?

9           A.   Again, I need to spend more time with this, because  
10          what we're talking about is, is interpreting the  
11          application of these --

12          Q.   Credits.

13          A.   -- discounts and credits and things.  So I can't  
14          answer that right now without spending more time..

15          Q.   Okay.  Turn over, if you would, to the page Bates  
16          numbered 73.

17                   Is that your signature under the word Purchaser,  
18          in the middle of the page?

19          A.   It is.

20          Q.   And there's a date underneath that, 6/20/2005?

21          A.   Okay.

22          Q.   Do you believe that you signed this Real Estate Sale  
23          and Purchase Agreement on June 20th of '05?

24          A.   Yes.

25          Q.   At the top of the document on that page it says:

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1 "Additional documents received by purchaser.  
2 Pursuant to Section 9.6, the purchaser acknowledges  
3 having received and reviewed, prior to the execution  
4 of the agreement, the following":

5 Then it appears to have a list of three things.  
6 The first one says, HUD; the next one says CCR; and  
7 the next one says, Platt, with two Ts.

8 Do you know what documents that that refers to?

9 A. What documents all three of those refer to?

10 Q. Yes.

11 A. Yes, the HUD disclosure.

12 Q. And was that the exhibit that we previously looked  
13 at --

14 A. Yes.

15 Q. -- Exhibit 2?

16 A. Yes.

17 Q. All right. I thought that was that.

18 Tell me what CCR is?

19 A. I recall that that probably means, I guess Community  
20 Covenants and Restrictions, I would imagine. And  
21 that talks about the things you're allowed to do if  
22 you're going to build, and sort of the rules of the  
23 road for the community are, both architectural review  
24 board, all sorts of things along those lines.

25 Q. And platt, with two Ts, I'm assuming that was some

1 sort of drawing?

2 A. Yes.

3 (Discuss off the record.)

4 BY MS. BURTON:

5 Q. Do you recall, other than the three documents listed  
6 on page Bates numbered 73 of Exhibit number 3, do you  
7 recall having any other documents provided to you  
8 prior to execution of Exhibit number 3?

9 A. What kind of documents?

10 Q. Any kind of documents.

11 A. Sure. There were other documents.

12 Q. Tell me what they were?

13 A. The sales literature from The Cliffs. And I don't  
14 know what all that encompasses, but there was a  
15 master site plan, there was a big glossy fold-out  
16 that showed you all the great places you could buy  
17 there. And associated with that there was, I assume,  
18 some other sales literature.

19 Q. Kind of marketing?

20 A. Yeah, brochure that had a picture of the 17th hole at  
21 the Vineyards, and on and on and on.

22 Q. Okay. And you would have gotten those type of  
23 marketing sales materials from Mr. Scott, I take it?

24 A. I would assume so, yeah.

25 Q. Looking at Exhibit number 3, does that refresh your

1 most of the documents except for the page that bears  
2 your wife's signature and the very last page, it  
3 looks like it says, June 21, 2005, 1105, at least  
4 that's the time it starts on the first page, and is  
5 that Carvy?

6 A. Cravey.

7 Q. Cravey. Sorry.

8 A. That's okay.

9 Q. Green, Wahlen, and that was where you were working in  
10 Atlanta?

11 A. Correct.

12 Q. So is it possible, based on looking at the document,  
13 that you actually got the document from The Cliffs,  
14 had it in your office or at home in Atlanta, signed  
15 it, and then faxed it back to the folks at The  
16 Cliffs?

17 A. That's what it appears.

18 Q. On the very last page of Exhibit number 3, there is a  
19 block for Seller, Keowee Falls Investment Group, LLC?

20 A. Um-hmm.

21 Q. And a signature of somebody who's listed as the  
22 treasurer.

23 Do you know when you acquired a copy of the  
24 agreement with a signature by Keowee Falls Investment  
25 Group LLC?

1 A. I do not.

2 Q. If you look on that same page, there's a small block  
3 on the left-hand side that has typed in, Jasmine Cove  
4 Lot 32, and then has lot purchase price,  
5 a-million-105, membership at 75,000, and a total of  
6 \$1,180,000; do you see that?

7 A. Yes.

8 Q. Do you know whether the membership referred to, is  
9 that \$75,000 related to the golf club?

10 A. Yes, I assume it does.

11 (Defendant's Exhibit 4 marked for  
12 identification, Kevin McCarthy  
13 deposition, 11/29/12, RAM.)

14 BY MS. BURTON:

15 Q. Let me hand you a document I've marked as Exhibit  
16 number 4. And I'll represent to you, Mr. McCarthy,  
17 this is also a document that was provided to us by  
18 your counsel.

19 Do you recognize this particular document?

20 A. I do not.

21 Q. Do you see your signature on it?

22 A. I do.

23 Q. Is that this little scrawl right above the words  
24 Kevin McCarthy?

25 A. Yes, it is.

1 BY MS. BURTON:

2 Q. Let me hand you a document I've marked as Exhibit  
3 number 9.

4 Do you recognize Exhibit number 9, Mr. McCarthy?

5 A. Looks to be the title.

6 Q. Is this the deed that transferred Lot 32 from Keowee  
7 Falls Investment Group LLC to you?

8 A. I don't know who it transferred it from, but that's  
9 what it appears to be. So it appears to be title  
10 that I hold for purchasing the property.

11 Q. Lets look at it together then.

12 In the first written, typed-in paragraph, where  
13 it says, Know all men; do you see that part?

14 A. Um-hmm.

15 Q. It says:

16 "Know all men by these presents that Keowee  
17 Falls Investment Group LLC, herein referred to as  
18 grantor, for and in consideration of the sum of one  
19 million one hundred," looks like it's handwritten in,  
20 "five thousand dollars, paid by Kevin R. McCarthy,  
21 hereinafter referred to as grantee, in the State  
22 aforesaid, the receipt of which is hereby  
23 acknowledged, has granted or been sold and released  
24 and by these presents does grant, bargain and sell  
25 and release unto," and then it's got your name, and

1 then it gives a description of the land.

2 Do you see that?

3 A. Yes, I do.

4 Q. Based on reading that, does it appear that the entity  
5 that sold the land to you was the entity known as  
6 Keowee Falls Investment Group LLC?

7 A. That's what it says.

8 Q. Did you have any understanding, were you ever told  
9 anything about, what Keowee Falls Investment Group,  
10 LLC is or was?

11 A. Not to my knowledge.

12 Q. Tell me why, I'm a little confused about this, the  
13 contract, we saw a page signed by you and a page  
14 signed by your spouse, can you tell me why the title  
15 initially titled out in your name solely?

16 A. No, I don't know why.

17 Q. Okay. Was the purchase price \$1,105,000?

18 A. Yes.

19 I should say, that was, as we walked through on  
20 some of these other things, that was the net purchase  
21 price after going through all those.

22 Q. The credits, et cetera?

23 A. Yes. So that would have been that.

24 Q. If you turn over to the second page of Exhibit number  
25 9, at the very top line, it says: "Witness our hand

1 and seal this 5th day of August 2005?

2 A. Um-hmm.

3 Q. Do you see that?

4 A. I do.

5 Q. Do you believe that August 5, 2005, was the date of  
6 the closing of the transaction?

7 A. I do, because that's what this says.

8 Q. Is that consistent with your recollection of about  
9 when the transaction closed?

10 A. Yes.

11 Q. Was there a formal closing that you attended?

12 A. I don't recall whether or not.

13 Q. I have seen on another document, it could be on this  
14 one too, somebody can probably draw my attention to  
15 it, this one shows on the back page Olson, Smith,  
16 Jordan & Cox as the lawyers in Clemson?

17 A. Um-hmm.

18 Q. Do you remember those being the closing attorneys?

19 A. I do not.

20 Q. Do you remember ever going to their offices --

21 A. I don't.

22 Q. -- in Clemson?

23 A. No, I don't.

24 THE WITNESS: Am I missing something?

25 MR. DUDLEY: No. We'll talk later.

1 BY MS. BURTON:

2 Q. No. I'm just curious as to how the closing occurred.  
3 Between the time of the purchase agreement that  
4 we looked at, Exhibit number 3, that I think you and  
5 I discussed is dated June the 20th of 2005 --

6 A. Um-hmm.

7 Q. -- and the deed, or title, that appears to be dated  
8 August the 5th, 2005?

9 A. Right.

10 Q. Tell me any contacts you had with any of the folks at  
11 The Cliffs, or any entity you think was associated  
12 with The Cliffs, about Lot 32?

13 A. I don't recall any.

14 Doesn't mean there weren't, but I don't recall  
15 any.

16 Q. Do you recall anything happening, other than you  
17 going out and getting financing, about purchasing the  
18 lot between the contract and the deed?

19 A. No.

20 And similar to other interactions like this, you  
21 know, Jay Scott was all over us --

22 Q. Oh, he wanted to make sure you closed, I'm sure.

23 A. -- until the deal was done. And then it was:  
24 McCarthy who? Which is okay, because I didn't expect  
25 to see him. But I mean there was a lot of work up to

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1 Common Pleas.

2 And I just wanted to ask you some questions  
3 about some of this stuff that's in the Complaint.

4 If you would, sir, turn to page number 4?

5 A. Okay.

6 Q. And I want to turn your attention to paragraph  
7 numbered 16 at the bottom of the page?

8 A. Okay.

9 Q. It states that:

10 "Sometime in April or May of 2011, plaintiffs  
11 were contacted by an adjacent property owner, Jack  
12 Harrell, about a subsurface condition that was  
13 affecting Harrell's lot and the cul-de-sac which is  
14 located above and adjacent to both the plaintiffs'  
15 lot and Harrell's lot."

16 Do you see that?

17 A. I do.

18 Q. Is that the telephone call that you were just  
19 mentioning to me?

20 A. It was, yes.

21 Q. Is the date contained in Paragraph 16, April or May  
22 of 2011, accurate?

23 A. Yes.

24 Q. Did you take any notes or anything of that call?

25 A. I'm sure -- well, I don't know if I took notes on

1           that call. So I don't know.

2           Q. If you had notes, do you have a clue where they might  
3           be located now?

4           A. They would either be in my office at home or in my  
5           office at work.

6           Q. Did you tell me a moment ago that Mr. Harrell called  
7           you at work?

8           A. He did.

9           Q. And introduced himself as your neighbor, and then  
10          said to you that your lots are falling into the lake?

11          A. Something to that effect, yes.

12          Q. What else if anything did Mr. Harrell share with you  
13          on that call?

14          A. Well, he gave me the whole background.

15                 And I had, I seem to recall that when he called  
16                 me, he gave me the whole, the background on, which I  
17                 didn't sort of, I didn't write all the detail down  
18                 and I didn't document it, I just sort of listened to  
19                 it, and I'm sure I've forgotten a lot.

20                 But he gave me the chronology of what he's gone  
21                 through in terms of buying the lot, building a house,  
22                 discovering the movements.

23                 He said he reached out to, he's reaching out to  
24                 the people on either side of him, because the  
25                 engineering report that he had indicated that there

1 were problems, not only on his lot, but on the  
2 adjacent lots on either side.

3 And so that I was on one side of him, and there  
4 was another party on the other side, which I believe  
5 the initial purchaser, his name was McCullam. And I  
6 believe that he subsequently foreclosed, or got his  
7 lot foreclosed on, so the bank owns it now. He told  
8 me all that.

9 He told me that, he told me that he had engaged  
10 an attorney, and that they were engaging engineers;  
11 and that he thought, given, based on what his  
12 engineers had said and what the engineering report  
13 that he had seen from The Cliffs, that it probably  
14 made sense, if I was inclined, that we could leverage  
15 resources to determine the magnitude of the problem  
16 we had.

17 I believe on that call he also told me, he said:  
18 Are you aware that there are inclinometers on your  
19 property?

20 And my reaction to that was, first, what's an  
21 inclinometer. And no.

22 And so he was clearly, he was clearly much  
23 further down the field than we were. I mean  
24 obviously he was aware of the problem; he had done  
25 some investigating; he had hired an attorney; he had

1 lined up engineers; he had, so he was very far along.  
2 And he sort of brought me up to speed on where he  
3 was.

4 And obviously I was not aware of any of that.

5 You know, the idea that we paid off our mortgage  
6 is very upsetting to me. Because had I known any of  
7 that, we would not, I'm very risk averse by nature,  
8 and I would have left the mortgage in place.

9 And after Jack Harrell called me, I wouldn't  
10 have paid a million dollars cash to then take the  
11 value of this whole property onto my balance sheet.

12 When somebody lends you money and they're  
13 secured by that property as collateral, you know,  
14 they're in it with you.

15 And had I known any of this, I would not have  
16 paid down that mortgage. And I'd have gone to  
17 Wachovia and said: We got a problem, I got \$150,000  
18 problem and you got a-million-dollar problem, let's  
19 work together.

20 Q. Okay. Let me, because you said a lot of things  
21 there, I want to make sure I understand all that.

22 A. I was venting a little bit, and I apologize.

23 Q. No, no. No, I appreciate it.

24 Look at Paragraph 17 for me, in Exhibit number  
25 16. It says: "Harrell shared with plaintiffs an

1 engineer's report dated July 2005 from Defendant  
2 S&ME."

3 Do you see that?

4 A. I do.

5 Q. Is that accurate, that Mr. Harrell provided you with  
6 a copy of a report prepared by S&ME?

7 A. I, it is because it says here, and if it was written  
8 down here by Tom, then it's accurate. I've gone over  
9 this whole thing with Tom.

10 What I'm uncertain of, is whether the report was  
11 shared with me directly by Jack, or whether it was  
12 shared through Jack's attorney, Sandy Stern, to Tom,  
13 and then I came into possession of it through that  
14 sort of chain of --

15 Q. I see.

16 A. But I came into possession of this report, directly  
17 by the hand of Jack, or through Jack's attorney to my  
18 attorney, I'm not sure exactly how it came to be.

19 Q. Tell me, then maybe I made some assumptions,  
20 obviously inaccurate.

21 After Mr. Harrell calls you up on the phone and  
22 says, we got a problem, and he relates his whole  
23 history about building his house, et cetera --

24 A. Right.

25 Q. -- what did you do next to see what was going on?

1 A. And The Cliffs were the ones who engaged them, is my  
2 understanding of that.

3 Q. And here's my question: Did anyone ever call you up  
4 and say, is it okay if we put inclinometers on your  
5 land?

6 A. Nobody did.

7 Q. They did not?

8 A. Nobody did.

9 Q. That I did not know, so I appreciate you telling me  
10 that.

11 A. Nobody called me up.

12 Q. So the first thing you knew that anybody had been  
13 doing any testing on your lot is Jack Harrell calling  
14 you up and telling you what the results of the  
15 testing were?

16 A. He didn't call me -- he assumed, I assume by the  
17 nature of his call, that when he called me up, he  
18 wasn't calling me to tell me the results of the  
19 testing. He was calling me to tell me, we got a  
20 problem.

21 He assumed I didn't know anything about the  
22 problem, and he was correct.

23 And then he went on in that same conversation  
24 to, as I say, catch me up on all the work he's done  
25 and the chronology of events that occurred for him,

1 and bring me up to speed.

2 His purpose in calling me was not to tell me,  
3 Hey, hey, the results of the inclinometer readings  
4 are that it moved this much.

5 Q. Right.

6 A. His purpose to call was to tell me, say, Let me tell  
7 you the title of the book, the preface, and the first  
8 chapter, and then I'll get you up to the sixth  
9 chapter where I can tell you about what the  
10 inclinometer readings are.

11 Q. Okay, but prior to that, you didn't even know  
12 somebody was testing on your land?

13 A. I didn't know who Jack Harrell was. I didn't know we  
14 had a problem with our land.

15 Q. Nobody had ever mentioned Bunnel-Lammons Engineering  
16 to you at all?

17 A. Never heard of them.

18 (Defendant's Exhibit 17 marked for  
19 identification, Kevin McCarthy  
20 deposition, 11/29/12, RAM.)

21 BY MS. BURTON:

22 Q. Let me hand you a document I've marked as Exhibit 17.

23 I will represent to you, Mr. McCarthy, that this  
24 document was provided to me by your counsel.

25 A. Um-hmm.

1 MR. DUDLEY: You need to say yes and no.

2 BY THE WITNESS:

3 A. Sorry. Yes.

4 Q. And it bears a Bates number, if you note, at the  
5 bottom, 323 through 325?

6 A. Okay.

7 Q. And I think you answered this earlier, but I want to  
8 make sure. In Paragraph 17 of the Complaint that you  
9 and I were looking at earlier?

10 A. Um-hmm, yes.

11 Q. That's on page 5, sir.

12 A. Got it.

13 Q. There's a reference to an engineer's report dated  
14 July 2005 from Defendant S&ME; do you see that?

15 A. I do.

16 Q. It says Harrell shared that with you.

17 And I'm trying to determine whether Exhibit 17  
18 is the document referred in Paragraph 17 of the  
19 Complaint?

20 A. It would appear that it is.

21 Q. And you have no independent recollection of how you  
22 got ahold of this?

23 A. Not specifically who provided it.

24 Q. I will also tell you, Mr. McCarthy, that the document  
25 does not have any attachments, the one that you

1           A. And I am now assuming that those attachments would be  
2           of great interest to us. And if what I thought about  
3           our requesting those attachments is true, that if we  
4           have not received them yet, I would be aware of that.

5           Q. But if you got attachments, it would have been in the  
6           lawsuit process, most likely?

7           A. Correct.

8                         And that if we felt like there was something  
9           that we felt was very important and relevant to this  
10          matter, and we requested it and we knew it existed  
11          and we didn't receive it yet, then I would know about  
12          that, that it hasn't been produced.

13          Q. Okay. Let me ask you this: Prior to seeing Exhibit  
14          number 17, however you got it, whether it was from  
15          Mr. Harrell or through his lawyer, however that  
16          process worked, had you ever heard of S&ME?

17          A. No.

18                         It's still hard for me to say.

19          Q. Well, I'll tell you, it's Soils and Materials  
20          Engineers, it used to be.

21          A. I've been on their website --

22          Q. There you go.

23          A. -- as a result of this. So I know what it used to  
24          be. It's the ampersand that throws me.

25          Q. It's a hard one.

1                   You had never heard of them before somebody put  
2                   this in your hand?

3           A. No.

4           Q. Have you ever to this day talked to a human being  
5                   about Lot 32 that you thought worked with S&ME?

6           A. Not to my knowledge.

7           Q. Have you ever hired S&ME to perform any work on Lot  
8                   32?

9           A. Not to my knowledge.

10          Q. Is it fair to say that your knowledge of S&ME is by  
11                   obtaining documents, either from Mr. Harrell or his  
12                   counsel or through the lawsuit process?

13          A. And their website, after being made aware of them  
14                   through the lawsuit process, correct.

15          Q. And I gather you visited their website to see who  
16                   they are and what they're all about?

17          A. Yes, I have.

18          Q. Do you have any information, not from your lawyer,  
19                   but from any other source, that S&ME performed  
20                   testing on Lot 32 prior to this lawsuit?

21          A. Not from my lawyer as a part of this process, but  
22                   outside of this process.

23          Q. Yes. I don't want what Mr. Dudley's told you. And I  
24                   know that's tough. And you talked to Mr. Harrell and  
25                   stuff.

1                   But do you have any information, you got it from  
2                   talking to somebody, you saw a document, something  
3                   like that, that tells you that S&ME did work on Lot  
4                   32 prior to this lawsuit?

5           A. Well, yes, through Jack. So Jack said, Jack has said  
6           that, so this is through Jack, not through Tom.

7           Q. Okay.

8           A. That the report that they have indicates that they  
9           were, indicates not only the Harrells' lot, and this  
10           again is to my knowledge and my best recollection,  
11           that S&ME was hired by The Cliffs to investigate  
12           originally all three lots on Jasmine Cove.

13                   And that what happened was, they did  
14           specifically a report on Jack's lot before he owned  
15           it; they mentioned the other two lots and the fact  
16           that there was evidence of what I now know is scarp,  
17           whatever scarp is, I now know it's not good and you  
18           don't want it on your lot, but that there was  
19           evidence that the scarp ran beyond the property lines  
20           of Jack's lot to the adjacent lots on either side.

21           Q. And you got that from --

22           A. From Jack Harrell.

23           Q. -- about this report?

24           A. I don't know.

25           Q. Or some other report?

- 1           A. I don't know if it was about that report in  
2           particular. About the circumstance.
- 3           Q. Do you have any information, whether you got it from  
4           Mr. Harrell or otherwise, that S&ME ever got onto  
5           your lot and did any kind of testing before the  
6           lawsuit?
- 7           A. I assumed, based on what Jack said, that S&ME had  
8           walked all over that point. Yes.
- 9           Q. Do you have any information that they did any kind of  
10          testing on your lot, before the lawsuit?
- 11          A. Yeah. Before our lawsuit.
- 12          Q. Right.
- 13          A. Yes, I do, from Jack, as I just said.
- 14          Q. That they did testing on your lot?
- 15          A. Oh, on my lot.
- 16          Q. Yes.
- 17          A. No, I don't.
- 18                 I have, as I said, information that they walked,  
19          a belief that they walked all over the point,  
20          including our lot, and that they noticed scarp on our  
21          lot.
- 22          Q. And where did you get information about S&ME walking  
23          all over the point?
- 24          A. Jack.
- 25          Q. Did Mr. Harrell provide you directly with any

1 Q. Question number 4 asked you to state each item or  
2 category of damage which you're claiming in the  
3 lawsuit?

4 A. Um-hmm.

5 Q. And then in response there is a paragraph Answer, and  
6 then there was a spreadsheet --

7 A. Um-hmm.

8 Q. -- referred to, See spreadsheet?

9 A. Yup, I see it's attached here.

10 Q. Today your lawyer kindly provided us with a new  
11 spreadsheet, which he blew up big for me because I'm  
12 too old to read that tiny one.

13 A. We're making it, that's part of our strategy, we're  
14 making it harder for you.

15 Q. I had him to do it big.

16 MS. BURTON: This is the only copy I have. How  
17 do you want to do this as an exhibit, though, Tom?

18 MR. DUDLEY: I can have Helen make another big  
19 copy of that.

20 MS. BURTON: I think we need to mark it as an  
21 exhibit, since he and I are getting ready to discuss  
22 it.

23 (Discussion off the record.)

24 (Brief recess.)

25 (Defendant's Exhibit 19 marked for

1 identification, Kevin McCarthy  
2 deposition, 11/29/12, RAM.)

3 BY MS. BURTON:

4 Q. Mr. McCarthy, I've handed you a two-page document  
5 that we have marked as Exhibit 19.

6 Can you tell me what this is first?

7 A. Yes. This is our accounting of the expenses and  
8 damages related to our Complaint.

9 Q. Who prepared this?

10 A. My wife did.

11 Q. Are you familiar enough with it --

12 A. Yes.

13 Q. -- for me to ask you questions about it?

14 A. Yes.

15 Q. You're going to have to tell me about what the  
16 columns are intended to depict at the top?

17 A. Sure.

18 Q. Start at the first one, the Contract Price, I think  
19 is pretty self-explanatory, right? We finally  
20 narrowed that down --

21 A. Yes, it's all uphill from there.

22 Q. -- in the sales documents, right?

23 A. Yes.

24 Q. Closing Fees, I think we saw in the HUD?

25 A. Yes.

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(864) 235-3518

1 associated with the closing of the refinance.

2 Q. Earlier when we were looking at the HUD statement and  
3 your handwritten notes on the front, you had asked a  
4 question, I don't know whether it was of yourself or  
5 a Cliffs person, as to the deductibility of the  
6 mortgage interest.

7 Can you tell me what the answer to that question  
8 ultimately was?

9 A. I can tell you what I think it was, and then, and  
10 then you can confirm it with my wife.

11 But I think the answer is that we do not, we did  
12 not calculate the interest as a, what I would  
13 consider a traditional mortgage interest deduction on  
14 our tax returns.

15 We considered it an investment expense, because  
16 the property was, and because of our real estate on  
17 our primary residence, we have either close to or the  
18 full amount of the deduction you're allowed to take  
19 for mortgage interest.

20 Our accountant, back to engaging professionals  
21 who know what the rules of the road are, our  
22 accountant has classified this, I think, as an  
23 investment expense.

24 Q. Okay, as a result of it being an investment expense,  
25 do you get any credit or deduction on your tax return

1 Q. If we had the Excel, we could see the columns?

2 A. Sure.

3 Q. Okay, I think I understand these calculations.

4 Have you had any expert go out to your lot to  
5 determine whether a repair can be effected?

6 A. No. Well, actually, excuse me.

7 To the best of my knowledge, and I would defer  
8 to Tom on this, but it is the, it is the opinion of  
9 our expert, Carroll Crowther, that he's not certain  
10 that a repair can be done, but he feels confident  
11 that if it can be done, it will be an exorbitant  
12 expense.

13 Q. Have you talked with Mr. Crowther at all about the  
14 possible options for repair?

15 A. I have not directly, but Tom may have.

16 Q. But you understand at least that Mr. Crowther, if a  
17 repair was an option, it would be an expensive  
18 option?

19 A. Yes.

20 Q. Do you know if it would be less than two million  
21 dollars?

22 A. I don't know.

23 But the other comment I would make in that  
24 regard is, me as a buyer, because I was a buyer of  
25 this property, so let's say I go and get it repaired,

THE CLIFFS COMMUNITIES
REAL ESTATE SALE AND PURCHASE AGREEMENT

THIS REAL ESTATE SALE AND PURCHASE AGREEMENT (the "Agreement") made by and between the below-named seller (the "Seller") identified on the Seller's signature page below (the "Seller"), whose mailing address is as set forth on page 6, and the below-named purchaser (the "Purchaser") identified on the Purchaser's signature page below.

Part I
Identifications

A. The Lot and What is Included in Price. The property to be purchased (the "Lot") is located in Section JC, Lot 32, Cliffs at Keowee Falls South

The Lot is listed for sale for \$ 1,140,000.00

The purchase of the Lot does not include a membership in the Golf and Country Club (the "Club"), which is reserved solely to its members in accordance with the use rights conferred by the Club Membership Plan for the categories and classifications of membership offered. Seller does not operate the Club. The Club is operated by The Cliffs Golf & Country Club, Inc. Seller will, however, discount the list price of the Lot by \$35,000 if Purchaser agrees to acquire a membership, and Purchaser will pay that amount at Closing toward a membership.

Check one of the following:

Handwritten initials: FKM (initial)

[X] If checked and initialed, Purchaser wishes to acquire a membership in the Club, either a Cliffs Family Membership or a Cliffs Golf Membership, and wishes to receive a \$35,000 discount and apply it toward the required membership deposit, and has attached hereto a signed Club Membership Addendum. While Purchaser is guaranteed the availability of a golf membership under the Membership Plan only if Purchaser acquires one within 30 days following Purchaser's Closing. Purchaser will receive the discount only if the membership is acquired at the Closing. If this paragraph is checked and initialed, the Purchase Price in Paragraph B below is net of the discount.

Handwritten initials: FKM (initial)

[ ] If checked and initialed, Purchaser does not wish to acquire a membership in the Club at this time. Purchaser understands that membership is subject to availability at the time Purchaser may wish to acquire one, and is not guaranteed. Purchaser will NOT receive any discount off the listed Purchase Price because Purchaser elects not to receive a membership.

B. Payment of Purchase Price. The "Purchase Price" is calculated and payable as follows:

Handwritten initials: FKM (initial)

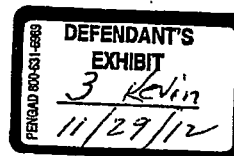
Table with 2 columns: Description and Amount. Rows include: Total Purchase Price (\$1,105,000.00), Discount Applied to Membership Deposit (\$35,000.00), Golf Membership, Initiation Deposit Add-on (\$40,000.00), SUB-TOTAL (\$1,180,000.00), Initial Earnest Money Deposit (\$5,000.00), Additional Deposit Due (\$0.00), Balance at Closing (\$1,175,000.00).

Handwritten initials: FKM (initial)

Handwritten initials: FKM (initial)

Handwritten initials: FKM (initial)

Handwritten initials: FKM (initial)



- C. Escrow Agent. The "Escrow Agent" is Olson, Smith, Jordan & Cox, Attorneys at Law, whose address is set forth in Section 9.4 of Part II below; and all deposits to Escrow Agent should be made payable to Olson, Smith, Jordan & Cox Escrow Account.

**Part II.**  
Terms and Conditions

For and in consideration of the Purchase Price set forth in Part I hereof and the mutual promises contained in this Agreement, Purchaser agrees to buy and Seller agrees to sell the Lot, conditioned upon there having not been a sale to a third party prior to the receipt of this Agreement by Seller, properly executed by Purchaser, together with the Earnest Money Deposit as provided in Part I, and execution hereof by Seller.

1. **The Purchase Price.** Purchaser will pay the Purchase Price of the Lot set forth in Paragraph B of Part I of this Agreement.

1.1 **Earnest Money Deposit.** The Escrow Agent will receive the Earnest Money Deposit set forth in Paragraph B of Part I, and will deposit said sums in its non-interest bearing escrow account, to be held by the Escrow Agent as the Earnest Money Deposit to be disbursed in accordance with this Part II. In the event of a termination of this Agreement under this Part II, except in the event of Purchaser's default (in which event the Earnest Money Deposit will be paid over to Seller as herein provided), all of the Earnest Money Deposit will be refunded to Purchaser without interest.

1.2 **Payments at Closing.** The Purchase Price, together with all of Purchaser's Closing costs, prepaids, and Closing escrow deposits, less the sum of Purchaser's Earnest Money Deposit, will be paid by Purchaser in cash or by certified, collected funds at the Closing hereinafter referred to.

2. **Financing**

2.1 **No Financing Contingency.** Purchaser acknowledges that this Agreement is not contingent upon Purchaser obtaining financing for the purchase of the Property. Seller makes no representations as to the availability or terms of financing, and the duties of Purchaser and Seller hereunder are not contingent upon Purchaser obtaining financing, or obtaining financing with any specific terms or conditions.

2.2 **Purchaser's Responsibility.** Purchaser is responsible for obtaining desired financing for the purchase of the Lot. By suggesting a source of financing and/or providing the application for such financing, Seller will not be deemed to have assumed any responsibility for obtaining such financing for Purchaser or to represent or warrant that such financing will be available to Purchaser. Purchaser represents that Purchaser has the financial means to purchase the Lot. Purchaser shall fully cooperate with Seller in procuring any evidence Seller reasonably requests that Purchaser has the financial means to pay the balance of the Purchase Price. Purchaser hereby gives Seller or Seller's designated agent permission to obtain one or more credit reports on Purchaser prior to the Closing Date. If Purchaser elects to obtain financing for the purchase of the Lot, Purchaser shall promptly apply for such financing and promptly deliver a loan commitment from an institutional lender to Seller. If Purchaser is not financing the purchase of the Lot, Purchaser shall promptly deliver account verifications to Seller upon Seller's request. If Seller determines, at any time prior to the Closing Date, in Seller's sole but reasonable discretion, that it is unlikely that Purchaser will be able to pay the balance of the Purchase Price on the Closing Date, Seller may terminate this transaction, and the Earnest Money Deposit shall be returned to Purchaser.

3. **Completion of Infrastructure Improvements**

3.1 **Completion of Infrastructure.** Seller agrees to provide roads and water service, and public utilities will provide electrical service and telephone service at no cost to Purchaser, as outlined in our Department of Housing and Urban Development ("HUD") Property Report made effective May 3, 2004, which is incorporated herein and made a part hereof by this reference. In all events, Seller agrees that Seller will complete the water and road infrastructure to Purchaser's Lot within the periods of time set forth in the Property Report, or, (a), in the case of water supply installation, on or before issuance of a certificate of occupancy for Purchaser's residence; and (b), in the case of paved roads to Purchaser's Lot, within sixty (60) days following Purchaser's notice to Seller that Purchaser has received a final certificate of occupancy for Purchaser's residence, whichever respective date occurs first. Seller will, at Seller's sole cost and

expense, provide on-site water for construction of Purchaser's residence if water service is not then available at Purchaser's Lot. Seller's obligation to complete the roads, water service, and electrical and telephone services within the time provided in the HUD Property Report is subject only to circumstances beyond Seller's control, such as acts of God, strikes, material shortages and other occurrences which are sufficient to constitute impossibility of performance under South Carolina law. In the event of such occurrences, Seller will proceed to completion within a reasonable time after the abatement of the event causing delay. In case the survey by which Seller will convey the Lot to Purchaser required bonding pursuant to Oconee County ordinance, Seller has posted a cash or surety bond or an irrevocable letter of credit issued on Seller's behalf to Oconee County, South Carolina, guaranteeing the completion of those roads and other infrastructure requiring bonding. If the approval of the survey by which Seller will convey the Lot to Purchaser did not require bonding by Oconee County ordinance, Seller has established one or more completion escrow accounts to assure completion of the water service and roads to the lots shown on that survey. Seller reserves the right to furnish Purchaser temporary easements for ingress and egress during development, and upon completion of permanent roads or rights-of-way providing ingress and egress, the temporary easements will automatically expire.

(a) **Installation of Infrastructure to Boundary of Lot.** With respect to completion of installation of roads and water service, as well as the installation of electrical and telephone services, Seller covenants these utilities and improvements will be brought to the boundary of Purchaser's Lot, not within the Lot lines to Purchaser's home. Therefore, all costs to connect such utilities or improvements to Purchaser's home will be Purchaser's sole obligation, and the electric utility company charges a set-up fee in conjunction with setting utility meters.

(b) **Septic System.** Purchaser will be responsible for installing and maintaining a septic tank system on the Lot when a dwelling is built on it. Purchaser will be required to make all arrangements for the permitting, governmental approval and installation of a septic tank system. In the event the Lot has not been previously tested and approved by the South Carolina Department of Health and Environmental Control for the installation of an individual sewage disposal system, and if Seller is then not able to resolve the issue within sixty (60) days following notice thereof, Seller will refund to Purchaser the Purchase Price and Purchaser will convey the Lot back to Seller, and thereafter, each of Seller and Purchaser will be fully released from any further liability to the other.

**3.2 Completion of Other Infrastructure; Conveyance or Turnover to a Property Owners' Association.** In addition to the infrastructure we are obligated to complete, as provided in Section 3.1 above, Seller agrees to complete construction and installation of approximately 25 miles of roads, including an overpass, constructed to governmentally-approved standards; drainage systems; water system storage tanks and water delivery booster stations, as well as pipes leading to Purchaser's Lot; and main electrical power feeds to the project, which will allow those public utilities serving Purchaser's Lot to extend service to the Lot; and manned and unmanned gate houses accessing the project; and approximately 10 miles of hiking and nature trails. The utility facilities will be turned over to the applicable utility company upon completion of construction and issuance of operating permits therefore, if any, and the constructed roads, drainage systems, gates and gatehouses, and hiking and nature trails described in this Section 3.2 will be conveyed or turned over to the Keowee Falls South Owners' Association on or before the expiration of two years from completion of construction, as set forth in the Declaration of Covenants, Conditions and Restrictions for the Cliffs at Keowee Falls South; provided, however, the obligation for maintenance, repair and replacement of the Common Areas will become the responsibility of the Keowee Falls South Owners' Association and its Members the date all required certificates or permits of occupancy or use are issued therefore, or the date such improvements may be used in the manner and for the purposes for which they are constructed, whichever is earlier.

#### **4. Recorded Covenants.**

**4.1 The Declaration of Covenants & Property Owners' Association.** The Lot will be conveyed subject to the Declaration of Covenants, Conditions and Restrictions for the Cliffs at Keowee Falls South recorded in the Office of Register of Deeds for Oconee County, as the same may be amended from time to time (herein, sometimes referred to as the "Declaration"), which includes the obligation that Purchaser pay regular and special assessments when levied for the common facilities and services of the Keowee Falls South Owners' Association (herein, sometimes referred to as the "Association") commencing with the date Seller conveys title to the Lot. Purchaser hereby acknowledges having received a copy of the Declaration, with appended Bylaws of the Association.

**4.2 Architectural Review.** Purchaser hereby acknowledges that any improvement to the Lot, including landscape improvements, will be subject to the architectural guidelines established, from time to time, pursuant to the

Declaration, and the prior written approval thereof by the architectural review committee established thereunder. Purchaser and Purchaser's builder will be solely responsible for the completion of construction of all improvements on the Lot and for proper drainage during and after house construction, as well as the published fee payable to architectural review committee for review and approval, prior to construction, of all construction and design plans with respect to any improvements to be placed on Purchaser's Lot. Purchaser will be responsible for paying a fee to the Architectural Review Committee for review and approval, prior to construction, of all construction and design plans with respect to any improvements to be placed on the Lot. Either Purchaser or Purchaser's contractor will also be responsible for posting a bond prior to commencing construction.

4.3 **Size of Residence.** Purchaser also acknowledges that the Declaration requires minimum square footages for residences constructed within Keowee Falls South based upon the area in which Purchaser's Lot is located. See Declaration and applicable amendments, if any, with respect to the application of such minimums.

5. **The Golf & Country Club.** Purchaser acknowledges the plan of development for the various Cliffs communities includes the Club's operation of various commercial, private golf and country club facilities. Purchaser further acknowledges that the Club's recreational facilities are operated by The Cliffs Golf & Country Club, Inc., a related third party of Seller, as a commercial business, and not as a non-profit enterprise, that Purchaser will have a license to use the facilities as herein described if Purchaser acquires a membership to do so, and that neither Purchaser nor any property owner association of which Purchaser may be a member has or will receive any ownership interest in the Club's facilities by virtue of Purchaser's acquisition of the Lot or membership in any such property owner association. The Club may, but will not be required to, add additional recreational facilities in the future. The Club operates and offers membership opportunities pursuant to a published Membership Plan, which the Club may supplement, amend, delete and change in its sole discretion at any time. If Purchaser wishes to become a member, Purchaser should take the time to read the Membership Plan prior to acquiring a membership. Purchaser acknowledges receiving a summary of The Cliffs Club membership opportunities. Such information is summary only, and Purchaser should refer to the Membership Plan for the actual terms and condition applicable to membership in the Club.

6. **Closing.** The sale and purchase contemplated by this Agreement will be closed by delivery to Purchaser of a properly executed and acknowledged general warranty deed, in proper, recordable form, in exchange for payment to Seller of the Purchase Price as hereinabove provided. Notwithstanding any provisions herein to the contrary, the legal description for Purchaser's Lot will be in accordance with and based upon the approved, bonded plat for the subdivision of which the Lot is a part (the "Plat").

6.1 **Deed to Lot.** The general warranty deed will convey to Purchaser a good and marketable or insurable (at regular rates), fee simple title to the Lot subject to matters of record, including, but not limited to, taxes and assessments not yet due, all special easements, restrictions and conditions shown and noted on the Plat, licenses and easements for utilities serving the property, the Declaration and the Bylaws of the Association, applicable ordinances and all other easements, rights-of-way, restrictive or utility easements, restrictions, covenants, affirmative obligations and conditions of record in the office of Register of Deeds.

If a title insurance company which is a member of the American Land Title Association will issue a binder to issue an owner's title insurance policy at Purchaser's expense, insuring the title to the Lot at regular rates in an amount equal to the Purchase Price (which owner's title insurance policy will have as exceptions only standard exceptions and those exceptions as are herein agreed and set forth), Seller will be deemed to be able to convey a marketable title in fee simple. If, at the Closing, Seller cannot deliver a general warranty deed to the Lot subject to the exceptions above, Seller will have the right to extend the Closing for an additional thirty (30) days to comply with the terms of the title policy.

6.2 **Closing Date and Time.** Closing will be conducted in the manner provided hereinafter, on the "Closing Date" set forth on Purchaser's signature page below, at the location set forth in Section 6.3 and at a time selected by Seller. Provided that Seller has fulfilled all of its obligations to Purchaser pursuant to this Agreement, Purchaser's failure or refusal to close at the time, place and date provided may, at Seller's option, be deemed a default by Purchaser.

6.3 **Closing Location.** Tender of the deed by Seller and the performance of Seller's requirements will be made at the Closing location designated by Seller on or before 10 days prior to the scheduled Closing. In no event will delivery of the deed exceed one hundred eighty (180) days from the date of Purchaser's execution of this Agreement. The Closing may take place in escrow, with Purchaser participating by making all deliveries required to be made by mail to

the Closing attorney prior to the Closing date, instead of in person; provided that all funds to be received from Purchaser on the Closing date, whether in person or by mail, must be in cash or certified, collected funds.

6.4 **Closing Costs.** Seller will pay for the preparation of the deed and the deed transfer fee required to record the deed, and Seller's attorney's fees. Purchaser shall pay for any and all other Closing costs, including but not limited to, loan service and origination fees, credit report and underwriting fees, appraisal expenses, recording fees, prepaid items, and title insurance premiums, and Purchaser's attorney's fees. A working capital contribution equal to two-months' Association assessments shall be paid to the Association, as provided in the Declaration.

(a) **Prorations at Closing.** Taxes and the Association's assessments will be prorated between Seller and Purchaser as of the date of closing, based upon information then available. Seller and Purchaser agree to adjust any such prorations following the Closing, as may be required by receipt of final bills therefor.

#### 7. Defaults.

7.1 **Default by Purchaser.** In the event Purchaser defaults in the performance of any of Purchaser's obligations pursuant to this Agreement and Seller is not in default, Seller will have the right to specifically enforce this Agreement according to its terms and/or to pursue any and all other remedies available to Seller at law or in equity, or Seller will, at Seller's election, be released from any further obligations to Purchaser pursuant to this Agreement and in such event will be entitled to retain the Earnest Money Deposit (but not exceeding 10% of the Purchase Price) as agreed liquidated damages, it being the intention and agreement of Seller and Purchaser that the amount of such Earnest Money Deposit will act as a fair measure of compensation for actual damages incurred by Seller as a result of Purchaser's default. However, notwithstanding the provisions of this Section 7.1, Seller expressly agrees that Seller will give Purchaser written notification of Purchaser's default or breach of contract and the opportunity to correct the default or breach within twenty (20) days following the receipt of Seller's notice.

7.2 **Default by Seller.** If Seller defaults in the performance of any of Seller's obligations as set forth in this Agreement and such default is not cured within twenty (20) days after written notice of default is given to Purchaser by Seller, Purchaser's sole remedy will be to rescind this Agreement and receive the immediate return of Purchaser's Earnest Money Deposit, pay Purchaser Purchaser's reasonable attorney's fees for any title examination by Purchaser's attorney and for such other reasonable closing expenses which Seller agrees, in its sole discretion, to pay; provided, however, that in the event of a non-material breach of any term or condition of this Agreement, Purchaser's remedies will not include termination of this Agreement.

8. **Real Estate Commission.** It is understood that Seller has by separate agreement appointed Cliffs Real Estate, Inc. as the exclusive real estate agent for sales of Lots within Cliffs at Keowee Falls South. Purchaser warrants and represents that, except as set forth to the contrary on the signature page of Purchaser, Purchaser has not dealt with any other real estate agent who may be entitled to claim a real estate commission in this transaction.

#### 9. Miscellaneous.

9.1 **Seller's Reserved Easements; Construction Setbacks.** Purchaser acknowledges that Seller reserves the right to grant and/or reserve, in its reasonable discretion, various easements for ingress and egress, maintenance and use on and over the Lot and the remainder of the Cliffs at Keowee Falls South development. No such easement will materially reduce the value or the usefulness of Purchaser's Lot. Furthermore, Purchaser's Lot is subject to front, rear and side lot line easements shown on the Plat and/or set forth in the Declaration, which also constitute construction setback limits.

9.2 **Seller's Adjacent Development.** Except as otherwise provided herein and notwithstanding any statements contained in this Agreement or otherwise to the contrary, Seller does not warrant in any manner whatsoever the development of any other properties which are owned by Seller in Pickens County or Oconee County, South Carolina, whether or not in the general vicinity of Purchaser's Lot, and Seller reserves the right to develop such properties, if developed, in any manner whatsoever without interference from any subsequent grantee of the Purchaser's Lot, notwithstanding any plans, renderings or drawings which may have been brought to the Purchaser's attention through public zoning hearings, documents filed for zoning purposes, public or private showings or proposed or preliminary development plans or references therein in any recorded covenants. There is no assurance that any facilities or amenities

shown for planning or proposed development purposes will ever be constructed, except only those which Seller herein covenants to complete or which are disclosed to be completed in the HUD Property Report for the Lot.

9.3 **As-is Condition.** Except as otherwise provided herein, Purchaser is purchasing and Seller is selling the Lot in an "AS IS" condition.

9.4 **Notices.** Any and all notices or other communication provided for in this Agreement will be given in writing and delivered by personal delivery or by registered or certified mail, first class postage prepaid, or by facsimile transmission. Any notice mailed in accordance with this Section 9.4 will be deemed received upon actual receipt thereof or after the expiration of five (5) days, whichever is earlier. Notice sent by facsimile transmission will be deemed received on the date of its transmission, provided transmission occurs prior to 5:00 p.m., Eastern Time, and the sender retains proof of its transmittal and receipt without error. Notice will be addressed as follows:

If to Seller: Keowee Falls Investment Group, LLC  
301 Beaver Dam Road  
Travelers Rest, SC 29690  
Attention: Marty Ritsch  
FAX: 864-836-8176

If to the Escrow Agent: Olson, Smith, Jordan & Cox  
PO Box 1633  
Clemson, South Carolina 29633  
Attention: Chris Olson, Esq.  
FAX: 864-654-3696

Notices, if to Purchaser: As set forth on Purchaser's signature page of this Agreement

The notice requirements of this Section 9.4 do not apply to the Purchaser's right to cancel this Agreement as provided on page 8 below and in accordance with the Interstate Land Sales Full Disclosure Act.

9.5 **Purchaser's Acknowledgment Concerning Representations.** Purchaser understands that any sales associate or other person representing Seller in this transaction does not have the authority to make any statements in conflict with or in addition to the information contained in this Agreement, and any other documents received from Seller, including without limitation, any representation made regarding the resale of Purchaser's Lot or its rental or investment potential, and that Seller, for itself and in behalf of any such agent, specifically disclaims any responsibility for such statements. Further, if any such statements were made, Purchaser acknowledges that by execution of this Agreement, Purchaser affirms that Purchaser has not relied upon any such statements, if any, and waives any rights that Purchaser might have as a result of such statements unless they are incorporated in this Agreement.

9.6 **Documents Received By Purchaser.** Purchaser further acknowledges having received and reviewed prior to the execution of this Agreement the following:

- (a) Copy of the Declaration, as supplemented and amended to the date hereof, together with appended By-Laws of the Association.
- (b) Copy of Plat.
- (c) Design and Construction Guidelines.
- (d) The checked documents or instruments listed on the Purchaser's signature page below.

9.7 **Time is of the essence.** It is expressly understood and agreed that **TIME IS OF THE ESSENCE** as to all obligations hereunder, including the Purchaser obligation to obtain a mortgage commitment and provide the Lender with all information requested if Purchaser is acquiring financing, even though such financing is not a contingency hereof.

9.8 Entire Agreement. Seller and Purchaser covenant and agree with each other that this written instrument, executed in duplicate originals, expresses the entire agreement between them and there is no other agreement, oral or otherwise, varying or modifying the terms of this Agreement.

9.9 Modification of Agreement. This Agreement may not be otherwise changed or modified, unless a subsequent written instrument executed by both Seller and Purchaser.

9.10 Interpretation Presumption. Seller and Purchaser represent and warrant to one another that each party's counsel or otherwise, actively participated in the finalization of this Agreement, and in the event of a dispute concerning the interpretation of this Agreement, each hereby waives the doctrine that an ambiguity should be interpreted against the party which has drafted the document.

9.11 Binding Effect; Assignment. This Agreement is binding upon the parties' respective heirs, assigns, personal representatives, successors and assigns; provided however, this Agreement and any of Purchaser's rights hereunder may not be assigned by Purchaser.

9.12 Resale Or Exchange Of Property. Seller has no program or provision for the sale or exchange of any Lots in the Cliffs at Keowee Falls South. There is no program, which assures that Purchaser will be able to exchange the Lot for other property.

9.13 Unenforceable Provisions. Should any provision of this Agreement be void or become unenforceable at law or in equity, the remaining provisions will remain in full force and effect and will not in any manner be thereby affected or impaired.

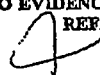
9.14 Survival. This Agreement and all the terms and conditions hereof will survive the Closing of the transaction contemplated hereby and will thereafter continue to bind the parties to this Agreement.

9.15 Counterpart Execution of Agreement. This Agreement may be signed by each of the parties upon a separate copy, and in such case one counterpart of this Agreement will consist of enough of such copies to reflect the signature of each. For purposes of this Agreement, a telecopy of an executed counterpart will constitute an original. Any person delivering an executed counterpart of this Agreement by telecopy will also deliver an original, executed counterpart of this Agreement, but the failure to deliver an original, executed counterpart will not affect the validity of this Agreement. This Agreement may also be executed in two or more counterparts, each of which will be deemed an original; but for purposes of proving the Agreement, it will not be necessary to produce or account for more than one such counterpart.

9.16 Effective Date. This Agreement will become effective, and the term "Effective Date" herein will mean, the last date executed by a party to be bound hereby.

9.17 Receipt of Agency Disclosure. RECEIPT AND EXPLANATION OF THE AGENCY DISCLOSURE FORM IS HEREBY ACKNOWLEDGED BY PURCHASER'S INITIALS BELOW THIS SECTION AND BY PURCHASER'S EXECUTION OF THIS AGREEMENT.

PURCHASER'S INITIALS HERE TO EVIDENCE HAVING RECEIVED THE AGENCY DISCLOSURE FORM REFERENCED ABOVE

  
CEL  
For Purchaser

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9.9 Modification of Agreement. This Agreement may not be otherwise changed or modified, absent some subsequent written instrument executed by both Seller and Purchaser.

9.10 Interpretation Presumption. Seller and Purchaser represent and warrant to one another that each has, by counsel or otherwise, actively participated in the finalization of this Agreement, and in the event of a dispute concerning the interpretation of this Agreement, each hereby waives the doctrine that an ambiguity should be interpreted against the party which has drafted the document.

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PURCHASER'S INITIALS HERE TO EVIDENCE HAVING RECEIVED THE AGENCY DISCLOSURE FORM REFERENCED ABOVE

law or in equity, the provisions affected or impaired.

*J. J. J.*  
For Purchaser

(BALANCE OF PAGE PURPOSELY BLANK)

9.15 Counterpart Execution of Agreement. This Agreement may be signed by each of the parties upon a separate copy, and in such case one counterpart of this Agreement will consist of enough of such copies to reflect the signature of each. For purposes of this Agreement, a telecopy of an executed counterpart will constitute an original. Any person delivering an executed counterpart of this Agreement by telecopy will also deliver an original, executed counterpart of this Agreement, but the failure to deliver an original, executed counterpart will not affect the validity of this Agreement. This Agreement may also be executed in two or more counterparts, each of which will be deemed an original; but for purposes of proving the Agreement, it will not be necessary to produce or account for more than one such counterpart.

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Additional Documents Received By Purchaser. Pursuant to Section 9.6, the Purchaser acknowledges having received and reviewed prior to the execution of this Agreement the following (if none, leave blank):

- HUD \_\_\_\_\_
- CCR \_\_\_\_\_
- PLATT \_\_\_\_\_
- \_\_\_\_\_

PURCHASER'S INITIAL HERE TO EVIDENCE HAVING RECEIVED THE DOCUMENTS LISTED ABOVE

*J. Scott*  
For Purchaser

YOU HAVE THE OPTION TO CANCEL YOUR CONTRACT OR AGREEMENT OF SALE BY NOTICE TO THE SELLER UNTIL MIDNIGHT OF THE SEVENTH DAY AFTER YOU HAVE RECEIVED A FULLY SIGNED COPY OF THE CONTRACT OR AGREEMENT.

IF YOU DID NOT RECEIVE A PROPERTY REPORT PREPARED PURSUANT TO THE RULES AND REGULATIONS OF THE OFFICE OF INTERSTATE LAND SALES REGISTRATION, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, IN ADVANCE OF YOUR SIGNING THE CONTRACT OR AGREEMENT, THE CONTRACT OR AGREEMENT OF SALE MAY BE CANCELLED AT YOUR OPTION FOR TWO YEARS FROM THE DATE OF SIGNING.

IN WITNESS WHEREOF, Purchaser and the Seller have each caused this instrument to be executed on the day and year set forth below their respective names.

WITNESS:

Purchaser:

*J. B. McCarthy*  
(Signature)

PURCHASER'S DATE

6 20 2005  
Month Day Year

The "Closing Date" is: July 20, 2005

YOU HAVE BEEN ADVISED THAT YOU MAY BE SUBJECT TO A CHANGE OF AGENT

RESELLER: Kevin McCarthy

NAME: Courtney Rountree

ADDRESS: 404 A Tim Valley Road

DEPARTMENT: CA

THE CONTRACT MAY BE CANCELLED AT ANY TIME

Telephone (Work): \_\_\_\_\_

Telephone (Home): \_\_\_\_\_

FAX Number: \_\_\_\_\_

E-mail Address: \_\_\_\_\_

Name in Which to Title Property: *Kevin R. McCarthy & Courtney E. Rountree*  
(insert the name or names to which Purchaser wishes title to the Lot to be deeded)

WITNESS Name of Real Estate Agent(s): *Jay Scott*  
(insert the name or names of both the Cliffs Real Estate agent representing Seller and any outside agent representing Purchaser)

(BALANCE OF PAGE PURPOSELY BLANK)

... MAY BE

Additional Documents Received By Purchaser. Pursuant to Section 9.6, the Purchaser acknowledges having received and reviewed prior to the execution of this Agreement the following (if none, leave blank):

- HUD
- CCR
- PLATT

PURCHASER'S INITIAL HERE TO EVIDENCE HAVING RECEIVED THE DOCUMENTS LISTED ABOVE

*J. Scott*  
For Purchaser

YOU HAVE THE OPTION TO CANCEL YOUR CONTRACT OR AGREEMENT OF SALE BY NOTICE TO THE SELLER UNTIL MIDNIGHT OF THE SEVENTH DAY AFTER YOU HAVE RECEIVED A FULLY SIGNED COPY OF THE CONTRACT OR AGREEMENT.

IF YOU DID NOT RECEIVE A PROPERTY REPORT PREPARED PURSUANT TO THE RULES AND REGULATIONS OF THE OFFICE OF INTERSTATE LAND SALES REGISTRATION, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, IN ADVANCE OF YOUR SIGNING THE CONTRACT OR AGREEMENT, THE CONTRACT OR AGREEMENT OF SALE MAY BE CANCELLED AT YOUR OPTION FOR TWO YEARS FROM THE DATE OF SIGNING.

IN WITNESS WHEREOF, Purchaser and the Seller have each caused this instrument to be executed on the day and year set forth below their respective names.

WITNESS:

Purchaser: *Courtney Rountree*  
(Signature)

Month: 6 Day: 20 Year: 2005  
v. 04/14/2005

The "Closing Date" is: July 20, 2005

Print or Type:  
 Name: Kevin McCarthy  
 Name: Courtney Rountree  
 Address: 604 A Tim Valley Road

Courtney Rountree Int'l  
 Telephone (Work): (704) 745-1484  
 Telephone (Home): (704) 819-8749  
 FAX Number: (704) 382-6538  
 E-mail Address: ~~crountree@bellsouth.net~~

Name in Which to Title Property: Courtney E. Rountree  
(Insert the name or names to which Purchaser wishes title to the Lot to be deeded)

Name of Real Estate Agent(s): Jay Scott  
(Insert the name or names of both the Cliff's Real Estate agent representing Seller and any outside agent representing Purchaser)

(BALANCE OF PAGE PURPOSELY BLANK)

Jul 06 05 03:24p

P.2

Seller:

Keweenaw Falls Investment Group, LLC

By

Its:

07      06      05  
Month      Day      Year

Property: Section: Jasmine Cove, Lot 32

Lot Purchase  
Price: \$ 1,105,000.00  
Membership: \$ 75,000.00  
Total: \$ 1,180,000.00

(BALANCE OF PAGE PURPOSELY BLANK)

STATE TAX 2873.00  
COUNTY TAX 1215.50  
EXEMPT \_\_\_\_\_

Doc ID: 0070900002 Type: DEE  
BK 1437 PG 183-184  
Space above this line for recording information

FILED FOR RECORD  
OCONEE COUNTY, S.C.  
REGISTER OF DEEDS

2005 AUG -8 P 3:32

STATE OF SOUTH CAROLINA  
COUNTY OF OCONEE

TITLE TO REAL ESTATE

KNOW ALL MEN BY THESE PRESENTS THAT, KEOWEE FALLS INVESTMENT GROUP, LLC, herein referred to as Grantor, for and in consideration of the sum of ONE MILLION ONE HUNDRED ~~ONE~~ THOUSAND AND NO/100 (\$1,000,000) Dollars, paid by KEVIN R. MCCARTHY, hereinafter referred to as Grantee, in the State aforesaid, the receipt of which is hereby acknowledged, has granted, bargained, sold and released, and by these presents does grant, bargain, sell and release unto:

KEVIN R. MCCARTHY,  
his heirs, successors, and assigns forever

All that certain piece, parcel or lot of land situate, lying and being in the State of South Carolina, County of Oconee, being known and designated as Lot Number Thirty-Two (32) The Cliffs at Keowee Falls South, Jasmine Cove, as shown on a plat of "Survey for Keowee Falls Investment Group, LLC" prepared by Robert E. Threatt, PLS #15519, dated March 10, 2004 and recorded March 19, 2004 in the Office of the Register of Deeds for Oconee County, South Carolina in Plat Book A993, Pages 6 and 7; said lot having the metes and bounds, courses and distances as upon said plat appear.

This conveyance is specifically subject to Restrictive Covenants contained in Deed from Crescent Resources, LLC to Keowee Falls Investment Group, LLC dated 12/16/02 and recorded 12/18/02 in Deed Book 1256, Page 257, Oconee County, SC; amended by "A Amendment and Restatement of General Deed Restrictions" dated 04/12/04 and recorded 04/20/04 in Deed Book 1341, Page 6, Oconee County records; Declaration of Covenants, Conditions and Restrictions for The Cliffs at Keowee Falls South recorded in Deed Book 1251 at Page 221; also First Amendment of Declaration of Covenants, Conditions and Restrictions for Keowee Falls South dated 11/19/03 and recorded 11/25/03 in Book 1314, Page 224; also Supplemental Declaration of Covenants, Conditions, and Restrictions for the Cliffs at Keowee Falls South dated 3/19/04 and recorded 3/19/04 in Deed Book 1334, Page 284, Oconee County records.

By this deed, the Grantee accepts the burdens or benefits regarding dock location as provided in Paragraph 2(d) of the First Amendment of Declaration of Covenants, Conditions and Restrictions for Keowee Falls South dated 11/19/2003, and recorded in Deed Book 1314, Page 224, Oconee County records.

This is a portion of the same property conveyed unto the Grantor herein by deed from Crescent Resources, LLC dated December 16, 2002 and recorded in the Office of the Recorder's Office in Deed Book 1256 at Page 257.

This conveyance is made subject to Easements, Restrictions, Covenants, and Conditions of record, including matters shown on recorded plats.

Grantee's Address: 604A Timm Valley Rd Atlanta, GA 30305

Tax/Map No. part of 077-00-01-001

TOGETHER with all and singular, the rights, members, hereditaments and appurtenances to the said premises belonging or in anywise incident or appertaining. TO HAVE AND TO HOLD all and singular the premises before mentioned unto the said Grantee, his heirs and assigns forever. AND THE GRANTOR does hereby bind Grantor's successors, executors and administrators, to warrant and forever defend all and singular the said premises unto the said Grantee, his heirs and assigns, against Grantor and Grantor's successors and against every person whomsoever lawfully claiming or to claim the same or any part thereof.

THIS PROPERTY DESIGNATED AS  
MAP 077 SUB 00 BLK 01 PARC 001 p10  
ON OCONEE COUNTY TAX MAPS  
Lechi Smith  
OCONEE COUNTY ASSESSOR

Recorded this 2005 day of August  
Book 1437 Page 183-184  
Fee \_\_\_\_\_  
Kimberly R. Nix  
Auditors Oconee County, S.C.

DEFENDANT'S  
EXHIBIT  
Kevin  
11/29/12

PLT-0082

Pay: Horton  
Jnu PO Box 10107  
Athens, GA 30607  
1000

002348

WITNESS our Hand and Seal this 5th day of August, 2005.

Signed, Sealed and Delivered  
in the Presence of:

Mavis Owens

Juli Shealy

Keowee Falls Investment Group, LLC  
By its Sole Member:  
The Cliffs Communities, Inc.

BY Martin Retzsch

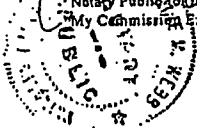
STATE OF SOUTH CAROLINA  
COUNTY OF OCONEE

)  
) . PROBATE  
)

Personally appeared before me the undersigned witness and made oath that (s)he saw the within named Grantor sign, seal and as its act and deed, deliver the within written Deed for the uses and purposes therein mentioned, and that (s)he with the other witness subscribed above witnessed the execution thereof.

SWORN to before me this  
5th day of August, 2005.

Mavis Owens

Stephen M. Webb  
Notary Public for the State of South Carolina  
My Commission Expires: 8/6/2012  


Prepared By:

NO TITLE EXAMINATION  
OLSON, SMITH, JORDAN & COX, P.A.  
P.O. BOX 1633  
CLEMSON, SC 29633  
85-0438C

PLT-0083

002350  
R  
10a

HORTON, DRAWDY, WARD & JENKINS, P.A.  
307 Pettigru Street, Greenville, SC 29601  
PO Box 10167 29603  
STATE OF SOUTH CAROLINA )

Doc ID: 0079910002 Type: DEE  
BK 1437 pg 185-186  
TITLE TO REAL ESTATE

OCONEE COUNTY )

OCONEE COUNTY

STATE TAX \_\_\_\_\_

Grantees Address: 604 A Timm Valley Road  
Atlanta, GA 30305

COUNTY TAX \_\_\_\_\_

EXEMPT

KNOW ALL MEN BY THESE PRESENTS, that

KEVIN R. MCCARTHY

In consideration of ONE DOLLAR (\$1.00) LOVE AND AFFECTION the receipt of which is hereby acknowledged, has granted, bargained, sold, and released, and by these presents do grant, bargain, sell and release unto

COURTNEY E. ROUNTREE, her heirs and assigns forever.

AN UNDIVIDED ONE-HALF INTEREST IN AND TO THE FOLLOWING:

All that certain piece, parcel or lot of land situate, lying and being in the State of South Carolina, County of Oconee, being known and designated as Lot Number Thirty Two (32), of The Cliffs at Keowee Falls South, Jasmine Cove, as shown on a plat thereof prepared by Robert E. Threatt, PLS 15519, dated March 10, 2004, and recorded in Plat Book A993 at Pages 6 and 7, and having the metes and bounds, courses and distances as upon said plat appear, together with a non-exclusive right of way and easement for the purpose of ingress and egress over and across the right of ways and easements shown on the aforementioned plat.

FILED FOR RECORD  
OCONEE COUNTY, S.C.  
REGISTER OF DEEDS

2005 AUG -8 P 3-33

This being the same property conveyed unto Kevin R. McCarthy by deed of Keowee Falls Investment Group, LLC, dated August 5, 2005, recorded in the Office of the Register of Deeds for Oconee County, SC on August 8, 2005 in Deed Book 1437 at Page 183.

This conveyance is subject to all restrictions, set-back lines, roadways, zoning ordinances, easements, and rights-of-way, if any, affecting the above described property.

Tca Map - part of 079-00-01-001

Recorded this 08th day of August  
Book 2005 Page 501107  
Fee \_\_\_\_\_  
Shonda R. Fife  
Auditors Oconee County, S.C.

THIS PROPERTY DESIGNATED AS  
MAP 000 SUB 002 BLK 01 PARCEL 001 p10 . 1  
ON OCONEE COUNTY TAX MAPS  
Debbie Smith  
OCONEE COUNTY ASSESSOR

DEFENDANT'S  
EXHIBIT  
10 Kevin  
11/29/12

PLT-0086

...burtenances to said premises belonging or in any wise incident or appertaining; to have and to hold all and singular the premises before mentioned unto the grantee(s), and the grantee's(s') heirs or successors and assigns, forever. And, the grantor(s) do(es) hereby bind the grantor(s) and the grantor's(s') heirs or successors, executors and administrators to warrant and forever defend all and singular said premises unto the grantee(s) and the grantee's(s') heirs or successors and assigns against the grantor(s) and the grantor's(s') heirs or successors and against every person whomsoever lawfully claiming or to claim the same or any part thereof.

WITNESS the grantor's(s') hand(s) and seal(s) this 5th day of August, 2005.

SIGNED, sealed and delivered  
in the presence of

[Signature]

[Signature]  
Kevin R. McCarthy

[Signature]

STATE OF GEORGIA )

ACKNOWLEDGMENT

COUNTY OF Fulton )

SWORN, subscribed and acknowledged before me this 5th day of August, 2005 by  
Kevin R. McCarthy.

[Signature] (SEAL)  
Notary Public for Georgia  
My commission expires:

PATRICIA A. ALTMAN  
NOTARY PUBLIC - FULTON COUNTY, GEORGIA  
MY COMMISSION EXPIRES JANUARY 12, 2008





DATE \_\_\_\_\_  
 COMPILED/TYPED BY \_\_\_\_\_  
 MAILED BY \_\_\_\_\_  
 HAND DELIVERED BY \_\_\_\_\_  
 AUTHOR/SENIOR AUTHOR \_\_\_\_\_  
 (INITIALS)

July 18, 2005

Mr. Donald H. Nickell, Jr., P.E.  
 The Cliffs Communities, Inc.  
 301 Beaver Dam Road  
 Travelers Rest, South Carolina 29690

**FILE COPY**  
 THIS DOCUMENT DOES NOT LEAVE FILE

Reference: **SUBSURFACE EXPLORATION FINDINGS**  
**Cliffs Keowee Falls South - Lot #31 Jasmine Cove**  
 Oconee County, South Carolina  
 S&ME Project No. 1261-05-423A

Dear Don:

S&ME, Inc. is pleased to submit this Subsurface Exploration Findings letter for Lot #31 (Jasmine Cove) at the Cliffs Keowee Falls South development. Our work for the property included an exploration of subsurface conditions, analysis, opinions regarding the cause of unusual features on the property and our geotechnical engineering recommendations regarding supporting residential structures. This letter presents a brief confirmation of our understanding of the project, the exploration results, and our geotechnical conclusions and recommendations regarding the above considerations.

Lot #31 fronts Lake Keowee along its western shoreline. The lot slopes upward away from the lake at a visually estimated inclination on the order of about 4 horizontal to 1 vertical. There are approximately three "scarp" areas across the site, each approximately paralleling the water surface and the contour of the lots. These surface features are very unique.

The lot was explored with two soil testing borings (L-1 and L-2) performed below the main "scarp" area and one boring (L-3) above the main "scarp" area. Additionally, three trackhoe excavated test pits were performed at similar locations as the borings. At each test pit and boring location, soils that appear to be residual in nature and common to the Piedmont Geologic Province were encountered to termination or refusal depths of 20 to

S&ME, Inc.  
 155 Tradd Street  
 Spartanburg, South Carolina 29301

(864) 574-2360  
 (864) 576-8730 fax  
 (864) 232-8987 Greenville

www.smeinc.com

DEFENDANT'S  
 EXHIBIT  
 17 Kevin  
 11/29/12

PLT-0323

30 feet below the ground surface. The residual soils generally consist of silty sand or sandy silt; however, an upper layer of sandy clay was present in boring L-1. The Standard Penetration Resistance (N) values in the residual soils varied from 2 to 31 blows per foot with the majority of the values in the 2 to 5 blows per foot range. These values indicate a very soft to soft consistency for silts and clays, and a very loose to loose relative density for sands.

The boring data indicates that the lot contains some unique surface and subsurface anomalies. Although the boring data indicates very low consistency soils extend well below the ground surface, it did not indicate that the exposed "scarp" areas are the result of lateral movements or surface sloughing. The surface features could be terraced alluvium deposited during past geologic events or possibly old road cuts created during construction of Lake Keowee.

Based on the subsurface data and our experience, it is our opinion that residential structures can be supported on-site with some modification to improve the foundation soils. Several options are available for soil improvement, but we would recommend undercut and replacement or rammed aggregate piers as the most practical. The undercut area would include the building limits and an area extending at least 15 feet outside the building limits, and would extend 5 to 7 feet.

Rammed Aggregate Piers are a patented system consisting of drilling vertical holes (typically 30-inches in diameter) and filling them in layers with compacted crushed stone to the foundation bearing level. Rammed Aggregate Piers are stiffer than the surrounding soil and support a disproportionate share of the foundation load while reducing foundation settlement. After Rammed Aggregate Pier construction, foundations and/or floor slabs may be constructed conventionally.

For planning purposes, the cost of undercutting soils, replacing them with off-site borrow soils, and wasting the undercut soils off site is typically about \$12 to \$15 per cubic yard. However, a majority of the undercut soils would most likely be suitable for reuse as structural fill. As for the Rammed Aggregate Piers, we estimate that approximately 50 to

75 piers would be required to support the structure and floor slab. The piers could be installed in 4 to 5 days (including a modulus load test) with an anticipated cost on the order of \$550 to \$600 per pier. However, this cost will vary depending on project specific variables. We can provide additional design and cost information as the project is further advanced.

We appreciate the opportunity to work with The Cliffs Communities, Inc. by providing the geotechnical engineering for this project. Should any questions arise regarding the information in this report or when we may be of further service, please contact us.

Sincerely,  
S&ME, Inc.

  
Michael Revis, P.E.  
Project Engineer  
[mrevis@smelnc.com](mailto:mrevis@smelnc.com)

  
Howard Perry, P.E.  
Senior Engineer  
[hnperry@smelnc.com](mailto:hnperry@smelnc.com)

	Total Expenditures by Category														Pmt		
	Contract Price	Closing Fees	Club Membership	Mortgage Interest	Mortgage Loan Fees	Property Taxes	Loss Tax Ded For M1 + Taxes (1)	Property Improvement (2)	HOA Dues	Club Dues + Fund Mnt + Dues Incr	Water Ducts	Legal Expenses	Engineering / Env Work	Total			
2005																	
Aug-05	1,105,000.00	8,874.76	35,000.00													1,148,874.76	1051
Nov-05																5,130.00	
Dec-05																	
2006																	
Jan-06																	
Feb-06																	
Mar-06						3,848.20										5,848.20	
Apr-06																	
May-06																	
Jun-06																	
Jul-06																	
Aug-06			20,000.00													20,000.00	
Sep-06																4,689.21	
Oct-06																4,689.21	
Nov-06																4,689.21	
Dec-06																4,689.21	
2007																	
Jan-07				4,689.21												4,689.21	
Feb-07				4,689.21												4,689.21	
Mar-07				4,689.21		13,483.00										18,172.21	
Apr-07				4,689.21												4,689.21	
May-07				4,689.21												4,689.21	
Jun-07				4,689.21												4,689.21	
Jul-07				4,689.21												4,689.21	
Aug-07			20,000.00	4,689.21												24,689.21	
Sep-07				4,689.21												4,689.21	
Oct-07				4,689.21												4,689.21	
Nov-07				4,689.21			(1,103.00)									2,885.71	
Dec-07				4,689.21												4,689.21	
2008																	
Jan-08				4,689.21		14,256.00		1,050.00								19,995.21	
Feb-08				4,689.21												4,689.21	
Mar-08				4,689.21												4,689.21	
Apr-08				4,689.21												4,689.21	
May-08				4,689.21												4,689.21	
Jun-08				4,689.21												4,689.21	
Jul-08				4,689.21												4,689.21	
Aug-08				4,689.21												4,689.21	
Sep-08				4,689.21												4,689.21	
Oct-08				5,163.93	2,859.32		(1,166.00)									(5,232.25)	
Nov-08				5,163.94												5,163.94	
Dec-08				5,163.94												5,163.94	
2009																	
Jan-09				5,132.48		14,302.20		1,300.00		715.00						21,789.28	
Feb-09				5,130.68						715.00						6,110.18	
Mar-09				4,812.88						715.00						5,592.38	
Apr-09				5,130.68						715.00						6,110.18	
May-09				5,130.68						715.00						6,110.18	
Jun-09				5,130.68						715.00						6,110.18	
Jul-09				5,130.68						715.00						6,110.18	
Aug-09				5,130.68						715.00						6,110.18	
Sep-09				3,840.41						715.00						4,599.91	250.0
Oct-09				4,011.01			(14,707.80)			715.00						(9,722.25)	
Nov-09				3,883.56						715.00						4,643.06	
Dec-09				4,011.01						1,294.25						5,311.76	
2010																	
Jan-10				3,883.56		14,000.00			510.00	1,190.00						20,543.06	
Feb-10				4,011.02					715.00							4,726.02	
Mar-10				4,011.01					715.00							4,726.02	
Apr-10				3,624.65					715.00							4,340.15	
May-10				4,011.02					715.00							4,726.02	
Jun-10				3,883.56					715.00							4,601.06	
Jul-10				3,883.55					715.00							4,601.06	
Aug-10				3,883.55					715.00							4,601.06	
Sep-10				3,883.55					715.00							4,601.06	
Oct-10				3,883.55					715.00							4,601.06	
Nov-10				3,883.55			(10,173.00)		715.00							(6,415.50)	
Dec-10				3,883.55					715.00							4,601.06	
2011																	
Jan-11				3,883.56					715.00							4,601.06	
Feb-11				3,883.56					715.00							4,601.06	
Mar-11				3,883.56					715.00							4,601.06	
Apr-11				3,883.56					715.00							4,601.06	
May-11				3,883.56					715.00							4,601.06	
Jun-11				3,883.56					715.00							4,601.06	
Jul-11				3,883.56					715.00							4,601.06	
Aug-11				3,883.56					715.00							4,601.06	
Sep-11				3,883.56					715.00							4,601.06	
Oct-11				3,883.56					715.00							4,601.06	
Nov-11				3,883.56			(10,219.40)		715.00							(6,431.24)	
Dec-11				3,883.56					715.00							4,601.06	
2012																	
Jan-12				3,883.56					715.00							4,601.06	
Feb-12				3,883.56		13,514.45			715.00							17,118.05	
Mar-12				3,883.56					715.00							4,601.06	
Apr-12				3,883.56					715.00							4,601.06	
May-12				3,883.56					715.00							4,601.06	
Jun-12				3,883.56					715.00							4,601.06	
Jul-12				3,883.56					715.00							4,601.06	
Aug-12				3,883.56					715.00							4,601.06	
Sep-12				3,883.56					715.00							4,601.06	
Oct-12				3,883.56					715.00							4,601.06	
Nov-12				3,883.56					715.00							4,601.06	
Dec-12				3,883.56					715.00							4,601.06	
Total	1,105,000.00	8,874.76	75,000.00	211,340.91	7,799.32	89,119.45	(50,821.20)	31,000.00	5,211.00	37,164.16	1,913.58				1,514,076.06	1,105.4	

Notes:

Highlighted items need follow-up verification

(1) Mort. Int. - property tax deductions classified as investment expense and reduce investment income therefore tax rate is estimated long term federal and state capital gains rate

(2) Shoreline stabilization work and associated permitting fees

(3) Estimate of Lost Investment Return (Principal Payments only)

Summary of Last Investment Returns										Total Expenses
Last Investment Returns - Principal Payments (1)				Cash Expenses (Ex. Prin.)	Com. Cash Expenses (Ex. Prin.)	Last Inv. Ret. - Cash		Total Last Investment Returns		
Last Investment Returns A	Last Investment Returns B	Last Investment Returns C	Sub-Total			Last Investment Returns D	1.0%			
1.0%	1.2%	1.0%								
2000										
Aug-00				43,874.76	43,874.76					1,148,874.76
Sep-00	167.97				43,874.76	182.81		350.78		350.78
Oct-00	167.97			5,130.00	49,004.76	204.19		372.16		5,501.16
Nov-00	167.97				49,004.76	204.19		372.16		372.16
Dec-00	167.97				49,004.76	204.19		372.16		372.16
2001										
Jan-01	167.97				49,004.76	204.19		372.16		372.16
Feb-01	167.97				54,852.96	228.55		396.52		6,244.72
Mar-01	167.97			5,848.20	54,852.96	228.55		396.52		396.52
Apr-01	167.97				54,852.96	228.55		396.52		396.52
May-01	167.97				54,852.96	228.55		396.52		396.52
Jun-01	167.97				54,852.96	228.55		396.52		396.52
Jul-01	167.97				54,852.96	228.55		396.52		396.52
Aug-01	167.97			20,000.00	34,852.96	111.80		478.86		20,479.86
Sep-01	167.97				34,852.96	111.80		478.86		478.86
Oct-01	167.97			4,669.21	39,522.17	131.24		499.31		5,168.53
Nov-01	167.97			4,669.21	84,191.38	350.80		518.77		5,187.96
Dec-01	167.97			4,669.21	88,860.59	370.25		538.22		5,231.43
2002										
Jan-02	167.97			4,688.71	93,549.30	389.79		557.76		5,246.47
Feb-02	167.97			4,688.71	98,238.01	409.33		577.30		5,266.61
Mar-02	167.97			18,152.71	116,390.72	484.96		653.93		18,865.64
Apr-02	167.97			4,688.71	121,079.43	504.50		673.47		5,286.18
May-02	167.97			4,688.71	125,768.14	524.03		693.00		5,306.71
Jun-02	167.97			4,688.71	130,456.85	543.57		712.54		5,327.25
Jul-02	167.97			4,688.71	135,145.56	563.11		732.08		5,347.79
Aug-02	167.97			24,688.71	159,834.27	665.99		833.93		24,833.66
Sep-02	167.97			4,688.71	164,522.98	685.53		853.47		5,368.30
Oct-02	167.97			2,885.71	167,408.69	697.56		865.51		5,389.84
Nov-02	167.97			4,688.71	172,097.40	717.07		885.04		5,410.38
Dec-02	167.97			4,688.71	176,786.11	736.61		904.58		5,430.92
2003										
Jan-03	167.97			19,994.71	196,780.82	819.92		937.89		19,994.71
Feb-03	167.97			4,688.71	201,469.53	839.46		957.43		5,606.14
Mar-03	167.97			4,688.71	206,158.24	858.99		976.97		5,717.67
Apr-03	167.97			4,688.71	210,846.95	878.53		996.50		5,738.21
May-03	167.97			4,688.71	215,535.66	898.07		1,016.04		5,758.75
Jun-03	167.97			4,688.71	220,224.37	917.61		1,035.57		5,779.29
Jul-03	167.97			4,688.71	224,913.08	937.14		1,055.11		5,799.83
Aug-03	167.97			4,688.71	229,601.79	956.67		1,074.64		5,820.37
Sep-03	167.97			4,688.71	234,290.50	976.21		1,094.18		5,840.91
Oct-03	167.97			15,723.23	239,969.23	954.03		1,122.00		15,723.23
Nov-03	167.97			3,333.56	234,635.67	978.35		1,141.33		6,499.88
Dec-03	167.97			3,183.44	239,302.11	997.84		1,160.77		6,540.32
2004										
Jan-04	167.97			21,788.18	261,290.29	1,088.73		1,238.70		21,788.18
Feb-04	167.97			6,110.18	267,400.47	1,114.10		1,282.16		7,393.34
Mar-04	167.97			3,592.18	270,992.65	1,137.49		1,303.66		6,997.84
Apr-04	167.97			6,110.18	277,102.83	1,162.93		1,325.16		7,411.10
May-04	167.97			6,110.18	283,212.99	1,188.41		1,346.63		7,828.36
Jun-04	167.97			6,110.18	289,323.17	1,213.87		1,368.10		8,245.62
Jul-04	167.97			3,977.58	293,300.75	1,238.61		1,400.19		7,438.16
Aug-04	167.97	2,753.34		2,923.31	301,866.03	1,277.78		1,481.09		6,708.99
Sep-04	167.97	2,753.34		2,923.31	306,445.94	1,276.94		1,480.25		6,820.16
Oct-04	167.97	2,753.34		2,923.31	309,952.99	1,286.65		1,488.83		6,931.33
Nov-04	167.97	2,753.34		2,923.31	312,876.30	1,294.89		1,497.42		7,042.50
Dec-04	167.97	2,753.34		2,923.31	315,800.00	1,297.11		1,506.01		7,153.67
2005										
Jan-05	167.97	2,753.34		2,923.31	318,723.71	1,303.70		1,514.60		7,264.84
Feb-05	167.97	2,753.34		2,923.31	321,647.42	1,310.29		1,523.19		7,376.01
Mar-05	167.97	2,753.34		2,923.31	324,571.13	1,316.88		1,531.78		7,487.18
Apr-05	167.97	2,753.34		2,923.31	327,494.84	1,323.47		1,540.37		7,598.35
May-05	167.97	2,753.34		2,923.31	330,418.55	1,330.06		1,548.96		7,709.52
Jun-05	167.97	2,753.34		2,923.31	333,342.26	1,336.65		1,557.55		7,820.69
Jul-05	167.97	2,753.34		2,923.31	336,265.97	1,343.24		1,566.14		7,931.86
Aug-05	167.97	2,753.34		2,923.31	339,189.68	1,349.83		1,574.73		8,043.03
Sep-05	167.97	2,753.34		2,923.31	342,113.39	1,356.42		1,583.32		8,154.20
Oct-05	167.97	2,753.34		2,923.31	345,037.10	1,363.01		1,591.91		8,265.37
Nov-05	167.97	2,753.34		2,923.31	347,960.81	1,369.60		1,600.50		8,376.54
Dec-05	167.97	2,753.34		2,923.31	350,884.52	1,376.19		1,609.09		8,487.71
2006										
Jan-06	167.97	2,753.34		2,923.31	353,808.23	1,382.78		1,617.68		8,598.88
Feb-06	167.97	2,753.34		2,923.31	356,731.94	1,389.37		1,626.27		8,710.05
Mar-06	167.97	2,753.34		2,923.31	359,655.65	1,395.96		1,634.86		8,821.22
Apr-06	167.97	2,753.34		2,923.31	362,579.36	1,402.55		1,643.45		8,932.39
May-06	167.97	2,753.34		2,923.31	365,503.07	1,409.14		1,652.04		9,043.56
Jun-06	167.97	2,753.34		2,923.31	368,426.78	1,415.73		1,660.63		9,154.73
Jul-06	167.97	2,753.34		2,923.31	371,350.49	1,422.32		1,669.22		9,265.90
Aug-06	167.97	2,753.34		2,923.31	374,274.20	1,428.91		1,677.81		9,377.07
Sep-06	167.97	2,753.34		2,923.31	377,197.91	1,435.50		1,686.40		9,488.24
Oct-06	167.97	2,753.34		2,923.31	380,121.62	1,442.09		1,694.99		9,599.41
Nov-06	167.97	2,753.34		2,923.31	383,045.33	1,448.68		1,703.58		9,710.58
Dec-06	167.97	2,753.34		2,923.31	385,969.04	1,455.27		1,712.17		9,821.75
2007										
Jan-07	167.97	2,753.34		2,923.31	388,892.75	1,461.86		1,720.76		9,932.92
Feb-07	167.97	2,753.34		2,923.31	391,816.46	1,468.45		1,729.35		10,044.09
Mar-07	167.97	2,753.34		2,923.31	394,740.17	1,475.04		1,737.94		10,155.26
Apr-07	167.97	2,753.34		2,923.31	397,663.88	1,481.63		1,746.53		10,266.43
May-07	167.97	2,753.34		2,923.31	400,587.59	1,488.22		1,755.12		10,377.60
Jun-07	167.97	2,753.34		2,923.31	403,511.30	1,494.81		1,763.71		10,488.77
Jul-07	167.97	2,753.34		2,923.31	406,435.01	1,501.40		1,772.30		10,599.94
Aug-07	167.97	2,753.34		2,923.31	409,358.72	1,507.99		1,780.89		10,711.11
Sep-07	167.97	2,753.34		2,923.31	412,282.43	1,514.58		1,789.48		10,822.28
Oct-07	167.97	2,753.34		2,923.31	415,206.14	1,521.17		1,798.07		10,933.45
Nov-07	167.97	2,753.34		2,923.31	418,129.85	1,527.76		1,806.66		11,044.62
Dec-07	167.97	2,753.34		2,923.31	421,053.56	1,534.35		1,815.25		11,155.79
2008										
Jan-08	167.97	2,753.34		2,923.31	423,977.27	1,540.94		1,823.84		11,266.96
Feb-08	167.97	2,753.34		2,923.31	426,900.98	1,547.53		1,832.43		11,378.13
Mar-08	167.97	2,753.34		2,923.31	429,824.69	1,554.12		1,841.02		11,489.30
Apr-08	167.97	2,753.34		2,923.31	432,748.40	1,560.71		1,849.61		11,600.47
May-08	167.97	2,753.34		2,923.31						

Depo Excerpts of  
Courtney McCarthy

Courtney McCarthy

Page 1

STATE OF SOUTH CAROLINA      IN THE COURT OF COMMON PLEAS  
COUNTY OF GREENVILLE      CA No.: 2011-CP-23-6376

Kevin McCarthy and Courtney E. McCarthy,

Plaintiffs,

vs.

Keowee Falls Investment Group, LLC,  
The Cliffs Communities, LLC, d/b/a  
The Cliffs at Keowee Falls South,  
Cliffs Real Estate, Inc.,  
The Cliffs Golf and Country Club, Inc.,  
and S&ME, Inc.,

Defendants.

---

DEPOSITION OF COURTNEY MCCARTHY

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Pursuant to notice of deposition or subpoena  
or agreement in the above-entitled case, a deposition  
was taken on the 29th day of November 2012,  
commencing at approximately 2:00 p.m., attended by  
counsel as follows:

Depositions and..., Inc.  
(864) 235-3518

1 Q. Do you remember getting any type of written  
2 information from Mr. Scott about Lot 32?

3 A. Such as?

4 Q. I wasn't there and I don't know.

5 I mean did he give you any kind of information,  
6 pictures, maps, plats?

7 A. Other than a property map that would show the  
8 location of the lot, not a, I'm not even sure if I  
9 know fully what a plat is, but I imagine a plat has  
10 more detail on the topography of the property.

11 I'm just talking about a flat map of physical  
12 lots. That's the only thing about the lot I  
13 remember. I did not get any photos, no.

14 Q. Before signing a contract to purchase the property,  
15 did you have any substantive conversations with  
16 anyone else you thought was associated with The  
17 Cliffs, other than Mr. Scott?

18 A. No.

19 (Defendant's Exhibit 20 marked for  
20 identification, Courtney McCarthy  
21 deposition, 11/29/12, RAM.)

22 BY MS. BURTON:

23 Q. Let me hand you a document I've marked as Exhibit 20.  
24 Do you recognize that document --

25 A. Yes, I do.

1 Q. -- Ms. McCarthy?  
2 A. Yes.  
3 Q. Is it a document that you initialed and signed?  
4 A. Yes, it is.  
5 Q. How about pull out Exhibit 3 for me, and get it in  
6 front of you with Exhibit 20?  
7 A. Yes.  
8 Q. You can probably answer my question as to why there  
9 are two of these?  
10 A. Um-hmm.  
11 Q. Do you know?  
12 A. Because I filled it out in Charlotte, probably in my  
13 office, and sent it back; and Kevin filled it out in  
14 Atlanta.  
15 Q. Well, the only reason I'm asking you is, if you look  
16 at page 74, Bates numbered 74 in Exhibit 3?  
17 A. I'm sorry?  
18 Q. Exhibit 3.  
19 A. Um-hmm.  
20 Q. Turn to the page that's Bates numbered at the bottom?  
21 You see those little PLT?  
22 A. Yes, I see.  
23 Yes.  
24 Q. You might be able to tell me if you think the  
25 signature page there on Exhibit 3 is the same

1 signature page as the signature page on Exhibit 20?

2 Can you find the signature on that one?

3 A. It appears to be.

4 Q. Is it your recollection that you would have signed  
5 Exhibit 20 and initialed it, in Charlotte, North  
6 Carolina?

7 A. That's my recollection. Based on looking at this, it  
8 would appear to me that I likely signed this and then  
9 just faxed, this fax that's referenced in this other  
10 exhibit, just the signature page.

11 Q. I was wondering if that was the case.

12 The document, Exhibit 20?

13 A. Um-hmm.

14 Q. Has, well, it has some initials on the left-hand  
15 side; are those your initials on the left?

16 A. Yes, they are.

17 Q. On the right-hand side there's handwritten notes?

18 A. Um-hmm.

19 Q. Is that your handwriting?

20 A. No, it's not.

21 Q. Because if you look at the document, Ms. McCarthy,  
22 the numbers at the bottom where it says P-L-T, that  
23 is an indication that's a document that came from  
24 your lawyer to us.

25 Do you have any idea whose handwriting that is?

1 A. I believe it's Kevin's.

2 Q. Okay. Can you tell me when the handwriting got  
3 placed on the document in relationship to you  
4 initialing and signing Exhibit 20?

5 A. I cannot.

6 Q. So you don't know whether it was on there when you  
7 signed it or it's something that got added  
8 subsequently?

9 A. I don't.

10 Q. Okay, that's fine.

11 Did you understand, when you initialed and  
12 signed Exhibit 20, that that was an agreement to  
13 purchase Lot 32?

14 A. Yes, I did.

15 Q. And you heard this tedious and laborious discussion  
16 your husband and I had about the purchase price and  
17 the golf membership?

18 A. Um-hmm.

19 Q. Was the purchase price for the lot, \$1,105,000?

20 A. Yes, it was.

21 Q. And then was the golf membership cost, 75,000  
22 although some was differed?

23 A. Yes.

24 Q. 35 was upfront and 40 was financed?

25 A. 40 was financed and paid in two separate

1 installments, 20,000 each.

2 Q. So we've got those numbers right after we worked at  
3 it some?

4 A. Um-hmm.

5 Q. In the contract to purchase, 20, that you initialed  
6 and signed, there is a listing on the same page as  
7 your signature, which is Bates numbered 52, do you  
8 see that?

9 A. Yes.

10 Q. At the top do you see the listing of documents, it  
11 says, Additional documents received by purchaser? Do  
12 you see that?

13 A. Yes.

14 Q. And there are three documents identified?

15 A. Yes.

16 Q. The first of those is HUD?

17 A. Yes.

18 Q. Do you know whether that document is the same as  
19 Exhibit number 2 that I asked you about a moment ago?

20 A. I believe it is.

21 Q. The next document is CCR; do you see that?

22 A. Yes.

23 Q. Do you have any recollection or understanding what  
24 that document was?

25 A. I believe that is the covenants and restrictions for

1 the community. I don't specifically recall that, but  
2 I believe that's what that is.

3 Q. The third one is plat. Do you recall receiving a  
4 drawing of some sort that depicted the boundary lines  
5 of the property?

6 A. I don't recall either way.

7 Q. Do you recall receiving any other documents, other  
8 than those referenced on page Bates numbered 52,  
9 prior to signing the sale and purchase agreement,  
10 other than you did tell me you got a property map?

11 A. Just marketing documents for The Cliffs communities.

12 Q. Sales, glossy kind of pretty brochures?

13 A. Yes.

14 (Defendant's Exhibit 21 marked for  
15 identification, Courtney McCarthy  
16 deposition, 11/29/12, RAM.)

17 BY MS. BURTON:

18 Q. Let me hand you a document I've marked as Exhibit  
19 number 21. Can you tell me what that is?

20 A. That is a check that I wrote to one of the law firms  
21 that was involved. I don't know if that's the title  
22 firm or who that is.

23 Q. Is that the earnest money?

24 A. When we looked at the sales contract before, I  
25 believe there was a reference to some type of five

1           thousand dollar deposit.

2           Q. That's on the HUD statement. I know there was a five  
3           thousand dollar earnest money?

4           A. I'm not sure if that's the same thing or not.

5           Q. Do you know what the five, this check is, if it's not  
6           the earnest money?

7           A. No.

8           Q. Look at Exhibits 9 and 10 if you would, please,  
9           ma'am. If you'll just lay them out in front of you.  
10           Have you seen the deeds before?

11          A. Yes, I believe so.

12          Q. Does Exhibit 9 appear to be a deed for Lot 32 from  
13          Keowee Falls Investment Group, LLC, to your husband?

14          A. Yes, it does.

15          Q. And does Exhibit 10 appear to be a deed from your  
16          husband for half interest in Lot 32 to you?

17          A. Yes, it does.

18          Q. Have you got any recollection about why the  
19          transaction occurred in this way, as opposed to you  
20          being joint grantees initially?

21          A. My recollection is that the initial mortgage was  
22          taken out solely in his name; we weren't married at  
23          the time.

24                    I'm not certain, but I believe I may have put up  
25                    some of the initial equity; whether I paid that money

Courtney McCarthy

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- 1 Q. -- in the April or May time frame of 2011.  
2 Do you recall that, listening to that testimony?  
3 A. Yes.  
4 Q. And I assume he reported that to you?  
5 A. Yes.  
6 Q. Have you had conversations with Jack Harrell?  
7 A. No, I have not.  
8 Q. Have you met him?  
9 A. No, I have not.  
10 Q. So you've never talked to the man, heard about the  
11 man?  
12 A. I've never spoken with him or met him.  
13 Q. Ms. McCarthy, other than your husband and your  
14 lawyer, and I don't want to know about conversations  
15 with your lawyer, have you had any substantive  
16 conversations with anybody about concerns about  
17 conditions on Lot 32?  
18 A. No, I have not.  
19 Q. So everything you know about that is secondhand via  
20 your husband, basically?  
21 A. My husband or my attorney, yes.  
22 Q. Have you ever had any conversation with anybody you  
23 thought was employed by S&ME?  
24 A. No.  
25 Q. Have you ever had any communication of any kind with

Depositions and..., Inc.  
(864) 235-3518

1 anybody you thought was employed by S&ME?

2 A. No.

3 Q. Other than Mr. Scott and Ms. Castleman, and perhaps  
4 clerical people that work with them, have you had any  
5 substantive conversations with anybody you thought  
6 was employed by a Cliffs entity or Keowee Falls  
7 Investment Group, LLC?

8 A. Other than clerical things like questions about club  
9 dues or homeowners association dues, I don't believe  
10 so.

11 Q. Are you the person that prepared that fancy  
12 spreadsheet we looked at?

13 A. Yes, I am.

14 Q. All right. I thought that was the case.

15 And I don't want to go through every single  
16 column on it with you. But there were a few items  
17 where your husband perhaps deferred to you.

18 (Brief recess.)

19 BY MS. BURTON:

20 Q. Exhibit number 19, do you have that handy?

21 A. I do.

22 Q. Okay, you've got something in front of you that's  
23 different than I've got in front of me.

24 MR. DUDLEY: It's the small version.

25 BY THE WITNESS:

**THE CLIFFS COMMUNITIES  
REAL ESTATE SALE AND PURCHASE AGREEMENT**

THIS REAL ESTATE SALE AND PURCHASE AGREEMENT (the "Agreement") made by and between the below-named seller (the "Seller") identified on the Seller's signature page below (the "Seller"), whose mailing address is as set forth on page 6, and the below-named purchaser (the "Purchaser") identified on the Purchaser's signature page below.

Part I  
Identifications

A. The Lot and What is Included in Price. The property to be purchased (the "Lot") is located in Section JC, Lot 32, Cliffs at Keowee Falls South

The Lot is listed for sale for \$ 1,140,000.00

The purchase of the Lot does not include a membership in the Golf and Country Club (the "Club"), which is reserved solely to its members in accordance with the use rights conferred by the Club Membership Plan for the categories and classifications of membership offered. Seller does not operate the Club. The Club is operated by The Cliffs Golf & Country Club, Inc. Seller will, however, discount the list price of the Lot by \$35,000 if Purchaser agrees to acquire a membership, and Purchaser will pay that amount at Closing toward a membership.

Check one of the following:

J CER  
(Initial)

If checked and initialed, Purchaser wishes to acquire a membership in the Club, either a Cliffs Family Membership or a Cliffs Golf Membership, and wishes to receive a \$35,000 discount and apply it toward the required membership deposit, and has attached hereto a signed Club Membership Addendum. While Purchaser is guaranteed the availability of a golf membership under the Membership Plan only if Purchaser acquires one within 30 days following Purchaser's Closing, Purchaser will receive the discount only if the membership is acquired at the Closing. If this paragraph is checked and initialed, the Purchase Price in Paragraph B below is net of the discount.

*Handwritten note:* need to verify 30 days?

(Initial)

If checked and initialed, Purchaser does not wish to acquire a membership in the Club at this time. Purchaser understands that membership is subject to availability at the time Purchaser may wish to acquire one, and is not guaranteed. Purchaser will NOT receive any discount off the listed Purchase Price because Purchaser elects not to receive a membership.

B. Payment of Purchase Price. The "Purchase Price" is calculated and payable as follows:

F CER  
(Initial)

Total Purchase Price: \$ 1,105,000.00

(i)  Discount Applied to Membership Deposit. If checked and initialed, Purchaser has checked the first box in A above and wishes to acquire Full Family Membership privileges, paying at the Closing \$35,000. \$ 35,000.00

F CER  
(Initial)

(ii)  Golf Membership, Initiation Deposit Add-on. If checked and initialed, Purchaser has checked the first box in A above and wishes to upgrade to a Golf Membership by paying at the Closing an additional sum of \$40,000. \$ 40,000.00

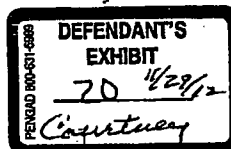
(iii) SUB-TOTAL, Purchase Price of Lot plus Membership Deposit Due at Closing ? \$ 1,180,000.00

(iv) Initial Earnest Money Deposit. An Earnest Money Deposit paid to Escrow Agent herewith \$ 5,000.00

(v) Additional Deposit Due. An additional Earnest Money Deposit due Escrow Agent within 0 days of the Effective Date hereof. \$ 0.00

(vi) Balance at Closing. The balance required at Closing in cash or certified funds (not including all of Purchaser's closing costs, prepaids, and escrow deposits) \$ 1,175,000.00

*Handwritten note:* 10% deferred



- C. Escrow Agent. The "Escrow Agent" is Olson, Smith, Jordan & Cox, Attorneys at Law, whose address is set forth in Section 9.4 of Part II below; and all deposits to Escrow Agent should be made payable to Olson, Smith, Jordan & Cox Escrow Account.

Part II.  
Terms and Conditions

For and in consideration of the Purchase Price set forth in Part I hereof and the mutual promises contained in this Agreement, Purchaser agrees to buy and Seller agrees to sell the Lot, conditioned upon there having not been a sale to a third party prior to the receipt of this Agreement by Seller, properly executed by Purchaser, together with the Earnest Money Deposit as provided in Part I, and execution hereof by Seller.

1. The Purchase Price. Purchaser will pay the Purchase Price of the Lot set forth in Paragraph B of Part I of this Agreement.

1.1 Earnest Money Deposit. The Escrow Agent will receive the Earnest Money Deposit set forth in Paragraph B of Part I, and will deposit said sums in its non-interest bearing escrow account, to be held by the Escrow Agent as the Earnest Money Deposit to be disbursed in accordance with this Part II. In the event of a termination of this Agreement under this Part II, except in the event of Purchaser's default (in which event the Earnest Money Deposit will be paid over to Seller as herein provided), all of the Earnest Money Deposit will be refunded to Purchaser without interest.

1.2 Payments at Closing. The Purchase Price, together with all of Purchaser's Closing costs, prepaids, and Closing escrow deposits, less the sum of Purchaser's Earnest Money Deposit, will be paid by Purchaser in cash or by certified, collected funds at the Closing hereinafter referred to.

2. Financing

2.1 No Financing Contingency. Purchaser acknowledges that this Agreement is not contingent upon Purchaser obtaining financing for the purchase of the Property. Seller makes no representations as to the availability or terms of financing, and the duties of Purchaser and Seller hereunder are not contingent upon Purchaser obtaining financing, or obtaining financing with any specific terms or conditions.

2.2 Purchaser's Responsibility. Purchaser is responsible for obtaining desired financing for the purchase of the Lot. By suggesting a source of financing and/or providing the application for such financing, Seller will not be deemed to have assumed any responsibility for obtaining such financing for Purchaser or to represent or warrant that such financing will be available to Purchaser. Purchaser represents that Purchaser has the financial means to purchase the Lot. Purchaser shall fully cooperate with Seller in procuring any evidence Seller reasonably requests that Purchaser has the financial means to pay the balance of the Purchase Price. Purchaser hereby gives Seller or Seller's designated agent permission to obtain one or more credit reports on Purchaser prior to the Closing Date. If Purchaser elects to obtain financing for the purchase of the Lot, Purchaser shall promptly apply for such financing and promptly deliver a loan commitment from an institutional lender to Seller. If Purchaser is not financing the purchase of the Lot, Purchaser shall promptly deliver account verifications to Seller upon Seller's request. If Seller determines, at any time prior to the Closing Date, in Seller's sole but reasonable discretion, that it is unlikely that Purchaser will be able to pay the balance of the Purchase Price on the Closing Date, Seller may terminate this transaction, and the Earnest Money Deposit shall be returned to Purchaser.

3. Completion of Infrastructure Improvements

3.1 Completion of Infrastructure. Seller agrees to provide roads and water service, and public utilities will provide electrical service and telephone service at no cost to Purchaser, as outlined in our Department of Housing and Urban Development ("HUD") Property Report made effective May 3, 2004, which is incorporated herein and made a part hereof by this reference. In all events, Seller agrees that Seller will complete the water and road infrastructure to Purchaser's Lot within the periods of time set forth in the Property Report, or, (a), in the case of water supply installation, on or before issuance of a certificate of occupancy for Purchaser's residence; and (b), in the case of paved roads to Purchaser's Lot, within sixty (60) days following Purchaser's notice to Seller that Purchaser has received a final certificate of occupancy for Purchaser's residence, whichever respective date occurs first. Seller will, at Seller's sole cost and

expense, provide on-site water for construction of Purchaser's residence if water service is not then available at Purchaser's Lot. Seller's obligation to complete the roads, water service, and electrical and telephone services within the time provided in the HUD Property Report is subject only to circumstances beyond Seller's control, such as acts of God, strikes, material shortages and other occurrences which are sufficient to constitute impossibility of performance under South Carolina law. In the event of such occurrences, Seller will proceed to completion within a reasonable time after the abatement of the event causing delay. In case the survey by which Seller will convey the Lot to Purchaser required bonding pursuant to Oconee County ordinance, Seller has posted a cash or surety bond or an irrevocable letter of credit issued on Seller's behalf to Oconee County, South Carolina, guaranteeing the completion of those roads and other infrastructure requiring bonding. If the approval of the survey by which Seller will convey the Lot to Purchaser did not require bonding by Oconee County ordinance, Seller has established one or more completion escrow accounts to assure completion of the water service and roads to the lots shown on that survey. Seller reserves the right to furnish Purchaser temporary easements for ingress and egress during development, and upon completion of permanent roads or rights-of-way providing ingress and egress, the temporary easements will automatically expire.

(a) **Installation of Infrastructure to Boundary of Lot.** With respect to completion of installation of roads and water service, as well as the installation of electrical and telephone services, Seller covenants these utilities and improvements will be brought to the boundary of Purchaser's Lot, not within the Lot lines to Purchaser's home. Therefore, all costs to connect such utilities or improvements to Purchaser's home will be Purchaser's sole obligation, and the electric utility company charges a set-up fee in conjunction with setting utility meters.

(b) **Septic System.** Purchaser will be responsible for installing and maintaining a septic tank system on the Lot when a dwelling is built on it. Purchaser will be required to make all arrangements for the permitting, governmental approval and installation of a septic tank system. In the event the Lot has not been previously tested and approved by the South Carolina Department of Health and Environmental Control for the installation of an individual sewage disposal system, and if Seller is then not able to resolve the issue within sixty (60) days following notice thereof, Seller will refund to Purchaser the Purchase Price and Purchaser will convey the Lot back to Seller, and thereafter, each of Seller and Purchaser will be fully released from any further liability to the other.

**3.2 Completion of Other Infrastructure; Conveyance or Turnover to a Property Owners' Association.** In addition to the infrastructure we are obligated to complete, as provided in Section 3.1 above, Seller agrees to complete construction and installation of approximately 25 miles of roads, including an overpass, constructed to governmentally-approved standards; drainage systems; water system storage tanks and water delivery booster stations, as well as pipes leading to Purchaser's Lot; and main electrical power feeds to the project, which will allow those public utilities serving Purchaser's Lot to extend service to the Lot; and manned and unmanned gate houses accessing the project; and approximately 10 miles of hiking and nature trails. The utility facilities will be turned over to the applicable utility company upon completion of construction and issuance of operating permits therefore, if any, and the constructed roads, drainage systems, gates and gatehouses, and hiking and nature trails described in this Section 3.2 will be conveyed or turned over to the Keowee Falls South Owners' Association on or before the expiration of two years from completion of construction, as set forth in the Declaration of Covenants, Conditions and Restrictions for the Cliffs at Keowee Falls South; provided, however, the obligation for maintenance, repair and replacement of the Common Areas will become the responsibility of the Keowee Falls South Owners' Association and its Members the date all required certificates or permits of occupancy or use are issued therefore, or the date such improvements may be used in the manner and for the purposes for which they are constructed, whichever is earlier.

#### 4. Recorded Covenants.

**4.1 The Declaration of Covenants & Property Owners' Association.** The Lot will be conveyed subject to the Declaration of Covenants, Conditions and Restrictions for the Cliffs at Keowee Falls South recorded in the Office of Register of Deeds for Oconee County, as the same may be amended from time to time (herein, sometimes referred to as the "Declaration"), which includes the obligation that Purchaser pay regular and special assessments when levied for the common facilities and services of the Keowee Falls South Owners' Association (herein, sometimes referred to as the "Association") commencing with the date Seller conveys title to the Lot. Purchaser hereby acknowledges having received a copy of the Declaration, with appended Bylaws of the Association.

**4.2 Architectural Review.** Purchaser hereby acknowledges that any improvement to the Lot, including landscape improvements, will be subject to the architectural guidelines established, from time to time, pursuant to the

Declaration, and the prior written approval thereof by the architectural review committee established thereunder. Purchaser and Purchaser's builder will be solely responsible for the completion of construction of all improvements on the Lot and for proper drainage during and after house construction, as well as the published fee payable to architectural review committee for review and approval, prior to construction, of all construction and design plans with respect to any improvements to be placed on Purchaser's Lot. Purchaser will be responsible for paying a fee to the Architectural Review Committee for review and approval, prior to construction, of all construction and design plans with respect to any improvements to be placed on the Lot. Either Purchaser or Purchaser's contractor will also be responsible for posting a bond prior to commencing construction.

4.3 **Size of Residence.** Purchaser also acknowledges that the Declaration requires minimum square footages for residences constructed within Keowee Falls South based upon the area in which Purchaser's Lot is located. See Declaration and applicable amendments, if any, with respect to the application of such minimums.

5. **The Golf & Country Club.** Purchaser acknowledges the plan of development for the various Cliffs communities includes the Club's operation of various commercial, private golf and country club facilities. Purchaser further acknowledges that the Club's recreational facilities are operated by The Cliffs Golf & Country Club, Inc., a related third party of Seller, as a commercial business, and not as a non-profit enterprise; that Purchaser will have a license to use the facilities as herein described if Purchaser acquires a membership to do so, and that neither Purchaser nor any property owner association of which Purchaser may be a member has or will receive any ownership interest in the Club's facilities by virtue of Purchaser's acquisition of the Lot or membership in any such property owner association. The Club may, but will not be required to, add additional recreational facilities in the future. The Club operates and offers membership opportunities pursuant to a published Membership Plan, which the Club may supplement, amend, delete and change in its sole discretion at any time. If Purchaser wishes to become a member, Purchaser should take the time to read the Membership Plan prior to acquiring a membership. Purchaser acknowledges receiving a summary of The Cliffs Club membership opportunities. Such information is summary only, and Purchaser should refer to the Membership Plan for the actual terms and condition applicable to membership in the Club. *Not Equity Club*

6. **Closing.** The sale and purchase contemplated by this Agreement will be closed by delivery to Purchaser of a properly executed and acknowledged general warranty deed, in proper, recordable form, in exchange for payment to Seller of the Purchase Price as hereinabove provided. Notwithstanding any provisions herein to the contrary, the legal description for Purchaser's Lot will be in accordance with and based upon the approved, bonded plat for the subdivision of which the Lot is a part (the "Plat"). *Get copy*

6.1 **Deed to Lot.** The general warranty deed will convey to Purchaser a good and marketable or insurable (at regular rates), fee simple title to the Lot subject to matters of record, including, but not limited to, taxes and assessments not yet due, all special easements, restrictions and conditions shown and noted on the Plat, licenses and easements for utilities serving the property, the Declaration and the Bylaws of the Association, applicable ordinances and all other easements, rights-of-way, restrictive or utility easements, restrictions, covenants, affirmative obligations and conditions of record in the office of Register of Deeds.

If a title insurance company which is a member of the American Land Title Association will issue a binder to issue an owner's title insurance policy at Purchaser's expense, insuring the title to the Lot at regular rates in an amount equal to the Purchase Price (which owner's title insurance policy will have as exceptions only standard exceptions and those exceptions as are herein agreed and set forth), Seller will be deemed to be able to convey a marketable title in fee simple. If, at the Closing, Seller cannot deliver a general warranty deed to the Lot subject to the exceptions above, Seller will have the right to extend the Closing for an additional thirty (30) days to comply with the terms of the title policy.

6.2 **Closing Date and Time.** Closing will be conducted in the manner provided hereinafter, on the "Closing Date" set forth on Purchaser's signature page below, at the location set forth in Section 6.3 and at a time selected by Seller. Provided that Seller has fulfilled all of its obligations to Purchaser pursuant to this Agreement, Purchaser's failure or refusal to close at the time, place and date provided may, at Seller's option, be deemed a default by Purchaser.

6.3 **Closing Location.** Tender of the deed by Seller and the performance of Seller's requirements will be made at the Closing location designated by Seller on or before 10 days prior to the scheduled Closing. In no event will delivery of the deed exceed one hundred eighty (180) days from the date of Purchaser's execution of this Agreement. The Closing may take place in escrow, with Purchaser participating by making all deliveries required to be made by mail to

the Closing attorney prior to the Closing date, instead of in person; provided that all funds to be received from Purchaser on the Closing date, whether in person or by mail, must be in cash or certified, collected funds.

6.4 Closing Costs. Seller will pay for the preparation of the deed and the deed transfer fee required to record the deed, and Seller's attorney's fees. Purchaser shall pay for any and all other Closing costs, including but not limited to, loan service and origination fees, credit report and underwriting fees, appraisal expenses, recording fees, prepaid items, and title insurance premiums, and Purchaser's attorney's fees. A working capital contribution equal to two-months' Association assessments shall be paid to the Association, as provided in the Declaration. X

(a) Prorations at Closing. Taxes and the Association's assessments will be prorated between Seller and Purchaser as of the date of closing, based upon information then available. Seller and Purchaser agree to adjust any such prorations following the Closing, as may be required by receipt of final bills therefor.

#### 7. Defaults.

7.1 Default by Purchaser. In the event Purchaser defaults in the performance of any of Purchaser's obligations pursuant to this Agreement and Seller is not in default, Seller will have the right to specifically enforce this Agreement according to its terms and/or to pursue any and all other remedies available to Seller at law or in equity, or Seller will, at Seller's election, be released from any further obligations to Purchaser pursuant to this Agreement and in such event will be entitled to retain the Earnest Money Deposit (but not exceeding 10% of the Purchase Price) as agreed liquidated damages, it being the intention and agreement of Seller and Purchaser that the amount of such Earnest Money Deposit will act as a fair measure of compensation for actual damages incurred by Seller as a result of Purchaser's default. However, notwithstanding the provisions of this Section 7.1, Seller expressly agrees that Seller will give Purchaser written notification of Purchaser's default or breach of contract and the opportunity to correct the default or breach within twenty (20) days following the receipt of Seller's notice.

7.2 Default by Seller. If Seller defaults in the performance of any of Seller's obligations as set forth in this Agreement and such default is not cured within twenty (20) days after written notice of default is given to Purchaser by Seller, Purchaser's sole remedy will be to rescind this Agreement and receive the immediate return of Purchaser's Earnest Money Deposit, pay Purchaser's reasonable attorney's fees for any title examination by Purchaser's attorney and for such other reasonable closing expenses which Seller agrees, in its sole discretion, to pay; provided, however, that in the event of a non-material breach of any term or condition of this Agreement, Purchaser's remedies will not include termination of this Agreement.

8. Real Estate Commission. It is understood that Seller has by separate agreement appointed Cliffs Real Estate, Inc. as the exclusive real estate agent for sales of Lots within Cliffs at Keowee Falls South. Purchaser warrants and represents that, except as set forth to the contrary on the signature page of Purchaser, Purchaser has not dealt with any other real estate agent who may be entitled to claim a real estate commission in this transaction.

#### 9. Miscellaneous.

9.1 Seller's Reserved Easements; Construction Setbacks. Purchaser acknowledges that Seller reserves the right to grant and/or reserve, in its reasonable discretion, various easements for ingress and egress, maintenance and use on and over the Lot and the remainder of the Cliffs at Keowee Falls South development. No such easement will materially reduce the value or the usefulness of Purchaser's Lot. Furthermore, Purchaser's Lot is subject to front, rear and side lot line easements shown on the Plat and/or set forth in the Declaration, which also constitute construction setback limits.

9.2 Seller's Adjacent Development. Except as otherwise provided herein and notwithstanding any statements contained in this Agreement or otherwise to the contrary, Seller does not warrant in any manner whatsoever the development of any other properties which are owned by Seller in Pickens County or Oconee County, South Carolina, whether or not in the general vicinity of Purchaser's Lot, and Seller reserves the right to develop such properties, if developed, in any manner whatsoever without interference from any subsequent grantee of the Purchaser's Lot, notwithstanding any plans, renderings or drawings which may have been brought to the Purchaser's attention through public zoning hearings, documents filed for zoning purposes, public or private showings or proposed or preliminary development plans or references therein in any recorded covenants. There is no assurance that any facilities or amenities



9.8 **Entire Agreement.** Seller and Purchaser covenant and agree with each other that this written instrument, executed in duplicate originals, expresses the entire agreement between them and there is no other agreement, oral or otherwise, varying or modifying the terms of this Agreement.

9.9 **Modification of Agreement.** This Agreement may not be otherwise changed or modified, absent some subsequent written instrument executed by both Seller and Purchaser.

9.10 **Interpretation Presumption.** Seller and Purchaser represent and warrant to one another that each has, by counsel or otherwise, actively participated in the finalization of this Agreement, and in the event of a dispute concerning the interpretation of this Agreement, each hereby waives the doctrine that an ambiguity should be interpreted against the party which has drafted the document.

9.11 **Binding Effect; Assignment.** This Agreement is binding upon the parties' respective heirs, devisees, personal representatives, successors and assigns; provided however, this Agreement and any of Purchaser's rights hereunder may not be assigned by Purchaser.

9.12 **Resale Or Exchange Of Property.** Seller has no program or provision for the sale or exchange of any Lots in the Cliffs at Keowee Falls South. There is no program, which assures that Purchaser will be able to exchange the Lot for other property.

9.13 **Unenforceable Provisions.** Should any provision of this Agreement be void or become unenforceable at law or in equity, the remaining provisions will remain in full force and effect and will not in any manner be thereby affected or impaired.

9.14 **Survival.** This Agreement and all the terms and conditions hereof will survive the Closing of the transaction contemplated hereby and will thereafter continue to bind the parties to this Agreement.

9.15 **Counterpart Execution of Agreement.** This Agreement may be signed by each of the parties upon a separate copy, and in such case one counterpart of this Agreement will consist of enough of such copies to reflect the signature of each. For purposes of this Agreement, a telecopy of an executed counterpart will constitute an original. Any person delivering an executed counterpart of this Agreement by telecopy will also deliver an original, executed counterpart of this Agreement, but the failure to deliver an original, executed counterpart will not affect the validity of this Agreement. This Agreement may also be executed in two or more counterparts, each of which will be deemed an original; but for purposes of proving the Agreement, it will not be necessary to produce or account for more than one such counterpart.

9.16 **Effective Date.** This Agreement will become effective, and the term "Effective Date" herein will mean, the last date executed by a party to be bound hereby.

9.17 **Receipt of Agency Disclosure.** RECEIPT AND EXPLANATION OF THE AGENCY DISCLOSURE FORM IS HEREBY ACKNOWLEDGED BY PURCHASER'S INITIALS BELOW THIS SECTION AND BY PURCHASER'S EXECUTION OF THIS AGREEMENT.

PURCHASER'S INITIALS HERE TO EVIDENCE HAVING RECEIVED THE AGENCY DISCLOSURE FORM REFERENCED ABOVE

  
CER  
For Purchaser

(BALANCE OF PAGE PURPOSELY BLANK)

Additional Documents Received By Purchaser. Pursuant to Section 9.6 the Purchaser acknowledges having received and reviewed prior to the execution of this Agreement the following (if none, leave blank):

HUD  
 CCR  
 PLATT

PURCHASER'S INITIAL HERE TO EVIDENCE HAVING RECEIVED THE DOCUMENTS LISTED ABOVE

J. Scott  
For Purchaser

YOU HAVE THE OPTION TO CANCEL YOUR CONTRACT OR AGREEMENT OF SALE BY NOTICE TO THE SELLER UNTIL MIDNIGHT OF THE SEVENTH DAY AFTER YOU HAVE RECEIVED A FULLY SIGNED COPY OF THE CONTRACT OR AGREEMENT.

IF YOU DID NOT RECEIVE A PROPERTY REPORT PREPARED PURSUANT TO THE RULES AND REGULATIONS OF THE OFFICE OF INTERSTATE LAND SALES REGISTRATION, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, IN ADVANCE OF YOUR SIGNING THE CONTRACT OR AGREEMENT, THE CONTRACT OR AGREEMENT OF SALE MAY BE CANCELLED AT YOUR OPTION FOR TWO YEARS FROM THE DATE OF SIGNING.

IN WITNESS WHEREOF, Purchaser and the Seller have each caused this instrument to be executed on the day and year set forth below their respective names.

WITNESS:

Purchaser:

Courtney Rountree  
(Signature)

(Signature)

6 20 2005  
Month Day Year

The "Closing Date" is: July 20, 2005

Print or Type:

Name: Kevin McCarthy

Name: Courtney Rountree

Address: 604 A Tim Valley Road

Courtney Rountree into:

Telephone (Work): (704) 715-1484

Telephone (Home): (704) 819-8749

FAX Number: (704) 3821-6538

E-mail Address: rountreecc@bellsouth.net

Name in Which to Title Property: Courtney E. Rountree

(Insert the name or names to which Purchaser wishes title to the Lot to be deeded)

Name of Real Estate Agent(s): Jay Scott

(Insert the name or names of both the Cliff's Real Estate agent representing Seller and any outside agent representing Purchaser)

(BALANCE OF PAGE PURPOSELY BLANK)

Seller:

Koowee Falls Investment Group, LLC

By: \_\_\_\_\_

Its: \_\_\_\_\_

Month

Day

Year

Property: Section: JC, Lot 32 WILL HAVE THE OPTION TO BUY THE PROPERTY FOR THE  
Lot Purchase Price: \$ 1,105,000.00  
Membership: \$ 75,000.00 HE DID NOT RECEIVE A CALL BY TELEPHONE  
Total: \$ 1,180,000.00 SHELL AT THE END OF THE

(BALANCE OF PAGE PURPOSELY BLANK)

THE UNDERSIGNED ESCROW AGENT EXECUTES THIS AGREEMENT SOLELY TO ACKNOWLEDGE RECEIPT OF THE PURCHASER'S ESCROW DEPOSIT IDENTIFIED ON PAGE 1 HEREOF, AND TO ACKNOWLEDGE THE UNDERSIGNED'S AGREEMENT TO HOLD AND DISBURSE THE SAID ESCROW DEPOSIT IN ACCORDANCE WITH THE TERMS AND CONDITIONS OF THIS AGREEMENT.

WITNESS:

Escrow Agent:

Olson, Smith, Jordan & Cox

By: \_\_\_\_\_

Its: \_\_\_\_\_

Month Day Year

**Depo Excerpts of  
William Mathews**

1 STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS

2 COUNTY OF GREENVILLE CA No.: 2011-CP-23-6376

3

4 Kevin McCarthy and Courtney E. McCarthy,

5 Plaintiffs,

6 vs.

7 Keowee Falls Investment Group, LLC,  
8 The Cliffs Communities, LLC, d/b/a  
9 The Cliffs at Keowee Falls South,  
10 Cliffs Real Estate, Inc.,  
11 The Cliffs Golf and Country Club, Inc.,  
12 and S&ME, Inc.,

13 Defendants.

14

15

16

17

18 DEPOSITION OF WILLIAM A. MATHEWS

19

20

21 Pursuant to notice of deposition or subpoena  
22 or agreement in the above-entitled case, a deposition  
23 was taken on the 6th day of December 2012, commencing  
24 at approximately 10:00 a.m., attended by counsel as  
25 follows:

26

27

28

1 Q. Does that sound like the right date when you went out  
2 there and met Mr. Yuda?

3 A. It does.

4 Q. At this point in time, who was BLE's client?

5 A. Zone 7 Nursery.

6 Q. And so is that why you're writing the report to Zone  
7 7?

8 A. Yes.

9 Q. Did they pay BLE for performing these observation  
10 services?

11 A. They did.

12 Q. Did you, this is probably a stupid question.

13 When you do a report like this one to Mr. Yuda  
14 at Zone 7, can you, as an engineer at BLE, provide a  
15 copy of that report to any third party, without Mr.  
16 Yuda's consent?

17 A. Typically we would get his consent to do that.

18 Q. I mean I've always heard that engineers cannot or do  
19 not, as a matter of practice, provide copies of their  
20 reports to third parties without getting client  
21 consent?

22 A. Right.

23 MR. DUDLEY: Object to the form of the  
24 question.

25 BY MS. BURTON:

1 Q. Is that BLE'S practice as well?

2 A. Yes.

3 Q. Is that your understanding of what the practice of  
4 most professional engineers is in your industry?

5 A. Yes.

6 Q. Did you provide a copy of this report, Exhibit  
7 number 3, to any other person or entity other than  
8 Mr. Yuda?

9 A. I don't recall.

10 Q. Okay. In paragraph number, sorry it's not numbered.

11 In the second paragraph of Exhibit number 3, you  
12 say in the second sentence that "the distress is part  
13 of a line of differential movement that extended in a  
14 semi-circular manner across the cul-de-sac."

15 Do you see that?

16 A. Yes.

17 Q. Is that basically a description of that red line you  
18 drew on Exhibit number 2?

19 A. Yes.

20 Q. And further into that paragraph, starting with the  
21 words, The semi-circular shape, you say it's a  
22 classic indication of a failure scarp that develops  
23 at the upper limits of a slope failure?

24 A. Yes.

25 Q. Can you tell me what you mean by a failure scarp?

1 A. That goes back to what we were talking about earlier,  
2 we'd need to have more exploration, samples  
3 collected, laboratory work done, topographic survey  
4 performed, all this information that's needed to set  
5 up a model to do stability analyses.

6 And then in that model, you can, you can  
7 simulate various methods to try to stabilize the  
8 slope, which will produce the factor of safety that  
9 you're looking for.

10 Q. I see.. Give me some examples of methods that you  
11 could use to stabilize, or that you could consider to  
12 use to stabilize the slope, once you'd done this  
13 global stability analysis?

14 A. Tie-backs would be one method.

15 Q. What else?

16 A. Soil nails are a method. Tie-backs, soil nails,  
17 flattening the slopes. There's a lot of different  
18 options that are available for increasing the factor  
19 of safety.

20 Q. Has anybody asked you to look at any of those  
21 possibilities in this case?

22 A. No.

23 (Defendant's Exhibit 16 marked for  
24 identification, Mathews deposition,  
25 12/6/12, RAM.)

1 A. It is.

2 Q. So it's just another report on, here's our updated  
3 readings?

4 A. More data.

5 Q. Okay.

6 (Defendant's Exhibits 17, 18 marked for  
7 identification, Mathews deposition,  
8 12/6/12, RAM.)

9 BY MS. BURTON:

10 Q. Did you provide the reports that we looked at, the  
11 September and October reports, to anybody other than  
12 the folks at The Cliffs?

13 A. It was also provided to Matt Vogt.

14 Q. Did you have permission from The Cliffs to do that?

15 A. Yes.

16 Q. Anybody other than Mr. Vogt and Mr. Nickell?

17 A. No, not that I know of.

18 Q. Let me hand you two documents, they may go together,  
19 that I've marked as Exhibits 17 and 18.

20 Can you please tell me what Exhibit 17 is?

21 A. It's an invoice.

22 Q. From BLE?

23 A. Yes.

24 Q. To The Cliffs?

25 A. Yes.

DEPOSITIONS AND..., INC.  
864-235-3518

1 A. Yes.

2 Q. And I think you told me earlier, you didn't read SI-5  
3 in this summer because there was poison ivy,  
4 et cetera?

5 A. Yes.

6 Q. You say that inclinometers 1 and 2, which are the  
7 ones on Lot 30, right?

8 You better keep that map out, keep that map  
9 handy.

10 A. Yes, 1 and 2 are on Lot 30.

11 Q. Have you ever reported to the owner of Lot 30 any of  
12 your data or results?

13 A. No.

14 Q. Have you ever heard, and I think that, and somebody  
15 can correct me if I'm wrong, I think in the past that  
16 lot was owned by somebody named McConnell. Have you  
17 ever heard that name?

18 MS. McMILLAN: McCullam.

19 BY MS. BURTON:

20 Q. McCullam. Sorry. Have you ever heard of McCullam?

21 A. No.

22 Q. Have you ever talked to a person you thought was  
23 affiliated with, a representative of, an attorney for  
24 somebody named McCullam?

25 A. I was unaware of who the owners of the lots were.

1 Q. I've heard, Mr. Mathews, that the McCullam lot was  
2 foreclosed, and that some bank is now the proud owner  
3 of Lot 30.

4 Have you ever talked with any person you thought  
5 was affiliated with a bank or lender associated with  
6 Lot 30, about the results of any of your reports?

7 A. No.

8 Q. Did you feel the professional obligation to report to  
9 somebody that you thought owned Lot 30 about the  
10 results of your reports?

11 A. Again, I was unaware who owned Lot 30. They were  
12 undeveloped. I assume they were probably still  
13 belonged to The Cliffs.

14 Q. Okay. In the third paragraph, under Evaluation, you  
15 report about SI-4 and SI-6, which are the two  
16 inclinometers along the, closer to the shoreline on  
17 Lots 31 and 32?

18 A. Yes.

19 Q. Do you see that.

20 And you say that those indicate a failure plane  
21 at 43 to 53 feet?

22 A. Yes.

23 Q. But you couldn't get the probe all the way down in  
24 either?

25 A. I could not get it past those points in either of

Depo excerpts of  
Roger Moore

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS  
COUNTY OF GREENVILLE CASE NO. 2011-CP-23-6376

KEVIN MCCARTHY and COURTNEY E. MCCARTHY,  
Plaintiffs,

vs.

KEOWEE FALLS INVESTMENT GROUP, LLC,  
THE CLIFFS COMMUNITIES, LLC,  
d/b/a THE CLIFFS AT KEOWEE FALLS SOUTH,  
CLIFFS REAL ESTATE, INC.,  
THE CLIFFS GOLF and COUNTRY CLUB, INC.,  
and S&ME, INC.,  
Defendants.

---

VIDEOTAPED DEPOSITION OF  
ROGER MOORE

---

DATE TAKEN: Monday, January 7, 2013

TIME BEGAN: 1:43 p.m.

TIME ENDED: 3:21 p.m.

LOCATION: Kenison, Dudley & Crawford  
704 East McBee Avenue  
Greenville, South Carolina

VIDEOGRAPHER: MICHAEL ARRISON, CLVS  
REPORTED BY: TARI B. KRAMER, RMR, CRR  
GALLAGHER COURT REPORTING  
864-234-5744

1           That's all the questions I have.

2   EXAMINATION BY MS. BURTON:

3   Q.   Mr. Moore, my name is Stephanie Burton, and I  
4       represent S&ME in this lawsuit. I believe you  
5       told us that you are a geologist by training.

6   A.   Yes.

7   Q.   And you have a Bachelor of Science degree from  
8       NC State in geology; is that right?

9   A.   Yes. That's correct.

10  Q.   As somebody -- because I was a political science  
11       major, so I don't know much about science  
12       majors. As somebody who obtained a geology  
13       degree, I assume that you would have taken a  
14       number of classes in the geology department; is  
15       that right?

16  A.   That's correct.

17  Q.   And I guess when you're a freshman, you take  
18       geology 101 and some introductory courses. Is  
19       that accurate?

20  A.   Yes.

21  Q.   Along with calculus and physics and other  
22       science classes; is that right?

23  A.   That's correct.

24  Q.   And then as you advance, you move up in the  
25       department to taking 200-level classes and

- 1           300-level classes and the like.
- 2    A.    Yes.
- 3    Q.    And you study things like the history of the  
4           earth; is that right?
- 5    A.    Yes.
- 6    Q.    And you study things about the composition of  
7           minerals and rocks; is that right?
- 8    A.    That's correct.
- 9    Q.    Okay. If somebody wants to be a geotechnical  
10           engineer, that goes to NC State, do they major  
11           in civil engineering?
- 12   A.    Typically. Yes.
- 13   Q.    Okay. Because a civil engineering degree, you  
14           can go out and be a civil engineer and design  
15           roads and bridges; right?
- 16   A.    Yes.
- 17   Q.    And you can be a structural engineer, who  
18           designs buildings -- the loads on buildings; is  
19           that right?
- 20   A.    Yes.
- 21   Q.    And then if you major in civil engineering, one  
22           of the things you can do with that degree is be  
23           a geotechnical engineer, if you have some  
24           specialized training. Is that accurate?
- 25   A.    Essentially. Yes.

- 1 Q. Okay. And somebody who goes to NC State and  
2 wants to ultimately be a geotechnical engineer  
3 would take classes in the engineering  
4 department; is that right?
- 5 A. Yes.
- 6 Q. Okay. And they would take classes, for example,  
7 like soil mechanics.
- 8 A. Probably. Yes.
- 9 Q. And certainly, soil mechanics -- when we talk  
10 about slopes and slope failure -- soil mechanics  
11 is sort of the area or discipline, at least,  
12 involved in that. Is that accurate?
- 13 A. Yes.
- 14 Q. You, yourself are not a professional engineer in  
15 the state of South Carolina.
- 16 A. That's correct.
- 17 Q. You are a registered geologist. Is that the  
18 right term?
- 19 A. Yes.
- 20 Q. And you don't hold yourself out to be an expert  
21 in the standard of care to be used by a  
22 geotechnical engineer, do you, sir?
- 23 A. In South Carolina?
- 24 Q. Yes, sir.
- 25 A. No.

- 1 Q. All right. In fact, in the state of South  
2 Carolina, you are not permitted to issue  
3 engineering recommendations, are you, sir?
- 4 A. Typically not. No.
- 5 Q. Okay. In fact, if somebody's going to make an  
6 engineering recommendation, under South Carolina  
7 law, they've got to have an engineer's seal on  
8 the recommendation, don't they?
- 9 A. For an engineering recommendation. Yes.
- 10 Q. And if you were to make an engineering  
11 recommendation in South Carolina, that would be  
12 the unauthorized practice of engineering,  
13 wouldn't it?
- 14 A. Probably. Depending if it was co-signed on a  
15 report that was, you know, with another engineer  
16 or, you know, something like that. Yes.
- 17 Q. Okay. If it was on a report and you got a  
18 licensed South Carolina engineer, they could put  
19 their seal and certification on the report  
20 under -- and therefore, be a proper engineering  
21 recommendation. Isn't that right?
- 22 A. Right.
- 23 Q. But you, yourself can't do that.
- 24 A. That's correct.
- 25 Q. All right. As I understand it, you personally

- 1           took the call from Skip Wilson at The Paragon  
2           Group on April 26 of 2005. Is that true?  
3    A.    That's correct.  
4    Q.    And Mr. Wilson told you that he was a contractor  
5           working for somebody who owned a lot in Jasmine  
6           Cove at Lake Keowee.  
7    A.    That's correct.  
8    Q.    And he told you the lot number was number 31.  
9    A.    That's correct.  
10   Q.    All right. And he told you that the owner's  
11          name was Rockwell.  
12   A.    Yes.  
13   Q.    Certainly, the Rockwells aren't somebody you  
14          knew in advance.  
15   A.    No.  
16   Q.    All right. And he told you that the Lake Keowee  
17          lot, to use your notes, has a slope failure.  
18          Isn't that accurate?  
19   A.    I believe he did.  
20   Q.    All right. And he asked your company, Alpha  
21          Environmental Sciences, to come out and take a  
22          look at the lot.  
23   A.    Yes.  
24   Q.    Now, the person that actually went out to take a  
25          look at the lot, in response to this call, was a

- 1 gentleman you worked with named Robert Forbes?
- 2 A. Yes.
- 3 Q. Goes by Bob, I take it.
- 4 A. Yes.
- 5 Q. And Mr. Forbes was somebody who worked at the  
6 company with you?
- 7 A. Yes.
- 8 Q. And as I understand it, Mr. Forbes had -- when  
9 he first started working with the company, he  
10 was a technician.
- 11 A. Yes.
- 12 Q. And a technician at a company like Alpha, is  
13 somebody who goes out to a site and performs  
14 various types of tests on materials at a site --
- 15 A. That's correct.
- 16 Q. -- is that accurate?
- 17 A. That's correct.
- 18 Q. And Mr. Forbes had done that for some period of  
19 time, I take it.
- 20 A. Yes.
- 21 Q. And Alpha was happy with his work and promoted  
22 him up to geotechnical project manager --
- 23 A. Yes.
- 24 Q. -- is that right?
- 25 A. (Nods head up and down.)

- 1 Q. And Mr. Forbes is not an engineer.
- 2 A. That's correct.
- 3 Q. He does not have a four-year engineering degree.
- 4 A. That's correct.
- 5 Q. He is not a geologist, like you.
- 6 A. That's correct.
- 7 Q. He does not have a four-year geology degree.
- 8 A. That's correct.
- 9 Q. Okay. I think he has some sort of two-year  
10 associate's degree. Is that true?
- 11 A. That's correct.
- 12 Q. And so Mr. Forbes' experience in the  
13 geotechnical area is basically on-the-job  
14 training.
- 15 A. Yes.
- 16 Q. And when he got promoted to the geotechnical  
17 project manager, he was responsible largely for  
18 coordinating the technicians that would be sent  
19 out to various sites.
- 20 A. His -- well, that was part of his  
21 responsibilities. Yes.
- 22 Q. He had a number of administrative  
23 responsibilities.
- 24 A. As well as going and making visits, like this  
25 particular one, to look at -- preliminarily look

- 1 at a site to determine whether we might need to  
2 take some additional -- do some additional  
3 investigation or exploration on the site.
- 4 Q. Okay. Mr. Forbes is certainly not qualified to  
5 render engineering opinions, is he, sir?
- 6 A. No.
- 7 Q. Or make engineering recommendations.
- 8 A. No.
- 9 Q. Okay. As I understood, Mr. Forbes basically  
10 performed a walk over and examination of Lot 31.  
11 Is that accurate?
- 12 A. Yes. I believe so.
- 13 Q. And by saying a walk over and examination, that  
14 means Mr. Forbes went out to the site and walked  
15 around on the land; is that right?
- 16 A. That's correct.
- 17 Q. And he would have looked around to see what he  
18 could see.
- 19 A. Yes.
- 20 Q. And he might have taken some of the pictures  
21 that are in your file.
- 22 A. Yes.
- 23 Q. And when he went out to the site, he didn't do  
24 any kind of testing, did he?
- 25 A. No.

1 Q. Okay. He didn't do any drilling in the ground  
2 or collecting the soil samples or anything like  
3 that.

4 A. No.

5 Q. If you would, sir, exhibit number -- which one  
6 was this? I'm looking at your May 11, 2005  
7 letter. Exhibit number 2. That letter was  
8 prepared somehow in combination between you and  
9 Mr. Forbes?

10 A. Yes.

11 Q. You don't know who actually did the initial  
12 draft.

13 A. I don't recall. No, I don't.

14 Q. You certainly would have been involved in  
15 looking over, before it was sent out to your  
16 client, The Paragon Group --

17 A. Yes.

18 Q. -- is that right?

19 A. Yes.

20 Q. Now, in the letter that you signed and  
21 Mr. Forbes signed, you state that initially the  
22 area in question may have been excavated at some  
23 point in the past; is that right?

24 A. Yes.

25 Q. And that's not information that you personally

1 had, 'cause you didn't go to the site before  
2 this letter was prepared.

3 A. That's correct.

4 Q. That was some information you'd obviously gotten  
5 from Mr. Forbes.

6 A. Either that or The Paragon Group.

7 Q. Or the client had told you it looked like there  
8 had been some excavation.

9 A. Looked like there might have been some  
10 excavation.

11 Q. The truth is, you don't know if there had been  
12 any prior grading on that site.

13 A. That's correct. We don't know.

14 Q. Okay. And you don't know if roads had been cut  
15 on that site.

16 A. We don't know.

17 Q. You don't know if heavy grading equipment had  
18 been moved across that site in the past.

19 A. No.

20 Q. Okay. Would you agree with me that you can make  
21 pretty steep road cuts if you don't intend to  
22 use a road very frequently?

23 A. I suppose that's true. Yes.

24 Q. Do you know who owned this land in the past?

25 A. I don't. I don't have a history of it. No.

1 Q. Okay. Do you know what purpose the land was  
2 used for in the past, before it became  
3 residential?

4 A. I don't.

5 Q. Do you -- would you agree with me that if  
6 grading had been done on the property in the  
7 past, that grading can create scarps?

8 A. Well, grading would have created an embankment,  
9 but not necessarily a scarp.

10 Q. Okay. Well, let's -- let's talk a little bit,  
11 because we've been using a bunch of words and  
12 hadn't defined them. When you talk about a  
13 scarp, you're talking about a place where the  
14 land drops down and you can actually see the  
15 face of soil. Is that true?

16 A. That's correct.

17 Q. And would you agree with me that if somebody  
18 took a piece of heavy grading equipment and  
19 moved it on the land to create a roadway, that  
20 you might see such a face of land?

21 A. You would. But by definition, a scarp is the  
22 result or the scar of land movement. Mass  
23 movement, such as a slide or a slope or failure.

24 Q. Okay. But it would look --

25 A. Different from an excavated embankment -- a road

1           embankment or what you're discussing.

2    Q.    Okay. But you would certainly see a change in  
3           elevation if somebody cut a road through --

4    A.    Certainly. Certainly.

5    Q.    -- and you certainly might see a face of soil  
6           where there was a drop down in --

7    A.    Certainly.

8    Q.    -- the land.

9    A.    Certainly.

10   Q.    Would you agree with me that grading might also  
11          create crevices in the land.

12   A.    Certainly possible.

13   Q.    Okay. And trenches in land.

14   A.    Yes.

15   Q.    And could create steep slopes in land.

16   A.    Yes.

17   Q.    Would you agree with me that if I move heavy  
18          grading equipment onto a site, that that could  
19          cause trees near where I've cut into the land to  
20          move?

21   A.    I would guess it's possible. Yes.

22   Q.    And after a time -- if I'd cut into the land --  
23          after a time, would you expect to see new  
24          sapling trees grow up where the land had been  
25          previously graded?

- 1 A. Yes. I would expect to.
- 2 Q. Okay. And if I did grading on a site and cut  
3 roads through a site, wouldn't you expect to see  
4 that there could be trees affected by the  
5 development of the land?
- 6 A. Yes.
- 7 Q. Did Alpha Environmental Sciences do any  
8 investigation to determine if there had been any  
9 prior grading or excavation on Lot 31?
- 10 A. No.
- 11 Q. Okay. In fact, you have no historical knowledge  
12 of the use of that site, do you?
- 13 A. No. We don't.
- 14 Q. Okay. In the letter that you and Mr. Forbes  
15 signed, you offer the opinion that this is a  
16 circular slope failure, which appears to be  
17 caused by the fluctuating water level of the  
18 lake; is that right?
- 19 A. Yes.
- 20 Q. And you derived that opinion from Mr. Forbes  
21 walking on the land and looking at it. Is that  
22 accurate?
- 23 A. Yes. Essentially, yes.
- 24 Q. There was no other basis for that opinion, other  
25 than his visual observation?

- 1 A. Okay. That's correct.
- 2 Q. And by fluctuating water level in the lake,  
3 we're talking about the original impoundment of  
4 water in Lake Keowee, aren't we?
- 5 A. Yes.
- 6 Q. You didn't have any reason to believe that Lake  
7 Keowee had been fluctuating significantly in its  
8 levels of water, did you?
- 9 A. No.
- 10 Q. Did you investigate, at all, what the full pool  
11 level of Lake Keowee was versus what it had been  
12 at the time?
- 13 A. No.
- 14 Q. Okay. In the letter to your client at The  
15 Paragon Group, you say that There are several  
16 sections along the southern part of the lot that  
17 are failing and sliding toward the lake.
- 18 A. Yes.
- 19 Q. And by that, Southern portion of the lot, we're  
20 talking about near the water's edge, aren't we?
- 21 A. Yes.
- 22 Q. Okay. You recommended to your client that a  
23 further investigation be performed by doing some  
24 soil borings.
- 25 A. Yes.

1 Q. Okay. And in fact, you made a written proposal  
2 to the folks at The Paragon Group for -- for  
3 exactly that; is that right?

4 A. Yes.

5 Q. And can you find for me your proposal dated May  
6 the 18th? I think the cover sheet might be the  
7 19th. Do you have that handy?

8 A. Yes.

9 Q. Can you tell me the exhibit number, please.

10 A. Exhibit 3, I guess it is.

11 Q. Okay. This proposal was prepared by Mr. Forbes?

12 A. Yes.

13 Q. And somebody else put their name on the  
14 proposal, a James K. Connors, PE. Was he a  
15 fellow that worked with you?

16 A. Yes.

17 Q. And he was a professional engineer.

18 A. Yes.

19 Q. And that's why he has PE after his name?

20 A. Yes.

21 Q. Okay. So he must have reviewed the proposal  
22 before it went out.

23 A. I believe he did, yes.

24 Q. And that was a common practice at your company,  
25 to have somebody -- not necessarily go out to a

1 site, but look behind the written work product  
2 just to make sure it looked okay.

3 A. Yes.

4 Q. Okay. In the proposal prepared by Alpha  
5 Environmental sciences, you -- you state in the  
6 first paragraph that the proposal is going to  
7 involve subsurface exploration services for  
8 field exploration and geotechnical engineering  
9 analysis; is that right? In the very first  
10 paragraph.

11 A. First paragraph. Yes.

12 Q. And that was because at the time this proposal  
13 was prepared and submitted to your client, you  
14 felt that geotechnical engineering analysis was  
15 something that needed to be done.

16 A. Yes.

17 Q. In the second paragraph of the proposal, Alpha  
18 Environmental Sciences says that the purpose of  
19 the investigation is to determine whether or not  
20 a portion of this lot is part of a circular  
21 slope failure caused by fluctuating water level  
22 of the lake. Is that accurate?

23 A. Yes.

24 Q. And that's basically to do more investigation  
25 for the conclusion that you guys reached when

1 Mr. Forbes went out there; right?

2 A. Yes.

3 Q. And by This lot, it was referring simply to the  
4 lot owned by the Rockwells at that time. Lot  
5 31.

6 A. Yes.

7 Q. You did not propose doing a broader  
8 investigation into the entire Jasmine Cove area,  
9 did you, sir?

10 A. No.

11 Q. Okay. You proposed to do three borings on the  
12 property; is that right?

13 A. Yes.

14 Q. Okay. And so I know -- you know what it means  
15 to do borings, but I'm not sure the jury knows  
16 what it means. When you talk about doing  
17 borings into the earth, tell -- tell the jury  
18 what you mean by doing that.

19 A. Basically, a mechanical or machine-driven drill  
20 would drill into the ground and -- and use  
21 hollow-stem augers which are hollow. They're  
22 advanced into the ground and a sample is driven  
23 into the ground through the center of the auger  
24 to collect a sample. And then that sample is  
25 then retrieved and collected and analyzed, if

1           necessary.

2    Q.    Okay.  So when you -- when you push, for lack of  
3           a better word, or drill this auger into the  
4           ground, you actually obtain samples of the soil  
5           as you're going down through the earth; is that  
6           right?

7    A.    Yes.

8    Q.    And another thing you're also doing is, you are  
9           doing blow counts; is that right?

10   A.    That's correct.

11   Q.    Tell the jury what you mean when you're saying  
12           you're doing blow counts at the same time.

13   A.    Basically, the -- the apparatus that takes the  
14           sample is a -- is a steel rod with a sample tube  
15           on the bottom.  Sliding weight on the top that's  
16           lifted and dropped repeatedly to drive the  
17           sample tube into the ground.  And the count or  
18           number of blows that it takes to drive that  
19           sample tube into the ground is then counted and  
20           recorded and that's what's showing up on the  
21           boring logs.

22   Q.    Okay.  So you -- you have a specific distance  
23           where you count the blows; is that right?

24   A.    Yes.

25   Q.    Okay.  Could you tell us what that distance is?

1 A. It varies. It may be 18 inches. It may -- in  
2 this case, it's 24 inches.

3 Q. Okay. So you count how many times it takes  
4 to -- how many blows it actually takes to  
5 advance that drilling apparatus 24 inches into  
6 the earth --

7 A. Yes.

8 Q. -- is that right?

9 A. That's correct.

10 Q. And that would be considered the blow count --

11 A. Yes.

12 Q. -- for that 24 inches.

13 A. Yes.

14 Q. And when you do drilling, let's say you did it  
15 20 feet into the ground, you would do -- you  
16 would count the blow counts as you progress  
17 through the earth; is that right?

18 A. That's correct.

19 Q. And the blow counts would be some indication of  
20 the density of the soil itself; is that right?

21 A. Relative density. That's correct.

22 Q. And blow counts are used in many geotechnical  
23 engineering formulas; is that right?

24 A. Yes.

25 Q. Okay. In your proposal, you propose doing three

1 of these borings to a depth of -- in the order  
2 of 15 feet. Is that accurate?

3 A. That's correct.

4 Q. And you felt that at the time, 15 feet was an  
5 adequate depth to analyze whether there was a  
6 circular slope failure caused by fluctuating  
7 water in the level of the lake.

8 A. Yes. At the time. Yes.

9 Q. Okay. And it would be fair to say that you did  
10 not think there was a deep-seated slope failure,  
11 because if you'd thought that, you certainly  
12 would have drilled deeper than 15 feet into the  
13 earth.

14 A. That's correct.

15 Q. Okay. With -- in your proposal, if you would --  
16 there's a total price. It was kind of a lump  
17 sum price. We'll come and do this work for you  
18 for a fixed price --

19 A. Yes.

20 Q. -- am I reading that right?

21 A. I think so.

22 Q. And you said that y'all would go out with your  
23 drill rig and do the drilling of these three,  
24 15-foot borings and a field project manager  
25 geologist would go out for six hours; is that

1 right?

2 A. That's correct.

3 Q. And then a report would get prepared and some  
4 other folks, a CAD operator and some secretarial  
5 folks would work on that; is that right?

6 A. That's correct.

7 Q. And for -- for doing that work, you were going  
8 to charge The Paragon Group \$2,444.50.

9 A. Yes.

10 Q. Okay. Attached to the proposal that was  
11 submitted to your client, The Paragon Group, is  
12 a two-page, double column -- I'm guessing 8.5,  
13 maybe, pretty small -- I got to put on my  
14 reading glasses to see it -- document that says  
15 it's standard conditions. You're familiar with  
16 that document.

17 A. Yes.

18 Q. That was Alpha Environmental Services standard  
19 terms and conditions, pursuant to which it was  
20 willing to do this particular project --

21 A. Yes.

22 Q. -- right? And so what you wanted was -- for  
23 \$2,400, roughly, the client was going to get  
24 services under these terms and conditions --

25 A. Yes.

- 1 Q. -- is that right? If you would, sir, turn your  
2 attention to section 3.2 in the terms and  
3 conditions document.
- 4 A. Yes.
- 5 Q. And in section 3.2, right above where it has  
6 3.3, it says that It is recognized and agreed  
7 that consultant has assumed responsibility only  
8 for making the investigations reports and  
9 recommendations to the client -- and client is  
10 all capitalized -- included in the scope of  
11 work. The responsibility for making any  
12 disclosures or reports to any governmental  
13 authority or any other third party and for the  
14 taking of corrective remedial or mitigative  
15 action shall be solely that of the client. Is  
16 that what it says?
- 17 A. It is.
- 18 Q. And what you're saying here is, we're working  
19 for you, Paragon, the client. If somebody else  
20 needs to get information about our report, they  
21 aren't getting it directly from us --
- 22 A. That's correct.
- 23 Q. -- right?
- 24 A. Unless so directed.
- 25 Q. And it was your standard practice, Alpha

1 Environmental Sciences standard practice, to do  
2 reports and share them with clients, not  
3 disseminate them to third parties.

4 A. Correct.

5 Q. Okay. And that is the practice in the industry,  
6 as far as you know.

7 A. Yes.

8 Q. It was certainly the practice when you worked at  
9 Law Engineering --

10 A. Yes.

11 Q. -- right? They didn't send their clients --  
12 their reports out to third parties, did they?

13 A. No.

14 Q. And it was the practice when you worked at  
15 Wilson Engineering.

16 A. Yes.

17 Q. And it is the practice at Alpha Environmental  
18 Sciences.

19 A. Yes.

20 Q. Okay. In addition, in the terms and conditions,  
21 I want to turn your attention to section 5.1,  
22 that says it's a limitation of liability.

23 A. Yes.

24 Q. And Alpha Environmental Services, in its  
25 proposal to its client, said that its liability

1 was limited to \$50,000 or the total contract  
2 price, whichever is less; is that right?

3 A. Yes.

4 Q. So it's either \$50,000 or \$2,400, which was the  
5 contract price here; is that right?

6 A. Yes.

7 Q. And certainly having a limitation of liability  
8 in your terms and conditions was some standard  
9 practice at Alpha --

10 A. Yes.

11 Q. -- and affected the price you were willing to  
12 quote for your clients.

13 A. Yes.

14 Q. Okay. If you would, sir, turn, in the standard  
15 conditions document, to section 6.3, which talks  
16 about reports. Can you see that?

17 A. Yes.

18 Q. And it says, in the second sentence, that  
19 Reports and written documents delivered to the  
20 client are instruments reflecting the services  
21 provided by consultant, pursuant to this  
22 agreement, and are made available for client's  
23 use subject to the limitations of this  
24 agreement. Do you see that?

25 A. Yes.

1 Q. And it says, The reports or other documents  
2 provided by consultant to client, pursuant to  
3 this agreement, are provided for the exclusive  
4 use of client and client's agents and employees  
5 for the subject property and are not to be used  
6 or relied upon in connection with other  
7 projects. Am I reading that accurately?

8 A. Yes.

9 Q. Okay. Aren't you telling your client that we're  
10 going to give you a report, but it's for you  
11 only and you can't use it for other jobs --

12 A. Basically. Yes.

13 Q. -- and other lots.

14 A. Other areas. Yes.

15 Q. Okay. And that was certainly part of the deal  
16 you cut with Paragon and -- and formed the basis  
17 of the price you were willing to charge those  
18 folks; is that right?

19 A. I believe so. Yes.

20 Q. Okay. I believe you told us that when -- I  
21 guess The Paragon Group accepted the proposal;  
22 right?

23 A. Yes.

24 Q. with the terms and conditions; is that right?

25 A. I believe so. Yes.

1 Q. Okay. 'Cause if they hadn't accepted the terms  
2 and conditions, there might have been some  
3 discussion about whether you guys were willing  
4 to do -- to do the work --

5 A. Correct.

6 Q. -- or whether you're willing to do it for  
7 \$2,400; right?

8 A. Right.

9 Q. Once a decision was made to go forward with the  
10 borings described in the proposal, I gather that  
11 you went out to the site.

12 A. Yes.

13 Q. And that was the one and only time you went out  
14 to that site.

15 A. That's correct.

16 Q. Is it the one and only time you've been to  
17 Jasmine Cove in your life?

18 A. I believe it is.

19 Q. Okay. And you went out -- and I gather the  
20 drillers were out there ahead of time and set  
21 up.

22 A. Yes.

23 Q. And they must have known how to, at least  
24 generally, where you guys wanted to drill;  
25 right?

- 1 A. Yes.
- 2 Q. I mean, they'd gotten set up before you showed  
3 up, I hope. Or did you help them get the drill  
4 rig down the hill?
- 5 A. Actually, I did.
- 6 Q. Okay. And you decided where they were going to  
7 set up.
- 8 A. Yes. Basically.
- 9 Q. Okay. And in deciding that, you found areas  
10 where it appeared there had been clearing  
11 previously on the property.
- 12 A. Yes. Appeared so. Yes.
- 13 Q. Okay. But you don't know when that clearing had  
14 occurred or for what purpose.
- 15 A. No.
- 16 Q. And you did not make any investigation in that  
17 regard.
- 18 A. No.
- 19 Q. You had not previously worked at The Cliffs  
20 property at Lake Keowee, had you?
- 21 A. No.
- 22 Q. Okay. And had not worked on projects in --  
23 around Lake Keowee, had you?
- 24 A. Yes. In other types of projects, but not -- not  
25 that type. Not this particular type, where

1           there was an investigation or exploration of a  
2           potential failure.

3    Q.    Okay.  When you went out there, you would agree  
4           with me that it would be important in  
5           determining whether there was a circular slope  
6           failure as to what the inclination of that site  
7           is.

8    A.    The inclination of the site.  I'm not --

9    Q.    How steep the site is.

10   A.    Potentially.

11   Q.    well, isn't it generally accurate to say that a  
12           relatively flat side is probably not likely to  
13           experience a slope failure.

14   A.    Well, this -- this started out as a -- a fairly  
15           flat site, apparently.

16   Q.    Okay.  Well, how do you know that?

17   A.    Based -- the basis of our -- all of our  
18           evaluation was that -- that there were -- the  
19           ground was all level at the time and then  
20           there -- experienced a slope failure.

21   Q.    Isn't it true that Lot 31 at Lake Keowee is  
22           generally flatter than many of the lots around  
23           Lake Keowee?

24   A.    I don't know if I have enough information to  
25           evaluate that.

1 Q. Okay. Do you have any idea what the inclination  
2 of that site is?

3 A. Off the top of my head, no.

4 Q. Okay. You don't know whether it's a 20 percent  
5 slope or a 30 percent slope or what the slope  
6 is.

7 A. Not off the top of my head. No.

8 Q. Okay. And to determine that, obviously having a  
9 topographic survey would be important; is that  
10 right?

11 A. Yes.

12 Q. Okay. When you went out to the site with the  
13 drilling crew, y'all ended up performing two,  
14 not three borings --

15 A. Yes.

16 Q. -- is that true? And it is typical when Alpha  
17 Environmental Services does borings, that you  
18 prepare a map of where the borings were actually  
19 done.

20 A. Typically. Yes.

21 Q. Okay. And attached to your report, there is no  
22 such map; true?

23 A. True.

24 Q. And the truth is, you don't know exactly where  
25 those two borings were done, do you, sir?

- 1 A. I don't recall exactly.
- 2 Q. Okay. What we do know is that boring number one  
3 went down roughly 21 feet into the earth --
- 4 A. Yes.
- 5 Q. -- is that right? And we know that at the top  
6 layers of the earth, the blow counts -- to talk  
7 about blow counts -- were in the range of three.
- 8 A. Yes.
- 9 Q. Okay. Which means it took three blows of the  
10 drill rig to advance the -- what did you call  
11 it? A probe? Auger?
- 12 A. To advance the sample tube.
- 13 Q. Advance the sample tube 24 inches into the  
14 earth.
- 15 A. Yes.
- 16 Q. And you would consider three blows relatively  
17 loose material?
- 18 A. Yes.
- 19 Q. Okay. And then in boring number one, as you got  
20 down to, say, 12 feet, the blow count -- blow  
21 counts increased.
- 22 A. Yes.
- 23 Q. And ultimately when you stopped the drill rig,  
24 it was at ten blows.
- 25 A. Yes.

1 Q. Okay. You did not advance the drill to reaching  
2 rock.

3 A. We did not.

4 Q. Okay. And you do not know where -- how deep the  
5 rock is in that area.

6 A. Not on the basis of this. No.

7 Q. Okay. Or on the basis of anything. Sitting  
8 here today, you can't tell how far down  
9 partially weathered rock is on that site.

10 A. On that site. No.

11 Q. Okay. You testified a moment ago that this low  
12 blow counts at the top was indicative of  
13 disturbance, I think, was the word you used.  
14 Was that the word you used?

15 A. I believe so. Yes.

16 Q. Okay. And you're saying that -- that having  
17 loose material at the top of the sample  
18 indicated that the soil had been disturbed in  
19 the past?

20 A. Yes.

21 Q. Okay. And you have the second boring and you  
22 advance that boring down to 19 feet. Am I  
23 reading that right?

24 A. Yes.

25 Q. And you had low blow counts at the top.

- 1 A. We did.
- 2 Q. But you got to a seven blow count at about,  
3 what, eight feet?
- 4 A. Yes.
- 5 Q. And then got up to ten, 13, ultimately stopped  
6 when you got 19 as the blow count.
- 7 A. Yes.
- 8 Q. So that material was loose at the upper five  
9 feet or so, but then got less loose as you  
10 progressed down --
- 11 A. Yes.
- 12 Q. -- is that accurate?
- 13 A. (Nods head up and down.)
- 14 Q. And you can't tell us today where boring B2, as  
15 it's labeled, was on the property?
- 16 A. I cannot specifically. No.
- 17 Q. Okay. You also testified about some laboratory  
18 testing that occurred, that I think is Exhibit  
19 No. 4.
- 20 A. Yes.
- 21 Q. And the laboratory testing, that was done by  
22 some of your technician folks in the lab?
- 23 A. Yes.
- 24 Q. Okay. You -- you tested water content in three  
25 samples; is that right?

- 1 A. That's correct.
- 2 Q. And I think you testified earlier that you used  
3 these samples because this was the area of your  
4 interest.
- 5 A. Yes.
- 6 Q. Okay. And you've got listed on the lab test the  
7 first sample was at B1, S3.
- 8 A. Yes.
- 9 Q. And that indicates, in boring number one, how  
10 far into the earth that sample was taken. Am I  
11 reading that right?
- 12 A. Yes.
- 13 Q. And S3 starts at five feet below the surface of  
14 the ground.
- 15 A. Yes, it does.
- 16 Q. Okay. And then the next one you looked at was  
17 in boring number one, S5, which was about ten  
18 feet in the ground. Am I reading that right?
- 19 A. Yes.
- 20 Q. So your area of interest was in the top ten feet  
21 or so; is that right?
- 22 A. Correct.
- 23 Q. You were not looking at some deep-seated issue  
24 when you did this analysis.
- 25 A. That's correct.

- 1 Q. Okay. You also, in Exhibit No. 4, have some  
2 reports about doing -- and I want to make sure I  
3 pronounce this right -- is it a sieve analysis?  
4 A. Yes.  
5 Q. Okay. Just want to make sure I get that word  
6 right. And when you do a sieve analysis in the  
7 laboratory, am I right that you set up a series  
8 of sieves, sort of like little kids use to play  
9 with sand on the beach?  
10 A. Yes. Uh-huh.  
11 Q. And the holes get progressively bigger as you go  
12 down?  
13 A. They get progressively smaller.  
14 Q. Progressively smaller. So you're catching  
15 bigger things at the top and as the dirt  
16 particles are smaller, they drop down to sieves  
17 with a smaller opening.  
18 A. That's correct.  
19 Q. Okay. And the reason you guys were doing this  
20 sieve analysis was simply to confirm the type of  
21 dirt -- to use a layman's term -- that you were  
22 pulling up when you did these borings --  
23 A. Correct.  
24 Q. -- is that right?  
25 A. That's correct..

- 1 Q. And you found that -- just roughly -- 60 percent  
2 of it or so was sands?  
3 A. Yes.  
4 Q. And the other material was smaller than sands,  
5 possibly silts.  
6 A. That's correct.  
7 Q. And certainly silts and sands -- I know y'all  
8 use sandy silts and silty sands -- certainly  
9 that is consistent with the type of dirt you  
10 would expect in the Piedmont.  
11 A. Yes.  
12 Q. Okay. So nothing about the sieve analysis  
13 surprised you in any way about the type of  
14 material that was out there.  
15 A. No. It was just used to confirm --  
16 Q. The type of soil --  
17 A. -- material that was classified. Yes.  
18 Q. Okay. All right. And it doesn't confirm --  
19 looking at a sieve analysis doesn't confirm  
20 anything about a slope failure, does it, sir?  
21 A. No.  
22 Q. And water content doesn't confirm anything about  
23 a slope failure either, does it?  
24 A. Other than just the -- whether there's a  
25 elevated moisture in a particular area.

- 1 Q. Tells you how much moisture is in the ground.
- 2 A. That's correct.
- 3 Q. Okay. Now, certainly if you wanted to know  
4 about the likelihood of a potential slope  
5 failure in the future, that can be done by a  
6 geotechnical engineer, can't it?
- 7 A. In the future.
- 8 Q. Yeah. You want to know whether a slope is  
9 stable or likely to fail. You can do that  
10 analysis.
- 11 A. Yes.
- 12 Q. Okay. And your company, Alpha Environmental  
13 Science, does do that sort of analysis.
- 14 A. Yes.
- 15 Q. Okay. And would I be correct that the name for  
16 such an analysis might be a global stability  
17 analysis?
- 18 A. Yes.
- 19 Q. Okay. And are you, at your company, capable of  
20 doing a global stability analysis?
- 21 A. Yes.
- 22 Q. Okay. And when you do a global stability  
23 analysis, y'all use fancy computer programs?
- 24 A. Quite often. Yes.
- 25 Q. It's not done by hand anymore, is it?

- 1 A. Well, Jim's kind of old school, but yes.
- 2 Q. But most people use a computer program, don't  
3 they?
- 4 A. Generally. Yes.
- 5 Q. To do a global stability analysis, you would  
6 need a lot of data to input into the  
7 calculation.
- 8 A. Yes.
- 9 Q. One thing you would need to know is about the  
10 strength of the soil.
- 11 A. Yes.
- 12 Q. Okay. And what kind of lab testing can you do  
13 to determine the strength of the soil?
- 14 A. You can -- you could do a confined compressive  
15 strength. You could do shear. Could do a lot  
16 of different additional testing.
- 17 Q. Okay. So could you do something like, say, a  
18 tri-axle shear test?
- 19 A. You could.
- 20 Q. Or a direct shear test?
- 21 A. Uh-huh.
- 22 Q. Okay. But Alpha Environmental Sciences didn't  
23 do those tests to determine the strength of the  
24 material on Lot 31.
- 25 A. No, we did not.

1 Q. To do a global stability analysis, you would  
2 also have to know, wouldn't you, the topography  
3 of the land?

4 A. Yes. You'd like to, yes.

5 Q. Okay. So you need to know the type of material  
6 you're dealing with, the topography of the land,  
7 because you're trying to figure out whether the  
8 force of gravity pushing down on a slope is  
9 going to exceed the strength of the soil to hold  
10 that mass and gravity back. Isn't that  
11 ultimately what you're trying to figure out?

12 A. Yes.

13 Q. Okay. But that is not any kind of testing that  
14 you have run with respect to Lot 31.

15 A. No.

16 Q. Okay. In the June 2, 2005 report, which is, I  
17 believe, Exhibit 7.

18 A. Yes.

19 Q. First of all, it's not an engineering report, is  
20 it?

21 A. No, it's not.

22 Q. Okay. Because it's not stamped by an engineer.

23 A. That's correct.

24 Q. Okay. And thus, it's not giving any kind of  
25 engineering recommendations.

- 1 A. It wasn't intended to.
- 2 Q. Okay. And there was no engineer employed by  
3 Alpha Environmental Sciences that was involved  
4 in preparing your report or making the  
5 recommendations in the report.
- 6 A. No. In this case, no.
- 7 Q. The report was prepared by Mr. Forbes.
- 8 A. Actually prepared by me.
- 9 Q. Okay. Well, Mr. Forbes signed the report.
- 10 A. And he had some input in -- just in relation to  
11 the -- the laboratory data that was submitted  
12 and that kind of thing.
- 13 Q. Okay.
- 14 A. Just minimal input on it.
- 15 Q. Okay. So you prepared the report, but his  
16 signature appears first --
- 17 A. Yes.
- 18 Q. -- right? That's a little unusual, isn't it?
- 19 A. It may have just been a off day for Cindy that  
20 day.
- 21 Q. Oh, okay. Okay. Not blaming your assistant,  
22 are you?
- 23 A. Sometimes you have to.
- 24 Q. Okay. And the report was issued to this  
25 Mr. Hutchinson at The Paragon Group --

- 1 A. Yes.
- 2 Q. -- right? It was not issued to any -- anybody  
3 else.
- 4 A. That's correct.
- 5 Q. It was not issued to any adjoining land owner.
- 6 A. No.
- 7 Q. It was not issued to anybody who you thought  
8 owned lot 32.
- 9 A. No.
- 10 Q. In fact, you did not feel obliged to notify  
11 adjoining land owners, because that would  
12 violate your contract terms, wouldn't it?
- 13 A. Yes.
- 14 Q. Okay. And you didn't feel that there was any  
15 imminent public safety issue, which warranted  
16 you figuring out who the adjoining land owners  
17 are and giving them kind of safety notice.
- 18 A. No.
- 19 Q. Because if you thought there was an imminent  
20 public safety issue, you would have to go notify  
21 somebody, wouldn't you?
- 22 A. Typically. Yes.
- 23 Q. In the report that was issued to The Paragon  
24 Group, you talk about an elevation change  
25 between the upper and lower portion of the lot;

1 is that right?

2 A. Yes. Uh-huh.

3 Q. And that's an area where, in the topographic  
4 map, there's a steeper topography over a short  
5 distance. It's little steeper there; right?

6 A. That's correct.

7 Q. Okay. In the letter, you told Mr. Hutchinson  
8 that you thought the failure was associated with  
9 the impoundment of Lake Keowee --

10 A. Yes.

11 Q. -- isn't that right? And you told him that you  
12 thought that the failure had occurred several  
13 years ago?

14 A. Yes.

15 Q. And you base that on the fact that a lot of the  
16 areas were covered up with brush and trees and  
17 the like.

18 A. That's correct.

19 Q. And the fact that these trees you've mentioned  
20 were bigger trees.

21 A. They were.

22 Q. They weren't little bitty, teeny sapling trees  
23 that had sprouted up from an acorn. They were  
24 bigger, older trees --

25 A. Yes.

1 Q. -- isn't that right? And you certainly intended  
2 Mr. Hutchinson and the folks at The Paragon  
3 Group, to understand that you were telling them  
4 that you thought a slope failure had happened in  
5 the past, associated with the impoundment of the  
6 lake.

7 A. That's correct.

8 Q. And Lake Keowee -- do you know when it got  
9 impounded?

10 A. I do not.

11 Q. Okay. So you don't know, really, whether the  
12 size of the trees kind of matches when that lake  
13 got constructed, do you?

14 A. I don't know.

15 Q. Okay. In the report, in the second paragraph,  
16 you talk about a zone from approximately three  
17 to five feet below existing grade, which you say  
18 showed very loose and soft conditions.

19 A. Yes.

20 Q. Do you see that?

21 A. Yes.

22 Q. And that was because the blow counts in the top,  
23 that you and I just talked about, were lower; is  
24 that right?

25 A. Yes.

1 Q. And that was the area of interest, I think, to  
2 use your words, that you were studying when you  
3 did this water content analysis.

4 A. Yes.

5 Q. Okay. And you were telling your customer --  
6 who's not a geotechnical engineer, we don't  
7 think -- that you thought that there was a  
8 failure zone in the top three to five feet on  
9 this property. Isn't that how to read the  
10 report?

11 A. Essentially. Yes. At that boring location.  
12 Yes.

13 Q. Okay. You did not tell The Paragon Group, nor  
14 did you believe that there was a deep-seated  
15 slope failure.

16 A. At that time, no.

17 Q. You did not tell, nor do you believe, that there  
18 is a slope failure that goes all the way up into  
19 the cul-de-sac on Jasmine Cove.

20 A. I haven't seen any evidence of that. But just  
21 in this work, no.

22 Q. Okay. Well, you drew and you showed Mr. Dudley  
23 this little curve that you've drawn on the --  
24 the topo prepared by the surveyor.

25 A. Right.

1 Q. You draw that across the middle of the lot,  
2 don't you?

3 A. Of which lot? I'm sorry.

4 Q. 31.

5 A. 31. Yes.

6 Q. Okay. You don't go all the way up into the  
7 cul-de-sac and encompass the entire area, do  
8 you?

9 A. No.

10 Q. And you don't think, and didn't think, that that  
11 was an area of a global -- some big global  
12 failure.

13 A. No.

14 Q. Okay. In the report -- the June 2nd, 2005  
15 report -- you say that there is a strong  
16 potential that further movement may occur along  
17 the original slope failure plane.

18 A. (Nods head up and down.)

19 Q. And did you intend to tell your client,  
20 essentially, hey, we think there was a slope  
21 failure in the past and we think there's a  
22 possibility there may be one in the future.

23 A. Yes. There's a potential for it to -- to move  
24 again. That's what -- what I was trying to get  
25 across.

- 1 Q. And I think you say that you think the potential  
2 to move again occurs if a whole bunch of water  
3 is introduced into the slope.
- 4 A. Yes.
- 5 Q. Okay. You did not do any testing to reveal if  
6 the slope was still in motion in June of 2005.
- 7 A. We did not.
- 8 Q. And you did not conclude that there was actual  
9 movement occurring while you were out on that  
10 site.
- 11 A. No.
- 12 Q. And you can't say, sitting here today, that in  
13 2005, when you stepped onto Lot 31, that there  
14 was any movement occurring, can you?
- 15 A. No.
- 16 Q. Okay. To determine whether there is, in fact, a  
17 potential of further movement, you -- if  
18 somebody was willing to pay for it -- could do a  
19 global stability analysis and that would give  
20 you that information, wouldn't it?
- 21 A. Yes.
- 22 Q. But nobody asked -- asked for that to be done or  
23 wanted to pay for it, I guess.
- 24 A. Yes. We were not asked.
- 25 Q. Okay. And you -- you know what a deep-seated

1 slope failure is; right?

2 A. Yes.

3 Q. Okay. In fact, geologists, I guess, are more  
4 interested in stuff deeper in the earth, maybe,  
5 than anybody else. You did not offer the  
6 opinion that there was a deep-seated slope  
7 failure on this property, did you?

8 A. No.

9 Q. And you certainly would have offered that  
10 opinion to your client if you thought that was  
11 true.

12 A. Yes.

13 Q. You did not do any evaluation of any adjacent  
14 lots --

15 A. No.

16 Q. -- right? And didn't make any conclusions about  
17 any adjacent lots and whether they were  
18 buildable or not buildable or had experienced  
19 failure or not.

20 A. No. We just mention in the -- in the bottom of  
21 the letter that, you know, our observations of  
22 the -- the geologic characteristics that we  
23 noted did extend beyond the boundaries of the  
24 lot and then extended to the north and south.  
25 But we didn't make any -- any recommendations as

1 to whether that was -- made it buildable or not,  
2 no.

3 Q. Okay. And you had been told that perhaps these  
4 folks were considering the lots, adjacent lots  
5 on either side.

6 A. That's correct.

7 Q. which is why you were telling them, hey, you  
8 guys, this could be an issue you might want to  
9 look into if you're going to swap lots --

10 A. Be cautious. Yes.

11 Q. Okay. You are currently, I think you said,  
12 working part time for Ameritech Slope  
13 Constructors.

14 A. Yes.

15 Q. Do I have the company's name right? And that's  
16 a geotechnical contracting company?

17 A. Yes.

18 Q. Okay. Would you agree with me that repairs to  
19 slope are feasible? Repairs of slopes are  
20 feasible to stabilize them?

21 A. Yes. Depending on the size and complexity.  
22 Yes.

23 Q. Sure. Well, size and complexity might not mean  
24 that it can't be fixed, it might just mean that  
25 it's expensive.

- 1 A. It -- it may not be doable with the current  
2 budget. Yes.
- 3 Q. Okay. Right. I understand. Would you agree  
4 with me that mechanical anchoring systems can be  
5 appropriate ways to stabilize a slope, if in  
6 fact, it is failing?
- 7 A. It can be. Yes.
- 8 Q. Okay.
- 9 A. It can be one of the methods.
- 10 Q. But you were not asked by The Paragon Group or  
11 Mr. Rockwell or Ms. Rockwell -- whoever the  
12 Rockwells are -- to figure out whether there was  
13 something that could be done on the lot to make  
14 it buildable.
- 15 A. No.
- 16 Q. Okay. And certainly if you'd been asked to do  
17 that, y'all would have either done it or help  
18 them find somebody that was capable of doing  
19 that sort of design.
- 20 A. Yes.
- 21 Q. Okay. And nobody ever asked -- asked anything  
22 about how to make this lot buildable of you or  
23 your company?
- 24 A. No. Not to my knowledge.
- 25 Q. The only thing you heard about is maybe they



May 11, 2005

Larry Hutchinson  
The Paragon Group  
111 Trout Lilly Lane  
Sunset, SC 29685

Re: Keowee Falls South- Jasmine Cove Lot 31 Site Evaluation, AES Project #5270.02

Dear Mr. Hutchinson;

On May 4, 2005 a representative of Alpha Environmental Sciences, Inc. visited the site as referenced above to evaluate an area on the lot that appears to have moved. Initially, it appears that the area in question may have been excavated at some point in the past. But after evaluating the rest of the site, there seems to sufficient evidence that indicates that this is a circular slope failure which appears to be caused by the fluctuating water level of the lake. In particular, there are several sections along the southern part of the lot that are definitely failing and sliding toward the lake.

We recommend further investigation in order to properly evaluate this situation. This investigation would involve performing several soil borings on this property, both in the area that appears to have failed and in the area above the apparent failure in order to compare the on-site geology. If you decide to go forward with this evaluation, we would be happy to provide a cost proposal for performing the soil borings and evaluating the information collected from the soil borings.

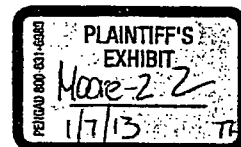
Thank you for the opportunity to provide this information to you. If you have any questions with regard to the situation, please do not hesitate to call us at 1-800-326-0299.

Respectfully submitted;

Alpha Environmental Sciences, Inc.

Roger D. Moore, P.G.  
Professional Geologist/Division Manager

Robert Forbes  
Geotechnical Project Manager



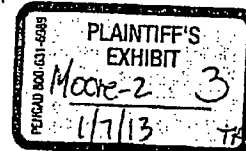
PROFESSIONAL ENVIRONMENTAL CONSULTING  
Engineering Services Provided by Alpha Engineering Services, PA  
Corporate Office: [www.alphaenvi.com](http://www.alphaenvi.com) Service Office:  
367 Dellwood Rd., Building A, Post Office Box 31 20 Country Plaza, 1300 E. Wade Hampton Blvd.  
Waynesville, NC 28786 • (828) 452-3449 / Fax (828) 452-7828 Greer, SC 29651-6244 • (864) 877-6670 / Fax (864) 877-4633

ALPHA-002

May 18, 2005



Mr. Larry Hutchinson  
The Paragon Group  
111 Trout Lilly Lane  
Sunset, SC 29685



**RE: Proposal for Subsurface Exploration and Geotechnical Engineering Analysis Services for Jasmine Cove Lot #31 at Keowee Falls, SC AES Proposal #5061GT**

Dear Mr. Hutchinson;

As requested during our recent conversation with you, Alpha Environmental Sciences, Inc. is pleased to present the following estimated total cost proposal for providing subsurface exploration services for the field exploration and geotechnical engineering analysis for the above referenced project. This proposal is based on the information gathered from our on-site meeting on May 4, 2005.

The purpose of this investigation is to determine whether or not a portion of this lot is part of a circular slope failure caused by the fluctuating water level of the lake. As part of this investigation, we propose to perform three hollow stem auger borings to a depth in the order of 15 feet below existing ground surface with consecutive split spoon sampling from the surface to the bottom of the boring. Following the field investigation, the information collected from the borings will be evaluated by a Professional Geologist to determine if this is a slope failure or not. The estimated cost of services is as noted below:

1	Drill rig mobilization trailer mounted rig		\$	450.00
2	Hollow stem auger drilling	45 ft @	\$ 12.50 /lf	\$ 562.50
3	Site Access - moving on site			\$ 450.00
4	Field project management Engineer / Geologist	6 hr @	\$ 85.00 /hr	\$ 510.00
5	Preparation of geotechnical report - Project Engineer / Geologist	2 hr @	\$ 75.00 /hr	\$ 150.00
6	Senior Professional Engineer	2 hr @	\$ 95.00 /hr	\$ 190.00
7	CAD Operator	2 hr @	\$ 39.00 /hr	\$ 78.00
8	Engineering Secretary	2 hr @	\$ 27.00 /hr	\$ 54.00
<b>Estimated Total</b>				<b>\$ 2,444.50</b>

We are prepared to mobilize onto the site within five to seven work days after authorization to proceed. We anticipate that drilling operations will require approximately one day and that the report preparation will take two to three days. Therefore, for time budget purposes, the total scope of work could require as much as 2 to 2 1/2 weeks from initial authorization through final report submission.

Attached to this letter, and an integral part of our proposal, are our "General Conditions of Services". These conditions represent the current recommendations of the Association of Soil and Foundation Engineers, the Consulting Engineers' Council, and the Geotechnical Division of the American Society of Civil Engineers.

PROFESSIONAL ENVIRONMENTAL CONSULTING  
Engineering Services Provided by Alpha Engineering Services, PA

**ALPHA-004**

Corporate Office: [www.alphaenviro.com](http://www.alphaenviro.com) Service Office:

367 Dellwood Rd., Building A, Post Office Box 31 20 Country Plaza, 1300 E. Wade Hampton Blvd.  
Waynesville, NC 28786 • (828) 452-3449 / Fax (828) 452-7828 Greer, SC 29651-6244 • (864) 877-6670 / Fax (864) 877-4633

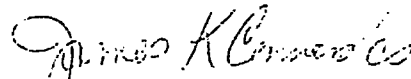
This letter is the agreement for our services. Your acceptance of this proposal may be indicated by signing and returning the enclosed copy to us. We are pleased to have this opportunity to offer our services and look forward to working with you on the project.

Respectfully submitted,

Alpha Environmental Sciences, Inc.



Bob Forbes  
Geotechnical Project Manager



James K. Connors, P.E.  
Senior Geotechnical Engineer

ACCEPTED BY: \_\_\_\_\_

TITLE: \_\_\_\_\_

FIRM: \_\_\_\_\_

DATE: \_\_\_\_\_

ALPHA-005

# ALPHA

ENVIRONMENTAL SCIENCES, INC.

## STANDARD CONDITIONS

CONTRACT/PROPOSAL DATE: May 19, 2005

CLIENT & CONSULTANT agree as follows:

### ARTICLE 1. DEFINITIONS

#### 1.1 CHARGES

Charges for work including all labor, materials, analyses, fringe benefits, overhead, costs and profit. Specific rates are defined in the Schedule of Charges attached hereto as Exhibit A.

### ARTICLE 2. COMPENSATION

#### 2.1 INVOICING PROCEDURE

Unless CONSULTANT requires payment in advance as provided below, CLIENT will be invoiced at the end of the first billing period (calendar month unless otherwise noted) following the commencement of work, at the end of each billing period thereafter and upon completion of the Project. Payment in full of each invoice must be received by CONSULTANT within ten (10) days of the date of such invoice. CONSULTANT will add 20% to invoices received from subcontractors to cover supervision and administration expense.

#### 2.2 EFFECT OF INVOICE

The work performed shall be deemed approved and accepted by CLIENT as and when submitted of Final Report unless CLIENT objects within 15 days of invoice date by written notice specifically stating the details in which CLIENT believes such work is incomplete or defective, and the invoice amount(s) in dispute. CLIENT shall pay undisputed amounts per this article.

#### 2.3 INTEREST; SUSPENSION OF WORK

Failure of CLIENT to make full payment of an invoice so that it is received by CONSULTANT within said ten (10) days of the date thereof, subjects the amount overdue to a delinquent account interest rate of one percent (1%) per month, compounded monthly, or the highest rate allowed by law, whichever is less. Failure of CLIENT to submit full payment of an invoice within 30 days of the date thereof subjects this agreement and the work herein contemplated to suspension or termination at CONSULTANT'S discretion. CONSULTANT'S attorneys' fees and other costs in collecting past due amounts, or in otherwise enforcing this agreement, shall be paid by CLIENT.

#### 2.4 ADVANCE PAYMENT; WITHHOLDING OF WORK PRODUCT

CONSULTANT reserves the right to require payment in advance for work estimated to be done during a given billing period. CONSULTANT, without any liability to CLIENT, reserves the right to withhold any services and work products herein contemplated pending payment of CONSULTANT. Where work is performed on the reimbursable basis, budget may be increased by written amendment executed by both parties to complete the scope of work shown in the Proposal. CONSULTANT is not obligated to provide services in excess of the authorized budget or scope of work shown in the Proposal.

### ARTICLE 3. CONDITIONS OF SERVICE

#### 3.1 SCOPE OF WORK

The scope of work (as shown in the Proposal) is an integral part of this agreement and shall control CONSULTANT'S obligations to provide services and work products. Services and work products not expressly included, as determined by CONSULTANT, are not covered by this agreement. Such services and work products will be provided only upon compliance by CLIENT with this agreement.

#### 3.2 EXISTING CONDITIONS AND ASSUMED RISKS

CLIENT acknowledges that CONSULTANT and its subcontractors have played no part in the creation or existence of any hazardous waste, pollution sources, nuisance, or chemical or industrial disposal problem which may exist, and that CONSULTANT has been retained for the sole purpose of assisting the CLIENT in assessing any problem which may exist and in assisting the CLIENT in formulating a remedial program, if such is within the Scope of Work which CONSULTANT has assumed. It is recognized and agreed that CONSULTANT has assumed responsibility only for making the investigations, reports, and recommendations to the CLIENT included within the Scope of Work. The responsibility for making any disclosures or reports to any governmental authority or any other third party and for the taking of corrective, remedial, or mitigative action, shall be solely that of the CLIENT.

#### 3.3 SERVICES DURING CONSTRUCTION

Any subcontractor work inspection or testing provided by CONSULTANT is for the purpose of determining the subcontractor's compliance with the functional provisions of PROJECT SPECIFICATIONS ONLY. Consultant in no way guarantees or insures any subcontractor's work nor assumes responsibility for methods or equipment used by any subcontractor, for job site safety or for any subcontractor's compliance with laws and regulations. CLIENT agrees that each subcontractor which it employs will be required to assume sole and complete

responsibility for job site conditions during the course of the Project, including safety of all persons and property, and that this responsibility shall be continuous and not be limited to normal working hours.

#### 3.4 COST ESTIMATES

Any statements of estimated cost furnished by CONSULTANT are predicted costs and are based on professional opinions and judgment. CONSULTANT cannot be held responsible for fluctuations in actual costs.

### ARTICLE 4. TERMINATION OR AMENDMENT OF AGREEMENT

#### 4.1 DUE TO DEFAULT

This agreement may be terminated by either party upon seven (7) days written notice should the other party fail substantially to perform in accordance with this agreement through no fault of the party initiating the termination.

#### 4.2 WITHOUT CAUSE

This agreement may be terminated by CLIENT upon at least 14 days written notice to CONSULTANT in the event that the Project is abandoned.

#### 4.3 TERMINATION ADJUSTMENT; PAYMENT

If this agreement is terminated through no fault of the CONSULTANT, CONSULTANT shall be paid for services performed and costs incurred to the termination notice date, including Reimbursable Direct Expenses due, plus an additional amount, not to exceed 20% of charges incurred to the termination notice date to cover services to orderly close the work and prepare project files and documentation, plus any additional direct expenses incurred by CONSULTANT including but not limited to cancellation fees or charges. CONSULTANT will use reasonable efforts to minimize such additional charges.

#### 4.4 ADJUSTMENT

Additional services or work products resulting in an adjustment of CONSULTANT'S original estimated budget or lump sum fee, if acceptable to CONSULTANT, will be provided at CLIENT'S request upon execution of a written amendment to this agreement expressly referring to the same, and signed by both parties.

#### 4.5 AMENDMENTS

This agreement may be amended only by a written instrument, signed by both CLIENT and CONSULTANT, which expressly refers to this agreement.

### ARTICLE 5. LIMITATION OF LIABILITY, WAIVER, WARRANTY, AND INDEMNITY

#### 5.1 LIMITATION ON LIABILITY

CONSULTANT'S liability to CLIENT, CLIENT'S contractors and subcontractors, and their agents, principals, employees, consultants, successors and assigns, and to all other third parties, which may arise from or be due directly or indirectly to the negligent acts, errors and/or omissions of CONSULTANT, its agents, employees or subcontractors shall not exceed \$50,000 or the total contract amount whichever is less and shall be limited to direct damages. All other damages such as loss of use, profits, anticipated profits, and like losses are consequential damages for which CONSULTANT is not liable. CLIENT shall give written notice to CONSULTANT of any claim of negligent act, error or omission within one (1) year after the completion of the work performed by CONSULTANT. Failure to give notice as herein required shall constitute a waiver of said claim by CLIENT.

#### 5.2 WARRANTY

The only warranty or guarantee made by CONSULTANT in connection with the services performed under this agreement is that the Scope of Services will be performed with reasonable care. CLIENT recognizes that the state of practice, particularly with respect to hazardous substances conditions, is changing and evolving. CLIENT agrees that the Scope of Work represents an agreed upon level of inquiry, investigation and/or work, and there is no guarantee or warranty that any or all environmental-related problems with the subject property will be revealed and/or corrected by such Scope of Work. CLIENT acknowledges that the Scope of Work represents a balance by CLIENT of the cost of work against the likely information and/or results to be achieved by such work, and that CONSULTANT cannot take responsibility for any matter not covered by the Scope of Work. When the findings and recommendations of CONSULTANT are based on information supplied by CLIENT or others, CONSULTANT shall not be liable for any inaccuracies in such information. No other warranty, express or implied, including without limitation warranties of merchantability and fitness for a particular purpose, is made or intended by providing consulting services or by furnishing oral or written reports of the findings made.

#### 5.3 INDEMNITY

CLIENT understands that in seeking the professional services of CONSULTANT, client may be requesting CONSULTANT to undertake uninsurable obligations for CLIENT'S benefit involving the presence or potential presence of hazardous, toxic or pollutive substances. Therefore, CLIENT agrees to defend, indemnify, and hold harmless CONSULTANT, its principals, employees, agents, contractors, successors and assigns from any and all damages, liabilities, claims, demands, costs and other

# ALPHA

ENVIRONMENTAL SCIENCES, INC.

expenses of any kind (including attorney's fees) arising out of the Project, in any manner, including without limitation those arising from property damage (including without limitation environmental cleanup) or personal injury (including death), excepting those arising solely out of the willful misconduct or negligence of CONSULTANT, its agents, employees or subcontractors in the performance of services under this agreement.

## ARTICLE 6. CONFIDENTIALITY

### 6.1 CONFIDENTIAL INFORMATION

CONSULTANT understands that it may be granted access to certain Confidential Information (as hereinafter defined) of CLIENT in the course of performing services hereunder. The term Confidential Information as used herein means all records and information with respect to CLIENT and/or the subject property under investigation that is stated in writing to CONSULTANT to be confidential. CONSULTANT agrees to hold in strictest confidence, and not to disclose or to permit disclosure to any person or entity other than CLIENT, nor make any unauthorized use of, any Confidential Information, without the prior written consent of CLIENT.

### 6.2 APPLICABILITY

The confidentiality obligations in Subsection 6.1 shall not apply to the extent that disclosure is necessary in connection with (i) the performance by CONSULTANT, its agents and subcontractors of services hereunder; (ii) compliance with any court order or other governmental directive; (iii) compliance with professional standards of conduct for the preservation of public safety, health and welfare; and (iv) protection of CONSULTANT against claims or liabilities arising from performance of services under this agreement.

### 6.3 REPORTS

In connection with the performance of the Project, CONSULTANT may deliver to CLIENT one or more reports or other written documents reflecting services provided and the results of the Project. All reports and written documents delivered to CLIENT are instruments reflecting the services provided by CONSULTANT pursuant to this agreement and are made available for CLIENT'S use subject to the limitations of this agreement. Such reports and other documents provided by CONSULTANT to CLIENT pursuant to this agreement are provided for the exclusive use of CLIENT and CLIENT'S agents and employees for the subject property and are not to be used or relied upon in connection with other projects. All reports, written documents, original data gathered by CONSULTANT and work papers produced by CONSULTANT in the performance of the Project shall be turned over to CLIENT upon request.

Should CLIENT make any such reports or other written material available to others or request that CONSULTANT address or forward copies of such to others, then CONSULTANT'S obligation with regard to such reports and other materials shall be to CLIENT only and limited to the provisions of this agreement. Such recipients and addresses (an addressee is a third party which receives a report prepared for CLIENT but at CLIENT'S request such report is addressed to the third party) receiving copies of reports and other materials shall as third parties to this agreement have no recourse or basis for claim against CONSULTANT and agree to look solely to CLIENT as provider of the reports and other materials. CLIENT shall indemnify and hold harmless CONSULTANT, its principals, agents, and attorneys' fees arising from any third party's use or reliance on such reports and other materials when such use or reliance is with CLIENT'S knowledge.

### 6.4 TERM OF CONFIDENTIALITY OBLIGATIONS

The confidentiality obligations set forth in this section shall survive the termination or expiration of this agreement.

## ARTICLE 7. GENERAL PROVISIONS

### 7.1 APPLICABLE LAW

This agreement shall be interpreted and enforced according to the laws of the State of North Carolina unless agreed otherwise.

### 7.2 PRECEDENCE OF CONDITIONS

Should any conflict exist between the terms herein and the form of any purchase order or confirmation, the terms hereof shall prevail in the absence of CONSULTANT'S express written agreement to the contrary.

### 7.3 ASSIGNMENT

Neither CLIENT nor CONSULTANT shall assign its interest in this agreement without the written consent of the other.

### 7.4 USE OF PROJECT DOCUMENTS

All tracings, survey notes, computer programs, and other original documents are instruments of service and shall not be used on other projects without CONSULTANT'S prior written consent, however, if used, such use shall be at CLIENT'S sole risk. No documents may be altered or modified except by CONSULTANT.

### 7.5 FORCE MAJEURE

Any delay or default in the performance of any obligation of CONSULTANT under this agreement resulting from any causes beyond CONSULTANT'S reasonable control, shall not be deemed a breach of this agreement. The occurrence of any such event shall suspend the obligations of CONSULTANT as long as performance is delayed or prevented thereby, and the fees due hereunder shall be equitably adjusted.

### 7.6 MERGER; WAIVER; SURVIVAL

Except as set forth in Article 4.5 above, this agreement constitutes the entire and integrated agreement between the parties hereto and supersedes all prior negotiations, representations, and/or agreements, written or oral. One or more waivers of any term, condition or other provision of this agreement by either party shall not be construed as a waiver of a subsequent breach of the same or any other provisions. Any provision hereof which is legally deemed void or unenforceable shall not void this entire agreement and all remaining provisions shall survive and be enforceable.

### 7.7 SERVICES BY CLIENT

CLIENT will provide access to the site or work, obtain all permits and provide all legal services in connection with the Project (if any) unless specifically included in the Scope of Work. CLIENT shall pay the costs of checking and inspection fees, zoning application fees, soil engineering fees, testing fees, surveying fees, permits, bond premiums, and all other charges not specifically covered by the terms of this agreement.

### 7.8 RECORDS ACCESS

CLIENT shall provide CONSULTANT, its agents and subcontractors access to records regarding the site or work to the extent necessary to perform CONSULTANT'S obligations hereunder. If any off-site investigations are required, CLIENT shall provide access rights as necessary. If CLIENT is not the owner of the site in question, it is the CLIENT'S responsibility to secure the required access rights from the site owners(s).

### 7.9 SAMPLES

Unless otherwise requested, test specimens or samples will be disposed of immediately upon completion of tests and analysis. Upon written request, CONSULTANT will retain samples for a mutually acceptable storage charge and period of time. In the event that samples contain or may contain hazardous materials, CONSULTANT shall, after completion of testing and at CLIENT'S expense, return such samples to CLIENT or recognizes and agrees that CONSULTANT is acting as a bailee and at no time assumes title to said samples or is responsible for arranging disposal of any substance.

### 7.10 PROJECT SITE

CLIENT recognizes that the performance of the services included in this agreement may cause alteration or damage to the Project site. CLIENT accepts the fact that this is inherent in the work and will not look to CONSULTANT for reimbursement or hold CONSULTANT liable or responsible for any such alteration or damage. Sampling locations will be repaired to an intact state. Should CLIENT not be owner of the property, then CLIENT agrees to notify the owner of the aforementioned possibility of unavoidable alteration and damage.

ALPHA ENVIRONMENTAL SCIENCES, INC.

By: Roger D. Moore

Print Name: Roger D. Moore, P.C.

Title: Professional Geologist/Division Manager

Executed this 19 day of May, 2005

CLIENT \_\_\_\_\_

By: \_\_\_\_\_

Print Name: \_\_\_\_\_

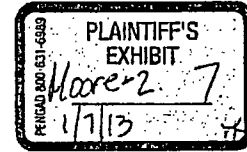
Title: \_\_\_\_\_

Executed this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_



June 2, 2005

Mr. Larry Hutchinson  
The Paragon Group  
111 Trout Lilly Lane  
Sunset, SC 29685



RE: Evaluation of Subsurface Conditions at the Keowee Falls South - Jasmine Cove - Lot 31  
AES Project # 5270.02

Dear Mr. Hutchinson:

In accordance with your request, Alpha Environmental Sciences, Inc has visited the project site, with an initial visit on May 4<sup>th</sup>, 2005. During this visit we performed a walkover and examination of the site, Alpha proposed to return to the site with a small trailer mounted drill rig and perform subsurface borings to examine the conditions in the subsurface soils. Our return visit was performed on May 25, 2005 to perform the borings and the Senior Professional Geologist from Alpha Environmental Sciences, Inc also visited the site at this time. Based on our observations and on the subsurface conditions as determined in two shallow hollow stem auger borings performed at the site, it is our opinion that the major change in elevation between the upper and lower portions at the lot was caused by a slope failure. The slope failure appears to extend beyond the boundaries of the lot in both the north and south directions. The failure appears to have been associated with the impoundment of Lake Keowee. The raising of the general water table elevation caused by the impoundment of the lake appears to have saturated a fine grained weak zone within the residual soils and partially weathered rock along this portion of the shoreline. The actual movement appears to have occurred several years ago as evidenced by the covering of the failed slope and the other associated areas of movement with organic matter, leaves, brush, etc. Other evidence for the time period of movement is shown by the growth angle of the larger trees on the lot (see the attached photos). The larger trees show evidence that they originally started growth in a generally vertical direction, were then tilted by the slope failure and then corrected their growth back to vertical. In addition, small portions of the failure are breaking off close to the waters edge and gradually falling and failing into the lake. Large pieces of relatively competent bedrock can be noted along the shoreline where the residual soils have been washed away, but the resistant rock remains.

Additional evidence of the slope failure and the conditions in the subsurface were identified by our soil boring B-2 performed in the lower portion of the lot. In B-2 a zone from approximately three to five feet below existing site grade showed very loose, soft conditions, with the augers encountering no resistance. At this depth there appears to be a zone of failure in which movement occurred. Other evidence of the both lateral and downward movement of the mass of soil and rock toward the lake was noted during our field examination of lot 31 and the lots on the north and south sides consisting of numerous linear crevices and small pits. These linear features were observed running parallel to the exposed failure scarp. In some cases the pits and crevices have filled in with detritus and organic matter, however; several were noted to the north extending to as much as three to five feet in depth.

Based on our findings, we strongly recommend that the building lot not be utilized for residential construction. A strong potential exists that further movement may occur along the original slope failure plane. It is possible that fluctuations in water level or infiltration of heavy rainfall similar to the hurricanes of the recent past may induce further movement along the failure plane. We would strongly urge that no construction be performed on this particular lot and perhaps both the lots to the north and south, however; further evaluation would be necessary for the adjoining lots to determine if stable soils are available in these areas.

PROFESSIONAL ENVIRONMENTAL CONSULTING  
Engineering Services Provided by Alpha Engineering Services, PA  
www.alphaenviton.com

ALPHA-015

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# ALPHA

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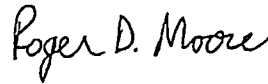
Please find attached the boring logs for the two borings performed on the property and photographs taken during our evaluation of the lot. Should you have any questions with regard to the information contained in this letter or require any additional information please do not hesitate to contact us.

Respectfully submitted,

*Alpha Environmental Sciences, Inc.*



Bob Forbes  
Geotechnical Project Manager



Roger D. Moore, PG  
Professional Geologist/Division Manager

ALPHA-016

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS  
COUNTY OF GREENVILLE CASE NO. 2011-CP-23-5300

JACK R. HARRELL, JR. and  
TINA W. HARRELL,

Plaintiffs,

vs.

KEOWEE FALLS INVESTMENT GROUP, LLC,  
THE CLIFFS COMMUNITIES, LLC and S&ME, INC.,  
Defendants.

---

DEPOSITION OF DOUGLAS CHAPPELL

---

DATE TAKEN: Tuesday, December 18, 2012

TIME BEGAN: 9:05 a.m.

TIME ENDED: 10:32 a.m.

LOCATION: Covington, Patrick, Hagins,  
Stern & Lewis  
211 Pettigru Street  
Greenville, South Carolina 29601

REPORTED BY: TARI B. KRAMER, RMR, CRR  
GALLAGHER COURT REPORTING  
864-234-5744

1 Austin View in North Carolina, which is a  
2 similar project involving some condos. But that  
3 was more on the tail end of it, wasn't as  
4 directly involved. I managed the project and  
5 budgeted the project on the Blue Ridge Parkway.

6 Q. Now how about micropiles?

7 A. Micropiles, I've been involved in dozens of  
8 those. A project called ABB in North Carolina.  
9 It's a large manufacturing tower. Boeing,  
10 Michelin, any number of industrial plants. I  
11 recently completed a project on Lake Keowee that  
12 involved both ground anchors and micropiles for  
13 stabilization of some ground movement.

14 Q. Who are you doing that for?

15 A. We did it for some homeowners there.

16 Q. In The Cliffs?

17 A. No. In Keowee Key.

18 Q. What were the names of the homeowners?

19 A. Roger and Juanita Keranen.

20 Q. How do you spell that last name?

21 A. K-e-r-a-n-e-n.

22 Q. What sort of problem had they had with their  
23 house?

24 A. They had noticed some movement of the walls  
25 separating, settlement, doors not opening,

1 windows not opening. And the house adjacent to  
2 it was torn down because of some similar issues.

3 Q. Do you recall the lot number for that?

4 A. I do not recall the lot number, but I do know  
5 the address.

6 Q. Thank you.

7 A. It's 624 North Flagship Drive.

8 Q. Do you recall what sort of problems were  
9 diagnosed with their lot?

10 A. Do you mean relative to the lot itself or the  
11 house?

12 Q. The lot.

13 A. Okay. InclInometers were installed and soil  
14 test borings were done. The inclinometers  
15 indicated movement over a period of six months  
16 to a year that they were read. The movement  
17 didn't subside. It was very slow. Nothing  
18 catastrophic, but progressive.

19 Q. Do you recall what the slope was for that lot?

20 A. It was approximately three to one.

21 Q. What type of soil did they have at that lot?

22 A. Residual soils. Silty sand, sandy silts.  
23 Fairly good shear strengths. Standard materials  
24 in the area.

25 Q. When did you complete work on this project?

1 A. We completed the actual construction phase in  
2 June, I believe.

3 Q. This year?

4 A. Yes. And we are finishing up -- we will be  
5 finishing up landscaping out there, probably  
6 within the next month.

7 Q. And did you work with anyone else on this  
8 project?

9 A. You mean --

10 Q. Supplier, subcontractors?

11 A. Well, we had suppliers that supplied us  
12 material, obviously, to use. We did have an  
13 outside company assist us with the design so  
14 that we would have two sets of eyes looking at  
15 the solution we proposed.

16 Q. And who was that company?

17 A. Dan Brown and Associates.

18 Q. Where are they based?

19 A. Kind of all over the country. You could  
20 probably say Auburn, Alabama. But they're a  
21 consortium of professors and professionals that  
22 kind of work out of their homes.

23 Q. Did you come to know them through your time down  
24 at Birmingham?

25 A. No. Came to know them through different trade

1 indicate large scale movement of a slope at a  
2 great depth. When I hear the term slope  
3 failure, it indicates to me, large-scale  
4 catastrophic-type movement.

5 Q. And you said, To me. Would that also be an  
6 industry definition?

7 A. There are a variety of industry definitions. It  
8 would be wording that would be used in  
9 geotechnical reports. Generally, the wording  
10 should indicate the severity of the movement.

11 Q. And how severe is the movement that you observed  
12 on lot 31?

13 A. Based on past inclinometer readings, those  
14 inclinometer readings, if accurate, suggest that  
15 it was possible that fairly small, relatively  
16 slow movement may have taken place in the past.

17 Q. What inclinometer readings have you reviewed in  
18 preparing for this deposition?

19 A. I have reviewed the Bunnell-Lammons inclinometer  
20 readings from, I guess, a couple of years ago.

21 Q. Have you reviewed any taken by S&ME?

22 A. I have not.

23 (Exhibit No. 1 marked: Attached.)

24 Q. Mr. Chappell, because this is your first  
25 deposition, I want to explain how exhibits work.

1           what you have in front of you is an exhibit we  
2           made part of the transcript of this deposition.  
3           I'm going to go over that with you and ask you  
4           some questions about that. And then when I'm  
5           finished, you need to leave that with the court  
6           reporter.

7   A.    Uh-huh.

8   Q.    I've had, in the past, some witnesses try to  
9           take exhibits with them, so I want to make sure  
10          that doesn't happen --

11  A.    I got plenty of copies back at the office.

12  Q.    -- otherwise, she's going to be yelling at me  
13          and I don't need that --

14  A.    You're welcome to it.

15  Q.    All right. I'm looking at your proposal I see  
16          you prepared on December 14th, 2012. And I'm  
17          looking under the section marked Project  
18          information and site conditions. Do you see  
19          what I'm referring to?

20  A.    Yes.

21  Q.    And I'm going to start with the paragraph that  
22          comes right underneath the section with the  
23          bullet points.

24  A.    Uh-huh.

25  Q.    Okay. And I see it has here, WEC performed a

- 1 stability analysis based on the data provided  
2 using back analysis techniques and an assumed  
3 factor of safety of one for the existing slope.  
4 what data -- I see here at the top, you're  
5 provided with soil test borings prepared by BLE.  
6 Do you recall the date of those soil test  
7 borings?
- 8 A. I do not recall the exact date.
- 9 Q. Do you recall the year?
- 10 A. It's probably a couple of years ago. They were  
11 taken at the same time as the inclinometers.
- 12 Q. So 2010?
- 13 A. Yes.
- 14 Q. And you looked at soil test borings prepared by  
15 S&ME?
- 16 A. Yes, ma'am.
- 17 Q. And what would have been the date for those?
- 18 A. That was probably this summer or fall.
- 19 Q. And you have Laboratory data prepared by S&ME.  
20 What was that?
- 21 A. That was shear strength testing, grain size  
22 analysis and hydraulic conductivity.
- 23 Q. And you looked at a site survey prepared by  
24 Freeland and Associates. What would have been  
25 the date of that site survey?

1 A. Again, probably mid to late summer -- early fall  
2 of this year.

3 Q. Would you have looked at anything from Freeland  
4 and Associates dated for December of this year?

5 A. It's possible. I don't know. I didn't look at  
6 the dates on the documents I was provided.

7 Q. And I believe you testified earlier, that your  
8 inclinometer data from BLE was dated from 2010.

9 A. It was probably a couple of years ago, yes.

10 Q. Now, what are the back analysis techniques that  
11 you refer to?

12 A. Typically -- you know, what we look at is -- you  
13 know, if -- we ran a hand analysis, based on a  
14 safety factor of one, to find the soil  
15 parameters that could result in instability.  
16 And we also ran a GeoStudio analysis, which is a  
17 boundary element, slope stability analysis to do  
18 the same thing; to find the soil parameters that  
19 could potentially result in instability.

20 Q. I notice up here at the top of your proposal  
21 where it says: Subject. You have, Lot 31. Is  
22 that the only lot you looked at in preparation  
23 of this report?

24 A. Well, there's a separate proposal -- for the  
25 preparation of this? Yes.

- 1 Q. Did you look at any other lots?
- 2 A. We did do an assessment of the adjacent lot --  
3 32, I guess.
- 4 Q. And you have there, at the end of that  
5 paragraph, and you said, Construction costs are  
6 based on our past experience with similar  
7 projects, the vicinity of the project.  
8 Satellite Keowee. I presume that would -- the  
9 project you just described, the Keranen project?
- 10 A. 624 Flagship Drive. Yes.
- 11 Q. And any others?
- 12 A. We have not done any other projects in that  
13 area.
- 14 Q. Have you prepared proposals?
- 15 A. We prepared a proposal on one other site.
- 16 Q. What was that site?
- 17 A. That was also in Keowee Key. There was no  
18 evidence of ongoing or current ground movement  
19 or anything. And nothing was done in the end.
- 20 Q. Do you recall what the location of that was?
- 21 A. I don't recall the address of it. No.
- 22 Q. Was it close to the Keranens?
- 23 A. Yes. It was south of lot 31. Well south, along  
24 the lake.
- 25 Q. And under Proposed scope of services, you say

1           you propose to install a composite system,  
2           micropiles and tieback anchors for slope  
3           stability. So what will the micropiles do?

4    A.    If the shear strength parameters are as  
5           indicated in the back analysis -- which, we have  
6           to assume those parameters, because if we use  
7           the parameters that are real from the lab data  
8           we get, then there are no issues. So if the  
9           shear strength parameters are what we assume in  
10          our back analysis, the micropiles react against  
11          each other and against a grade beam above to  
12          introduce an uphill force to the slope.

13   Q.    And what would the tieback anchors accomplish?

14   A.    The tieback anchors supplement the micropiles in  
15          introducing that uphill force.

16   Q.    So how do you determine where to place the  
17          micropiles?

18   A.    Do you mean relative to the house or relative to  
19          each other?

20   Q.    Relative to the house.

21   A.    Typically, on this particular project, we went  
22          some distance between the house and the lake  
23          shore and installed this system. Which, it's a  
24          grade beam that goes across in front of the  
25          house and back up. It protects the house from

1 any sort of movement or anything like that.

2 It's based on the footprint of the home. But it  
3 will be between the home and the lake.

4 Q. And when you say footprint of the home, were you  
5 provided a document giving the dimensions of the  
6 footprint and the location on the lot?

7 A. Of lot 31?

8 Q. Yes.

9 A. Yes.

10 Q. And who provided that?

11 A. Well, it was provided by Stephanie Burton. It  
12 was prepared by Freeland.

13 Q. And on the second page, you said, It's important  
14 to note that some trees may have to be cut to  
15 allow for installation of the concrete grade  
16 beam. About how many trees do you think would  
17 have to be cut?

18 A. I have no idea. I would have to actually look  
19 at the lot. It could be none. We would attempt  
20 to position it in a location that would cause  
21 minimal disturbance to trees.

22 Q. And in the exclusions, you have WEC is not  
23 included of the following in our proposal.  
24 Performance and payment bond. If you were to  
25 actually perform this work, would you provide a

1 performance and payment bond?

2 A. We typically don't provide performance and  
3 payment bonds on residential work of this  
4 nature.

5 Q. And I notice here on the third page, when you  
6 get to the price and payment provisions, I  
7 understand that your estimated fee be \$608,700.

8 A. Uh-huh.

9 Q. Do you think that's an over estimate or an under  
10 estimate?

11 A. I think it's about where it probably needs to  
12 be. The actual final fee, we wouldn't know  
13 exactly until you do final design, but it's a  
14 pretty accurate estimate. I didn't try to  
15 undershoot it, I didn't try to overshoot it.

16 Q. And did you visit lot 31 when you prepared this  
17 estimate in front of you?

18 A. You mean, have I been to lot 31?

19 Q. Yes.

20 A. Yes. I've been to lot 31.

21 Q. And when were you at lot 31?

22 A. That's probably been two years ago.

23 Q. But not since?

24 A. No.

25 Q. Would you have also visited lot 32 about two

1           years ago?

2    A.    Yes.

3    Q.    You can give that back to the court reporter,  
4           please.

5           In preparing your estimate, your proposal, did  
6           you review any data concerning other lots in the  
7           Jasmine Cove area?

8    A.    We did review borings that took place on lot 32.

9    Q.    But just 31 and 32?

10   A.    Yes.

11   Q.    Have you been informed about concerns in the  
12           past concerning stability of the Jasmine Cove  
13           cul-de-sac?

14   A.    No.

15   Q.    Are you, at this time, continuing to do testing  
16           and discovery on lot 31?

17   A.    No.

18   Q.    Do you intend to prepare a report on lot 31 or  
19           32 in the future?

20   A.    The only documents that would be prepared in the  
21           future would be design documents, were we to be  
22           given a construction contract.

23           (Exhibit No. 2 marked: Attached.)

24   Q.    What you have in front of you, Mr. Chappell, is  
25           a November 22nd, 2010 email sent from you to Don

1 something like this, it doesn't behoove us to  
2 spend weeks and weeks doing analysis, because  
3 we -- we're not getting -- we're not paid to do  
4 analysis.

5 So if we're producing a cursory estimate, we  
6 might spend a day or two looking at an estimate  
7 instead of a week or two looking at an  
8 estimate.

9 Q. But now your recommendation in your December  
10 14th, 2012 appears to be both pattern ground  
11 anchors and micropiles. Am I understanding that  
12 correctly?

13 A. That's a composite system of the two.

14 Q. So why would you now recommend both?

15 A. Because given more time to analyze things in the  
16 computer, this looks like the more effective and  
17 cost -- the more technically effective and cost  
18 effective solution. It takes the better part of  
19 both options.

20 Q. So in 2010, your recommendation to Mr. Nickell  
21 was that either pattern ground anchors or  
22 micropiles need to be installed in lots 32, 31,  
23 and 30; is that correct?

24 A. That was based on inclinometers and the  
25 assumption that all three would need to be

1 repaired.

2 Q. So let's say if we go ahead and go with your  
3 proposal for lot 31, and these are installed on  
4 lot 31, but are not installed on lot 30. Could  
5 there potentially develop problems for lot 31  
6 because no work was done on lot 30?

7 MS. MCMILLAN:

8 Objection to the form.

9 MS. WRIGHT:

10 You may answer.

11 A. It is very unlikely. The repair is designed in  
12 such a way to isolate the repaired lots from  
13 adjacent lots.

14 EXAMINATION RESUMED BY MS. WRIGHT:

15 Q. And how do you accomplish that?

16 A. We build the grade beam in and the pattern  
17 ground anchor straight across the front of the  
18 house. Then at the ends, the grade beam is  
19 angled up slope to produce a cutting edge that  
20 isolates it from adjacent properties.

21 Q. You can give that back to the court reporter.  
22 And before I mark this, Mr. Chappell, I came  
23 across this. Are these pictures that you or  
24 wurster would have prepared for Mr. Nickell back  
25 in 2010?

1 Q. And I take it the last picture would be the  
2 same, as well?

3 A. Yes.

4 Q. And then turning to our next page, which has  
5 Bates number MGC00599, did you prepare this  
6 diagram?

7 A. I did not prepare this diagram. This diagram  
8 was prepared by the Federal Highway  
9 Administration.

10 Q. And would any work in the proposal that you put  
11 together on December 14th, 2012, would that  
12 involve the installation of a cap beam similar  
13 to what we see in this diagram?

14 A. Yes.

15 Q. And whereabouts would that cap beam go?

16 A. That cap beam would be located between the home  
17 and the lake shore and would be buried.

18 Q. And how do you determine the critical slip  
19 surface?

20 A. That is done through computer analysis.

21 Q. Have you prepared that yet, as part of your  
22 proposal?

23 A. I'm not quite sure what you're asking there.

24 Q. When you were putting together your proposal for  
25 December 14th, 2012, did you determine the

1 critical slope surface?

2 A. We have to assume a slip surface in order to do  
3 the analysis behind the proposal.

4 Q. But you haven't been able to actually locate  
5 that?

6 A. We assume a slip surface. I haven't dug into  
7 the ground and looked for it.

8 Q. Okay. Then turning to the next page, which has  
9 a Bates number MGC00598, did you prepare this  
10 diagram?

11 A. Yes.

12 Q. And what is this designed to show?

13 A. This is a theoretical slope stability model of  
14 the property, based on assumed soil parameters  
15 that would have back calculated into a factor of  
16 safety over one.

17 Q. So you're saying of the property. Are you  
18 referring to lot 31?

19 A. This would have been a generalized section of,  
20 basically, all three lots.

21 Q. Then going to the next page, the Bates number is  
22 hidden under the staple, but it's MGC00597.

23 A. Uh-huh.

24 Q. Did you prepare this diagram?

25 A. I did not.

1 looked at before. Do you agree?

2 A. No. This is a -- this is a slope stability  
3 model. This differs from the other one, in that  
4 this shows using pattern ground anchors instead  
5 of using micropiles. But other than that, it is  
6 the same model.

7 Q. And then we turn to the next page, which has the  
8 Bates number MGC00595.

9 A. Uh-huh.

10 Q. Micropile installation. Where was that taking  
11 place?

12 A. This is at a Department of Transportation bridge  
13 in western North Carolina.

14 Q. So about how much disturbance would the  
15 Harrells, on lot 31, have to face with the  
16 installation of micropiles and tiebacks?

17 A. During construction, it's about the same level  
18 of disturbance as any other construction would  
19 create. Then when it's done, it's restored to  
20 approximately what's there.

21 Q. About how long would that take?

22 A. You'd probably take somewhere between three  
23 months and six months, from start to finish of  
24 the scope.

25 Q. You can return that to the court reporter.

1 Now, when you prepared your proposal for  
2 December 14, 2012, did you take into account  
3 that the assumed slope failure could extend to  
4 other lots adjacent to lot 31?

5 A. Yes.

6 Q. And did that -- does your proposal take that  
7 into consideration?

8 A. Yes.

9 Q. How so?

10 A. Again, we -- in order to secure the individual  
11 house pads, we turn the ends of the repair up  
12 slope to isolate the individual pads.

13 MS. WRIGHT:

14 I have no further questions. I'm going to turn  
15 this over to the other attorneys who may have  
16 some questions for you.

17 EXAMINATION BY MR. DUDLEY:

18 Q. Chappell?

19 A. Yes.

20 Q. I want to make sure I pronounce that right. I'm  
21 Tom Dudley. I represent the McCarthys. They  
22 own lot 32.

23 A. Nice to meet you too.

24 Q. I'll try to make this as quick as I can. With  
25 regards to this last statement you said, in the

1 proposal that you have generated for -- in  
2 December of 2012, for lots 31 and 32, you  
3 presented -- you generated two different  
4 proposals; correct?

5 A. Yes.

6 Q. And you've isolated -- in the design parameters  
7 that you've done -- and that's preliminary so  
8 far; right?

9 A. Yes.

10 Q. What other information or -- let me ask you  
11 this. Have you requested additional information  
12 to further refine these proposals?

13 A. We have enough information. The proposal is  
14 about as refined as the proposal would get. Say  
15 the work were done, a contract would be issued  
16 for the design. Then the design is done -- and  
17 a full design, to get it as economical and  
18 efficient as you can, might take three or four  
19 weeks and a lot of analysis. Then that design  
20 would be done and the price would be adjusted  
21 according to that design. Could go down, could  
22 go up a little. In the past, we typically have  
23 seen them go down.

24 MR. DUDLEY:

25 I marked up mine, Stephanie, the one you gave me

1           yesterday for lot 32. Do you have a clean copy?

2   MS. BURTON:

3           No.

4   MR. DUDLEY:

5           Do you have a clean copy?

6   MS. MCMILLAN:

7           I have a clean copy that we could copy.

8           (Discussion held off the record.)

9           (Exhibit No. 4 marked: Attached.)

10   EXAMINATION RESUMED BY MR. DUDLEY:

11   Q.   Mr. Chappell, I was showing you what's been  
12        marked as Plaintiff's Exhibit No. 4. Can you  
13        identify that as the proposal you did for slope  
14        stabilization, for lot 32, Keowee Falls south?

15   A.   Uh-huh.

16   Q.   You need to say yes, 'cause --

17   A.   Yes.

18   Q.   A string of MM's doesn't really translate very  
19        well.

20        All right. Now, as I understood, there was some  
21        additional -- you would take this proposal,  
22        there's some additional information you would  
23        need to refine your proposal.

24   A.   Not additional information I would need. It's  
25        additional analysis we would have to do.

- 1 Q. And so if we add ten percent to the number, you  
2 think that's probably going to be about the  
3 number --
- 4 A. That's going to be your ceiling.
- 5 Q. All right. So let's -- I want to just walk you  
6 through this proposal. And again, kind of where  
7 I started off on this, is that this design for  
8 lot 32 -- and it -- there's no house on it.  
9 This poses the theoretical building pad where it  
10 might be placed.
- 11 A. Yes.
- 12 Q. And the way you've designed the repair for lot  
13 32 is for it to -- at the ends -- it would stand  
14 alone. It's a stand-alone design.
- 15 A. Yes.
- 16 Q. And it's -- because a slope -- geological  
17 conditions don't respect property lines, do  
18 they?
- 19 A. Right.
- 20 Q. And as an engineer, you have to account for  
21 that, that I need to -- if I'm going to make a  
22 repair for this lot, I've got to account for  
23 adjacent lots and what those conditions are.
- 24 A. Yes.
- 25 Q. Now, back in 2010, the proposal -- the cursory

1 phenomenon.

2 Q. And the Keowee project that you worked on for  
3 the homeowner, you considered that just a slope  
4 movement?

5 A. I would consider that -- in order to describe it  
6 to someone, I would say you have some slow slope  
7 movement going on.

8 Q. And for that Keowee project, that's what you  
9 define as slope movement?

10 A. Yes.

11 Q. And you suggested a repair to the tune of about  
12 \$300,000?

13 A. \$400,000 with the potential for only spending  
14 three.

15 Q. Did the Keowee project include both micropiles  
16 and tieback anchors?

17 A. Yes.

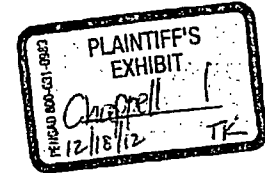
18 Q. Can you pull out your November the 8th email to  
19 Don Nickell.

20 A. Yes.

21 Q. This -- and I'll tell you, this appears to be  
22 the first contact you had with Mr. Nickell about  
23 the Jasmine Cove -- the Jasmine Point area.

24 A. Uh-huh.

25 Q. Do you remember the phone call you got or how



December 14, 2012

Gibbes Burton, LLC  
308 East Saint John Street  
Spartanburg, South Carolina 29302  
[shurton@gibbesburton.com](mailto:shurton@gibbesburton.com)

Subject: Proposal for Slope Stabilization  
Lot 31, Keowee Falls South  
Oconee County, South Carolina  
Wurster Engineering & Construction, Inc. Proposal No. 12-1701

Wurster Engineering & Construction, Inc. (WEC) is pleased to submit this proposal for the referenced project. This proposal includes a review of the project information provided to us, site conditions observed, the proposed scope of services, exclusions, access and supply provisions, price and payment provisions, and terms and conditions.

#### PROJECT INFORMATION AND SITE CONDITIONS

Our understanding of this project is based on our review of the following documents:

- Soil Test Boring Logs prepared by Bunnell Lammons Engineering
- Soil Test Boring Logs prepared by S&ME
- Laboratory Data prepared by S&ME
- A site survey prepared by Freeland and Associates
- Inclinoimeter data prepared by Bunnell Lammons Engineering

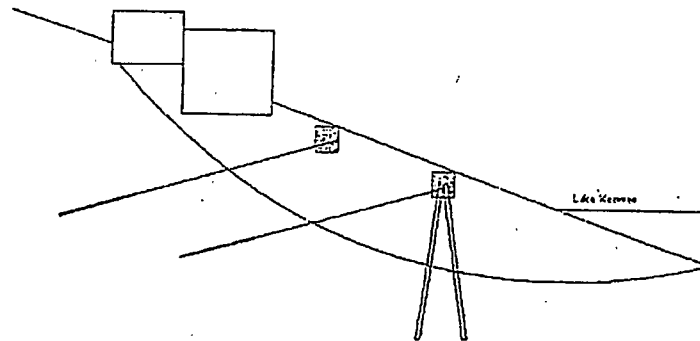
It is our understanding that a geotechnical design-build solution is desired to protect the stability of the existing home at the project site in the event of potential ground movement. WEC performed a stability analysis based on the data provided using back analysis techniques and an assumed factor of safety of 1 for the existing slope. Using the resulting parameters, slope stabilization measures were introduced into the model to bring the safety factor to between approximately 1.35 and 1.5. WEC then estimated a design-build construction cost for the project. The solution and construction costs are based on our past experience with similar projects in the vicinity of the project site on Lake Keowee.

#### PROPOSED SCOPE OF SERVICES

We propose to install a composite system of micropiles and tieback anchors for slope stability. The repair will be placed between the house and the lake. The repair measures are intended to prevent significant future distress to the structure in the event of ground movement. The landscaped area between the installed measures and the lake may be subject to small, likely imperceptible movements. A registered professional engineer specializing in geotechnical engineering and construction will design the slope stabilization. The repair shall consist of the following:

- Two rows of battered, closely spaced, micropiles will be installed in a line between the home and the lake, over a distance of about 150 ft. We estimate that the micropiles will be about 60 ft long.
- The micropiles will be joined together just below the ground surface with a reinforced concrete grade beam.

- A row of prestressed, tieback anchors will be installed through the concrete grade beam to pretension the micropiles and provide additional lateral ground support. We estimate that the anchors will be between 80 and 90 feet in length.
- An upper row of prestressed, tieback anchors will be installed. The tieback anchors will be connected to large precast concrete pads which transfers the resisting load tieback anchors to the ground, creating a "patterned ground anchor system".
- Excavation will be performed to install the concrete grade beam and to set the precast concrete pads. Grading will then be performed to nearly restore the original ground surface.
- Seed and straw will be placed over the disturbed soils to re-establish vegetation in the area.
- It is important to note that some trees may have to be cut to allow for installation of the concrete grade beam.



#### PROPOSED REPAIR

#### EXCLUSIONS

The following is not included in our proposed scope of services. We have assumed that others will perform this work.

- Relocation and costs associated with relocation of utilities that prohibit the installation of tieback anchors or micropiles.
- Contracting with and cost of materials testing firm for grout sampling and testing.

WEC has not included the following in our proposal.

- Performance and Payment Bond.
- Liquidated or consequential damages.
- Support of existing or proposed utilities.

#### ACCESS AND SUPPLY

Owner shall provide and assume responsibility for the following at no cost or delay to us unless specifically stated otherwise in this proposal:

1. Right of way enabling one continuous operation for the installation of the above described slope stabilization.
2. Power lines closer than legally or safely permissible are to be removed or de-energized; clear and accurate markings of all existing adjacent utilities with formal notification to our personnel, prior to the start of work. If deemed necessary by WEC, relocation of utilities interfering with slope stabilization. Removal and relocation of all overhead, land or underground utilities and obstructions interfering with our work.

3. On-site parking for all corporate vehicles.
4. Water supply: Furnish sufficient potable water for the conduct of our work at city pressure on the job site. A water spigot will be suitable.

#### PRICE AND PAYMENT PROVISIONS

WEC will provide the Proposed Scope of Services described above in accordance with the following breakdown:

Proposed Scope of Services	Fee
Mobilization, Lump Sum	\$10,000
Design, Lump Sum	\$15,000
Micropiles, each (30)	\$10,000
Tieback Anchors, each (30)	\$4,000
Tieback Anchor Pads, each (15)	\$3,500
Reinforced Concrete Grade Beam, Per CY (153)	\$400
Grading, Lump Sum	\$30,000
Landscaping Allowance, Lump Sum	\$20,000

Based on the quantities outlined above, our estimated fee to provide these services would be \$608,700.

WEC reserves the right to revise our pricing upon completion of final design documents. A contingency for variation in costs (10%) may be appropriate.

We request a pre-award meeting to clarify scope, schedule, payment items, and terms.

#### TERMS AND CONDITIONS

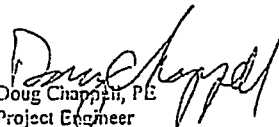
1. We require 1/3 payment prior to start of design.
2. Invoices will be provided each month for work completed and projected to be completed within a subject month.
3. Payment of our invoices will be required within 30 days after each invoice date.
4. Late payments will be subject to a charge of 1.5% per month.
5. This proposal may be withdrawn by WEC if not accepted within 90 days.

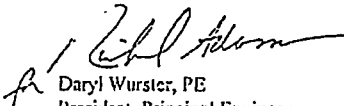
#### ACCEPTANCE

Owner may accept this Proposal either by signature, oral assent, authorizing Contractor to commence providing services, or making any payments to Contractor in consideration of services, and any of the above modes of acceptance shall be deemed to incorporate all of the terms of this Proposal into the contract between the parties thereby formed.

Respectfully submitted

Wurster Engineering & Construction, Inc.

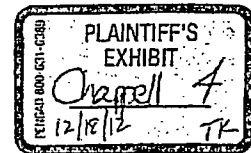
  
Doug Chappin, PE  
Project Engineer

  
Daryl Wurster, PE  
President, Principal Engineer

Accepted:

Date: \_\_\_\_\_

Name: \_\_\_\_\_



December 14, 2012

Gibbes Burton, LLC  
308 East Saint John Street  
Spartanburg, South Carolina 29302  
shurton@gibbesburton.com

Subject: Proposal for Slope Stabilization  
Lot 32, Keowee Falls South  
Oconee County, South Carolina  
Wurster Engineering & Construction, Inc. Proposal No. 12-1702

Wurster Engineering & Construction, Inc. (WEC) is pleased to submit this proposal for the referenced project. This proposal includes a review of the project information provided to us, site conditions observed, the proposed scope of services, exclusions, access and supply provisions, price and payment provisions, and terms and conditions.

#### PROJECT INFORMATION AND SITE CONDITIONS

Our understanding of this project is based on our review of the following documents:

- Soil Test Boring Logs prepared by Bunnell Lammons Engineering
- Soil Test Boring Logs prepared by S&ME
- Laboratory Data prepared by S&ME
- A site survey prepared by Freeland and Associates
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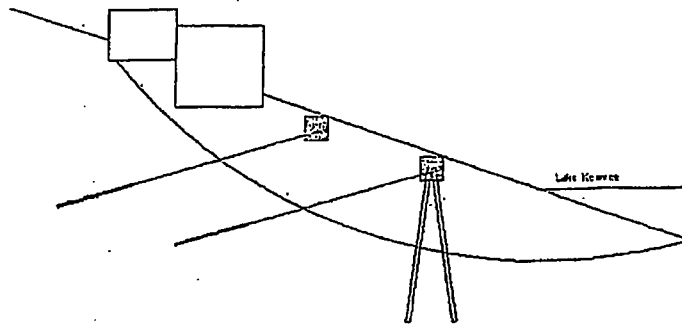
It is our understanding that a geotechnical design-build solution is desired to protect the stability of a theoretical house pad at the project site in the event of potential ground movement. For the purposes of this estimate, we have assumed that the lot owner will construct a home at the same approximate distance from the lake as the existing home on Lot 31. WEC performed a stability analysis based on the data provided using back analysis techniques and an assumed factor of safety of 1 for the existing slope. Using the resulting parameters, slope stabilization measures were introduced into the model to bring the safety factor to between approximately 1.35 and 1.5. WEC then estimated a design-build construction cost for the project. The solution and construction costs are based on our past experience with similar projects in the vicinity of the project site on Lake Keowee.

#### PROPOSED SCOPE OF SERVICES

We propose to install a composite system of micropiles and tieback anchors for slope stability. The repair will be placed between the house pad and the lake. The repair measures are intended to prevent significant future distress to the structure in the event of ground movement. The landscaped area between the installed measures and the lake may be subject to small, likely imperceptible movements. A registered professional engineer specializing in geotechnical engineering and construction will design the slope stabilization. The repair shall consist of the following:

- Two rows of battered, closely spaced, micropiles will be installed in a line between the home and the lake, over a distance of about 170 ft. We estimate that the micropiles will be about 60 ft long.
- The micropiles will be joined together just below the ground surface with a reinforced concrete grade beam.
- A row of prestressed, tieback anchors will be installed through the concrete grade beam to pretension the micropiles and provide additional lateral ground support. We estimate that the anchors will be between 80 and 90 feet in length.

- An upper row of prestressed, tieback anchors will be installed. The tieback anchors will be connected to large precast concrete pads which transfers the resisting load tieback anchors to the ground, creating a "patterned ground anchor system".
- Excavation will be performed to install the concrete grade beam and to set the precast concrete pads. Grading will then be performed to nearly restore the original ground surface.
- Seed and straw will be placed over the disturbed soils to re-establish vegetation in the area.
- It is important to note that some trees may have to be cut to allow for installation of the concrete grade beam.



#### PROPOSED REPAIR

#### EXCLUSIONS

The following is not included in our proposed scope of services. We have assumed that others will perform this work.

- Relocation and costs associated with relocation of utilities that prohibit the installation of tieback anchors or micropiles.
- Contracting with and cost of materials testing firm for grout sampling and testing.

WEC has not included the following in our proposal.

- Performance and Payment Bond.
- Liquidated or consequential damages.
- Support of existing or proposed utilities.

#### ACCESS AND SUPPLY

Owner shall provide and assume responsibility for the following at no cost or delay to us unless specifically stated otherwise in this proposal:

1. Right of way enabling one continuous operation for the installation of the above described slope stabilization.
2. Power lines closer than legally or safely permissible are to be removed or de-energized; clear and accurate markings of all existing adjacent utilities with formal notification to our personnel, prior to the start of work. If deemed necessary by WEC, relocation of utilities interfering with slope stabilization. Removal and relocation of all overhead, land or underground utilities and obstructions interfering with our work.
3. On-site parking for all corporate vehicles.
4. Water supply: Furnish sufficient potable water for the conduct of our work at city pressure on the job site. A water spigot will be suitable.