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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge

Appellate Case No. 2020-001275

Westbury Park Residential Association, Inc.,.....Respondent,

v.

Estate at Westbury Owners Association, Inc.,.....Appellant.

RESPONDENT’S MOTION TO DISMISS APPEAL AS UNAPPEALABLE

Respondent Westbury Park Residential Association, Inc. (“Westbury Park”) moves this Court for an order dismissing the above-captioned appeal as unappealable. The order on appeal is an order denying in part and granting in part Appellant Estate at Westbury Owners Association, Inc.’s (“the Estate”) motion for partial summary judgment. (**Exh. 1**, Order). An order denying a motion for summary judgment is never appealable, and Respondent Westbury Park Residential Association, Inc. (“Westbury Park”) does not appeal the portion of the order that granted summary judgment against it. This Court should dismiss the appeal.

BACKGROUND

This is a dispute between a homeowners’ association and a condominium horizontal property regime about an easement that provides access through the homeowners’ association neighborhood to the condominium complex and whether the condominium must continue to pay for its use of that easement or the easement terminated for failure to pay.

Westbury Park is a homeowners' association for the Westbury Park gated residential community of single-family homes in Bluffton, South Carolina. (**Exh. 2**, Cmplt. p. 1). The Estate is a horizontal property regime for a condominium complex. *Id.* at pp. 1-2. The same developer developed both properties, but they are separate legal entities. *Id.* The only access to the Estate's condominium complex is through the gates and residential streets of the Westbury Park community. *Id.* at p. 2.

In 1998, the developer filed a Declaration of Covenants, Conditions, Restrictions and Easements for Palmetto Lakes Apartments at Westbury Park ("the Declaration"). (**Exh. 3**, 1998 Declaration). The Declaration provided to the Estate an access easement over Westbury Park's streets. The Estate is required to pay for the access, and Westbury Park is responsible for maintenance of the streets. *Id.*

The specific language of the Declaration states the declarant developer grants to the owner of the Estate property, a "[p]erpetual non-exclusive right for vehicular and pedestrian access" to the Estate over two of Westbury Park's residential streets. (Exh. 3, 1998 Declaration pp. 7-8, §§ 7.02(a)-(b)). The Declaration requires the Estate to pay to Westbury Park an annual assessment of \$17,500.00 (increased annually based on the Consumer Price Index) "as its share of the costs for maintenance" of the streets. *Id.* at p. 9, § 8.01. The Declaration provided an initial term of twenty years and gave "the Declarant, its successor or assigns" the right to renew the Declaration "for an unlimited number of successive ten (10) year periods." *Id.* at pp. 9-10, § 9.01.

The "Palmetto Lakes Apartments" referred to in the Declaration is the predecessor to the Estate. The declarant developer and Estate property owner amended the Declaration in 2005 to allow the apartments to convert to a condominium horizontal property regime that is the Appellant

Estate. (**Exh. 4**, 2005 Amendment). The 2005 amendment also increased the amount the Estate must pay for the easement use to \$7,200.00 per month, with annual increases. *Id.*

In 2015, the developer assigned to Westbury Park the declarant rights, including the right to receive the easement fees. (**Exh. 5**, Estate Payment Division Agreement and Assignment). The Estate paid the fees to Westbury Park until August 2018, when it defaulted. *Id.* In October 2018, Westbury Park renewed the Declaration under § 9.01, which states in part that the “Declaration may be renewed for an unlimited number of successive ten (10) year periods by the Declarant, its successors or assigns.” (Exh. 3, 1998 Declaration pp. 9-10). The Estate refused to acknowledge the renewal and refuses to pay for the residents of its 320 condominiums to use the easement.

On January 24, 2020, Westbury Park filed a complaint against the Estate to require the Estate to pay the delinquent easement fees as required by the Declaration, establish a separate access to the Estate other than the residential streets of Westbury Park, and to enjoin abuse of the gate access system by the Estate’s residents. (Exh. 2, Cmplt. p. 3). The complaint includes causes of action for (1) an injunction, (2) a declaratory judgment for the valid renewal of the declaration and the Estates’ default on payments, (3) a termination of the easement by the Estate’s breaches of nonpayment and abuse of the roadways, (4) an alternative declaratory judgment that the easement was an easement in gross that terminated and the Estate must establish another entrance to the apartment complex, (5) an alternative declaratory judgment that no easement exists and none is necessary because alternative access exists, (6) unjust enrichment, and (7) an alternative action to terminate any easement based on changed conditions. (Exh. 2, Cmplt. pp. 11-20).

On March 18, 2020, the Estate filed an answer that generally denied all of the allegations and asserted the following counterclaims: (1) breach of contract, (2) breach of fiduciary duty and accounting, (3) nuisance, (4) declaratory judgment for express appurtenant easement, (5)

alternatively, an easement by necessity, (6) alternatively, an easement by prescription, (7) quantum meruit, and (8) accounting. (**Exh. 6**, Ans. & Counterclaims).

The parties agreed to refer the case to the Honorable Marvin H. Dukes, III, Master in Equity. On May 21, 2020, about two months after the Estate filed its Answer, it filed a motion for partial summary judgment. (**Exh. 7**, Mot. for Partial Summ. J.). It asked the lower court to grant summary judgment in its favor on all of Westbury Park's causes of action except for the injunction. *Id.* The Estate also moved for summary judgment on three of its counterclaims—a declaratory judgment for an express appurtenant easement or, alternatively, an easement by necessity, and an accounting. *Id.* The parties filed memoranda in support of their positions, and Westbury Park also filed a motion for summary judgment on its injunction cause of action. (**Exh. 8**, Estate Memo. Supp. of Mot.; **Exh. 9**, Westbury Park Supp. Memo. in Opp. to Mot.).

On September 16, 2020, Judge Dukes held a hearing on the motions. On September 21, 2020, he issued an Order granting in part and denying in part the Estate's motion. The only substantive ruling Judge Dukes made is that the Estate has an express appurtenant easement to access the condominiums through Westbury Park. (**Exh. 1**, Order). Judge Dukes made that ruling by granting the Estate's motion for summary judgment on its counterclaim for an express appurtenant easement and on Westbury Park's causes of action for a declaratory judgment that no easement existed or alternatively for an easement in gross. *Id.* The Order states "I find that the easement is an express appurtenant Easement and that the renewal of the term was intended to be unilateral under 9.01. I find that the term was properly extended by the filing of the extension as contemplated under 9.01." (**Exh. 1**, Order p. 1). As to the express appurtenant easement ruling, Westbury Park is the aggrieved party. However, it chose not to appeal.

Judge Dukes denied the remainder of the Estate's Motion. *Id.* at pp. 1-2. He explained that the "Estate has no right of accounting and there is no right by Estate to direct how the funds are used." *Id.* at p. 1. Judge Dukes also denied Westbury Park's motion for a temporary injunction on its injunction action. *Id.*

The day after Judge Dukes issued the ruling, the Estate filed a Notice of Appeal. Westbury Park did not file a cross-appeal.

ARGUMENT

The Order on appeal is an order denying a motion for partial summary judgment. "[I]t is well settled that an order denying summary judgment is never reviewable on appeal." *Bank of N.Y. v. Sumter Cnty.*, 387 S.C. 147, 154, 691 S.E.2d 473, 477 (2010). An appellate court is "prohibited from reviewing" the denial of a motion for summary judgment because it is "never subject to review, not in an interlocutory appeal [] or even after final judgment." *AJG Holdings LLC v. Dunn*, 392 S.C. 160, 167, 708 S.E.2d 218, 222 (Ct. App. 2011). "A denial of a motion for summary judgment decides nothing about the merits of the case, but simply decides the case should proceed to trial." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994). "The denial of summary judgment does not establish the law of the case, and the issues raised in the motion may be raised again later in the proceedings by a motion to reconsider the summary judgment motion or by a motion for a directed verdict." *Id.* at 477, 443 S.E.2d at 380.

The Estate is "a party aggrieved by an order" only as to the part of the order denying its motion for summary judgment. Rule 201(b), SCACR. However, because those rulings are "never" appealable, this Court must dismiss the appeal. *AJG Holdings*, 392 S.C. at 167, 708 S.E.2d at 222.

The Estate may argue the following language in the order effectively granted summary judgment for Westbury Park:

I find . . . that the renewal of the term was intended to be unilateral under 9.01. I find that the term was properly extended by the filing of the extension as contemplated under 9.01. . . . Estate has no right of accounting and there is no right by Estate to direct how the funds are used.

(Exh. 1, Order p. 1). These statements are not final, appealable rulings for at least two reasons. First, the plain language of the Order following those statements makes clear that the lower court **denied** summary judgment on those issues. *Id.* at p. 2. Second, Westbury Park does not interpret those statements as granting summary judgment to it on those issues. Westbury Park did not move for summary judgment on those issues, so they were not before the lower court to decide in its favor. Because Westbury Park takes the position that those issues remain to be litigated by the parties, the Estate has no basis for asserting the statements are final, appealable rulings. If the Estate filed this appeal out of fear that Westbury Park would argue the lower court's rulings are final and binding, this motion to dismiss resolves that issue.

The Order denies summary judgment and does not establish any final findings of fact or law against the Estate. There is nothing for this Court to review, and it should dismiss the appeal.

In the event that the Court denies this motion to dismiss and finds the statements are final, appealable rulings, Westbury Park reserves all of its rights to argue for an opinion from this Court affirming the lower court's rulings.

CONCLUSION

For these reasons, the order cited in Appellant's Notice of Appeal is not immediately appealable, and this Court should dismiss the appeal.

October 12, 2020

Respectfully submitted,

s/Kathleen C. Barnes

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Exhibits to Motion to Dismiss

1. Order denying injunction and granting in part and denying in part motion for partial summary judgment
2. Complaint filed by Westbury Park Residential Association, Inc.
3. 1998 Declaration of Covenants, Conditions, Restrictions and Easements for Palmetto Lakes Apartments at Westbury Park
4. 2005 Amendment to Declaration of Covenants, Conditions, Restrictions and Easements for Palmetto Lakes Apartments at Westbury Park
5. 2015 Estate Payment Division Agreement and Assignment
6. Answer and Counterclaims of Estate at Westbury Owners Association, Inc.
7. Defendant Estate at Westbury Owners Association, Inc.'s Motion for Partial Summary Judgment
8. Defendant/Counterclaim Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment
9. Plaintiff's Supplemental Memorandum in Opposition to Summary Judgment and in Support of its Motion for a Temporary Injunction

EXHIBIT 1

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF BEAUFORT	)	
	)	CASE NO: 2020-CP-07-00158
	)	
Westbury Park Residential Association, Inc.,)	)	
	)	
Plaintiff(s),	)	
	)	ORDER DENYING INJUNCTION AND
vs.	)	GRANTING IN PART AND DENYING
	)	IN PART MOTION FOR PARTIAL
	)	SUMMARY JUDGMENT
	)	
Estate at Westbury Owners Association, Inc.,)	)	
	)	
Defendant(s).	)	
_____	)	

This Plaintiff's motion for temporary injunction and Defendant's motion for partial summary judgment came before me in a live hearing on September 16, 2020.

Defendant Property Owner's Association (Estate) asserts that it holds an easement across the property of the Plaintiff Property Owner's Association (Park). Park seeks relief related to the conduct of certain individuals using that easement (believed to be residents of Estate)ⁱ. Park further challenges the nature of the easement and seeks to be paid certain use and maintenance assessments which are the subject of dispute. Estate seeks to confirm its easement as perpetual and appurtenant and to establish that the term of payment has expired.

I find that the Temporary Injunction should be denied, as it does not meet the requirement for irreparable harm and additionally that it seeks relief which compels non-parties to act or abstain from activities.

With regard to Estate's Motion for partial summary judgment:

I find that the easement is an express appurtenant Easement and that the renewal of the term was intended to be unilateral under 9.01. I find that the term was properly extended by the filing of the extension as contemplated under 9.01. I do not see a conflict between 9.01 and 9.02. 9.01 deals with term and 9.02 deals with "...this Declaration, or any provision hereof, or any covenant, condition or restriction contained herein..."

Further, the assessment provision (8.02) of the Declaration agreement (as further modified by paragraph 4 of the 2005 amendment), calls for a sum certain in payments. The obligation of the Estate is to pay the contracted sum and the obligation of Park is to maintain the easement. Had the proportional maintenance cost exceeded the actual revenue received under the assessment provision, Park would have suffered a loss. Estate has no right of accounting and there is no right by Estate to direct how the funds are used. So long as the easement is in good condition and available for the reasonable, contracted and anticipated use of Estate residents, Park has complied with its contractual obligations.

I therefore:

- 1) Deny Defendant's summary judgment motion on Plaintiff's second cause of action (declaratory judgment).
- 2) Deny Defendant's summary judgment motion on Plaintiff's third cause of action (termination by breach)
- 3) Grant Defendant's summary judgment motion on Plaintiff's fourth cause of action regarding the type of easement.
- 4) Grant Defendant's summary judgment motion on Plaintiff's fifth cause of action (declaratory judgment on alternative access)
- 5) Deny Defendant's summary judgment motion on Plaintiff's sixth cause of action. (unjust enrichment)
- 6) Deny Defendant's summary judgment motion on Plaintiff's seventh cause of action (changed conditions).
- 7) Grant Defendant's summary judgment motion on Defendant's fourth counterclaim (type of easement)
- 8) Deny Defendant's summary judgment motion on Defendant's fifth counterclaim (easement by necessity).
- 9) Deny Defendant's summary judgment motion on Defendant's eighth counterclaim (accounting).

IT IS SO ORDERED:

Honorable Marvin H. Dukes, III
Master in Equity and Special Circuit Court
Judge for Beaufort County

September ____, 2020
 Beaufort, South Carolina

ⁱ Park offered video showing motorists entering through the exit gate. While I am tempted to call this maneuver a "raspberry beret", Prince lyrical references have no place in the body of this Order.



Beaufort Common Pleas

Case Caption: Westbury Park Residential Association, Inc. VS Estate At Westbury Owners Association, Inc.

Case Number: 2020CP0700158

Type: Order/Other

So Ordered:

s/Marvin H. Dukes III #3069

EXHIBIT 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	
Westbury Park Residential	)	
Association, Inc.,	)	
	)	
Plaintiff,	)	COMPLAINT
	)	
v.	)	(Non Jury)
	)	
Estate at Westbury Owners	)	
Association, Inc.,	)	
	)	
Defendant.	)	
_____	)	

COMES NOW, the Plaintiff, complaining of the Defendant, would respectfully show unto this Honorable Court the following:

PREAMBLE/SUMMARY OF THE CASE

The Plaintiff, Westbury Park Residential Association, Inc. ("Westbury Park"), is an association of homeowners operating and managing the residential community known as Westbury Park located in Bluffton, South Carolina. Westbury Park consists of approximately 127 acres with 109 acres devoted to single family residential homes. Plantation Properties, LLC (the "Developer") undertook development of the community in 1998. Certain declarant rights were assigned to Westbury Park in 2015 by the Developer and the Association now enjoys full control of the community.

Plantation Properties, LLC undertook development of what is now known as the Estate at Westbury Owners Association, Inc. (the "Estate at Westbury" or the "Estates") as an apartment complex by executing a Declaration of Covenants, Conditions, Restrictions and Easement for Palmetto Lakes Apartments at Westbury Park on November 10, 1998 (recorded on November 12, 1998 in Book 1106 at Page 1225, Beaufort County Register of Deeds) (herein, the "Apartment Declaration"). The Estate at Westbury was converted to a horizontal

property regime on or about 2005 and now is a 20-acre condominium association of 320 units. The Estates are a separate legal entity from Westbury Park. When designing the communities, the Developer created access to the Estates only through Westbury Park's residential streets, over Kensington Boulevard and a section of Westbury Parkway.

Westbury Park is gated, with mechanical gates controlling access into and out of Westbury Park and therefore the Estate at Westbury. According to Section 8.01 of the Apartment Declaration, the Estates and its predecessors paid fees to the Developer for this access and for the maintenance and care of the streets, landscaping and lighting. While the Developer received payment from the Estates for years, Westbury Park was the party obligated to maintain, manage, and secure the access roads used by the Estate at Westbury. During this time, Westbury Park received only a fraction of the funds for the maintenance and use of the corridor while it was under developer control, despite shouldering the burden of the maintenance of the corridor, responsibility of securing the gates and corridor and diminution of property values created by the excessive traffic on those streets.

In 2015, the right to receive payment for the care, upkeep and securing of the "Required Streets" was assigned by the Developer to Westbury Park. From 2015 through most of 2018, the Estates made payments to Westbury Park pursuant to this assignment of Declarant rights. By August 2018, however, the Estates were in default on the full amounts owed to Westbury Park according to the Apartment Declaration.

In October 2018, Westbury Park, renewed the Apartment Declaration according to Section 8 of the Declaration. Estate at Westbury stopped payments to Westbury Park in October 2018 and, despite notices and demands made to the Estates, it has made no payment to Westbury Park for the maintenance and security of the streets and the gates since October 2018 when it already was in default. In addition, the Estates have refused to cooperate with Westbury Park in its efforts to keep unauthorized vehicles and individuals out of the communities, has refused to pay Westbury Park for damage to Westbury Park property

caused by Estate residents (including damage to the gates, making them inoperable at times), and has ignored requests for information Westbury Park needs to properly secure the communities. This is important, as a history of crime and vandalism has occurred in the communities as a result of the gates being broken or other unauthorized access.

This litigation seeks to immediately enjoin the abuse of gate access and damage of property by Estate at Westbury residents and visitors and force the Estate at Westbury to cooperate with the administration of gated access, cure the default by Westbury Park, and permanently establish the rights of the Parties by establishing access to the Estate at Westbury other than through the streets and gates of Westbury Park.

THE PARTIES AND JURISDICTION

1. Plaintiff, Westbury Park Residential Association, Inc. (herein, “Westbury Park” or “Plaintiff”), is a not for profit corporation organized under the laws of the State of South Carolina with a principal place of business in Beaufort County, South Carolina. Westbury Park is the governing entity for that certain residential community in southern Beaufort County known as “Westbury Park” a planned residential community of single-family homes with gated access to Buck Island Rd. and Plantation Park Drive.

2. Defendant Estate at Westbury Owners Association, Inc. (herein, “Estate at Westbury” or “Defendant”) is a not for profit organization organized under the laws of the State of South Carolina with a principal place of business in Beaufort County, South Carolina. Defendant is the governing entity for that certain residential community and horizontal property regime situate in southern Beaufort County known as the “Estate at Westbury.”

3. The facts that give rise to this dispute arose in Beaufort County, South Carolina and properties involved in this dispute exists in Beaufort County, South Carolina.

4. This court has jurisdiction over the matter and venue is proper.

RELATIONSHIP OF THE PARTIES

Overview of the History and Content of Conveyances

5. The paragraphs of the preamble are incorporated by reference herein.

6. The Estate at Westbury is a residential condominium association (a horizontal property regime) located to the east of and adjoining Westbury Park. The residents, tenants, guests, and contractors of the Estate at Westbury presently utilize certain streets within and the gate into Westbury Park to access the Estate at Westbury.

7. The Estate at Westbury relies upon the Declaration of Covenants, Conditions, Restrictions And Easements for Palmetto Lakes Apartments at Westbury Park, dated November 10, 1998, found at Book 1106, Page 1225, at the Beaufort County Register of Deeds (ROD) (herein, the “Apartment Declaration”), in asserting easement rights for ingress and egress through certain streets of Westbury Park.

8. The Apartment Declaration was not executed under seal.

9. The Apartment Declaration contains no Acknowledgment.

10. The Apartment Declaration contains no Probate.

11. The Apartment’s Declaration fails to meet the statutory requirements of an instrument effecting property interests in South Carolina.

12. The Declarant of the Apartment Declaration was Plantation Properties, L.L.C. The Apartment Declaration referenced above in Paragraph 7 is incorporated herein as **Exhibit 1**, and is referenced herein as, the “Estate Property.”

13. Among other things, Section 7.02 of the Apartment Declaration states that, “*Subject to the provisions hereof* and the restriction contained in Subparagraph 7.02(a) hereafter, Owner, its successors and assigns . . . shall have a right and easement of use of those certain easements as hereinafter more fully described.”

(emphasis added). Section 7.02 of the Apartment Declaration further states that it granted the Owner of the Apartments a “Perpetual and non-exclusive right for vehicular and pedestrian access over and across Westbury Park Way from its intersection with US Highway 278 and its intersection with Kensington Boulevard . . .”, and, a “Perpetual non-exclusive right for vehicular and pedestrian access over and across Kensington Boulevard from its intersection with Buck Island Road to its intersection with the Property.”

14. Section 8 of the Apartment Declaration requires the Estate at Westbury to make monthly payments to Westbury Park as the assignee of certain Declarant rights, for the use and maintenance of the streets described in paragraph 13, above.

15. The Property was defined in a legal description contained in Exhibit “A” of the Apartment Declaration.

16. The Apartment Declaration defines “Owner” as the owner of a fee interest in the “Property.”

17. On November 10, 1998, the same date that the Apartment Declaration was executed, the Estate Property was transferred by deed found at Book 1106 / Page 1245 of the Beaufort County Register of Deeds by Plantation Properties, LLC to Westbury Park Apartments, Ltd. (herein, the “Apartment’s Deed”), incorporated herein as **Exhibit 2**. Upon information and belief, this deed was properly executed per South Carolina law with full force and effect.

Westbury Park Apartments, Ltd. Conveys Its Interest to Montecito
Westbury/Conversion to HPR

18. On October 28, 2005, Westbury Park Apartments, Ltd. conveyed its interests in the Estate Property to Montecito Westbury, LLC by deed found at Book 2261 / Page 1673 of the ROD and incorporated herein as **Exhibit 3** (herein, “Montecito Deed”).

19. Any and all purported conveyance within the Montecito Deed to which Westbury Park Apartments, Ltd. did not have an ownership right are void.

20. On November 1, 2005, Plantation Properties, LLC (as Declarant) filed an Amendment to the Declaration of Covenants, Conditions, Restrictions and Easements for Palmetto Lakes Apartments at Westbury Park (Book 2269/ Page 1997). This Amendment states that the Declarant, *inter alia*:

- a. Allowed the Property to be converted to condominium units;
- b. Reiterated the Estate Property’s owners, residents and guests’ did not have the right of use and easement access to Westbury Park’s common areas and amenities, including parks, swimming pools and pool houses;
- c. Revised the monthly amounts owed by the Owner of the Property (as defined in the Apartment Declaration) as an assessment for its use of and for the maintenance of the streets described in paragraph 13, above.

21. On January 1, 2006, Montecito Westbury, LLC recorded a Master Deed (herein, the “Estate Master Deed”) stating that it submitted the Estate Property to the Horizontal Property Act of South Carolina (“the Act”). The Estate Master Deed is found at the ROD, Book 2310 / Page 2012.

22. Upon information and belief, the Defendant Estate at Westbury Owners Association, Inc. (“Estate at Westbury”) was created on or about the same time of the filing of the Estate Master Deed referenced above.

Assignment of Declarant Rights to Westbury Park and Estate of Westbury’s Default on Payment Obligations to Westbury Park

23. As stated above, Westbury Park is the assignee of certain Declarant rights of Plantation Properties, LLC held under the Apartment Declaration, including the rights to receive payments from the Estate at Westbury for the maintenance and upkeep of the streets used by the Estate at Westbury for ingress and egress through Westbury Park to the Estate at Westbury.

24. The Estate at Westbury paid money to Westbury Park per the agreement contained in the Declaration as the assignee of Declarant rights before it defaulted on payments.

25. As of August 31, 2018, the Estate at Westbury was in default on payments owed to Westbury Park pursuant to the Apartment Declaration.

26. In October 2018, Westbury Park renewed the Declaration of Covenants, Conditions, Restrictions, and Easements for Palmetto Lakes Apartments at Westbury Park by filing a notice of extension with the ROD per Section 9.01 of the Declaration, which is incorporated herein as **Exhibit 4**.

27. The Estate at Westbury holds a continuing contractual obligation to pay Westbury Park per the terms of the Apartment Declaration for its continued use, enjoyment and the benefit of the streets it uses through Westbury Park to access its property. The Estate at Westbury has failed to make any payment to Westbury Park for money owed pursuant to the Declaration since on or about October 17, 2018.

28. On October 31, 2018 Estate at Westbury owed approximately \$22,753.01 to Westbury Park per the terms of the Apartment Declaration. It is in default and remains in default of the Apartment Declaration.

29. The Estate at Westbury has failed to remedy multiple notices to cure its default.

30. Westbury Park continues to maintain and secure the roadways and corridors of the alleged right of way for the benefit and gain of the Estate at Westbury, at great expense to Westbury Park.

31. The amount due and owing by the Estate at Westbury to Westbury Park has reached over \$100,000.00, plus attorney's fees and costs.

32. The Estate at Westbury has 320 residential units. Westbury Park has 350 residential units. As many if not more vehicles traveling to the Estate at Westbury use the roadways subject to the alleged right of way as do residents and/or guests of Westbury Park. The residents of Westbury Park who reside along the alleged right of ways suffer great burdens, risks and loss of property values due to the traffic upon the roadways. This traffic injures all property values of Westbury Park.

33. Alternative access to the Estate Property is possible, and was conditionally approved by Beaufort County in 2009 during the construction of the extension of Plantation Park Drive at minimal cost to the Estate at Westbury. However, upon information and belief, the Estate at Westbury refused to participate in any planning or expense of an additional access to the Estate Property at the time.

Exhibit 5

Continuing, Damage and Unauthorized Entry by Estate at Westbury to Gates Maintained, Supervised and Paid for by Westbury Park

34. Upon information and belief, since its inception, Westbury Park has held and maintained gates for the safety, security and benefit of its residents. Westbury

Park continues to maintain, operate and manage the gates and the streets used by the Estate at Westbury at great cost and burden to Westbury Park.

35. The Estate at Westbury, its owners, residents and guests gain substantial benefit from the gated access and roadway use, market their property as a gated community, and derive benefit from the common elements, spaces and amenities of Westbury Park that adjoin the roads used for ingress and egress by the Estate at Westbury.

36. Over the past year, Westbury Park has documented scores of occurrences where residents, guests and/or vendors of the Estate at Westbury forcefully open the mechanical gates without use of a password or “key fob,” physically forcing the gates open. Each of these breaches constitute a security risk to the residents of Westbury Park and the Estate at Westbury, and damage or risk damage the mechanisms of the gates. At times, the gates are not functional due to damage caused by residents, guests or vendors of the Estate at Westbury.

37. On other occasions, residents or guests of the Estate at Westbury have recklessly and/or negligently damaged the gates to Westbury Park. The Estate at Westbury has refused to reimburse Westbury Park for these expenses after demand. On each occasion the damage caused the gates to be inoperable for weeks until they could be repaired. Westbury Park paid for these repairs and the Estate at Westbury refused to reimburse Westbury Park for the repairs and refused to hold its owners accountable for the damage.

38. Westbury Park repeatedly has requested the Estate at Westbury to take reasonable action to prevent the gate breaches by its guests and residents and has repeatedly requested the Estate at Westbury to cooperate with it in the administration of the gate access. Estate at Westbury repeatedly refused to cooperate with the administration of the gates.

39. Residents and vendors of the Estate at Westbury, including security personnel for the Estate at Westbury, continued to forcibly breach the gates after Westbury Park sent notices to the Estate of Westbury of gate breaches and have at times allowed unknown individuals to “piggy back” into the gates after unauthorized access.

40. Estate at Westbury has acknowledged that it has not provided all of its owners, residents, guests and/or vendors with access cards or codes to the gates.

41. Historically, gate failures have caused increased crime and vandalism in both Westbury Park and the Estate at Westbury. This crime is documented in contemporary news stories.

42. The Estate at Westbury has failed to respond to reasonable requests from Westbury Park to prevent gate breaches and security risks and, instead, has facilitated the breaches through its security contractor, refusing to enforce and/or promulgate reasonable Rules and Regulations for its residents, guests and vendors, at the expense, risk and damage to Westbury Park and its residents.

43. The actions described above create an imminent liability risk a constitute a threat to the safety of the owners, residents and guests of Westbury Park, causing substantial financial damage to Westbury Park and its individual owners.

44. While the Estate at Westbury substantially and materially benefits from its access over certain roadways of Westbury Park and the gates of Westbury Park, Westbury Park and its individual owners suffer substantial burden, financial damage, and security risk caused by the access and the abuse of that access.

FOR A FIRST CAUSE OF ACTION
(Injunction)

45. All allegations of the preceding paragraphs are reiterated fully as if stated verbatim herein.

46. As stated above, owners, residents, guests, and/or vendors of the Estate at Westbury repeatedly have forced open the gates to Westbury Park without authority and in reckless disregard of the property rights of Plaintiff, the functioning of the gate, and safety of residents and guests of Plaintiff.

47. Plaintiff has documented scores of these gate breaches, and made demand to Estate at Westbury to take corrective action to prevent further gate breaches and damage, including providing Westbury Park with a full list of its residents and vendors and vehicle registrations in effort to facilitate proper access to the communities.

48. After demand, Estate at Westbury continues to fail to monitor the conduct of its residents, guests, and vendors (or other unknown individuals), who

continue to physically force open the gates, risking and creating damage to the gates, entering the communities without authority.

49. These acts create a substantial risk to the safety of the residents and guests of Plaintiff, cause damage to the property, subjected residents to vandalism and theft, and, if left unabated, will continue to cause risk to the safety of residents and guests of Plaintiff and cause damage to the property of Plaintiff.

50. Estate at Westbury residents, guests and vendors continuing to enter into Westbury Park without authority and proper credentials and/or damaging property would result in irreparable harm to Plaintiff and its owners.

51. The Plaintiff has no other adequate means or remedy to prevent the activities of residents, guests and vendors of the Estate at Westbury.

52. The equities demand an injunction be granted for the benefit of Plaintiff enjoining residents, guests, and/or vendors of Estate at Westbury from:

- a. entering the gates of Plaintiff's community without authority,
- b. damaging the gates, and
- c. requiring the Estate at Westbury take reasonable measures to prevent such actions by its residents, guests, and vendors.

53. Further, the Plaintiff is entitled to an injunction requiring Estate at Westbury to permanently provide Plaintiff with the identities of its Owners, Residents, a list of authorized vehicles and vehicle plates (the same material Westbury Park requests of its own residents) so that Westbury Park may reasonably

monitor gate access into the communities, and any other specific orders the circumstances require.

FOR A SECOND CAUSE OF ACTION

(Declaratory Judgment)

(The Apartment Declaration is Renewed and in the Estate is in Default)

54. All preceding allegations are reiterated fully as if stated verbatim herein.

55. The Plaintiff is entitled to Judgment Declaring:

a. The Apartment Declaration was renewed by Westbury Park and remains in full force and effect by its terms, which speak for themselves;

b. ESTATE AT WESTBURY is in default of the terms of the Apartment Declaration;

c. ESTATE AT WESTBURY owes to WESTBURY PARK all outstanding payments due under the Apartment Declaration, plus all attorney's fees, interest and costs of collection, including the fees and costs associated with this action;

d. Any and all other relief just and reasonable, including authorization for Westbury Park to lien and foreclose upon the Common Elements of the Estates at Westbury.

FOR A THIRD CAUSE OF ACTION

(*Termination by Breach*)

(Terminating Easement on account of the breach by Estate at Westbury)

56. Paragraphs 1 through 55 are repeated as if fully restated verbatim herein.

57. By failing to pay Westbury Park for its use of the roadways of Westbury Park and gate access, the Estate at Westbury breached its contract with Westbury Park.

58. The default, breach and reckless use of the alleged easement by the Estate at Westbury was substantial and material, in addition to failing to pay Westbury Park for the use of the roadways and gates, it has refused reasonable requests to prevent unauthorized entry of its residents and guests into the communities. The relationship between the Parties has been severely and permanently injured.

59. As stated above, Westbury Park is entitled to an order for all amounts due under the Declaration.

60. Additionally, because of Estate of Westbury's abuse of ingress and egress into Westbury Park, Westbury Park is entitled to an order terminating the use agreement and/or alleged easement enjoyed by the Estate at Westbury over and through the property of Westbury Park, and compelling the Estate at Westbury to plan and build alternative access to its property other than over and through the property of Westbury Park, within a reasonable time.

61. Westbury Park is entitled to an order declaring the respective rights of the Parties during the period in which the alternative access to Estate at Westbury is designed, planned and built.

FOR A FOURTH CAUSE OF ACTION

In the Alternative

(Declaratory Judgment)

(Any easement conveyed was an easement in gross and now terminated)

62. All preceding allegations contained in paragraphs 1 through 53 are reiterated as if fully stated verbatim herein.

63. In the alternative, if any easement exists, it was of residential character, and was an easement *in gross*.

64. Further, if any easement was conveyed, it was superseded by the execution and grant of Deed by the Apartment's Deed (**Exhibit 2**), which was properly executed and recorded, and did not convey the ingress and egress easement rights to the Estate Property.

65. Reasonable alternative means for ingress and egress exist to the Estate Property.

66. The alleged easement rights to the Estate Property through Westbury Park should therefore be declared null, or, in the alternative, any easement granted was in gross, and now extinguished.

67. Westbury Park Residential Association is entitled to an order declaring that:

- a. A permanent easement over Westbury Park's streets benefiting the Estate at Westbury does not exist;
- b. The Estate at Westbury Owners Association be required to plan and construct an alternative access to the Estate Property for regular ingress and egress to the Estate Property for its residents, guests, and vendors within a reasonable timeframe.

- c. Establishing the rights and responsibilities of the Plaintiff and Defendant in the period of construction of the new access to the Estate Property, including establishing the amount of payments owed to Westbury Park during the period of construction for the maintenance and use of the streets used as ingress and egress to the Estates;
- d. Awarding attorney's fees and costs of this action to Plaintiff;
- e. Any and all other just and reasonable relief.

FOR A FIFTH CAUSE OF ACTION

In the Alternative

(Declaratory Judgment)

(No Easement Exists and Requiring Estate at Westbury to Construct Alternative Access to Property)

68. All allegations of the preceding paragraphs 1 through 53 are repeated as if fully restated verbatim herein.

69. As stated above, the Apartment's Declaration which purportedly conveyed use rights to the Estate Property was created and filed in violation of SC Code Ann. § 30-5-30 (1976) (as amended).

70. In the alternative, while an agreement for use rights may have existed between the parties and their successors, no easement was granted.

71. Reasonable alternative means for ingress and egress exist to the Estate Property.

72. Westbury Park Residential Association, Inc. is entitled to an order declaring that:

- a. No easement exists;

- b. Reasonable alternative means to access the Estate property exists;
- c. The Estate at Westbury Owners Association be required to plan and construct an alternative access to the Estate Property for regular ingress and egress to the Estate Property for its residents, guests, and vendors within a reasonable time;
- d. Establishing the rights and responsibilities of the Plaintiff and Defendant in the period of planning and construction of the new access to the Estate Property;
- e. Awarding outstanding amounts owed by Defendant under the use agreement to Plaintiff;
- f. Awarding attorney's fees and costs of this action to Plaintiff;
- g. Any and all other just and reasonable relief.

AS A SIXTH CAUSE OF ACTION

In the Alternative

(Unjust Enrichment)

77. Paragraphs 1 through 53 are repeated as if fully restated verbatim herein.

78. In the alternative, the Defendant enjoys a substantial benefit from the security of the gates and in the ingress to and egress from its property.

79. The Plaintiff suffers the significant burden of unilaterally maintaining and securing the gates, the streets, lighting, landscaping and areas which the Defendant enjoys, as further detailed above herein.

80. The access increases Estate of Westbury property values while decreasing the quality of life and property values of Westbury Park and its owners and residents.

81. The scheme of creating a single access to the Estates through Westbury Park was created by a Developer for the benefit of the Developer and to the detriment of the communities and residents that will otherwise have to suffer the burden of the scheme after the develop derived inequitable benefits from the scheme.

82. If an easement to the benefit of the Estate Property exists, and, if the Court determines that the payment terms of the Apartment Declaration were not renewed, it is unjust to allow Defendant to continue to enjoy the ingress and egress over the streets, increased property values, and enjoy the security of the gate and patrols all borne by Plaintiff, while Plaintiff bears all expense to the maintenance and upkeep of the streets, the gate, the nuisance of the great volume of traffic, and damage to Plaintiff's property and property values, all caused by Defendant's use and abuse of the same.

83. As a direct result of the Defendant's unjust enrichment, the Plaintiff is damaged, and continues to be damaged, and is entitled to an award of damages in a reasonable amount and an Order setting forth Defendant's obligation to continue to pay a reasonable amount for ingress and egress over those certain streets, the gate, and other benefits associated with the same.

AS A SEVENTH CAUSE OF ACTION

In the Alternative

(Termination via Changed Conditions and/or Relative Hardship Doctrines)

84. The Plaintiff repeats paragraphs 1 through 53 and 82 through 87 as if fully restated verbatim herein.

85. The Apartment Declaration was drafted by a Declarant for the benefit of the Developer/Declarant and not for the benefit of Westbury Park.

86. The design of the communities, with limited ingress and egress via a limited shared residential corridor, was not intended as a long-term solution and is not congruent with modern planning and land use requirements and practices, the developments have been completely built out with limited ingress and egress points.

87. The Estate at Westbury has abused its access through Westbury Park and its right to use the gate.

88. The Estate at Westbury has refused to reasonably contribute to the management and expense of the shared roadways and common gates to the association after repeated demands.

89. By converting the Estate Property to condominium units from apartment units, the Declarant substantially changed the character, use and nature of the Estate Property, converting the property from one owner to 320 owners, substantially injuring the residential community of Westbury Park without the input or authority of owners from Westbury Park, forever, through a developer-controlled board.

90. The developer designed the alleged easement, the Estate at Westbury payment obligations, and converted the Estate at Westbury to a condominium regime for its benefit and not for the benefit of Westbury Park, which now suffers the burden and expense of the alleged easement, factors outside of the control of the Parties to this action.

91. If the Court determines the easement exists and if the Estate at Westbury bears no payment obligations to Westbury Park, Westbury Park is left with the obligation, burden and expense of the maintenance of the roads subject to the easement, the thoroughfares subject to the easement, maintenance of the gates,

administration of the security of the properties, and forced to suffer the traffic, lack of control and property devaluation caused by the easement.

92. The easement should be terminated given the changed conditions of the properties.

93. The easement should be terminated given the relative hardship the easement burdens Westbury Park and its residents.

94. The Plaintiff prays for an order terminating the alleged non-exclusive easement over Westbury Park property and ordering the Estate at Westbury to plan and design a separate entrance suitable for their owners, residents and vendors.

AS AN EIGHTH CAUSE OF ACTION
(*Reservation*)

95. The Plaintiff repeats all preceding paragraphs as if fully repeated verbatim herein.

96. The Plaintiff reserves leave to freely amend this complaint to add additional causes of action, conform the pleadings as facts and evidence are further determined, or otherwise modify the pleadings.

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WHEREFORE, the Plaintiff prays that the Court inquire into the matters herein and grant judgment against Defendant pursuant to the pleadings herein, grant Plaintiffs an award of pre-judgment interest, attorney's fees, costs, and for such other and further relief as the Court may deem just and proper.

s/ Benjamin T. Shelton

Benjamin T. Shelton

SC Bar No 77207

FINGER, MELNICK & BROOKS, P.A.

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email: bshelton@fingerlaw.com

Hilton Head Island, South Carolina

January 24, 2020

EXHIBIT 3

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**DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS
AND EASEMENTS FOR PALMETTO LAKES APARTMENTS
AT WESTBURY PARK**

This Declaration of Covenants, Conditions and Restrictions ("Declaration") is made this 10th day of November, 1998, by Plantation Properties, L.L.C., a South Carolina Limited Liability Company ("Declarant") as follows:

ARTICLE I

RECITALS

1.01 Declarant is the owner of the approximately twenty (20) acre parcel of real property in Bluffton Township, Beaufort County, South Carolina; more fully described on attached Exhibit "A" (the "Property").

1.02 General Plan: To establish a general plan for the improvement and development of the Property, Declarant hereby subjects the Property to the conditions, covenants and restrictions set out below, upon and subject to which all of the Property shall be hereafter owned, leased, hypothecated and used.

ARTICLE III

GENERAL PROVISIONS

2.01 Establishment of Restrictions: Declarant, owner of the Property, hereby declares that the Property is now held, and shall hereafter be owned, leased, hypothecated and used subject to the restrictions set forth in this Declaration, each and all of which is and are for, and shall inure to the benefit of, and pass with, and be enforceable as equitable servitudes by the Owner or Lessee of each and every portion of the Property, and shall apply to and bind the heirs, assignees and successors in interest of any Owner or Lessee of each and every portion of the Property.

2.02 Purpose of Restrictions: The purposes of these restrictions is to insure proper development and use of the Property to be in keeping with the community wide standards established for the Westbury Park Commercial Subdivision, and the Westbury Park Residential Subdivision, the latter of which is contiguous to the Property.

2.03 Definitions:

(a) Improvements: "Improvements" shall mean and include buildings, out-buildings, parking areas, loading areas, fence, walls, landscaping, poles, signs and any structures of any type or kind.

(b) Owner: "Owner" shall mean the owner of the fee interest in the Property.

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(c) Plat: That certain Plat thereof prepared by Surveying Consultants entitled "ALTA/ACSM Land Survey of 20.00 Acre Parcel, a Section of Block X-1 a Portion of Rose Hill Plantation, Bluffton Township, Beaufort County, South Carolina, dated the 7th day of October, 1998 and recorded in the records of the RMC Office for Beaufort County, South Carolina in Plat Book 67 Page 118."

(d) Required Streets: "Required Streets" shall mean Westbury Park Way and Kensington Boulevard as shown on the Plat.

(e) Westbury Park Commercial Area: "Westbury Park Commercial Area" shall mean all those certain lots, roadways and common areas more fully shown and described on a Plat of Westbury Park Commercial, Beaufort County, South Carolina prepared for Plantation Properties, L.L.C. by Thomas & Hutton Engineering Co. dated March 10, 1997, recorded in the Office of the Register of Mesne Conveyance for Beaufort County, South Carolina in Plat Book 63 at Page 183.

(f) Westbury Park Residential Area: "Westbury Park Residential Area" shall mean all or any portion of that tract of land situate, lying and being in Rose Hill Planned United Development, Bluffton Township, Beaufort County, South Carolina, containing 128.973 acres, more or less, shown and described as "BLOCK X-1" on that certain plat entitled "A Plat of Block X-1, X-2, X-3, and X-4 being a portion of Block "X" prepared by Thomas & Hutton Engineering Co., Boyce L. Young, SCRLS 11079, dated December 30, 1996 and recorded in the RMC Office for Beaufort County, South Carolina in Plat Book 58 at Page 198, less and except the Property.

2.04 Prior to Construction: "Prior to construction", the Owner shall maintain the Property in a neat and orderly condition free of weeds and other debris.

ARTICLE III

REGULATION OF IMPROVEMENTS

3.01 County Requirements:

(a) Nothing herein shall supersede the County of Beaufort's present or future requirements and ordinances. All of said requirements and ordinances, shall prevail, and it shall be the responsibility of Owner to conform to them.

(b) General: No structure, of any kind, and no part thereof, shall be placed on the Property closer to the property line than permitted by the County of Beaufort, giving consideration to any variance that may be obtained.

3.02 Completion of Construction: After commencement of construction of any structure, the Owner shall diligently prosecute the work thereon, to the end that the structure shall not remain in partly finished condition any longer than reasonably necessary for completion thereof.

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3.03 Excavation: No excavation shall be made except in connection with construction of an improvement, and upon completion thereof exposed openings shall be backfilled and disturbed ground shall be graded.

3.04 Landscaping: Landscaping shall be installed prior to occupancy or within sixty (60) days after the completion of the first building on the Property, whichever occurs first. All areas in the Property not used for structures, parking, storage, sidewalks, amenities, driveways and other improvements, shall be planted and maintained with grass and landscaping.

3.05 Signs: No billboard or advertising sign shall be permitted. No attached or detached signs or displays identifying Owner or the apartment complex on the Property shall be used unless their design has first been submitted to and approved by Declarant in writing, so as to assure a dignified and basically uniform appearance of all signs and displays within the Property.

3.06 Storage and Loading Areas - Outside Storage: After all construction of the Improvements is complete, no construction, landscape or maintenance material, supplies or products shall be stored or permitted to remain on the Property in unscreened areas. Screening of storage areas shall be accomplished by the use of landscaping, walls, buildings, fencing or any combination thereof, to a height sufficient to screen the stored items, except that such height shall not exceed eight feet.

3.07 Waste Disposal: No waste material or refuse shall be dumped, placed or (except during construction) allowed to remain on the Property outside a permanent structure unless it is in closed containers of a quality to control odors and behind a visual barrier screening such areas so that they are not visible from neighboring properties or public streets. All such waste and trash materials shall be regularly removed and shall not be allowed to accumulate.

3.08 Off-Street Parking:

(a) The arrangement, access and number of all parking spaces and lots shall conform to applicable County of Beaufort requirements and ordinances, giving consideration to any variances that may be obtained.

(b) Automobile parking areas shall be provided with entrances, exits and aisles adequate to provide safe movement of vehicles.

(c) Subject to the Development Regulations of Beaufort County, South Carolina, the front yard and exterior side yard setback areas may be used for parking and access ways. However, not less than 20 feet of the setback areas (exclusive of wetlands), as measured from the property line, shall be landscaped.

(d) Adequate off-street parking shall be provided to accommodate all parking needs of employees, tenants and visitors on the Property.

3.09 Trucking and Loading:

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- (a) Adequate turn around room area shall be provided for safe operation of trucks in loading areas.
- (b) Trucking areas shall be adequately designed and paved for the type of operation intended.

3.10 Building Regulations: Any building erected on the Property shall conform to the following construction practices:

- (a) The exterior of all structures erected on the Property shall be constructed in accordance with the Approved Plans (as hereinafter defined).
- (b) All buildings erected shall conform to the applicable building codes and ordinances of the County of Beaufort, giving consideration to any variance that may be obtained.
- (c) Exterior walls shall be painted or suitably treated in accordance with the Approved Plans.

3.11 Care, Maintenance and Repairs: All structures, landscaping and improvements from time to time placed upon the Property in accordance with the terms hereof or the requirements and ordinances of the County of Beaufort shall be maintained in good clean condition and repair at all times, normal wear and tear excepted.

3.12 Drainage: All drainage of water from the Property and Improvements thereon shall drain or flow into easement areas provided for such purpose as shown on the Plat, and all slopes and terraces shall be maintained as to prevent any erosion thereof upon any streets or adjoining property and in accordance with the applicable ordinances of the County of Beaufort and the State of South Carolina.

ARTICLE IV

APPROVAL OF PLANS

4.01 Submission of Plans: No improvements shall be erected, placed, altered, maintained or permitted to remain on the Property until plans and specifications showing plot layout and all exterior elevations, with materials and colors therefor and structural designs, signs, landscaping, and a tree survey indicating trees to be removed and replaced shall have been submitted to and approved in writing by Declarant (the "Approved Plans").

4.02 Standards for Approval: Approval by Declarant shall be based, among other things, on conformity and harmony of external design with neighboring sites; relation to topography, grade and finished ground elevation of the site being improved to that of neighboring sites; proper design of main exterior elevation with respect to nearby streets; and conformity of plans and specifications to the purpose and general plan and intent of these restrictions. All structures and walls shall be

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constructed of maintenance free durable material. Declarant shall not arbitrarily or unreasonably withhold its approval of such plans and specifications.

4.03 Time for Approval: If Declarant fails to either approve or disapprove such plans and specifications within twenty (20) days after the same have been submitted to and received by Declarant it shall be conclusively presumed that Declarant has approved the plans and specifications.

Upon receipt of approval from Declarant pursuant to this section, the Owner to whom the same is given shall, within six (6) months of acquisition of title, satisfy all conditions thereof, subject to force majeure, and diligently proceed with the commencement and completion of all approved construction and alterations. In all cases, work shall be substantially completed within two (2) years from the date of commencement of construction. If there is a failure to comply with this paragraph, then the approval given pursuant to this section shall be deemed revoked unless Declarant, upon written request made to it prior to the expiration of said two (2) year period, grants a written extension of the time for completing work.

4.04 Release of Liability: Neither Declarant nor its successors or assigns shall be liable for damages to anyone submitting plans to them for approval or to any Owner affected by this Declaration, by reason of a mistake in judgment, negligence or nonfeasance arising out of or in connection with the approval or disapproval or failure to approve any such plans. Every person who submits plans to Declarant for approval agrees, by submission of such plans, and every Owner of the Property agrees, by acquiring title thereto or interest therein, that he will not bring any action or suit against Declarant to recover any such damages.

ARTICLE V

REGULATION OF OPERATIONS AND USES

5.01 Permitted Operations and Uses: The Property is subject to the restriction that it be used for the construction and operation of an apartment complex to contain not more than three hundred twenty (320) apartments, which shall be utilized for residential purposes only.

5.02 Other Operations and Uses: The Owner shall be subject to the following restrictions:

(a) Resubdivision of the Property: The property shall not be split, divided or subdivided for sale, resale, gift, transfer or otherwise, nor shall its boundary lines be altered, without the prior written approval of Declarant.

(b) Temporary Buildings: No temporary building, trailer, garage or building under construction shall be used temporarily or permanently as a residence on the Property except as temporary sleeping or living quarters required or desirable for security purposes. Owner or Owner's contractors may use temporary structures, such as construction trailers while developing the Property.

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(c) Fences: No fence or wall of any kind shall be erected, maintained or altered on the Property without the prior approval of Declarant.

(d) Antenna/Satellite Dish: Except with the prior written approval of Declarant, no outside television or radio aerial, satellite dish or antenna or other device for the reception and transmission of radio or television or other electronic signals, including telecommunications towers shall be erected or maintained on any portion of the Property or upon the exterior of any buildings erected on the Property. Declarant shall approve an application for the installation of one (1) satellite dish to provide television services to the apartments, so long as the satellite dish or other receiving device shall not be visible from the ground on any property contiguous to the Property.

(e) Clothes lines, Garbage Cans, Mailboxes: No clothes lines visible from any property contiguous with the Property shall be permitted. All equipment and garbage cans shall be kept in a garbage can screened by adequate planning or approved fencing so as to conceal them from view by neighboring residence and streets.

(f) Parking and Related Restrictions: (i) No vehicle belonging to Owner or any of Owner's tenants shall be permitted to park on any of the streets that provide access to the Property that are not contained within the Property or on any property contiguous to the Property; and (ii) no school bus, truck (other than pick-up trucks), commercial vehicle (over one (1) ton capacity), house trailer, mobile home, motor home, recreational vehicle, camper, habitable motor vehicle of any kind, boat or boat trailer, or like equipment shall be permitted on the Property on a permanent basis unless stored within garages or carports.

(g) Lagoon Front and Wetlands: Owner and Owner's tenants shall conform to all restrictions placed by applicable laws, ordinances and covenants on lagoons or wetlands on the Property.

(h) Solid Waste: (i) Neither Owner nor any of Owner's tenants shall dump rubbish, garbage or any other form of solid waste on the Property; (ii) except during construction, neither Owner nor any other contractor shall burn rubbish, garbage or any other form of solid waste on the Property; (iii) except for building materials employed during the course of any construction on the Property, no lumber, metals, bulk materials or solid waste of any kind shall be kept, stored or allowed to accumulate on the Property unless screened or otherwise handled in a reasonable manner; and (iv) at all times, containers for the collection of rubbish, garbage or any other form of solid waste must be maintained in a screened or enclosed area.

(i) Nuisances: No noxious or offensive activity shall be carried on upon the Property, nor shall anything be done on the Property by Owner or any of Owner's tenants which may be or may become a public or private nuisance to the Westbury Park community.

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ARTICLE VI

ENFORCEMENT

6.01 **Equitable Servitudes:** All of the provisions herein contained shall run with the land and shall be enforceable at law or in equity as equitable servitudes by Declarant.

6.02 **Attorneys Fees:** In any legal or equitable proceeding for the enforcement of this Declaration or to restrain any violation of this Declaration or any provision hereof, the prevailing party shall, in addition to all other costs, be entitled to recover from the non-prevailing party reasonable attorneys' fees. All remedies provided herein or at law or in equity shall be cumulative and not exclusive.

6.03 **Inspection:** Declarant may from time to time at any reasonable hour or hours, and after reasonable notice to Owner, enter and inspect any property subject to these restrictions (other than the interior of any apartments) to ascertain compliance therewith. No such entry or inspection shall disrupt or disturb any of Owner's tenants or Owner's operations of the Property, unless Owner's tenants or Owner's operation of the Property are the cause for entry.

6.04 **Failure to Enforce Not a Waiver of Rights:** The failure of Declarant or any Owner to enforce any restriction herein contained shall in no event be deemed to be a waiver of the right to do so thereafter nor of the right to enforce any other restriction.

ARTICLE VII

EASEMENTS

7.01 **Easements for Declarant:** Declarant hereby reserves for itself its successors and assigns the "Relocatable 20' Sanitary Sewer Easement" and that certain "Relocatable 20' Storm Drain Easement" as more fully shown on that certain Plat entitled "ALTA/ACSM Land Title Survey of 20 Acre Parcel, Westbury Park, a section of BLOCK X-1 a portion of Rose Hill PUD, Bluffton Township, Beaufort County, South Carolina" prepared for Declarant by Surveying Consultants, dated October 7, 1998, a copy of which is recorded in the records of the Office of the Register of Mesne Conveyance for Beaufort County, South Carolina in Plat Book 67 at Page 118 ("Plat"). Owner shall have the right to relocate the easements described herein prior to its commencement of construction of improvements on the Property, provided such relocation does not make the easements unusable.

7.02 **Easements for Owner:** Subject to the provisions hereof and the restriction contained in Subparagraph 7.02(a) hereafter, Owner, its successors and assigns, Owner's tenants, all guests and invitees of such tenants/owners, all employees, contractors, suppliers, vendors and other representatives of Owner and all other persons who reasonably need, on Owner's behalf, access to the "Property" shall have a right and easement of use of those certain easements as hereinafter more fully described as shown on the Plat.

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(a) Perpetual non-exclusive right for vehicular and pedestrian access over and across Westbury Park Way from its intersection with US Highway 278 and its intersection with Kensington Boulevard. This right-of-way is relocatable by Declarant and/or Buck Island, L.L.C. provided such relocated easement affords the Property adequate and proper access to and from US Highway 278. It is specifically agreed and understood notwithstanding anything to the contrary herein, construction traffic and construction suppliers are prohibited from utilizing this easement for access to or from the Property. Owner shall be responsible to place signs directing all construction traffic and construction suppliers going to the Property to only use Kensington Boulevard as shown on the Plat, and to insert provisions within construction contracts specifying the allowable access route.

(b) Perpetual non-exclusive right for vehicular and pedestrian access over and across Kensington Boulevard from its intersection with Buck Island Road to its intersection with the Property.

(c) Permanent, non-exclusive easement for Owner's directional signs, as approved by Declarant pursuant to the provisions herein, at the approximate locations shown as follows on the Plat:

1. At the intersection of the east right-of-way of Buck Island Road and Kensington Boulevard; the easement for this sign shall not be relocatable;

2. At the southwest corner of Kensington Boulevard and Westbury Park Way; this easement can be relocated provided that the relocated directional sign easement must afford adequate and proper directions to the Property from US Highway 278 and Buck Island Road; and

3. At the northwest corner of the intersection of Arley Way and Westbury Park Way; this easement can be relocated provided that the relocated directional sign easement must afford adequate and proper directions to the Property from US Highway 278.

(d) Permanent, Non-Exclusive Twenty-Five Foot (25') Storm Drain Easement as more fully shown on the Plat.

(e) A Five Foot (5') Utility Easement (measured from the center line of buried utility cables and lines) on each sides of said buried utility cables and lines within the rights-of-way of Kensington Boulevard for the purpose of installing, maintaining, repairing, replacing and/or relocating when necessary any utility lines providing utilities to the Property.

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ARTICLE VIII

ASSESSMENTS

8.01 The Owner, its successors or assigns (but not tenants), by accepting a Deed to the Property is deemed to covenant and agree to pay an assessment ("Assessment") to Declarant, or its assigns on an annual basis the sum of \$17,500.00 as its share of the costs for maintenance of the Required Streets and landscaping along the Required Streets and around and within parks within the Westbury Park Residential Area and the Westbury Park Commercial Area. This Assessment shall become due and payable on February 1 of each year and if not paid shall bear interest at the rate of ten percent (10%) per annum until paid. The reasonable care and replacement of the Required Streets and landscaping within the Westbury Park Residential Area shall remain the responsibility of the Westbury Park Residential Owners Association, Inc., and the reasonable care and replacement of the Required Streets and landscaping within the Westbury Park Commercial Area shall remain the responsibility of the Westbury Park Commercial Center Property Owners Association, Inc.

8.02 The Assessment as set forth hereinabove shall commence on January 1, 1999, be adjusted annually to reflect changes in the Consumer Price Index for all Urban Consumers, All Items (Base Year 1982-1984 = 100) published by the United States Department of Labor, Bureau of Labor Statistics, all city average. Under no circumstances will the Annual Assessment fall below the minimum of \$17,500.00 per year.

8.03 The Assessment shall, if not paid within thirty (30) days of its due date, constitute a lien against the Property until paid. The lien shall also secure payment of interest, late charges (subject to the limitations of South Carolina Law) and costs of collection (including attorney and paralegal fees). Such lien shall be superior to all other liens, except: (a) the liens of all taxes, bonds, Assessments and other levies which by law would be superior, and (b) the lien or charge of any first priority mortgage of record made in good faith and for value. Notwithstanding the foregoing to the contrary, the subordination of the Assessment lien to the lien of any first priority mortgage of record shall only apply to such Assessments which have become due and payable prior to foreclosure. Any mortgagee who acquires title to the Property by foreclosure shall be liable for Assessment thereafter becoming due. All other persons acquiring liens or encumbrances on the Property after this Declaration shall have been recorded shall be deemed to consent that such liens or encumbrances shall be inferior to such future liens for assessments as provided herein, whether or not such prior consent shall be specifically set forth in the instruments creating such liens or encumbrances.

ARTICLE IX

TERM, TERMINATION, MODIFICATION AND ASSIGNMENTS OF DECLARANT'S RIGHTS AND DUTIES

9.01 Term: This Declaration, every provision hereof and every covenant, condition and restriction contained herein shall continue in full force and effect for a period of twenty (20) years from and after the date of recording of this Declaration, provided that rights and easements which are stated herein to have a longer duration shall have such longer duration. This Declaration may

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be renewed for an unlimited number of successive ten (10) year periods by the Declarant, its successors or assigns filing a notice of extension with the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina prior to the expiration of any term.

9.02 Termination and Modification: This Declaration, or any provision hereof, or any covenant, condition or restriction contained herein, may only be terminated, extended, modified or amended, as to the whole of said Property or any portion thereof by the Declarant and Owner jointly. No such termination, extension, modification, or amendment shall be effective until a proper instrument in writing has been executed and acknowledged and recorded in the Office of the Register of Mesne Conveyance for Beaufort County, South Carolina. No such termination, extension, modification or amendment shall be in violation of County requirements and/or ordinances.

9.03 Assignments of Declarant's Rights and Duties: Any or all of the rights, powers and reservations of Declarant herein may be assigned to any person, corporation or association which will assume the duties of Declarant pertaining to the particular rights, powers and reservations assigned, and upon any such person, corporation or association evidencing its consent in writing to accept such assignment and assume such duties, he or it shall, to the extent of such assignments, have the same rights and powers and be subject to the same obligations and duties as are given to and assumed by Declarant herein. The term "Declarant" as used herein includes all such assignees and their heirs, successors and assigns.

ARTICLE X

MISCELLANEOUS PROVISIONS

10.01 Constructive Notice and Acceptance: Every person who now owns or acquires any fee simple title in or to any portion of the Property is and shall be conclusively deemed to have consented and agreed to every covenant, condition and restriction contained herein, whether or not any reference to this Declaration is contained in the instrument by which such person acquired an interest in said property.

10.03 Paragraph Headings: Paragraph headings, where used herein, are inserted for convenience only and are not intended to be a part of this Declaration or in any way to define, limit or describe the scope and intent of the particular paragraphs to which they refer.

1235

10.04 Effect of Invalidation: If any provision of this Declaration is held to be invalid by any final judgment in a contested judicial proceeding the invalidity of such provision shall not affect the validity of the remaining provisions hereof and the same shall remain in full force and effect.

WITNESSES:

Karen B. Murphy

[Signature]

PLANTATION PROPERTIES, L.L.C.

By: James N. Richardson, Jr.
Its: Managing Member

Attest:

By: William W. Jones, Jr.
Its: Member

Buck Island, L.L.C. joins in this Declaration for the sole purpose of confirming the easements granted in Paragraphs 7.02(a) and 7.02(c)(3), and for no other purposes whatsoever.

WITNESSES:

Karen B. Murphy

[Signature]

BUCK ISLAND, L.L.C.

By: [Signature]
Its: MANAGING PARTNER

Attest:

By: William W. Jones, Jr.
Its: Member

1236

STATE OF SOUTH CAROLINA)

PROBATE

COUNTY OF BEAUFORT)

PERSONALLY appeared before me the undersigned witness, who, on oath; says that s/he saw the within named PLANTATION PROPERTIES, L.L.C., by its appropriate officers, sign and seal the within written instrument, and as its act and deed deliver the same, and that s/he with the other witness, whose signature appears above, witnessed the execution thereof.

Karen B. Murphy

SWORN TO before me this 10th
day of November, 1998

[Signature]
Notary Public for South Carolina

My Commission Expires: Oct 19, 2003

STATE OF SOUTH CAROLINA)

PROBATE

COUNTY OF BEAUFORT)

PERSONALLY appeared before me the undersigned witness, who, on oath; says that s/he saw the within named BUCK ISLAND, L.L.C., by its appropriate officers, sign and seal the within written instrument, and as its act and deed deliver the same, and that s/he with the other witness, whose signature appears above, witnessed the execution thereof.

Karen B. Murphy

SWORN TO before me this 10th
day of November, 1998

[Signature]
Notary Public for South Carolina

My Commission Expires: Oct 19, 2003

ST. 2-A:DISK#5\PALMETTO.COV

1237

EXHIBIT "A"**Legal Description**

ALL that certain piece, parcel or tract of land lying and being in Bluffton Township, Beaufort County, South Carolina, containing 20.00 acres, more or less, shown and described on that certain plat entitled "ALTA/ASCM Land Title Survey of 20.00 Acre Parcel, Westbury Park, A Section of Block X-1, A Portion of Rose Hill P.U.D., Bluffton Township, Beaufort County, South Carolina" prepared by Terry G. Hatchell, SCRLS #11059 of Surveying Consultants, dated October 7, 1998, revised on October 28, 1998, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Plat Book 67, page 118 ("Plat") ("Property"). For a more detailed description, reference is made to said Plat of record.

EXHIBIT 4

**AMENDMENT TO DECLARATION OF COVENANTS, CONDITIONS,
RESTRICTIONS AND EASEMENTS FOR PALMETTO LAKES APARTMENTS
AT WESTBURY PARK**

This Amendment to Declaration of Covenants, Conditions, Restrictions and Easements is effective as of the 1st day of November 2005 (the "Effective Date") by and between Plantation Properties, L.L.C., a South Carolina limited liability company ("Declarant"), and Montecito Westbury, LLC ("Owner"), and amends that certain Declaration of Covenants, Conditions, Restrictions and Easements for Palmetto Lakes Apartments at Westbury Park (the "Declaration") dated November 10, 1998 and recorded in the Office of the Register of Mesne Conveyance for Beaufort County, South Carolina, in Book 1106 at Page 1225, as follows:

1. The following sentence shall be inserted at the end of Section 5.01: "Notwithstanding the foregoing, nothing herein shall be interpreted or applied to prohibit or limit the conversion of the Property to the condominium form of ownership or use of the Property for condominiums."

2. The following sentence shall be inserted at the end of Section 5.02(a): "Notwithstanding the foregoing, nothing herein shall be interpreted or applied to prohibit or limit the conversion of the Property to the condominium form of ownership."

3. The following shall be inserted as new Section 7.02(f): "Owner, its successors and assigns, Owner's tenants, all guests and invitees of such tenants/owners shall not have use rights or easement access to the Westbury Park Residential Area amenities, including parks, swimming pools and pool houses."

4. The first two sentences of Section 8.01 shall be deleted and, the following sentences shall be inserted at the beginning of Section 8.01. "The Owner, its successors or assigns, by accepting a Deed to the Property is deemed to covenant and agree to pay an assessment ("Assessment") to Declarant, or its assigns on a monthly basis in the amount of \$7,200 as its share of the costs for maintenance of the Required Streets and landscaping along the Required Streets and around and within parks within the Westbury Park Residential Area and the Westbury Park Commercial Area. This assessment shall become due and payable on the 15th day of each month, and if not paid shall bear interest at the rate of ten percent (10%) per annum until paid. In the event the Owner converts the Property to the condominium form of ownership, the resulting condominium association shall have the obligation to collect adequate funds from the individual unit owners and pay the Assessment directly to the Declarant."

5. Section 8.02 shall be deleted and the following sentence shall be inserted at the beginning of Section 8.02. "The Assessment as set forth hereinabove shall commence on January 1, 2006, and shall be adjusted annually to reflect changes in the Consumer Price Index for all urban Consumers, All Items (base year 1982-1984=100) published by the United States Department of Labor, Bureau of Labor Statistics, all city average. Under no circumstance will the Annual Assessment fall below the minimum of \$86,400.00 per year."

BEAUFORT COUNTY SC- ROD

BK 02289 PGS 1997-1999

DATE: 11/16/2005 10:36:01 AM

INST # 2005097730 RCPT# 376572

6. The following is added as a new Section 8.04: "For the calendar year in which the Property is converted to the condominium form of ownership ("Conversion"), the Owner shall be responsible for the Assessment prorated to, but not including, the date of Conversion. In the calendar year in which the Conversion occurs, the owner of each condominium unit shall only be responsible for its prorata share of the Assessment, such proration being in accordance with The Horizontal Property Act of South Carolina, applicable from and including the date of Conversion to the remainder of such calendar year. Subsequent to the calendar year in which Conversion occurs, the owner of each condominium unit shall only be responsible for its prorata share of the Assessment, in accordance with The Horizontal Property Act of South Carolina. Otherwise, the provisions of Article VIII of the Declaration shall apply."

7. Declarant warrants and represents to Owner that Declarant has not assigned any of its rights of enforcement or modification under the Declaration.

8. All terms not defined herein shall have their assigned meaning in the Declaration.

In all other respects, the Declaration is hereby ratified and confirmed.

IN WITNESS WHEREOF, Declarant and Owner have caused this instrument to be executed as of the Effective Date.

WITNESS:

WITNESS:

Name: JANET A. SMITH

DECLARANT:

PLANTATION PROPERTIES, L.L.C.

By:

Name: James N. Richardson, Jr.

Title: Managing Member

STATE OF SOUTH CAROLINA)

COUNTY OF BEAUFORT)

PROBATE

PERSONALLY appeared before me the undersigned witness, who, on oath; says that s/he saw the within named PLANTATION PROPERTIES, L.L.C., by its appropriate member, sign and seal the within written instrument, and as its act and deed deliver the same, and that s/he with the other witness, whose signature appears above, witnessed the execution thereof.

SWORN TO before me this 27
day of October, 2005

Notary Public for South Carolina

My Commission Expires: 8-8-2011

OWNER:

WITNESS:

MONTECITO WESTBURY, LLC, a Delaware limited liability company

Julie L. Douglass
 Name: Julie L. Douglass
Carolyn K. Cloud

Carolyn K. Cloud

By: James B. Porter
 Name: James B. Porter
 Title: Vice President

STATE OF FLORIDA)

COUNTY OF DUVAL)

PROBATE

PERSONALLY appeared before me the undersigned witness, who, on oath; says that s/he saw the within named MONTECITO WESTBURY, LLC by the appropriate officer of its appropriate partner, sign and seal the within written instrument, and as its act and deed deliver the same, and that s/he with the other witness, whose signature appears above, witnessed the execution thereof.

SWORN TO before me this 1st
 day of November, 2005

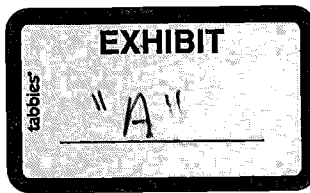
Julie L. Douglass
 Notary Public for Florida Julie L. Douglass
 My Commission Expires: _____

Julie L. Douglass
Carolyn K. Cloud

Carolyn K. Cloud



EXHIBIT 5



STATE OF SOUTH CAROLINA)
)
COUNTY OF BEAUFORT)

ESTATE PAYMENT DIVISION AGREEMENT AND ASSIGNMENT

THIS ESTATE PAYMENT DIVISION AGREEMENT AND ASSIGNMENT is made and entered into this ____ day of _____, 2015, among Plantation Properties, LLC (hereinafter "PPLLC"), Westbury Park Residential Association, Inc. (hereinafter "ROA") and Westbury Park Commercial Center Property Owners' Association, Inc. (hereinafter "COA").

AGREEMENT

WHEREAS, on November 1, 2005, PPLLC entered into an "Amendment to Declaration of Covenants, Conditions, Restrictions and Easements for Palmetto Lakes Apartments at Westbury Park" with Montecito Westbury, LLC, pursuant to which certain assessment funds are paid to PPLLC on a monthly basis in connection with the Estate at Westbury Park condominiums (the "Estate Funds"), which is incorporated herein by reference and referred to as the "Estate Agreement;" and,

WHEREAS, PPLLC does agree that beginning on August 1, 2015 to relinquish any rights that it may have to the Estate Funds and assign such Estate Funds to the ROA and COA; and,

WHEREAS, the COA agrees not to pursue, by lawsuit or other means, PPLLC for any Estate Funds paid to PPLLC prior to August 1, 2015; and,

WHEREAS, the ROA and COA have entered into an agreement as to the division of the Estate Funds between them, whereby beginning on August 1, 2015 the Estate Funds are to be divided 80% to the ROA and 20% to the COA; and,

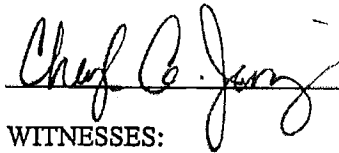
NOW, THEREFORE, for and in consideration of the sum of Ten and 00/100 Dollars (\$10.00) paid in hand by the ROA and COA to PPLLC, the receipt and sufficiency whereof is hereby acknowledged, PPLLC does, hereby assign, set over, transfer and convey to the ROA and COA, and their respective successors and assigns: a) all of PPLLC's rights, title and interest in and to the Estate Agreement; and b) all of PPLLC's rights, title and interest in and to the Estate Funds.

The ROA and the COA agree that the Estate Funds will be divided between them as follows: ROA: eighty percent (80%); COA: twenty percent (20%). The Estate Funds will be paid to the ROA which will remit the COA's portion of the funds within twenty (20) days of receipt of the same. The ROA shall not charge any administration fee for its collection and handling of the Estate Funds; provided, however, if legal action is necessary to collect the Estate Funds, the costs of collection shall be prorated and deducted from the Estate Funds. The ROA and COA agree to cooperate with each other in any required collection efforts regarding the Estate Funds.

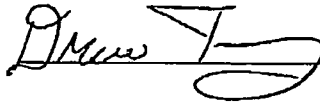
IN WITNESS WHEREOF, the undersigned have executed this document as of the day and year first above written.

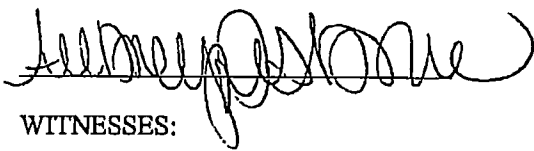
WITNESSES:





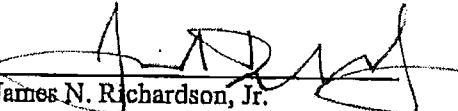
WITNESSES:



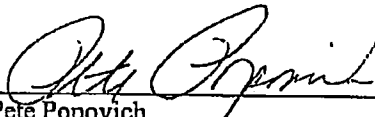


WITNESSES:

PLANTATION PROPERTIES, LLC

By: 
James N. Richardson, Jr.
Managing Member

WESTBURY PARK RESIDENTIAL
ASSOCIATION, INC.

By: 
Pete Popovich
President

WESTBURY PARK COMMERCIAL
CENTER PROPERTY OWNERS'
ASSOCIATION, INC.

By: _____
Richard L. Boeke
President

IN WITNESS WHEREOF, the undersigned have executed this document as of the day and year first above written.

WITNESSES:

PLANTATION PROPERTIES, LLC

By: _____
James N. Richardson, Jr.
Managing Member

WITNESSES:

WESTBURY PARK RESIDENTIAL
ASSOCIATION, INC.

By: _____
Pete Popovich
President

WITNESSES:

WESTBURY PARK COMMERCIAL
CENTER PROPERTY OWNERS'
ASSOCIATION, INC.

By: Richard L. Boeke
Richard L. Boeke
President

Brooke Boeke
Stephanie M. M.

EXHIBIT 6

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO.: 2020-CP-07-00158

WESTBURY PARK RESIDENTIAL
ASSOCIATION, INC.,

Plaintiff/Counterclaim
Defendant,

v.

ESTATE AT WESTBURY OWNERS
ASSOCIATION, INC.,

Defendant/Counterclaim
Plaintiff.

**ANSWER AND COUNTERCLAIMS
OF ESTATE AT WESTBURY
OWNERS ASSOCIATION, INC.**

TO: BENJAMIN T. SHELTON, ESQUIRE, ATTORNEY FOR PLAINTIFF

Defendant Estate at Westbury Owners Association, Inc. (hereinafter "Defendant" or "Estate at Westbury"), by and through its undersigned counsel, hereby answers the Complaint of Westbury Park Residential Association, Inc. (hereinafter "Plaintiff" or "Westbury Park"). Estate at Westbury denies each and every allegation that is not specifically admitted herein.

ANSWERING PLAINTIFF'S PREAMBLE

Defendant Estate at Westbury denies all allegations within the Plaintiff's "Preamble/Summary of the Case" that are inconsistent with applicable instruments of record which pertain to the parties and the real property that is the subject of this litigation, or that differ in any way from Defendant's summary of the case, to wit:

In or about 1998, an entity called Plantation Properties, LLC (the "Developer" or the "Declarant"), which is not a party to this lawsuit, undertook to develop its large tract

of property in Bluffton, South Carolina. Its scheme of development included commercial, single family residential, and multi-family residential units. By way of various recorded instruments, the Developer subjected the property to covenants, conditions, and easements that run with the land.

The particular subject of this lawsuit is the Declaration of Covenants, Conditions, Restrictions, and Easements for Palmetto Lakes Apartments at Westbury Park, which became effective November 10, 1998. (Exhibit 1; hereinafter the “Apartment Declaration”). The Apartment Declaration sets forth the rights and responsibilities of the Developer/Declarant, as well as the rights and responsibilities of the Owner of the property that was to be developed into multi-family dwelling units (the “Defendant” or “Estates at Westbury” or “Estates”), *inter alia*.¹ Within the Apartment Declaration, the Developer granted a “[p]erpetual, non-exclusive right for vehicular and pedestrian access over and across Westbury Park Way from its intersection with US Highway 278 and its intersection with Kensington Boulevard.” (Ex. 1, p. 8, § 7.02(a), “Easements for Owner”). The Developer also granted a “[p]erpetual, non-exclusive right for vehicular and pedestrian access over and across Kensington Boulevard from its intersection with Buck Island Road to its intersection with the [Estates] Property.” (Ex. 1, p. 8, § 7.02(b), “Easements for Owner”).²

¹ Over time, the property has been owned by several entities. In 2006 the Apartment Property was converted to a horizontal property regime. Thus, the “Owner,” as defined in the Apartment Declaration, are now the title holders of the fee interests in the individual condominium units. The individual fee holders are members of Defendant, a nonprofit corporation. Certain obligations of the Owner were assigned to Defendant in 2005 (*see infra*).

² Within the Apartment Declaration, Kensington Boulevard and Westbury Parkway are referred to and defined as the “Required Streets.”

Thus, as Plaintiff accurately states in its preamble, “When designing the communities, the Developer created access to the Estates **only** through Westbury Park’s residential streets, over Kensington Boulevard and a section of Westbury Parkway.” (Complaint, p. 2) (emphasis added). The Estate has therefore always used those streets for its access, as was intended by the Developer. The Developer’s easement grants are appurtenant and perpetual, by the express terms of the Apartment Declaration, and they are for ingress and egress for vehicles and pedestrians.

Nonetheless, for several years now, the Plaintiff has told the residents of the Defendant Estate that they cannot use the sidewalks, which it claims are Westbury Park amenities, and it has required that residents of Defendant walk in the street. Further, among other things, this lawsuit seeks to require the Estate to gain some other access to its property, despite Plaintiff’s admission that the Developer only planned access as set forth above.

In the Apartment Declaration, the Developer/Declarant also delineated various obligations and covenants, separate and apart from the perpetual easement grants. The Developer’s intent can be construed from the plain language of the Apartment Declaration, which clearly states that “[t]he reasonable care and replacement of the Required Streets and Landscaping within the Westbury Park Residential Area **shall remain the responsibility of the [Plaintiff] . . .**” (Ex. 1, p. 9, § 8.01) (emphasis added). The Declaration contains a covenant by the Owner of the Property to pay **to the Declarant** an annual Assessment in the amount of \$17,500. (*Id.*). On information and belief, there was an arrangement between the Developer/Declarant and the Plaintiff, wherein the

Developer remitted some amount of these assessments to the Plaintiff. The Declarant covenanted that the assessments were to be for the Owner's "share of the costs for maintenance of the Required Streets and landscaping along the Required Streets" (Ex. 1, p. 9, § 8.01). On information and belief, this money was not used – as required and promised – for the maintenance and landscaping of the streets that are the subject of this litigation.

By its express language, the Apartment Declaration—and the covenant to pay assessments that it contained—had a limited term:

9.01 Term: This Declaration, every provision hereof, and every covenant, condition, and restriction contained herein shall continue in full force and effect for a period of twenty (20) years from and after the date of recording of this Declaration, provided that rights and easements which are stated herein to have a longer duration shall have such longer duration.

(Ex. 1). Thus, by the plain language of the Apartment Declaration, the covenant to pay an assessment had a finite term of 20 years, whereas the easements had a perpetual duration. The covenant to pay an assessment was intended to (and did) terminate on November 10, 2018.

Further, the Apartment Declaration specifically limited the method by which it could be modified or extended:

9.02 Termination and Modification: This Declaration, or any provision hereof, or any **covenant**, condition, or restriction contained herein, may only be terminated, **extended**, modified, or amended, as to the whole of said Property or any portion thereof **by the Declarant and Owner jointly**.

(Ex. 1) (emphasis added). Thus, by the plain language of the Apartment Declaration, the covenant to pay an assessment could only be modified or extended by agreement of the Declarant and the Owner jointly.

On or about November 1, 2005 the Declarant and the Owner³ jointly modified the Apartment Declaration, in accordance with the declaration's required method of modification. (Exhibit 2, Amendment to Declaration) (the "Amended Apartment Declaration"). The Amended Apartment Declaration, by joint agreement, increased the amount of the assessment to be paid by the Owner to the Declarant from \$17,500/year to \$7,200/month (to be adjusted and increased annually). (Ex. 2, ¶¶ 4-6). Further, the Owner's obligation to pay the assessment was assigned to the Defendant herein. (Ex. 2, ¶ 4). The Amended Apartment Declaration specifically **did not extend the term** of the Apartment Declaration, nor of the covenant to pay the assessment. (Ex. 2, "In all other respects, the [Apartment] Declaration is hereby ratified and confirmed."). Thus, under the terms of the Amended Apartment Declaration, the Defendant was obligated to (and did) pay the increased monthly assessment until the covenants within the Apartment Declaration expired, on November 10, 2018.

Plaintiff wrongly asserts that the Declarant assigned its declarant rights to the Plaintiff in 2015, and it wrongly asserts that "the [Plaintiff] Association now enjoys full control of the community." (Complaint, p. 1). In fact, on August 8, 2015, Plaintiff entered into an "Estate Payment Division Agreement and Assignment," by which the Declarant

³ The identity of the "Owner" (defined by the Apartment Declaration in §2.03 as "the owner of the fee interest in the Property") changed several times over the years, by conveyance deeds recorded in the Office of the Register of Deeds for Beaufort County:

1. By deed from Plantation Properties LLC to Westbury Park Apartments, Ltd. (Book AE at Page 2486);
2. By deed from Westbury Park Apartments, Ltd. to Montecito Westbury (Book 02261 at Page 1673);
3. By numerous individual conveyance deeds from Montecito Westbury to numerous condominium unit holders.

assigned to Plaintiff – and also to another entity not party to this lawsuit – the right to collect the assessment required under the Amended Apartment Declaration, as well as the duty to use the assessment for maintenance and landscaping of the Required Streets. (Exhibit 3, Estate Payment Division Agreement and Assignment) (the “Agreement”). This unrecorded agreement did not convey declarant rights to Plaintiff.

Plaintiff wrongly contends that it “renewed the Apartment Declaration” in October, 2018. (Exhibit 4, hereto; also Exhibit 4 to the Complaint). In fact, the purported Notice of Extension attached as Exhibit 4 to Plaintiff’s Complaint is without any legal effect, for at least three reasons: (1) only the Declarant and the Owner – jointly – can extend or modify the Apartment Declaration, and the Plaintiff is not the Declarant; (2) only the Declarant and the Owner – jointly – can extend or modify the Apartment Declaration, and the Notice of Extension purports to do so unilaterally; (3) for the sake of argument, even if the Agreement did assign declarant rights (which is denied), those rights were assigned to both the Plaintiff and to another entity, which is not party to this lawsuit, and which did not sign the purported, invalid Notice of Extension.

Defendant properly continued to pay assessments until the Apartment Declaration terminated in November 2018. Over the contemplated 20-year term of the Apartment Declaration, Defendant paid over \$1.3 million dollars in assessments for “its share of the costs for maintenance of the Required Streets and landscaping.” Pursuant to the Apartment Declaration, the Declarant had a fiduciary duty to use the assessment funds for this sole, express purpose. Pursuant to the Agreement, the Plaintiff had a fiduciary duty to use the assessment funds for this sole, express purpose. On information

and belief, Plaintiff put the funds into a general account and spent it on its own expenses.

The Community has a recorded policy to address the gate breaches and violations complained of within the Complaint. (Exhibit 5).

Defendant answers the numbered Paragraphs of the Complaint as follows:

FOR A FIRST DEFENSE

1. Defendant admits the allegations of Paragraph 1, on information and belief.
2. Defendant admits the allegations of Paragraph 2, with the clarification that it is the association of co-owners charged with managing the affairs of the horizontal property regime known as the "Estate at Westbury."
3. Defendant admits the allegations of Paragraph 3 for jurisdictional purposes only.
4. Defendant admits that this Court has jurisdiction over this matter and that venue is proper.

AS TO THE RELATIONSHIP OF THE PARTIES

5. The above paragraphs are incorporated herein by reference.
6. Answering Paragraph 6, the Defendant admits that it is a condominium association charged with the management of a horizontal property regime created pursuant to the Horizontal Property Act of South Carolina. Defendant admits that, pursuant to the grant of an easement by the original Developer of the subject property, its members and occupants presently use Westbury Park Way and Kensington Boulevard to access the Estate at Westbury. The easement grants are set forth within the *Declaration of Covenants, Conditions, Restrictions, and Easements for Palmetto Lakes Apartments at*

Westbury Park (the “Apartment Declaration”), which is attached hereto as Exhibit 1 and incorporated herein by reference.

7. Answering Paragraph 7, Defendant admits that the Apartment Declaration contains express grants of appurtenant easements for ingress-egress access, including: “(a) Perpetual non-exclusive right for vehicular and pedestrian access over and across Westbury Park Way from its intersection with US Highway 278 and its intersection with Kensington Boulevard” and “(b) Perpetual non-exclusive right for vehicular and pedestrian access over and across Kensington Boulevard from its intersection with Buck Island Road to its intersection with the Property.”

8. Answering the allegations of Paragraph 8, Defendant denies that the Apartment Declaration was not executed under seal. (See Ex. 1, p. 12, Probate, “Personally appeared before me the undersigned witness, who, on oath, says that s/he saw the within named [signatories], by its appropriate officers, **sign and seal** the within written instrument . . .”) (emphasis added).

9. Defendant denies the allegations of Paragraph 9. (Ex. 1, p. 12).

10. Defendant denies the allegations of Paragraph 10. (Ex. 1, p. 12).

11. Defendant denies the allegations of Paragraph 11.

12. Answering the allegations contained in Paragraph 12, Defendant admits that the Declarant of the Apartment Declaration was Plantation Properties, LLC and craves reference to Exhibit 1 for the complete terms of the Apartment Declaration.

13. Defendant admits that Paragraph 13 contains a partial statement of certain terms of the Apartment Declaration, and Defendant craves reference to Exhibit 1 for the complete language.

14. Defendant denies the allegations of Paragraph 14, as stated, and it craves reference to the four corners of the Apartment Declaration for the force and effect of Section 8, which requires certain entities to pay an assessment to Declarant for a period of 20 years, which period expired on or about November 12, 2018. Defendant further answers that, pursuant to Section 8 of the Apartment Declaration, Plaintiff is responsible for the “reasonable care and replacement of the [subject] Streets and landscaping within the Residential Park Residential Area.” (Ex. 1, § 8.01).

15. Defendant admits the allegations of Paragraph 15.

16. Defendant admits the allegations of Paragraph 16.

17. Answering the allegations contained in Paragraph 17, Defendant asserts that the “Apartment Deed” described in that Paragraph (and attached as Exhibit 2 to the Complaint) was recorded on December 15, 1998, whereas the Apartment Declaration was recorded on November 12, 1998. Defendant craves reference to those recorded instruments for the force and effect of their terms, and Defendant denies any allegations inconsistent therewith.

**As to Westbury Park Apartments, Ltd.’s Conveyance
to Montecito Westbury/Conversion to HPR**

18. Answering Paragraph 18, Defendant craves reference to the instrument attached as Exhibit 3 to the Complaint, and it denies any allegations that are inconsistent therewith.

19. Paragraph 19 contains vague and unspecified allegations, which Defendant denies. Defendant further denies any allegations that are inconsistent with duly recorded instruments affecting the real property that is the subject of this lawsuit.

20. Answering the allegations of Paragraph 20, including its subparts a, b, and c, Defendant craves reference to the Amendment to Declaration of Covenants Conditions Restrictions, and Easements for Palmetto Lakes Apartments at Westbury Park, attached hereto as Exhibit 2 and denies any allegations inconsistent therewith.

21. Answering the allegations of Paragraph 21, Defendant states that the referenced Estate Master Deed was in fact recorded on January 26, 2006. Defendant craves reference to the recorded instrument and denies any allegations inconsistent therewith.

22. Defendant admits the allegations of Paragraph 22, further stating that it was organized in or about October of 2005.

As to the Section of the Complaint regarding Purported Assignment of Declarant Rights to Westbury Park and Estate of Westbury's Alleged Default

23. Defendant denies the allegations of Paragraph 23 as stated.

24. Defendant denies the allegations of Paragraph 24 as stated.

25. Defendant denies the allegations of Paragraph 25.

26. Defendant denies the allegations of Paragraph 26 and further states that the purported instrument attached to the Complaint as Exhibit 4 is invalid and does not have any legal force or effect, including but not limited to that it did not extend the Apartment Declaration.

27. Defendant denies the allegations of Paragraph 27.

28. Defendant denies the allegations of Paragraph 28.

29. Defendant denies the allegations of Paragraph 29.

30. Defendant denies the allegations of Paragraph 30, as stated, and it further asserts that Defendant has the benefit of a perpetual easement for vehicular and pedestrian access over and across the subject property pursuant to Section 7.02 of the Apartment Declaration, and that Plaintiff has the sole obligation to maintain the subject easement, streets, and landscaping pursuant to Section 8.01 of the Apartment Declaration. (Exhibit 1).

31. Defendant denies the allegations of Paragraph 31.

32. Answering Paragraph 32, Defendant admits that it has 320 residential units and that Westbury Park has 350 residential units. Defendant denies the remaining allegations of Paragraph 32, as stated.

33. Defendant denies the allegations of Paragraph 33, as characterized.

As to Alleged Continuing Damage and Alleged Unauthorized Entry by Estate at Westbury to Gates Maintained, Supervised, and Paid for by Westbury Park

34. Defendant denies the allegations of Paragraph 34, as characterized. Defendant further states that this Paragraph and Paragraph 35 describe an appurtenant easement, which by its very nature burdens Plaintiff's property and benefits Defendant's property.

35. Defendant denies the allegations of Paragraph 35, as characterized.

36. Defendant denies the allegations of Paragraph 36, as characterized.

37. Defendant denies the allegations of Paragraph 37, as characterized.

38. Defendant denies the allegations of Paragraph 38, as characterized.

39. Defendant denies the allegations of Paragraph 39.

40. Defendant denies the allegations of Paragraph 40, as characterized.

41. Defendant denies the allegations of Paragraph 41, as characterized.

42. Defendant denies the allegations of Paragraph 42.

43. Defendant denies the allegations of Paragraph 43.

44. Defendant denies the allegations of Paragraph 44, as characterized. Defendant further states that Paragraph 44 describes an easement, which by its very nature burdens Plaintiff's property and benefits that of Defendant.

AS TO PLAINTIFF'S FIRST CAUSE OF ACTION
(Alleged Injunction)

45. The answers and denials of the above paragraphs are incorporated herein by reference.

46. Defendant denies the allegations of Paragraph 46.

47. Defendant denies the allegations of Paragraph 47, as characterized.

48. Defendant denies the allegations of Paragraph 48.

49. Defendant denies the allegations of Paragraph 49.

50. Defendant denies the allegations of Paragraph 50, as characterized.

51. Defendant denies the allegations of Paragraph 51.

52. Defendant denies the allegations of Paragraph 52, and further asserts that Defendant's residents, their "tenants, all guests and invitees of such tenants/owners, all employees, contractors, suppliers, vendors and other representatives of [owners] and all other persons who reasonably need . . . access to the 'Property'" have a right of access and easement of use in Plaintiff's roads and sidewalks. (See Ex. 1, Article VII, § 7.02).

53. Defendant denies that Plaintiff is entitled as a matter of law to the specific relief that it seeks.

AS TO PLAINTIFF'S SECOND CAUSE OF ACTION
(Alleged Declaratory Judgment)

54. The answers and denials of the above paragraphs are incorporated herein by reference.

55. Defendant denies that Plaintiff is entitled to the relief it seeks in Paragraph 55:

- a. Defendant denies that the Apartment Declaration was renewed by Plaintiff Westbury Park for numerous reasons, including without limitation because the purported amendment failed to comply with the requirements for an extension pursuant to the plain language of the Apartment Declaration;
- b. Defendant denies that it is in default;
- c. Defendant denies that it owes any payments to Plaintiff whatsoever;
- d. Defendant denies that Plaintiff is entitled to the relief it seeks, and it particularly denies that Plaintiff has any legal right or standing to foreclose on any Common Elements or to place a lien on them.

AS TO PLAINTIFF'S THIRD CAUSE OF ACTION
(Alleged Termination by Breach)

56. The answers and denials of the above paragraphs are incorporated herein by reference.

57. Defendant denies the allegations of Paragraph 57.

58. Defendant denies the allegations of Paragraph 58.

59. Defendant denies the allegations of Paragraph 59, and it further asserts that it has paid all amounts due to Plaintiff pursuant to the clear and unambiguous language of the Apartment Declaration.

60. Defendant denies the allegations of Paragraph 60.

61. Defendant denies that Plaintiff is entitled to the relief requested or to any relief whatsoever.

AS TO PLAINTIFF'S FOURTH CAUSE OF ACTION
(In the Alternative for Declaratory Judgment, wrongly alleging easement in gross)

62. The answers and denials of the above paragraphs are incorporated herein by reference.

63. Defendant denies the allegations of Paragraph 63.

64. Defendant denies the allegations of Paragraph 64, and it further asserts that the plain language of the Apartment Declaration subjects the subject property to the equitable servitudes contained therein, which run with the land, including but not limited to the appurtenant perpetual easement grants for access, ingress, and egress over the streets that are the subject of this litigation. (*See Ex. 1*).

65. Defendant denies the allegations of Paragraph 65.

66. Defendant denies that Plaintiff is entitled to the relief that it seeks in Paragraph 66.

67. Defendant denies that Plaintiff is entitled to the relief that it seeks in Paragraph 67, including its subparts lettered a through e.

AS TO PLAINTIFF'S FIFTH CAUSE OF ACTION

(In the Alternative for Declaratory Judgment, wrongly alleging no easement exists)

68. The answers and denials of the above paragraphs are incorporated herein by reference.

69. Defendant denies the allegations of Paragraph 69.

70. Defendant denies the allegations of Paragraph 70.

71. Defendant denies the allegations of Paragraph 71.

72. Defendant denies that Plaintiff is entitled to the relief that it seeks in Paragraph 72, including its subparts lettered a-g.

AS TO PLAINTIFF'S SIXTH CAUSE OF ACTION
(Alleged Unjust Enrichment)

73. The Complaint does not contain a paragraph numbered 73.

74. The Complaint does not contain a paragraph numbered 74.

75. The Complaint does not contain a paragraph numbered 75.

76. The Complaint does not contain a paragraph numbered 76.

77. Answering Paragraph 77, Defendant incorporates herein by reference the answers and denials of the above paragraphs 1 through 76.

78. Answering Paragraph 78, Defendant admits that it has the benefit of its access easement for ingress and egress.

79. Answering Paragraph 79, Defendant asserts that pursuant to the Apartment Declaration, Plaintiff shares the burden of maintaining the easement with Westbury Park Commercial Center Property Owners Association, Inc.; Defendant denies any allegations inconsistent with the Apartment Declaration. (*See Ex. 1*).

80. Defendant denies the allegations of Paragraph 80, as characterized.

81. Defendant denies the allegations of Paragraph 81, as characterized.

82. Defendant denies the allegations of Paragraph 82, as characterized. Defendant further asserts in answer that the covenants, conditions, restrictions, and easements that run with the land that is the subject of this lawsuit are contained within recorded instruments within the chain of title of both parties.

83. Defendant denies the allegations of Paragraph 83, and it further denies that Plaintiff is entitled to the relief requested, or to any relief from the Defendant whatsoever.

AS TO PLAINTIFF'S SEVENTH CAUSE OF ACTION
(Alleged Termination via Changed Conditions
and/or Alleged Relative Hardship Doctrine)

84. Defendant incorporates herein by reference the answers and denials of the above paragraphs.

85. Defendant denies the allegations of Paragraph 85, as characterized, and Defendant further asserts by way of answer that the Developer is a necessary party to Plaintiff's allegations in this lawsuit which Plaintiff has failed to join.

86. Defendant denies the allegations of Paragraph 86, as characterized.

87. Defendant denies the allegations of Paragraph 87.

88. Defendant denies the allegations of Paragraph 88.

89. Defendant denies the allegations of Paragraph 89 and further asserts by way of answer that the Developer is a necessary party to Plaintiff's allegations in this lawsuit which Plaintiff has failed to join.

90. Defendant denies the allegations of Paragraph 90 and further asserts by way of answer that the Developer is a necessary party to Plaintiff's allegations in this lawsuit which Plaintiff has failed to join.

91. Defendant denies the allegations of Paragraph 91 and further asserts by way of answer that the Developer is a necessary party to Plaintiff's allegations in this lawsuit which Plaintiff has failed to join.

92. Defendant denies the allegations of Paragraph 92.

93. Defendant denies the allegations of Paragraph 93.

94. Answering the allegations of Paragraph 94, Defendant denies that Plaintiff is entitled to the relief that it requests, or to any relief whatsoever from Defendant.

AS TO PLAINTIFF'S EIGHTH CAUSE OF ACTION
(Alleged Reservation)

95. Defendant incorporates herein by reference the answers and denials of the above paragraphs.

96. The allegations of Paragraph 96 do not require an answer from Defendant; to the extent an answer is required, Defendant denies any allegation inconsistent with the substance of this Answer, the valid and applicable recorded instruments referenced herein, and the Rules of Civil Procedure.

97. Answering Plaintiff's WHEREFORE paragraph, Defendant denies that the Plaintiff is entitled to the relief that it requests, or for any relief from Defendant whatsoever.

**FOR A SECOND DEFENSE
(Failure to State A Claim)**

The Complaint fails to state a claim against Defendant that is proper and cognizable under applicable law.

**FOR A THIRD DEFENSE
(Statutes of Limitation and Repose)**

Plaintiff's claims are barred by the applicable statute of limitations and statute of repose.

**FOR A FOURTH DEFENSE
(Waiver and Laches)**

Plaintiff's claims are barred by the doctrines of waiver and laches.

**FOR A FIFTH DEFENSE
(Estoppel)**

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

**FOR A SIXTH DEFENSE
(Unclean Hands)**

Plaintiff's claims are barred by the doctrine of unclean hands.

**FOR AN SEVENTH DEFENSE
(No Breach)**

Defendant did not breach its contract with Plaintiff.

**FOR AN EIGHTH DEFENSE
(Unconscionability)**

In the alternative, the contract at issue is void as unconscionable and/or it is an invalid contract of adhesion.

**FOR A NINTH DEFENSE
(Perpetual Contracts Unenforceable)**

In the alternative, the contract at issue is invalid because it is perpetual.

**FOR A TENTH DEFENSE
(Mistake)**

In the alternative, the contract at issue is unenforceable because of mutual mistake.

**FOR AN ELEVENTH DEFENSE
(Contribution/Set-off)**

Defendant is entitled to contribution or set-off for any relief granted.

**FOR A TWELFTH DEFENSE
(Failure to Mitigate)**

Plaintiff has failed to mitigate its damages, if any.

**FOR A THIRTEENTH DEFENSE
(Proximate Cause)**

Plaintiff's damages, which are denied, were not proximately caused by any acts or omissions of Defendant.

**FOR A FOURTEENTH DEFENSE
(Rule 12 and Rule 19, SCRPC)**

Plaintiff has failed to join indispensable parties for its claims, including Plantation Properties, LLC and Westbury Park Commercial Center Property Owners Association, Inc.

**FOR AN FIFTEENTH DEFENSE
(Punitive Damages Unconstitutional)**

To the extent punitive damages are claimed, Plaintiff's demand for punitive damages is unconstitutional under the United States Constitution, the South Carolina Constitution and under federal law.

**FOR A SIXTEENTH DEFENSE
(Statutory Cap on Damages)**

Defendant pleads the statutory limit on punitive and other damages, including under S.C. Code § 15-32-510, *et seq.*

**FOR A SEVENTEENTH DEFENSE
(Ongoing Investigation and Reservation of Rights)**

Defendant has not had an opportunity to conduct a sufficient investigation or to engage in adequate discovery regarding the circumstances of Plaintiff's allegations. Defendant intends to act as best it can to inform itself of the pertinent facts and prevailing circumstances surrounding any purported injury or damage to Plaintiff as alleged in the First Amended Complaint, and Defendant gives notice of its intent to assert any further affirmative defenses.

**FIRST COUNTERCLAIM
(Breach of Contract)**

1. Defendant repeats, reiterates, and re-alleges each and every preceding paragraph as if the same were set forth herein verbatim.
2. By virtue of the Estate Payment Division Agreement and Assignment (Exhibit 3) (the "Agreement"), the Developer/Declarant assigned to the Plaintiff some of its rights, interests, and duties with respect to Defendant's assessment payments.
3. Pursuant to the terms of the Apartment Declaration (Ex. 1), the Amended Apartment Declaration (Ex. 2), and the Agreement (Ex. 3), the Plaintiff was required to use the assessment funds that it collected from Defendant for "[Defendant's] share of the costs for maintenance of [Kensington Boulevard and Westbury Park Way] and

landscaping along [Kensington Boulevard and Westbury Park Way] and around and within parks within the Westbury Park Residential Area and Westbury Park Commercial Area.” (Ex. 1, § 8.01).

4. On information and belief, Plaintiff has used and does use the assessment funds that it collects from Defendant for numerous other purposes, in breach of its contractual obligation.

5. As a direct result of Plaintiff’s breach of contract, Defendant has suffered damages.

6. Defendant is entitled to actual damages, in an amount to be determined at trial.

SECOND COUNTERCLAIM (Breach of Fiduciary Duty and Accounting)

7. Defendant repeats, reiterates, and re-alleges each and every preceding paragraph as if the same were set forth herein verbatim.

8. Pursuant to, *inter alia*, the terms of the Apartment Declaration (Ex. 1), the Amended Apartment Declaration (Ex. 2), and the Agreement (Ex. 3), Defendant has paid to the Plaintiff approximately \$100,000 **per year** in assessments, the express purpose of which is to account for Defendant’s share of the costs of maintenance of certain, limited portions of Westbury Park Way and Kensington Boulevard, and the surrounding landscaping.

9. On information and belief, the actual cost of such maintenance and landscaping is an amount far less than \$100,000 per year.

10. Pursuant to the terms of the Apartment Declaration, the Amended Apartment Declaration, and the Agreement, Plaintiff has a fiduciary duty to the Defendant to use

any assessment collected from the Defendant for the express purpose of maintaining and landscaping certain, limited portions of Westbury Park Way and Kensington Boulevard.

11. Plaintiff further has a fiduciary duty to the Defendant to manage and conserve any excess assessment funds for the purpose of creating a reserve for deferred maintenance costs.

12. Defendant has breached that duty by, *inter alia*, failing to use the assessment for street maintenance or landscaping, by adding the assessment funds that it collects into its general account to be spent on items other than road maintenance and landscaping, and by failing to use excess assessment funds to create a reserve to prepare for deferred maintenance costs.

13. As a direct and proximate result of Plaintiff's breaches of its fiduciary duty, Defendant has been injured and suffered damages.

14. Defendant is entitled to an accounting of Plaintiff's use of the assessment funds, to actual damages, and to punitive damages in an amount sufficient to deter such conduct in the future.

THIRD COUNTERCLAIM (Nuisance)

15. Defendant repeats, reiterates, and re-alleges each and every preceding paragraph as if the same were set forth herein verbatim.

16. Defendant and its members have a real property interest in an appurtenant easement for vehicle and pedestrian access over Westbury Park Way and Kensington Boulevard.

17. Plaintiff has substantially and unreasonably interfered with Defendant's and its members' interest in the easement, including but not limited to by posting signs prohibiting the use of sidewalks by Defendant, and by enforcing those signs by requiring that residents of the Defendant Estate walk in the street. (Exhibit 6).

18. Plaintiff's unreasonable – and dangerous – interference with Defendant's use of its easement for pedestrian access works hurt, inconveniences, and damages Defendant.

19. Defendant is entitled to a permanent injunction prohibiting Plaintiff from interfering with its property interest in the easement.

FOURTH COUNTERCLAIM
(Declaratory Judgment for Express Appurtenant Easement)

20. Defendant repeats, reiterates, and re-alleges each and every preceding paragraph as if the same were set forth herein verbatim.

21. The original developer for the property that is the subject of this litigation developed the land according to a plan set forth in numerous recorded instruments, including deeds, plats, and covenants.

22. When it developed the subject property, the developer recorded a Declaration of Covenants, Conditions, Restrictions and Easements, which is attached as Exhibit 1 and incorporated herein (the "Apartment Declaration").

23. The Apartment Declaration contains an express grant of a perpetual, appurtenant easement for access:

7.02 Easement for Owner: Subject to the provisions hereof and the restriction contained in Subparagraph 7.02(a) hereafter, Owner, its successors and assigns, Owner's tenants, all guests and invitees of such

tenants/owners, all employees, contractors, suppliers, vendors and other representatives of Owner and all other persons who reasonably need, on Owner's behalf, access to the "Property" shall have a right and easement of use of those certain easements as hereinafter more fully described as shown on the Plat.

(a) Perpetual non-exclusive right for vehicular and pedestrian access over and across Westbury Park Way from its intersection with US Highway 278 and its intersection with Kensington Boulevard.

(b) Perpetual non-exclusive right for vehicular and pedestrian access over and across Kensington Boulevard from its intersect with Buck Island Road to its intersection with the Property.

24. Defendant is entitled to a judgment from this Court holding that Defendant and its members hold an express, perpetual, appurtenant easement in the streets and sidewalks that are the subject of this litigation.

25. Defendant is entitled to an injunction enjoining Plaintiff from any further interference with the use of its easement by Defendant and its members.

FIFTH COUNTERCLAIM
(In the alternative, for Easement by Necessity)

26. Defendant repeats, reiterates, and re-alleges each and every preceding paragraph as if the same were set forth herein verbatim.

27. Plantation Properties, LLC, as the Developer of the property that is the subject of this lawsuit, once owned the subject property as one large tract.

28. Plantation Properties, LLC subsequently severed title to the one large tract, by conveying portions of the parcel to the Plaintiff's and the Defendant's predecessors in title.

29. Both Defendant and Plaintiff claim title from a common source, *i.e.*, Plantation Properties, LLC, to different parts of the integral tract.

30. If Plaintiff's allegation is correct, and the Developer did not grant to Defendant an express appurtenant easement for ingress and egress, then Defendant's property is enclosed on all sides by other lands.

31. If Defendant's property is enclosed on all sides, then the Plaintiff, as successor in title to the Developer, is obligated by law to allow Defendant and its members a right of way over the streets that are the subject of this litigation.

32. Defendant is entitled to a judgment from this Court so declaring.

SIXTH COUNTERCLAIM
(In the Alternative, for Easement by Prescription)

33. Defendant repeats, reiterates, and re-alleges each and every preceding paragraph as if the same were set forth herein verbatim

34. In the alternative, Defendant and its predecessors in title have been using the streets that are the subject of this litigation openly, obviously, continuously, and adversely, for a period of twenty years, for the purpose of accessing the property.

35. Defendant is entitled to a judgment from this Court that it and its members hold a prescriptive appurtenant easement in the streets that are the subject of this litigation.

36. Defendant is further entitled to a judgment from this Court enjoining the Plaintiff from any further interference with its easement rights.

**SEVENTH COUNTERCLAIM
(Quantum Meruit)**

37. Defendant repeats, reiterates, and re-alleges each and every preceding paragraph as if the same were set forth herein verbatim.

38. Defendant has conferred a benefit on the Plaintiff by paying to it, for many years, an assessment in an amount greater than necessary for the annual maintenance of the streets and landscaping that are the subject of this litigation.

39. Defendant reasonably expected that Plaintiff would place any excess funds into a reserve account in anticipation of deferred maintenance costs.

40. Plaintiff has failed to place the excess assessment funds into a reserve account in anticipation of deferred maintenance costs, and Plaintiff instead currently enjoys the use of those funds in breach of its contractual and fiduciary duties to Defendant.

41. Any retention by Plaintiff of the excess assessment funds would be inequitable.

42. Defendant is entitled to a judgment in the amount of any assessment funds that Plaintiff failed to use for maintenance or landscaping, in accordance with the Apartment Declaration.

**EIGHTH COUNTERCLAIM
(Accounting)**

43. Defendant incorporates the statements, denials, and allegations above as if set forth fully herein.

44. Defendant demands an accounting of the money it has paid to Plaintiff for maintenance and other costs related to the streets and landscaping, for a determination

of which funds were spent appropriately or inappropriately under the obligations referenced above.

WHEREFORE, having fully answered the Plaintiff's Complaint, and asserting the above affirmative defenses and counterclaims, Defendant prays that the Complaint would be dismissed with prejudice, for a full accounting of the assessment money paid by Defendant, for an Order enjoining Plaintiff from any further interference with Defendant's easement, for the specific relief requested above, for the reasonable costs and attorney's fees associated with this matter, and for all other such relief that this Court deems just and proper.

Respectfully Submitted,

FORD WALLACE THOMSON LLC

By: s/Ian S. Ford

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*Attorneys for Defendant and Counterclaim Plaintiff Estate
at Westbury Owners Association, Inc.*

March 18, 2020

Charleston, South Carolina

EXHIBIT 7

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO.: 2020-CP-07-00158

WESTBURY PARK RESIDENTIAL
ASSOCIATION, INC.,

Plaintiff/
Counterclaim
Defendant,

v.

ESTATE AT WESTBURY OWNERS
ASSOCIATION, INC.,

Defendant/
Counterclaim Plaintiff.

**DEFENDANT ESTATE AT WESTBURY
OWNERS ASSOCIATION, INC.'S
MOTION FOR
PARTIAL SUMMARY JUDGMENT**

TO: BENJAMIN T. SHELTON, ESQUIRE, ATTORNEY FOR PLAINTIFF

You will please take notice that the Defendant/Counterclaim Plaintiff Estate at Westbury Owners' Association, Inc. ("Defendant" or "Estate") will move, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure, on the tenth day after service hereof, or as soon thereafter as counsel may be heard, for an Order of this Court granting Summary Judgment in the Estate's favor as to the following causes of action brought by the Plaintiff:

- Plaintiff's Second Cause of Action (alleged declaratory judgment that the Apartment Declaration is renewed and the Estate is in default)
- Plaintiff's Third Cause of Action (alleged termination by breach)
- Plaintiff's Fourth Cause of Action (alleged declaratory judgment that any easement conveyed was an easement in gross)

- Plaintiff's Fifth Cause of Action (alleged alternative declaratory judgment that no easement exists and requiring Defendant to construct alternative access to the Property)
- Plaintiff's Sixth Cause of Action (alleged unjust enrichment)
- Plaintiff's Seventh Cause of Action (alleged termination via changed conditions)

Further, Defendant will move pursuant to Rule 56, SCRCP, for an Order granting Summary Judgment in Defendant's favor as to its following counterclaims against the Plaintiff:

- Defendant's Fourth Counterclaim (for declaratory judgment for express appurtenant easement)
- Defendant's Fifth Counterclaim (alternatively, for easement by necessity)
- Defendant's Eighth Counterclaim (for an accounting)

The grounds for this Motion are that no genuine question of material fact exists, and Defendant is entitled to judgment as a matter of law in its favor on each of the above-listed causes of action. This motion will be supported by the pleadings, affidavits, and other such materials as may be submitted to the Court prior to the hearing, including, but not limited to memoranda of law.

[signature appears on the next page]

Respectfully submitted

FORD WALLACE THOMSON LLC

By: s/Ainsley F. Tillman

Ian S. Ford

Ian.Ford@FordWallace.com

Ainsley F. Tillman

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Charleston, South Carolina

May 21, 2020

CERTIFICATE OF SERVICE

The undersigned certifies that on May 21, 2020, this Motion was served by electronic mail and NEF on all attorneys of record.

FORD WALLACE THOMSON LLC

s/Ainsley F. Tillman

EXHIBIT 8

STATE OF SOUTH CAROLINA
COUNTY OF BEAUFORT

IN THE COURT OF COMMON PLEAS
CIVIL CASE NO.: 2020-CP-07-00158

WESTBURY PARK RESIDENTIAL
ASSOCIATION, INC.,

Plaintiff/Counterclaim
Defendant,

v.

ESTATE AT WESTBURY OWNERS
ASSOCIATION, INC.,

Defendant/Counterclaim
Plaintiff.

**DEFENDANT/COUNTERCLAIM
PLAINTIFF'S MEMORANDUM
IN SUPPORT OF MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Defendant/Counterclaim Plaintiff Estate at Westbury Owners Association, Inc. ("Defendant" or "Estate") hereby submits this Memorandum in Support of its Motion for Partial Summary Judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Defendant Estate is seeking summary judgment in its favor as to several of the Plaintiff's causes of action, as well as on several of its counterclaims, as set forth in more detail below.

One basis for this Motion is that those particular causes of action on which summary judgment is sought **may be decided by this Court strictly on the recorded instruments that govern the relationship between the parties.** In other words, the plain language of the governing documents leaves no question of fact for a jury, and the Defendant is entitled to judgment as a matter of law on each of the following causes of action brought by the Plaintiff:

- Plaintiff's Second Cause of Action (alleged declaratory judgment that the Apartment Declaration is renewed and the Estate is in default)
- Plaintiff's Third Cause of Action (alleged termination by breach)
- Plaintiff's Fourth Cause of Action (alleged declaratory judgment that any easement conveyed was an easement in gross)
- Plaintiff's Fifth Cause of Action (alleged alternative declaratory judgment that no easement exists and requiring Defendant to construct alternative access to the Property)
- Plaintiff's Sixth Cause of Action (alleged unjust enrichment)
- Plaintiff's Seventh Cause of Action (alleged termination via changed conditions)

For the same reason, the Defendant is entitled to judgment as a matter of law as to each of the following counterclaims against the Plaintiff:

- Defendant's Fourth Counterclaim (for declaratory judgment for express appurtenant easement)
- Defendant's Fifth Counterclaim (alternatively, for easement by necessity)
- Defendant's Eighth Counterclaim (for an accounting)

BACKGROUND

The background in this case is important, because it sets the stage for what has festered into a bitter grudge on the part of the Plaintiff Westbury Park, against the Defendant Estate at Westbury, which (as set forth below) is misplaced and entirely without legal basis. **At the outset, this Court should know that the Plaintiff has not brought any cause of action against the Developer, although Defendant contends that the Developer is a necessary party to this dispute (and the true party with whom Plaintiff's grievance lies).**

In or about 1998, an entity called Plantation Properties, LLC (the "Developer" or the "Declarant") undertook to develop its large tract of property in Bluffton, South Carolina. Its scheme of development included: (1) commercial, (2) single family residential units, and (3) multi-family residential units. By way of various recorded instruments, the Developer subjected the property to covenants, conditions, and easements that run with the land. The Developer set forth its scheme of development on numerous recorded plats, as well as in a "Master Plan." (See Exhibit 1, Master Plan).

As developers tend to do, the Developer in this instance drafted and recorded separate declarations of covenants, conditions, restrictions, and easements for each of the above-referenced types of units (i.e., commercial, single-family, and multi-family). It created and incorporated non-profit associations for each category (except, not immediately for the multi-family parcel), which entities were bound by the declarations and charged with their enforcement. The declarations governed the relationships between the Developer and each separate entity (and its members). In this instance, the

Developer intentionally distinguished each entity and its corresponding property, and it expressly excluded them from the confines of one another's declarations. Thus, in a nutshell, the Developer's scheme progressed in this way:

1. Developer bought a large tract of land and developed a Master Plan for its use;
2. Developer recorded a Declaration of Covenants, Conditions, and Restrictions for Westbury Park Commercial Center and subjected portions of its property to it; Developer thereby established the Westbury Park Commercial Center Property Owner's Association, Inc. (the "Commercial Association") (RMC Office for Beaufort County, in Book 1012, at Page 827). The Declaration references a Plat, which depicts the subject property and certain streets (including Westbury Park Way).
3. Next, the Developer recorded a Declaration of Covenants, Conditions, Restrictions, and Easements for Palmetto Lake Apartments at Westbury Park (the "Apartment Parcel"). **The Apartment Parcel, by way of recorded instruments, transformed over time into the condominium regime that is the Defendant in this lawsuit** (*see infra*). Initially, by way of the declaration, the Developer retained control over the Apartment Parcel and it did not create an association for its governance.
4. Finally, the Developer recorded a Declaration of Covenants, Conditions, and Restrictions for Westbury Park Residential Properties, and it subjected certain property to it. It thereby established the entity that is the Plaintiff in this lawsuit.

Since the Commercial Association is not party to this lawsuit, we will leave out a lengthy description of its history.

However—alas, dear reader—a lengthy description *is* necessary to this Court’s understanding of the complicated relationship of the Plaintiff and the Defendant and the instruments that govern that relationship. If this Court bears with the undisputed history set forth below, it will understand that no question of fact exists that, *inter alia*, Defendant has an express appurtenant easement over the streets and sidewalks belonging to the Plaintiff, for which Defendant expressly contracted and gave exorbitant consideration, which has been paid in full.

I. The Defendant’s parcel is defined and bound.

First, the *Declaration of Covenants, Conditions, Restrictions, and Easements for Palmetto Lakes Apartments at Westbury Park*, became effective November 10, 1998. (Exhibit 2; hereinafter the “Apartment Declaration”). The Apartment Declaration sets forth the rights and responsibilities of the Developer/Declarant, as well as the rights and responsibilities of the Owner of the property that was to be developed into multi-family dwelling units (the “Defendant” or “Estate at Westbury” or “Estate”), *inter alia*.¹ Within the Apartment Declaration, in a section titled “Easements,” the Developer granted to the Owner (i.e. the predecessor-in-title of the individual unit holders within the Defendant Estates) a “[p]erpetual, non-exclusive right for vehicular and pedestrian access over and

¹ Over time, the property has been owned by several entities. In 2006 the Apartment Property was converted to a horizontal property regime. Thus, the “Owner,” as defined in the Apartment Declaration, are now the title holders of the fee interests in the individual condominium units. The individual fee holders are members of Defendant, a nonprofit corporation. Certain obligations of the Owner were assigned to Defendant in 2005 (*see infra*).

across Westbury Park Way from its intersection with US Highway 278 and its intersection with Kensington Boulevard.” (Ex. 2, p. 8, § 7.02(a), “Easements for Owner”). The Developer also granted a “[p]erpetual, non-exclusive right for vehicular and pedestrian access over and across Kensington Boulevard from its intersection with Buck Island Road to its intersection with the [Estates] Property.” (Ex. 2, p. 8, § 7.02(b), “Easements for Owner”).² Importantly, at the time the Developer made these express grants, it still owned the tract that became the residential (i.e. Plaintiff’s) subdivision.

In the Apartment Declaration, the Developer/Declarant also delineated various obligations and covenants, separate and apart from the perpetual easement grants. The Declaration contains a covenant by the Owner of the Property to pay **to the Declarant** an annual Assessment in the amount of \$17,500. (*Id.*). **There is not – anywhere within the Declaration – an obligation to pay any assessment to the Plaintiff Residential Association.** In fact, the Plaintiff Residential Association was not a signatory to the Apartment Declaration, which exclusively governed the relationship between the Owner and the Developer. However, the Developer’s plan of development and intent can be construed from the plain language of the Apartment Declaration, which clearly states that “[t]he reasonable care and replacement of the Required Streets and Landscaping within the Westbury Park Residential Area **shall remain the responsibility of the [Plaintiff] Westbury Park Residential Owners Association, Inc. . . .**” (Ex. 2, p. 9, § 8.01) (emphasis added) (this intent is reiterated in other documents, as set forth herein).

By its express language, the Apartment Declaration – and the Owner’s covenant

² Within the Apartment Declaration, Kensington Boulevard and Westbury Parkway are referred to and defined as the “Required Streets.”

to pay assessments to the Developer that it contained – had a limited term:

9.01 Term: This Declaration, every provision hereof, and every covenant, condition, and restriction contained herein shall continue in full force and effect for a period of twenty (20) years from and after the date of recording of this Declaration, provided that rights and easements which are stated herein to have a longer duration shall have such longer duration.

(Ex. 2). **Thus, by the plain language of the Apartment Declaration, the covenant to pay an assessment had a finite term of 20 years, whereas the easements had a perpetual duration.** The covenant to pay an assessment was intended by the parties to terminate on November 10, 2018.

Importantly, the Apartment Declaration specifically limited the method by which it could be modified or extended:

9.02 Termination and Modification: This Declaration, or any provision hereof, or any **covenant**, condition, or restriction contained herein, may only be terminated, **extended**, modified, or amended, as to the whole of said Property or any portion thereof **by the Declarant and Owner jointly**.

(Ex. 2) (emphasis added). Thus, by the plain language of the Apartment Declaration, the Owner's covenant to pay an assessment could only be modified or extended by agreement of the Declarant and the Owner jointly.

On or about November 1, 2005 the Declarant and the Owner³ jointly modified the

³ The identity of the "Owner" (defined by the Apartment Declaration in §2.03 as "the owner of the fee interest in the Property") changed several times over the years, by conveyance deeds recorded in the Office of the Register of Deeds for Beaufort County:

1. By deed from Plantation Properties LLC to Westbury Park Apartments, Ltd. (Book AE at Page 2486);
2. By deed from Westbury Park Apartments, Ltd. to Montecito Westbury (Book 02261 at Page 1673);
3. By numerous individual conveyance deeds from Montecito Westbury to numerous condominium unit holders.

Apartment Declaration, in compliance with the Declaration's required method of modification in § 9.02. (Exhibit 3, Amendment to Declaration) (the "Amended Apartment Declaration"). The Amended Apartment Declaration, **by joint agreement**, increased the amount of the assessment to be paid by the Owner to the Declarant from \$17,500/year to \$7,200/month (to be adjusted and increased annually). (Ex. 3, ¶¶ 4-6). Further, the Owner's obligation to pay the assessment was assigned to the Defendant Estate herein, in contemplation of the Apartment Parcel becoming a condominium regime. (Ex. 3, ¶ 4). The Amended Apartment Declaration specifically and intentionally **did not extend the term** of the Apartment Declaration, nor of the covenant to pay the assessment.⁴ (Ex. 3, "In all other respects, the [Apartment] Declaration is hereby ratified and confirmed.")⁵ Thus, under the express terms of the Amended Apartment Declaration, the Defendant was obligated to (and did) pay the increased monthly assessment until the covenants within the Apartment Declaration expired—as mutually intended, agreed, and contracted for—on November 10, 2018.

II. The Plaintiff's property is defined and bound.

Let's go back in time, now, to shortly after the Developer recorded the Apartment Declaration and the express appurtenant easements that it contained, in November 1998.

⁴ This makes sense. The Apartment Declaration did not need to be extended in term, because the easements were perpetual, and the restrictions pertaining to use of the property (governing, i.e., clotheslines, parking, mailboxes, etc.) were about to be eclipsed by a condominium Master Deed.

⁵ This Amendment also reveals the intent of the makers of the contract (in 2005, the two developers). They mutually agreed to increase the assessment payment for a limited duration, which was the contemplated and agreed upon consideration for the easements. Over time, the assessment payment amounted to well over a million dollars.

Thereafter, on December 30, 1998, the Developer set apart the portion of its property that it planned for residential use by recording the *Declaration of Covenants, Conditions, and Restrictions for Westbury Park Residential Properties* in the RMC Office for Beaufort County, in Book 1122, at Page 285 (Exhibit 4) (the “Residential Declaration”). By the Residential Declaration, the Plaintiff was born, and its members (individual lot owners) took title to their lots subject to the encumbrances contained in the Residential Declaration.

In addition to a property description which referenced a plat, the Residential Declaration referenced, incorporated, and had attached to it as an exhibit, the Developer’s Master Plan. (Ex. 1). The Master Plan clearly depicts the Apartment Parcel as an otherwise landlocked tract with access via streets within the Residential property. Furthermore, the Residential Declaration expressly defines the relationship between the Plaintiff Residential Association and the Defendant Westbury Estate (Apartment Parcel), as intended by the Developer. The following terms of the Residential Declaration are pertinent to the parties and claims in this lawsuit:

1.1. Purpose and Intent. Declarant, as the owner of the real property described on Exhibit “A”, intends by the recording of this Declaration to create a general plan of development for the planned community known as Westbury Park. This Declaration provides a flexible and reasonable procedure for the future expansion of Westbury Park to include additional real property as Declarant deems appropriate and provides for the overall development, administration, maintenance and preservation of the real property now and hereafter comprising Westbury Park. An integral part of the development plan is the creation of Westbury Park Residential Owners Association, Inc., an association to be comprised of all owners of residential real property in Westbury Park, to operate and maintain various common areas and community improvements and to administer and enforce this Declaration and the other governing documents referred to in this Declaration. In addition, it establishes a mechanism by which to realize the goal of creating a community in which good citizenship and community service are encouraged from all residents.

1.2. **Binding Effect.**

(a) All property described on Exhibit "A" and any additional property which is made a part of Westbury Park in the future by filing of one or more Supplemental Declarations in the Public Records, shall be owned, conveyed and used subject to all of the provisions of this Declaration, which such run with the title to such property. The provisions of this Declaration shall not apply to the Apartment Parcel. This Declaration shall be binding upon all Persons having any right, title, or interest in any portion of the Properties, as well as the occupants of any Unit and their guests and invitees.

2.1. **"Apartment Parcel"**. That 20.00 acre parcel more fully shown and described on that certain Plat prepared by Surveying Consultants, Inc. entitled "ALTA/ACSM Land Title Survey of 20.00 Acre Parcel, Westbury Park, A Section of Block X-1, A Portion of Rose Hill P.U.D., Bluffton Township, Beaufort County, South Carolina", prepared by Terry G. Hatchell, SCRLS #11059 of

2.17. **"Master Plan"**. The land use plan for the development of the Westbury Park community attached hereto as Exhibit "F" as may be amended, which plan includes the property described on Exhibit "A" and may include all or a portion of the property described on Exhibit "B" which Declarant may from time to time anticipate subjecting to this Declaration. Inclusion of property on the Master Plan shall not, under any circumstances, obligate Declarant to subject such property to this Declaration, nor shall the exclusion of property described on Exhibit "B" from the Master Plan, described on Exhibit "B" from the Master Plan bar its later annexation in accordance with Article IX.

2.26. **"Required Streets"**. Shall mean Westbury Parkway and Kensington Boulevard as shown on the Plat of the Apartment Parcel.

7.2. **Maintenance of Area of Common Responsibility**. The Association, subject to the rights of the Owners set forth in this Declaration, shall manage and control the Common Area and all improvements thereon (including, without limitation, furnishings, equipment and common landscaped areas) and shall keep it in good, clean, attractive and sanitary condition, order and repair, consistent with this Declaration and the Community-Wide Standard, which shall include, but need not be limited to:

(a) all landscaping and other flora, parks, lakes, signage, structures, improvements and bike and pedestrian pathways/trails situated upon the Common Area;

(b) all streets, specifically including the Required Streets within the Property and all street lights and signage within the right-of-way of said streets shall be the responsibility of the Association and shall be maintained in good condition, reasonable normal wear and tear excepted;

11.7. Easement for Use of Private Streets. Declarant hereby creates a non-perpetual, non-exclusive easement for access, ingress and egress over the private streets within the Common Area, for law enforcement, fire fighting, paramedic, rescue and other emergency vehicles, equipment and personnel; for school buses; for U.S. Postal Service delivery vehicles and personnel; private delivery or courier services the Apartment Parcel; and for vehicles, equipment and personnel providing garbage collection service to the Properties; provided, such easement shall not authorize any such Persons to enter the Properties except while acting in their official capacities.

(Ex. 4).

Thus, under the clear language of the Residential Declaration that binds the Plaintiff, the Plaintiff is solely responsible for the cost and expense of the maintenance of the Required Streets, in which the Defendant (and every unit owner within the condominium regime) has an appurtenant easement, granted to them by the Developer. This was the Developer's plan and intent.

The Plaintiff and its members took title to their property, encumbered as it was by the Residential Declaration, and with—at a minimum—constructive knowledge of the fact that one of the obligations of property ownership within the development was the maintenance of streets in which others (including the Defendant and its residents, UPS drivers, flower delivery vans, school buses, etc.) had an express easement.

The Defendant Westbury Estate has always used those streets and sidewalks for its access, as was intended by the Developer. The Developer's easement grants are appurtenant and perpetual, by the express terms of the Apartment Declaration, and they are for access, ingress, and egress for vehicles and pedestrians.

Nonetheless, for several years now, the Plaintiff has told the residents of the Defendant that they cannot use the sidewalks, which it claims are Westbury Park amenities, and it has required that residents of Defendant walk in the street. Further,

among other things, this lawsuit seeks to require the Estate to gain some other access to its property, despite Plaintiff's admission that the Developer only planned access as set forth above.

III. The story continues.

After the initial flurry of recorded instruments in 1998, the Developer set about to conveying its property, subject to the above-referenced Declarations:

- It built the infrastructure.
- It began to convey residential lots, in phases.
- It amended the Apartment Declaration (as set forth above), jointly with the Owner at the time, so that it could be converted into condominiums.
- The Apartment Parcel was converted to a condominium regime ("The Estate at Westbury"), pursuant to South Carolina law and a recorded Master Deed.
- The Owner of the Apartment Parcel began to convey individual condominium units in fee simple. By virtue of the derivation clause in those deeds, among other things, the individual unit holders took title subject to the Apartment Declaration, including its perpetual easements over the Required Streets.
- The Master Deed created the Defendant Association; Defendant's members are the individual unit owners within the condominium regime.

Defendant properly continued to pay assessments until the Apartment Declaration terminated in November 2018. Over the contemplated and bargained-for 20-

year term of the Apartment Declaration, Defendant paid over \$1.3 million in assessments for “its share of the costs for maintenance of the Required Streets and landscaping.” (Ex. 2 § 8.01; *see also* Ex. 3).

Pursuant to the unambiguous language of the Apartment Declaration, the Declarant had a fiduciary duty to use the assessment funds for this sole, express purpose (i.e., the maintenance of the Required Streets). As set forth below, Plaintiff was assigned that fiduciary duty by the Declarant.

IV. Developer never assigned all of its declarant rights to Plaintiff.

Plaintiff wrongly asserts that the Declarant assigned its declarant rights to the Plaintiff in 2015, and it wrongly asserts that “the [Plaintiff] Association now enjoys full control of the community.” (Complaint, p. 1). **There is no question of fact that Plaintiff’s assertions are impossible under the plain language of the controlling documents.** The Apartment Declaration permits the Developer to assign its rights, in Section 9.03, but it places limits on that assignment. The terms of the declaration specify that the declarant can convey “any or all” of its rights, and it limits the exercise of those rights to the “particular rights, powers, and reservations assigned.” (Ex. 2, § 9.03) (emphasis added).

The documents reflect that on August 8, 2015, Plaintiff entered into an “Estate Payment Division Agreement and Assignment,” by which the Declarant assigned to Plaintiff—and also to another entity that is not a party to this lawsuit—the **particular** right to collect the assessment required under the Amended Apartment Declaration, as well as the **particular** duty to use the assessment for maintenance and landscaping of the

Required Streets. (Exhibit 5, Estate Payment Division Agreement and Assignment) (the “Payment Agreement”). This unrecorded⁶ agreement, by its clear terms, **did not** convey “all” of the Declarant’s rights to Plaintiff. Rather, it **merely assigned the particular right to collect the assessment funds**, which Plaintiff did, until the assessment term expired on November 10, 2018. This is clear from a reading of the Payment Agreement as a whole, which primarily concerns the division of funds, but also from the title of the Payment Agreement, as well as this language, which specifically references the Amended Apartment Declaration (which it refers to as the “Estate Agreement”):

NOW, THEREFORE, for and in consideration of the sum of Ten and 00/100 Dollars (\$10.00) paid in hand by the ROA and COA to PPLLC, the receipt and sufficiency whereof is hereby acknowledged, PPLLC does, hereby assign, set over, transfer and convey to the ROA and COA, and their respective successors and assigns: a) all of PPLLC’s rights, title and interest in and to the Estate Agreement; and b) all of PPLLC’s rights, title and interest in and to the Estate Funds.

As discussed in Section I, *supra*, the Amended Apartment Declaration: (1) increased the amount of assessment funds that the Estate was to pay to the Developer for the remainder of the 20-year term of the Declaration; and (2) did not extend the term of the Declaration. It is clear that the Payment Agreement did not convey Declarant rights beyond the ability to collect assessment funds.

Plaintiff wrongly contends that it renewed the Apartment Declaration in October 2018 by way of a “Notice of Extension of the Declaration of Covenants, Conditions, Restrictions, and Easements” for the Apartment Parcel. (“Notice of Extension”) (Exhibit

⁶ The fact that the Payment Agreement was not recorded further demonstrates that it was not a complete assignment of all declarant rights, which would bind the property itself.

5).⁷ In fact, the purported Notice of Extension is without any legal effect, for at least three reasons, none of which are questions of fact:

(1) only the Declarant and the Owner—jointly—can extend or modify the Apartment Declaration, and the Plaintiff is not the Declarant;

(2) only the Declarant and the Owner—jointly—can extend or modify the Apartment Declaration, and the Notice of Extension purports to do so unilaterally;

(3) for the sake of argument, even if the Agreement did assign declarant rights (which is denied), those rights were assigned to both the Plaintiff and to another entity, which is not party to this lawsuit, and which did not sign the purported, invalid Notice of Extension.

LEGAL STANDARD

The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. In its determination of whether summary judgment is proper, the court must view all evidence in the light most favorable to the non-moving party, in order to determine

⁷ As set forth in Section I, *supra*, the Apartment Declaration expressly limits the manner in which it can be extended:

9.02 Termination and Modification: This Declaration, or any provision hereof, or any **covenant**, condition, or restriction contained herein, may only be terminated, **extended**, modified, or amended, as to the whole of said Property or any portion thereof **by the Declarant and Owner jointly**. (Ex. 2).

whether any genuine issue of material fact exists that would necessitate the trial of the case by a jury. *Barr v. City of Rock Hill*, 330 S.C. 640, 642, 00 S.E. 2d 157, 158 (Ct. App. 1998). “However, when plain, palpable, indisputable facts exist on which reasonable minds cannot differ, Summary Judgment should be granted.” *Hedgepath v. AT&T*, 348 S.C. 340 at 355, 559 S.E.2d 327 at 336 (Ct. App. 2001).

“Restrictive covenants are contractual in nature and bind the parties thereto in the same way as any other contract.” *Seabrook Island Property v. Berger*, 616 S.E.2d 431, 365 S.C. 234 (2005) (internal citations omitted). The construction of a clear and unambiguous contract is a matter of law for the court. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014). Similarly, the determination of the grantor’s intent when reviewing a clear and unambiguous deed is a question of law for the court. *Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012). “In construing a contract, it is axiomatic that the main concern of the court is to ascertain and give effect to the intention of the parties.” *Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 46, 747 S.E.2d 178, 183 (2013). “If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required, and the contract’s language determines the instrument’s force and effect.” *Id.* (internal citations omitted).

ARGUMENT

The causes of action on which Defendant seeks summary judgment are entirely questions of law, which can be decided without discovery or testimony, based on the unambiguous recorded documents that bind the parties to this lawsuit. This Court should grant judgment in favor of Defendant on the following causes of action, which are unabashedly not set forth in their proper numerical order:

I. Defendant is entitled to a Declaratory Judgment that it and its members have express appurtenant easements in the Required Streets.

Defendant's Fourth Counterclaim is for judgment from this Court that Defendant Estate, and its members,⁸ hold express, perpetual, appurtenant easements in the Required Streets. This is clear from the granting language of the Apartment Declaration, and it is equally clear from the plats and Master Plan.

A. The plain language of the Apartment Declaration conveys appurtenant easements.

The character of an express easement is determined by the nature of the right and the intention of the parties creating it. An appurtenant easement inheres in the land, concerns the premises, has one terminus on the land of the party claiming it, and is essentially necessary to the enjoyment thereof. *Proctor v. Steedley*, 398 S.C. 561, 730 S.E.2d 357 (Ct. App. 2012).

As set forth above, the Developer imposed restrictions on its property as a whole and conveyed easements pertaining to its property, which were intended to run with the

⁸ Defendant's members are the individual condominium unit holders. Defendant (as fee owner of the common areas within the condominium regime) and its members are the successors-in-title to the Owner as defined in the Apartment Declaration.

land (i.e. that inhere in the land and concern the premises):

2.01 Establishment of Restrictions: Declarant, owner of the Property, hereby declares that the Property is now held, and shall hereafter be owned, leased, hypothecated and used subject to the restrictions set forth in this Declaration, each and all of which is and are for, and shall inure to the benefit of, and pass with, and be enforceable as equitable servitudes by the Owner or Lessee of each and every portion of the Property, and shall apply to and bind the heirs, assignees and successors in interest of any Owner or Lessee of each and every portion of the Property.

(Ex. 2). The Developer made the following grants:

ARTICLE VII

EASEMENTS

7.02 Easements for Owner: Subject to the provisions hereof and the restriction contained in Subparagraph 7.02(a) hereafter, Owner, its successors and assigns, Owner's tenants, all guests and invitees of such tenants/owners, all employees, contractors, suppliers, vendors and other representatives of Owner and all other persons who reasonably need, on Owner's behalf, access to the "Property" shall have a right and easement of use of those certain easements as hereinafter more fully described as shown on the Plat.

(a) Perpetual non-exclusive right for vehicular and pedestrian access over and across Westbury Park Way from its intersection with US Highway 278 and its intersection with Kensington Boulevard. This right-of-way is relocatable by Declarant and/or Buck Island, L.L.C. provided such relocated easement affords the Property adequate and proper access to and from US Highway 278. It is specifically agreed and understood notwithstanding anything to the contrary herein, construction traffic and construction suppliers are prohibited from utilizing this easement for access to or from the Property. Owner shall be responsible to place signs directing all construction traffic and construction suppliers going to the Property to only use Kensington Boulevard as shown on the Plat, and to insert provisions within construction contracts specifying the allowable access route.

(b) Perpetual non-exclusive right for vehicular and pedestrian access over and across Kensington Boulevard from its intersection with Buck Island Road to its intersection with the Property.

(Ex. 2).⁹ The applicable plats and Master Plan — which are incorporated by reference into

⁹ This Court should be aware that the burden of the easement described in subsection (a), over Westbury Park Way, is borne by the Westbury Park Commercial Owners Association, which is not a party to this lawsuit.

both the Plaintiff's and the Defendant's declarations, and by which the entire property was developed and conveyed—leave no question that the easements are essentially necessary to the enjoyment of the Defendant's property, which is otherwise landlocked. (See Exhibit 1, Master Plan; and Exhibit 7).

The Declaration's language is clear that the Developer intended to and did grant express, perpetual, appurtenant easements to the Owner (i.e., the predecessor in title to the Defendant) for vehicular and pedestrian access over the streets that are the subject of this litigation. The Defendant respectfully requests a Declaratory Judgment from this Court so holding.

B. The recorded plats and Master Plan also entitle Defendant to appurtenant easements.

Additionally, or alternatively, the Defendant and its individual members are entitled to judgment that they hold appurtenant easements in the subject streets for the simple reason that they took title to their property with reference to plats and plans that depict the streets.

It is a long-standing rule of South Carolina law that an owner who takes title to property with reference to a plat acquires an interest in the easements that appear on that plat. *Ralph v. McLaughlin* at 352-353, 834 S.E.2d at 230-231, citing, *inter alia*, *Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 145 S.E.2d 922 (1965) (“[W]here a deed describes land as is shown on a certain plat, such plat becomes a part of the deed”), *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 105, 217 S.E.2d 16, 19-20 (1975) (“[T]he purchaser of lots with reference to the plat of the subdivision acquire[s] every easement, privilege, and advantage shown upon said plat”) (“Such an easement is deemed a part of the

property to which the grantee is entitled and of which he cannot be divested except by due process of law;”); *see also* *See Newton v. Batson*, 223 S.C. 545, 77 S.E.2d 212 (1953) (owner of a lot in a subdivision adjoining a small triangular lot, which evidence showed had been intended by the developer as a part of a beautified area, had a special property interest in the latter entitling him to preserve its use for the intended purpose).

In this instance, plats depicting the subject streets, as well as the Developer’s Master Plan, are within the chains of title of Defendant and each individual unit holder within the Defendant condominium regime. Because the subject streets are depicted on those plats, they are appurtenant to and inhere in the property that was conveyed by virtue of those plats.

For this additional reason, apart from the plain language of the Apartment Declaration, Defendant and its members are entitled to judgment as a matter of law that they hold an appurtenant easement in the Required Streets.

II. Defendant is alternatively entitled to a Declaratory Judgment that it and its members have an easement by necessity in the Required Streets.

Alternatively, this Court should grant summary judgment as to the Defendant’s Fifth Counterclaim, for an easement by necessity.

The elements of a claim for easement by necessity are: (1) unity of title; (2) severance of title; and (3) necessity. *Paine Gayle Props., LLC v. CSX Transp., Inc.*, 400 S.C. 568, 735 S.E.2d 528, 539 (Ct. App. 2012). “To establish unity of title, the owner of the dominant estate must show that his land and that of the owner of the servient estate once belonged to the same person.” *Kennedy v. Bedenbaugh*, 352 S.C. 56, 60, 572 S.E.2d 452, 454 (2002). “Severance of title means that title to a larger tract was ‘severed’ by conveyance

of a part to the plaintiff's predecessor in title and of a part to the defendant's predecessor in title; 'they both claim, from a common source, different parts of the integral tract, which necessarily assumes a severance.'" *Id.* (quoting *Brasington v. Williams*, 143 S.C. 223, 141 S.E. 375; citing *Turnbull v. Rivers*, 14 S.C.L. 131, 139 (Ct. App. 1825) ("The necessity by which a person derives a right of way, is when one person sells to another lands inclosed [sic] on all sides by other lands. Here[,] the law imposes an obligation on the seller to allow the purchaser a right of way over his adjacent land."))).

First, as set forth in the Background section, above, both the Plaintiff's and the Defendant's land were once wholly owned by the Developer. There is no question that the first element (unity of title) is established.

Second, as set forth above, the Developer – the common source of the property – severed title by conveying the Defendant Estate Apartment Parcel and the Plaintiff Residential property separately, after subjecting the tracts to separate declarations of covenants and restrictions, as well as a Master Plan.

Third, the Master Plan and Plats attached hereto leave no question that Defendant's land would be enclosed on all sides and landlocked without access over the streets that are the subject of this litigation. (See Ex. 1, Master Plan; Ex. 7; Exhibit 8 "Phase 1, Westbury Park").

Because Defendant meets each element of an easement by necessity as a matter of law, it respectfully requests that this Court would (alternatively) so declare.

III. The Court's determination on the preceding two issues subsumes the Plaintiff's Fourth and Fifth Causes of Action.

Because Defendant is entitled as a matter of law to judgment that it holds express,

perpetual, appurtenant easements in the streets that are the subject of this litigation, this Court should grant summary judgment in Defendant's favor as to Plaintiff's Fourth and Fifth causes of action.

A. The recorded instruments are clear that the Defendant holds appurtenant easements in the streets.

Plaintiff's fourth cause of action requests a declaratory judgment that any easement conveyed was an easement in gross. The primary basis for this argument by Plaintiff goes to the element of necessity and is that "reasonable alternative means for ingress and egress exist" to the Defendant's property. (Complaint, ¶ 65).¹⁰ Plaintiff's argument that there is other access to Defendant's property is wrong for two reasons. First, the recorded instruments, including the Master Plan, make it clear that the easement is the intended access by the original developer to an otherwise landlocked parcel. Second, the purported other access is described in Paragraph 33 of the Plaintiff's Complaint as a potential extension that was first proposed (by Plaintiff) in 2009 and never came to fruition. As this Court knows, the language of the Declaration's easement

¹⁰ Plaintiff also argues, in Paragraph 63 of the Complaint, that any easement conveyed was "of residential character." Whether an easement is of residential character has no bearing on the question of whether an easement is in gross or appurtenant.

Another of Plaintiff's arguments, in Paragraph 64 of the Complaint, is based on the incorrect premise that the Apartment Declaration was statutorily insufficient. *See* Complaint ¶¶ 8-11. Apparently, Plaintiff was missing the last few pages of the Apartment Declaration, which indicate that it was executed under seal, duly acknowledged and probated. Thus, Plaintiff's argument in Paragraph 64 of the Complaint (that the easement grant was superseded by a deed attached as Exhibit 2 to the Complaint) is invalid. The deed in question is a deed found within Defendant's chain of title, and the grant is made "together with all and singular the Rights, Members, Hereditaments, and Appurtenances" to the property, which would include the previously recorded Apartment Declaration binding the property, within which the easements were granted (it also references the same plat as in the Apartment Declaration, which identifies the access as Kensington Boulevard, Arley Way, and Westbury Park Way) (See Plat, Exhibit 7).

grant—at the time and place of its making (i.e., in 1998)—is what this Court is bound to construe in determining whether the easement in question is appurtenant or in gross. Hypothetical different access (over wetlands) proposed for the first time in 2009 and which was never finally approved nor constructed should not factor into this Court’s analysis of whether the easement was necessary at the time of its conveyance (in 1998).

As set forth above, this Court should find that Defendant Estate and its members were granted and hold a perpetual appurtenant easement in the streets that are the subject of this litigation.

B. This Court should not hold that no easement exists.

Defendant is also entitled to judgment in its favor as to Plaintiff’s Fifth Cause of Action, in which it requests judgment that no easement exists and requiring Defendant to construct alternative access. For the reasons set forth above, the Defendant has a perpetual appurtenant easement in the streets as a matter of law. To hold otherwise would divest 320 individual condominium unit holders (all whom took title to their property subject to the Apartment Declaration, the plats, and the Master Plan) of access that was clearly granted to them and in which they have an appurtenant property interest.

IV. The easements could not be terminated by any alleged breach.

Next, this Court should grant to the Defendant summary judgment as to the Plaintiff’s Third Cause of Action and find that the easements could not have been terminated by any alleged breach of contract, as a matter of law. This is so for each of the following reasons:

A. Pursuant to the Apartment Declaration, any purported failure to pay an assessment (which is denied) would not affect the property interest of the Defendant and its individual unit holders in the easements.

A plain reading of the Apartment Declaration – which was a negotiated agreement between the Developer and the original Owner to the apartment tract—leaves no question that the obligation to pay an assessment was: (1) for a limited duration (20 years); and (2) separate and distinct from the perpetual easements granted for access to the property; (3) enforceable only by lien.

First, as discussed above, the clear language of the easement grants within Section 7.02 indicates that they are perpetual. Further, the clear language of the assessment obligation in Section 8.01 requires payment to the Developer while at the same time unambiguously placing the financial burden for road maintenance squarely and solely upon the Plaintiff (and another entity not party to this suit). And, finally, the clear language of Sections 9.01 and 9.02 differentiates between the easements (which have a perpetual duration) versus the assessments (which have a finite 20-year term that can only be extended with the consent of the Owner). (See Exhibit 2).

Closing the deal on this issue is the language of the Apartment Declaration that unequivocally sets forth the mechanism for enforcing any alleged failure to pay an assessment, which is obviously not by asking a court to terminate perpetual easements:

8.03 The Assessment shall, if not paid within thirty (30) days of its due date, constitute a lien against the Property until paid. The lien shall also secure payment of interest, late charges (subject to the limitations of South Carolina Law) and costs of collection (including attorney and paralegal fees). Such lien shall be superior to all other liens, except: (a) the liens of all taxes, bonds, Assessments and other levies which by law would be superior, and (b) the lien or charge of any first priority mortgage of record made in good faith and for value. Notwithstanding the foregoing to the contrary, the subordination of the Assessment lien to the lien of any first priority mortgage of record shall only apply to such Assessments which have become due and payable prior to foreclosure. Any mortgagee who acquires title to the Property by foreclosure shall be liable for Assessment thereafter becoming due. All other persons acquiring liens or encumbrances on the Property after this Declaration shall have been recorded shall be deemed to consent that such liens or encumbrances shall be inferior to such future liens for assessments as provided herein, whether or not such prior consent shall be specifically set forth in the instruments creating such liens or encumbrances.

(Ex. 2).

The plain language of the Apartment Declaration leaves no question that the remedy for any alleged failure to pay an assessment (which is denied) is under no circumstances the unilateral termination of perpetual access easements.

B. Any purported failure to pay an assessment (which is denied) could not affect the property interest in the easements of Defendant and its individual unit holders, as a matter of law.

As set forth in Section I, above, the 320 individual unit holders within Defendant condominium regime, each of which took title with reference to plats and plans depicting Kensington Boulevard, Arley Way, and Westbury Park Way as access to their otherwise landlocked property, cannot be divested of their ownership interest in those roads – and **particularly not by way of this lawsuit, which has not named them as parties.** *See, e.g., Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 145 S.E.2d 922 (1965) and *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975) (both cases which stand for the established law in South Carolina that a purchaser with reference to a plat acquires a special property interest in every easement and benefit depicted on the plat, of which he

cannot be divested except by due process of law).

V. This Court should not terminate the easements under the equitable doctrines of relative hardship or changed conditions.

The Plaintiff's Seventh Cause of Action asks this Court to terminate express, perpetual, appurtenant easements—which are the only access for 320 owners within Defendant regime—because of the purported burden that those easements place upon Plaintiff. To repeat: *The Plaintiff complains that the easements are a benefit to the Defendant and a burden to the Plaintiff.*¹¹ If this Court reviews Paragraphs 84-94 of the Plaintiff's Complaint, it will be readily apparent to the Court that the Plaintiff's Seventh Cause of Action is on its face untenable, misdirected, unprecedented, and it should be summarily denied.

First, the allegations within this cause of action do not leave any question that the Plaintiff's ire in this regard would more properly be directed at the Developer, which was the architect of this community, and which is not a party to this lawsuit. It was the Developer, and not the Defendant, which: (1) developed its land in phases, (2) determined the character of the property, (3) imposed covenants, restrictions, and easements that run with the land, (4) designed the roads, and (5) allocated to the Plaintiff—and to another entity not a party to this lawsuit—the sole responsibility and burden of maintenance of the streets within the community.

Second, each and every one of Plaintiff's members took title to their residential property with **at least** constructive knowledge of the appurtenant obligations and

¹¹ This is the very nature of an easement.

covenants, as well as the Developer's intended plan. See, for one example, the following excerpts from the covenants within Plaintiff's and its members' chains of title:

7.2. Maintenance of Area of Common Responsibility. The Association, subject to the rights of the Owners set forth in this Declaration, shall manage and control the Common Area and all improvements thereon (including, without limitation, furnishings, equipment and common landscaped areas) and shall keep it in good, clean, attractive and sanitary condition, order and repair, consistent with this Declaration and the Community-Wide Standard, which shall include, but need not be limited to:

(a) all landscaping and other flora, parks, lakes, signage, structures, improvements and bike and pedestrian pathways/trails situated upon the Common Area;

(b) all streets, specifically including the Required Streets within the Property and all street lights and signage within the right-of-way of said streets shall be the responsibility of the Association and shall be maintained in good condition, reasonable normal wear and tear excepted;

(Ex. 4, Residential Declaration). The terms of development and the design of the community was contracted for and agreed upon **by the Plaintiff and its members** when they took title to their property subject to the recorded instruments which clearly contain burdens that run with their land. **This Court should not find any hardship whatsoever in the necessity to perform a contracted-for maintenance obligation that is appurtenant to real property.**

Third, the Developer's scheme was the basis of the Defendant's and its members' understanding of the property in which they were investing:

The reasonable care and replacement of the Required Streets and landscaping within the Westbury Park Residential Area shall remain the responsibility of the Westbury Park Residential Owners Association, Inc., and the reasonable care and replacement of the Required Streets and landscaping within the Westbury Park Commercial Area shall responsibility of the Westbury Park Commercial Center Property Owners Association, Inc.

(Ex. 2, Apartment Declaration, § 8.01). Defendant and its members took title subject to the express terms of the Apartment Declaration (as amended), including its definite

provisions for assessment payments lasting for a limited duration, as well as by plats and plans depicting their access. **This Court should not divest Defendant and its members of their contracted-for property rights, as a matter of law.**

Fourth, the Plaintiff cites no case law that holds that a vested property right can be unilaterally terminated for purported hardship, particularly within a lawsuit that does not name the 320 (or more) individual holders of the interest. For each of these reasons, this Court should grant summary judgment to the Defendant as to Plaintiff's Seventh Cause of Action.

[Suggested Intermission]

VI. The Apartment Declaration was not renewed, and the Defendant is not in default.

Under a plain reading of the applicable documents, Defendant is entitled to summary judgment as to the Plaintiff's Second Cause of Action. In its Complaint, Plaintiff wrongly claims that it unilaterally extended the Apartment Declaration, in 2018. As set forth in Background, Section IV, above, the purported extension was invalid as a matter of law for numerous reasons, including that the purported renewal was unilateral, in violation of: (1) the Apartment Declaration's express terms; (2) long-standing property law; and (3) contract law.

A. The contract at issue prevents unilateral renewal.

As further set forth above, the Apartment Declaration governs the relationship between the Developer and the Owner of the Apartment Parcel (which has changed over

time). The Apartment Declaration had a finite term of 20 years, which could only be extended by mutual agreement between the parties (i.e. the Declarant and the Owner):

9.02 Termination and Modification: This Declaration, or any provision hereof, or any covenant, condition or restriction contained herein, may only be terminated, extended, modified or amended, as to the whole of said Property or any portion thereof by the Declarant and Owner jointly. No such termination, extension, modification, or amendment shall be effective until a proper instrument in writing has been executed and acknowledged and recorded in the Office of the Register of Mesne Conveyance for Beaufort County, South Carolina. No such termination, extension, modification or amendment shall be in violation of County requirements and/or ordinances.

(Ex. 2). Thus, the plain language of the contract at issue operates to thwart any purported unilateral extension or modification.

B. Property law prohibits Plaintiff's purported unilateral renewal.

"Restrictive covenants, sometimes referred to as 'real covenants,' are agreements 'to do, or refrain from doing, certain things with respect to real property.'" *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888, 893 (Ct. App. 2014) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct.App.2006) (citation and quotation marks omitted)). "Restrictive covenants affecting real property cannot be properly and fully understood without resort to property law." *Id.* (emphasis added)

As further set forth above, the Developer recorded the Apartment Declaration, which initially governed the relationship between the Developer and the Defendant's and its members' predecessor in title. The recorded Apartment Declaration had a finite term of 20 years, which could only be extended by mutual agreement between the parties.

This limitation on extension and modification makes sense, and it is **required** by property law. The Declaration, once recorded, affects and creates vested property

interests. South Carolina law is clear that vested property interests in the nature of servitudes cannot be unilaterally altered. *See Ralph v. McLaughlin*, at 353, 834 S.E.2d at 231 (discussing South Carolina law that prevents the unilateral alteration of property interests, particular by a developer); *see also Corbin v. Cherokee Realty*, 229 S.C. at 24, 91 S.E.2d 542, 546 (“The Florenza Company could not without the consent of [the owner] change the location or width of [the easement].”). Hence, any change to the property rights and obligations within the Apartment Declaration (including an extension of their term) can only be accomplished “by Declarant and Owner jointly” by way of a duly recorded written instrument.

In this manner, the Apartment Declaration was legitimately amended – pursuant to its express terms – one time, in 2005, by the Declarant and the Owner, jointly. (Ex. 3, Amended Declaration). Thereafter, the “Owner,” defined by the Declaration in § 2.03 as the owner of the fee interest in the property, went from being a single entity to being the 320 fee holders of individual condominium units, as well as the Defendant (as to common areas). Once the Owner began to convey condominium units (as was specifically contemplated by the Amended Declaration), as a matter of law and under the plain language of the declaration, each unit holder’s execution and acknowledgement would be necessary in order to extend or modify the declaration. **This has never occurred.**

Defendant is entitled to summary judgment in its favor as to Plaintiff’s Second Cause of Action because the Plaintiff’s purported renewal was invalid as a matter of law.

C. Contract law prohibits Plaintiff’s unilateral renewal.

Plaintiff’s purported renewal is invalid under contract law, as well. Defendant

and its members undertook the express contractual obligation to pay assessments, totaling more than \$1.3 million dollars, for an understood, mutually-agreed upon, finite term of 20 years. For the Plaintiff, even as an assignee of the Developer, to attempt to unilaterally amend and alter fundamental terms that were the basis of the bargain would be illegal and unenforceable. *Lee v. Univ. of S.C.*, 407 S.C. 512, 757 S.E.2d 394 (2014) (noting that once a contractual bargain is formed, and the obligations are set, that the contract can only be altered by mutual agreement and for further consideration), *citing* 17A Am.Jur.2d Contracts § 507 (“[O]ne party to a contract may not unilaterally alter its terms.”).

In sum, **the Plaintiff was powerless to alone effect any extension of the Apartment Declaration’s obligation to pay an assessment.** This Court should so hold, and it should grant summary judgment in favor of the Defendant as to Plaintiff’s Second Cause of Action.

VII. Plaintiff’s cause of action for unjust enrichment fails as a matter of law.

Defendant is entitled to summary judgment on Plaintiff’s Sixth Cause of Action, for unjust enrichment. Unjust enrichment is an equitable remedy that is available in the absence of an express contract. *Myrtle Beach Hosp. v. City of Myrtle Beach*, 341 S.C. 1, 8, 532 S.E.2d 868, (2000) (noting that equitable remedies are available where there is no remedy at law and stating that “[i]n a law action, the measure of damages is determined by the parties’ agreement, while in equity, ‘the measure of the recovery is the extent of the duty or obligation imposed by law, and is expressed by the amount which the court considers the defendant has been unjustly enriched at the expense of the plaintiff.’”) (citations

omitted). In this instance, an express contract (and remedy at law) exists, and so Plaintiff's action must fail.

In support of its cause of action for unjust enrichment, Plaintiff argues that "[t]he scheme of creating a single access to the [Defendant] Estates through Westbury Park was created by a Developer for the benefit of the Developer and to the detriment of the communities and residents that will otherwise suffer the burden of the scheme after the Developer derived inequitable benefits from the scheme." (Complaint ¶ 81). This argument suggests that Plaintiff's real complaint lies with the Developer, rather than with the Defendant. The Developer is not a party to this lawsuit.

Plaintiff's Complaint further ignores that the relationship of the parties is governed by several express contracts, as further discussed above, including but not limited to:¹²

- The Apartment Declaration (in which Developer granted the easements at issue, and in which Owner covenanted to pay an assessment for "its share of the cost of the maintenance of the Required Streets") (Ex. 2);
- The Amended Apartment Declaration (in which Defendant and Developer jointly agreed to a significantly increased assessment payment for the remainder of the term) (Ex. 3);
- The Residential Declaration, in which Plaintiff covenanted and agreed to maintain the streets that are the subject of this lawsuit (Ex. 4);

¹² Other express contracts include the deeds and plats within both parties' chains of title, as further discussed, *supra*.

- The Payment Agreement (in which Developer assigned to Plaintiff the right to collect the assessment from the Defendant) (Ex. 5).

As a matter of law, Plaintiff cannot invoke an equitable remedy where the expectations and rights of the parties are bound by the above express contracts. *Id.* The parties contracted for and agreed to perpetual easements; they mutually agreed upon an assessment obligation totaling \$1.3 million dollars. Plaintiff contracted for and agreed to take title to property burdened by those easements. Plaintiff was assigned the right to collect the assessment from the Defendant, for the remainder of the term of the Apartment Declaration.

In sum, Defendant has not received any benefit for which it has not paid valuable consideration, which consideration was contemplated by express contract. Therefore, this Court should grant summary judgment in Defendant's favor as to Plaintiff's Sixth Cause of Action.

VIII. Defendant is entitled to an accounting as a matter of law.

Within the Apartment Declaration, as amended, the Developer covenanted that the Defendant's assessments were for the Defendant's "share of the costs for maintenance of the Required Streets and landscaping along the Required Streets" (Ex. 2, § 8.01) (Ex. 3). This promise created a fiduciary duty on the part of the Developer to use the assessment for that express purpose. The Developer subsequently assigned to the Plaintiff the right to collect the assessment, pursuant to the terms of the Apartment Declaration. (Ex. 5). The Plaintiff therefore inherited the Developer's duty to use the assessment for the Defendant's share of the maintenance of the streets that are the subject

of this litigation. Under the clear language of the contract at issue, Defendant is entitled to an accounting of the Plaintiff's use of the assessment funds that it collected.

CONCLUSION

For the reasons set forth above, this Court should grant summary judgment in favor of Defendant as to each of the causes of action identified herein. Plaintiff's lawsuit is based on a fundamental misunderstanding of the declarations and covenants of the community. The terms of those documents are not in dispute, and those terms require a legal ruling in Defendant's favor. If Plaintiff has any claim, it is against the Developer, not against Defendant.

Respectfully submitted

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September 14, 2020

EXHIBIT 9

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOURTEENTH JUDICIAL CIRCUIT
COUNTY OF BEAUFORT	)	CIVIL ACTION NO.: 2020-CP-07-00158
WESTBURY PARK RESIDENTIAL	)	
ASSOCIATION, INC.	)	PLAINTIFF'S SUPPLEMENTAL
	)	MEMORANDUM IN OPPOSITION TO
Plaintiff,	)	SUMMARY JUDGMENT AND IN
	)	SUPPORT OF ITS MOTION FOR A
v.	)	TEMPORARY INJUNCTION
	)	
	)	
	)	
ESTATE AT WESTBURY OWNERS	)	
ASSOCIATION, INC.,	)	
	)	
Defendant.	)	
	)	

TO: Ian Ford, Esq., Ainsley Tillman, Esq., and Evan Bromley, Esq., Attorneys for Defendant:

9.01 Term: This Declaration, every provision hereof and every covenant, condition and restriction contained herein shall continue in full force and effect for a period of twenty (20) years from and after the date of recording of this Declaration, provided that rights and easements which are stated herein to have a longer duration shall have such longer duration. This Declaration may

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be renewed for an unlimited number of successive ten (10) year periods by the Declarant, its successors or assigns filing a notice of extension with the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina prior to the expiration of any term.

Section 9.01, Declaration of Covenants, Conditions, Restrictions and Easements for Palmetto Lakes Apartments at Westbury Park¹

¹ The Plaintiff begins its brief by including the entire text of Section 9.01 of the Declaration of Covenants, Conditions, Restrictions and Easements for Palmetto Lakes Apartments at Westbury Park. The Defendant failed to include the text of the second sentence of Section 9.01 in the body of its 34 page Memorandum in Support of Summary judgment. Further, in its cut and paste excerpt of 9.01, the Defendant fails to include the second sentence of § 9.1, excluding language that expressly sets forth the procedure and method that the Declarant, its Successors or Assigns may unilaterally *renew* the Declaration for successive 10 year terms. The Plaintiff submits for the Court's edification that the second sentence of Section 9.01 is the crux of a great deal of this case.

I. THE PLAINTIFF'S LIKELIHOOD OF SUCCESS ON THE MERITS IS GREAT AND THE DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT SHOULD BE DENIED

MATERIAL FACTUAL BACKGROUND

The Defendant, Estate at Westbury Owners Association, Inc. (herein, the "Estate") is a horizontal property regime per the laws of South Carolina created on or about 2005. Prior to 2005, the development now known as the Estate was known as "Palmetto Lakes Apartments," and was owned by an individual owner, with all units being rental apartments. Thus, now a condominium complex, the Estate is the successor in interest to certain recorded instruments, including the "Declaration of Covenants, Conditions, Restrictions and Easements for Palmetto Lakes Apartments at Westbury Park." ((BK 57094 / PG 1225), Beaufort County ROD) (herein, the "Apartment Declaration") (**Exhibit 1**).

The Estate exists on a 20 acre parcel of land with 320 units (herein, the "Apartment Parcel"). The Apartment Parcel is northeast to Westbury Park Residential Association, Inc. (herein, "Westbury Park") and contiguous to it. It is possible to place an separate access to it from Plantation Park Rd., which would have been done between 2009 and 2011 had the Estates not refused the free development of that separate entrance by Beaufort County and Westbury Park. **Exhibit 2** (Estate at Westbury Board Meeting Minutes dated 12/11/10 discussing the detriments of a back gate and positive renting/selling point of entering the Estate community through a "private, peaceful attractive residential neighborhood"); **Exhibit 3** (Letter

from Estate at Westbury turning down the nearly free development of a second entrance in 2011).

Kensington Boulevard is a residential street within Westbury Park with individual houses placed fairly closely together on both sides. Presently, the only way to access the Apartment Parcel is through Westbury Park, on Kensington Blvd. While Westbury Park has over 350 residential units, it sits on over 120 acres. Thus, the thoroughfare of Kensington Blvd. receives an extraordinary amount of traffic from residents and vendors of the Estates, a 20 acre parcel with 320 units, significantly effecting the quality of life for the residents along the corridor.

a. Applicable provisions of the Apartment Declaration

Perhaps anticipating future friction that such land use planning could create, the Declarant of the Apartment Parcel, Plantation Properties, LLC, included Sections 2:01 and 2:02, establishing the Restrictions and the Purpose of Restrictions of the Apartment Declaration:

2.01 Establishment of Restrictions: Declarant, owner of the Property, hereby declares that the Property is now held, and shall hereafter be owned, leased, hypothecated and used subject to the restrictions set forth in this Declaration, each and all of which is and are for, and shall inure to the benefit of, and pass with, and be enforceable as equitable servitudes by the Owner or Lessee of each and every portion of the Property, and shall apply to and bind the heirs, assignees and successors in interest of any Owner or Lessee of each and every portion of the Property.

2.02 Purpose of Restrictions: The purposes of these restrictions is to insure proper development and use of the Property to be in keeping with the community wide standards established for the Westbury Park Commercial Subdivision, and the Westbury Park Residential Subdivision, the latter of which is contiguous to the Property.

Pg. 1, Exhibit 1.

Article VII, Sections 7.02(a)-(b) of the Apartment Declaration sets forth vehicular and pedestrian right of ways from the two roadway entrances of Westbury Park to the Apartment Parcel (where the Estate is located)²:

7.02 Easements for Owner: Subject to the provisions hereof and the restriction contained in Subparagraph 7.02(a) hereafter, Owner, its successors and assigns, Owner's tenants, all guests and invitees of such tenants/owners, all employees, contractors, suppliers, vendors and other representatives of Owner and all other persons who reasonably need, on Owner's behalf, access to the "Property" shall have a right and easement of use of those certain easements as hereinafter more fully described as shown on the Plat.

(a) Perpetual non-exclusive right for vehicular and pedestrian access over and across Westbury Park Way from its intersection with US Highway 278 and its intersection with Kensington Boulevard. This right-of-way is relocatable by Declarant and/or Buck Island, L.L.C. provided such relocated easement affords the Property adequate and proper access to and from US Highway 278. It is specifically agreed and understood notwithstanding anything to the contrary herein, construction traffic and construction suppliers are prohibited from utilizing this easement for access to or from the Property. Owner shall be responsible to place signs directing all construction traffic and construction suppliers going to the Property to only use Kensington Boulevard as shown on the Plat, and to insert provisions within construction contracts specifying the allowable access route.

(b) Perpetual non-exclusive right for vehicular and pedestrian access over and across Kensington Boulevard from its intersection with Buck Island Road to its intersection with the Property.

Article VIII of the Apartment Declaration (**Exhibit 1**) sets forth fixed Assessments, put in place initially for Palmetto Lakes Apartments, paid to the Declarant, and lien rights held by the Declarant in the event of a failure to pay:

² The Plaintiff maintains and does not waive the argument that the Declaration does not create a right of way, easement, or any other real property interests as it is not contain an Acknowledgement, in violation of SC Code § 30-5-10, et seq.

ARTICLE VIII

ASSESSMENTS

8.01 The Owner, its successors or assigns (but not tenants), by accepting a Deed to the Property is deemed to covenant and agree to pay an assessment ("Assessment") to Declarant, or its assigns on an annual basis the sum of \$17,500.00 as its share of the costs for maintenance of the Required Streets and landscaping along the Required Streets and around and within parks within the Westbury Park Residential Area and the Westbury Park Commercial Area. This Assessment shall become due and payable on February 1 of each year and if not paid shall bear interest at the rate of ten percent (10%) per annum until paid. The reasonable care and replacement of the Required Streets and landscaping within the Westbury Park Residential Area shall remain the responsibility of the Westbury Park Residential Owners Association, Inc., and the reasonable care and replacement of the Required Streets and landscaping within the Westbury Park Commercial Area shall remain the responsibility of the Westbury Park Commercial Center Property Owners Association, Inc.

8.02 The Assessment as set forth hereinabove shall commence on January 1, 1999, be adjusted annually to reflect changes in the Consumer Price Index for all Urban Consumers, All Items (Base Year 1982-1984 = 100) published by the United States Department of Labor, Bureau of Labor Statistics, all city average. Under no circumstances will the Annual Assessment fall below the minimum of \$17,500.00 per year.

8.03 The Assessment shall, if not paid within thirty (30) days of its due date, constitute a lien against the Property until paid. The lien shall also secure payment of interest, late charges (subject to the limitations of South Carolina Law) and costs of collection (including attorney and paralegal fees). Such lien shall be superior to all other liens, except: (a) the liens of all taxes, bonds, Assessments and other levies which by law would be superior, and (b) the lien or charge of any first priority mortgage of record made in good faith and for value. Notwithstanding the foregoing to the contrary, the subordination of the Assessment lien to the lien of any first priority mortgage of record shall only apply to such Assessments which have become due and payable prior to foreclosure. Any mortgagee who acquires title to the Property by foreclosure shall be liable for Assessment thereafter becoming due. All other persons acquiring liens or encumbrances on the Property after this Declaration shall have been recorded shall be deemed to consent that such liens or encumbrances shall be inferior to such future liens for assessments as provided herein, whether or not such prior consent shall be specifically set forth in the instruments creating such liens or encumbrances.

- b. The 2005 Amendment to the Apartment Declaration Allowing Conversion to Condominium Units and Modifying the Assessment

In 2005, the Apartment Declaration was *AMENDED* to allow the Apartment Parcel to be converted to condominium units, which was previously prohibited (see

Exhibit 1, § 5.02(a)). In approving this Amendment to the Apartment Declaration, the Declarant and the owner of the Apartment Parcel agreed to *alter and change* the Assessment payment from \$17,500 per year, to a base amount of \$7,200 a month. Specifically, Sections 4 and 5 of the Amendment to Declaration of Covenants, Conditions, Restrictions and Easements for Palmetto Lakes Apartments at Westbury Park (herein, the “Amendment”) (**Exhibit 4**), state:

4. The first two sentences of Section 8.01 shall be deleted and, the following sentences shall be inserted at the beginning of Section 8.01. “The Owner, its successors or assigns, by accepting a Deed to the Property is deemed to covenant and agree to pay an assessment (“Assessment”) to Declarant, or its assigns on a monthly basis in the amount of \$7,200 as its share of the costs for maintenance of the Required Streets and landscaping along the Required Streets and around and within parks within the Westbury Park Residential Area and the Westbury Park Commercial Area. This assessment shall become due and payable on the 15th day of each month, and if not paid shall bear interest at the rate of ten percent (10%) per annum until paid. In the event the Owner converts the Property to the condominium form of ownership, the resulting condominium association shall have the obligation to collect adequate funds from the individual unit owners and pay the Assessment directly to the Declarant.”

5. Section 8.02 shall be deleted and the following sentence shall be inserted at the beginning of Section 8.02. “The Assessment as set forth hereinabove shall commence on January 1, 2006, and shall be adjusted annually to reflect changes in the Consumer Price Index for all urban Consumers, All Items (base year 1982-1984=100) published by the United States Department of Labor, Bureau of Labor Statistics, all city average. Under no circumstance will the Annual Assessment fall below the minimum of \$86,400.00 per year.”

The Plaintiff draws reference to the fact that, in the Amendment, which was signed by both the Declarant and the Owner of the Estate’s predecessor in interest, no inspection rights were granted. No rights for an accounting or for reconciliation were provided. And, instead, it was specifically stated that, “Under no circumstance will the Annual Assessment fall below the minimum of \$86,400.00 per year.”

c. Westbury Park’s October 2018 Renewal of the Declaration

Section 9.01 of the Apartment Declaration states (in its entirety):

9.01 Term: This Declaration, every provision hereof and every covenant, condition and restriction contained herein shall continue in full force and effect for a period of twenty (20) years from and after the date of recording of this Declaration, provided that rights and easements which are stated herein to have a longer duration shall have such longer duration. This Declaration may

9

be renewed for an unlimited number of successive ten (10) year periods by the Declarant, its successors or assigns filing a notice of extension with the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina prior to the expiration of any term.

In 2015, Declarant Rights for the Apartment Declaration were assigned Westbury Park and Westbury Park Commercial Association. Westbury Park is the Declarants successor. Per the plain terms of Section 9.01 of the Declaration, Westbury Park Residential Association renewed the Apartment Declaration for a period of 10 years on October 23, 2018 by filing a Notice of Extension with the Register of Deeds (**Exhibit 5**) (Notice of Extension of the Declaration of Covenants, Conditions, Restrictions, and Easements for Palmetto Lakes Apartments at Westbury Park, and recording assignment of Declarant Rights).

D. The Estate of Westbury's Material Breach of the Declaration and Easement Agreement

Section 9.01 of the Declaration—the Term and Renewal section—speaks nothing of joint filing. It does not require any filing renewing the Declaration to be acknowledged. As stated above, on October 23, 2018, the Declaration was renewed by Westbury Park. Ironically, also on or about October 23, 2018, Westbury Park received correspondence from the Estate (dated October 15, 2018) stating that it would not recognize or take part in any *extension* of the declaration. In this correspondence, the Defendant failed acknowledge or include the express procedure

for the Declarant, its successors or its assigns to unilaterally renew Section 9.01 (**Exhibit 6**) (Correspondence from Counsel for Defendant, declaring that the Estate will not extend the declaration, and failing to reference Section 9.01 of the Declaration). Indeed, as set forth more fully below, Sections 9.01 and 9.02 contain material differences showing the instrument's intent.

Section 9.01 (set forth verbatim, above) **expressly sets forth the manner in which the Declaration may be Renewed in successive 10 year terms by the Declarant or its successors or assigns, alone.** Thus, it specifically controls the natural length of the Declaration by its original terms and not to its unnatural termination, or alteration of its content, substance, or any extension not in congress with its original terms. Section 9.01 sets forth a unilateral right for the Declarant or its successors or assigns to *renew* the Declaration by filing "Notice of Extension with the Office of the Register of Mesne Conveyances for Beaufort County, South Carolina prior to the expiration of any term." This is different from altering, modify or otherwise extending the Declaration to different terms or in a different manner than what is already included in the text of the Declaration.

Compare Section 9.01 *with* the text of 9.02:

9.02 Termination and Modification: This Declaration, or any provision hereof, or any covenant, condition or restriction contained herein, may only be terminated, extended, modified or amended, as to the whole of said Property or any portion thereof by the Declarant and Owner jointly. No such termination, extension, modification, or amendment shall be effective until a proper instrument in writing has been executed and acknowledged and recorded in the Office of the Register of Mesne Conveyance for Beaufort County, South Carolina. No such termination, extension, modification or amendment shall be in violation of County requirements and/or ordinances.

Section 9.02 speaks nothing to the Declarant's right to renew the Declaration for successive 10 year terms. Instead, its terms clearly set forth a different meaning and purpose—a requirement for a joint filing in the event that the Declaration is *changed* from its existing terms. “*This declaration, or any provision hereof, or any covenant, condition or restriction contained herein*, may only be terminated, extended, modified, or amended, as to the whole of said Property or any portion thereof by the Declarant and Owner jointly.” (emphasis added). That is, if the contents of this Declaration are to be *changed*, the Declarant and Owner must do so together. **Importantly**, for a filing under section 9.02 to be effective, it must be “Executed and acknowledged and recorded.” Again, 9.01 specifically does not require a joint filing for renewal, and it says nothing of being “executed and acknowledged jointly.” Section 9.02 does.

- i. The differences between the recording procedure and execution procedure found between Section 9.01 and Section 9.02 have meaning.

Clearly, the differences between the recording procedure and execution procedure contained in 9.01 and 9.02 have meaning. An Acknowledgement is a defined term under South Carolina law. (indeed, there is an “Act” for that SC Code § 26-3-10, et seq.). By including the requirement that an alteration under Section 9.02 be “executed and acknowledged jointly” and setting forth a different procedure for the Declarant or its assigns to unilaterally file a Notice renewing the Declaration in preordained ten year terms in 9.01 (as opposed to modifying or expanding its existing content as is set forth in 9.02), the drafter of the instrument conveys its intent treat

a renewal of the Declaration which does not change the substance thereof differently from a modification. “[I]t is the duty of the court to construe deeds and determine their legal effect, where there is no such ambiguity as requires parol proof and submission to the jury.” Hunt v. Forestry Comm’n, 358 S.C. 564, 569, (S.C. App. 2004)(quoting 26A C.J.S. Deeds § 168 (2001)).

Here, because the Plaintiff renewed the Declaration under Section 9.01 in strict conformity with its terms, it will succeed in the suit, and the Defendant’s Motions for Summary Judgment as to the Plaintiff’s claims must fail.

II. THE ESTATE AT WESTBURY’S COUNTERCLAIMS ARE WITHOUT MERIT.

a. **The Estate waived its right to an Accounting, Unjust Enrichment, and/or Breach of Fiduciary Duty Claims long ago.**

From 1998 to 2018, the Estate has no record of any objection to the assessment and no record of a demand for a single reconciliation or for an accounting of the assessment funds. Jeanette Prinson Dep 49:11—52:17 (Sept. 2, 2020)(HOA Manager for Defendant); Austin Adams Dep. 38:4—39:12 (Sept. 2, 2020)(Vice President of the Defendant). If nothing else, the Plaintiff holds a significant argument that the Estate waived all claims towards any relief for an Accounting, Unjust Enrichment, Breach of Fidiciary Duty, or Breach of Contract, and assented to the terms of the contract long, long ago.

Further, the Plaintiff submits that the failure to request relief before October 2018 was because it was known then, and should be now, that the Assessment constitutes a fixed fee specifically set forth in the contract for the Apartment Parcel’s

use, enjoyment and access to its property, as well as constituting consideration for the substantial burden placed on Westbury Park for the traffic that exists on the purported easement corridor, and the cumbersome effect the same has to its residents safety and quality of life.

Looking closely at the contract at issue—the Apartment Declaration and its Amendment (pertinent terms included in text, above)—grant no rights whatsoever to an accounting, reconciliation or even an implication that the money should be set aside for a specific purpose. Instead, it states plainly and definitively that the amounts paid are “as its share.” Period.

Moreover, the payment structure has a floor of \$86,400.00/year. This amount constitutes the payment of an assessment fee. The Defendant has no equitable right to be repaid amounts paid without protest or legal right to claw-back funds that were specifically owed under a fixed-fee contract.

The intangible value represented by the “Easement fee” is perhaps best expressed by the Board of the Estate at Westbury in **Exhibit 2**, where it recognizes that its community would suffer from a second entrance because:

- it is presently the “ ‘Hidden Jewel of Bluffton’ because we are hidden from the main highway and aligned with a quiet residential neighborhood.”
- The back gate “may attract unwanted pedestrian visitors to the community. . . .” And, the “Estate will experience increased community through-traffic generated from the Westbury Community seeking a fast

approach to Highway 278” (that is, what Westbury Park has suffered for over 20 years from the Estate residents and visitors).

- “Units directly at the back gate will suffer loss of tranquility, privacy, vehicle noise and possible reduction in property values”

Westbury Park submits that each of these concerns is the precise reason the Easement Fee existed, and are realities that its residents suffer and live through every day.

b. The Estate is barred from obtaining any relief under the Doctrine of Unclean Hands.

Since October 2018, the Estate has refused to make any further payments toward the assessment and, again, for the first time after paying the assessment for 20 years, demanded an accounting for its payments without basis. This is wholly against the common law duty of a Dominant Estate’s responsibility to pay its portion of maintenance and care of an easement.

Further, it appears the Estate made the decision to breach the easement agreement and refuse to make any payment to Westbury Park without a Board or owner vote authorizing the act. See Jeanette Prinson Dep. 46:24-48:19. In so doing, it subjects itself to a judgment for back payments, interests, attorney’s fees, and ultimately, potential foreclosure on its common elements. It did not seek a declaratory judgment ruling from the court. Instead, it took a tenuous and extreme position arguing against the plain reading of the Declaration and still omits key language in its arguments which is the crux of case between the parties to this day. Indeed, the Accounting demand and the Estate’s declaration that it would make no

further payments whatsoever to Westbury Park for its use of its streets, security, and maintenance and operation of the gates appears to be *Ultra Vires* act by the Board of the Estate at Westbury, entered into with a vote or authority.

c. The Estate acknowledges that the Apartment Declaration does not contain terms granting it the rights or relief that it is seeking

The Estate's Vice President acknowledged at his deposition that the assessment agreement at issue contains no language or "verbiage" stating that the Estate has any right to an accounting regarding payments made to Westbury Park. Adams Dep. 67:4—9. Mr. Adams acknowledges that no language sets forth a requirement that the money would be deposited in a trust, constructive or otherwise. Id. 67:10—15. Mr. Adams acknowledges that the Apartment Declaration does not contain verbiage stating that it has a right to a reconciliation or any type of inspection rights. Id. 67:16—21. In the same deposition, Mr. Adams acknowledges that "[a] contract states what it states." Id. 61:4-6.

d. Westbury Park is not the real party at interest relative to the Defendant's Counterclaims.

To further complicate the Estate's position, until recently, Westbury Park Residential Association received only a portion of the Assessment funds, with the Declarant retaining the majority. The Estate knows that Westbury Park received but a small portion of the money it paid to the Declarant over time, yet it choses not name the Declarant as a party.

In sum, the Plaintiff's likelihood of success on the merits in the underlying action is great, the Defendant's Motions for Summary Judgment should be denied,

and the Plaintiff's Motion for a Temporary Injunction should be granted, for further reasons set forth below.

III. THE RELIEF THE PLAINTIFF SEEKS IN ITS MOTION FOR A TEMPORARY INJUNCTION IS REASONABLE, PROPER AND NECESSARY UNDER THE CIRCUMSTANCES

While it is undoubtedly the correct rule that a court of equity will not interfere by injunction in cases of nuisances, trespasses, and like injuries to property when the parties can have complete redress in a court of law, still if it appears that irreparable mischief will be done by withholding the process, or where the damages that will result to the complainants are incapable of being adequately measured, or where the mischief is such, from its continuous and permanent character, that it must occasion constantly recurring grievances, which cannot be otherwise prevented, a court of equity ought to interfere by injunction to stay the wrong and protect the complainants' property and personal rights [218 S.C. 272] from hurt or destruction.

Carter v. Lake City Baseball Club, 218 S.C. 255, 62 S.E.2d 470 (S.C. 1950)

- a. **The Plaintiffs have documented over one hundred incidents of unauthorized gate access by Estate at Westbury residents and guests, and scores of incidents of trespass upon Westbury Park common property since December 2018, and they continue.**
 1. Despite the Defendant's representations that the Plaintiffs have provided "no evidence" to them regarding the Defendant's conduct, the Plaintiffs shared with the Defendants scores of videos and photographs documenting entry by Estate residents, guests, or vendors violating Westbury Park's Rules and Regulations concerning gate entry, use of common property, and/or traffic infractions.
- B. **The Defendant holds the responsibility of regulating their member's use of the area subject to the purported easement, and, the Plaintiff has the right to regulate conduct on its common property**
 1. The Estate acknowledges that it is "bound" by "Westbury Park's rules concerning the gates and access to the property." See Exhibit 2, Estate at Westbury's Memorandum in Opposition to Temporary Injunction.

2. It is clear that Westbury Park has the right to regulate and enforce conduct on its own property. See Howorka v. Harbor Island Owners' Association, Inc., 292 S.C. 381, 356 S.E.2d 433 (S.C. App. 1987)
- C. Defendant fails to reasonably enforce its existing rules and regulations, making it impossible for Plaintiff to regulate conduct on its property**
1. Defendant admits that it and its members ["we"] are "bound" by Westbury Park's Rules and Regulations Id., yet it refuses to take any meaningful administrative action when notified of its residents' breach of those very Rules and Regulations.
- D. Defendant has consistently failed to implement reasonable rules, fines, warnings, or other deterrents to prevent its members and occupants from damaging Westbury Park property and violating its Rules and Regulations.**
- E. Defendant fails to cooperate with Westbury Park in any meaningful manner to allow it to enforce Rules and Regulations as to its property, to prevent property damage and criminal acts, and to restrain trespassing by its residents;**
1. While Westbury Park appreciates steps made to acknowledge cooperation is needed, all recent actions taken by the Estate are in response to demands made by Westbury Park or in response to this litigation.

Defendant's Exhibit 2, Exhibit 3, and Exhibit 4 to its Memorandum in Opposition are a direct result of and in response to the Plaintiff's lawsuit and correspondence. See Exhibit 8 (Letter to Defendant dated June 20, 2019 Notifying Defendant of Default and of Gate Trespass by Security for the Estate at Westbury); Exhibit 9 (Letter to Defendant dated April 8, 2020 notifying Defendant of violations by its residents). Like the Defendant in Mack v. Edens, "only when [the Estate] was sued did [it] relent." 306 S.C. 433, 437; 412 S.E.2d 431, 434 (S.C. App. 1991) (holding

that injunction was a proper remedy for trespass on land from the release of water, even when the Defendant abated the act after being sued).

Further, the court should give no weight to this hearing being continued from its original date: It was originally continued as a courtesy to the Defendant and, thereafter, it was continued until the parties could appear in person due to the Covid-19 crisis.

F. The Defendant's actions and inactions cause or constitute a serious risk of irreparable harm to the Plaintiff

1. While the Defendant disparages and undermines the Plaintiff's claims to a continual trespass to its real property in its brief, South Carolina law is clear: continuous trespassing constitutes conduct that is proper for a court to enjoin. Carter v. Lake City Baseball Club, 218 S.C. 255, 272 62 S.E.2d 470 (S.C. 1950)

Injunction is the proper remedy for a continuous trespass to land. Mack v. Edens, *Supra* (citing McClellan v. Taylor, 54 S.C. 430, 32 S.E. 527 (1899)). The Plaintiff's documentation of repeated, recurring trespass to its real property fixtures (gates) and of its real property (streets, sidewalks, parks, lagoons and other common areas) by Estate owners, residents and/or guests and repeated recurring trespass upon its amenities and Common Elements constitutes a continual trespass.

Similarly, the Defendant's owners residents and guests continual and repeated brazen violations of the Plaintiff's Rules, Regulations and public safety laws (operating vehicles through exit ways to avoid gates, pushing the gates open, failing to stop at stop signs, etc.), constitutes a serious risk and likelihood of permanent injury. Without assistance from the Estate with cooperation in enforcing its own

Rules and Regulations as to vehicle registration, occupant monitoring, and occupant registries, Westbury Park is largely powerless to effectively enforce its rules, regulate conduct on its property, and prevent further action. Without the Estate taking enforcement actions on violations of gate policy, Westbury Park is powerless to prevent future harm.

Because of the permanent and recurring nature of the injury, which cannot otherwise be prevented, this court should enjoin the continuous trespassing of Estate owners and residents and protect Westbury Park's property rights from further hurt and destruction. See Mack v. Edens, 306 S.C. 433, 412 S.E.2d 431 (S.C. App. 1991).

G. The Plaintiff has a high degree of likelihood of success on the merits.

The Plaintiff draws reference to their arguments in this memorandum in opposition to Summary Judgment.

Respectfully submitted,

/s/Benjamin T. Shelton

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Hilton Head Island, South Carolina
September 15, 2020

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

The Honorable Marvin H. Dukes, III, Master in Equity and Special Circuit Court Judge

Appellate Case No. 2020-001275

Westbury Park Residential Association, Inc.,.....Respondent,

v.

Estate at Westbury Owners Association, Inc.,.....Appellant.

PROOF OF SERVICE

The undersigned certifies that a copy of the (1) Notice of Appearance of Kathleen C. Barnes on Behalf of Respondent Westbury Park Residential Association, Inc., and (2) Respondent's Motion to Dismiss Appeal as Unappealable with exhibits have been served upon counsel for Appellant via electronic mail at the email address stated in the Attorney Information System as set forth below on October 12, 2020.

FORD WALLACE THOMSON LLC
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October 12, 2020

BROMLEY LAW FIRM LLC
Evan K. Bromley
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s/Kathleen C. Barnes
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RECEIVED
Oct 12 2020
SC Court of Appeals

BARNES

LAW FIRM | LLC

Kathleen C. Barnes
Admitted: Georgia | South Carolina

October 12, 2020

Via E-Mail

The Honorable Jenny Abbott Kitchings
Clerk of Court for the Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211
ctappfilings@sccourts.org

RECEIVED

Oct 12 2020

SC Court of Appeals

Re: *Westbury Park Residential Association, Inc. v. Estate at Westbury Owners Association, Inc.*
Appellate Case No. 2020-001275

Dear Mrs. Kitchings:

Attached for electronic filing and service pursuant to section (c)(6) of Supreme Court Order 2020-05-29-02 *RE: Operation of the Appellate Courts During the Coronavirus Emergency*, please find the following documents: Notice of Appearance of Kathleen C. Barnes on behalf of Respondent, Respondent's Motion to Dismiss Appeal as Unappealable, and proof of electronic service of the motion. Please file the documents and return one file-stamped copy to me via email. By electronic copy of this letter, I am serving all counsel of record with a copy of the same.

Pursuant to Order 2020-05-29-02, the \$50.00 filing fee is being mailed to the Supreme Court within five days of the date of this filing. If you have any questions, please do not hesitate to contact me. Thank you.

Sincerely,



Kathleen C. Barnes

Enclosures

cc: Ian S. Ford
Ainsley F. Tillman
Evan K. Bromley
Benjamin T. Shelton