NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Ralph Stroman, Special Referee

Case No. 2009-CP-26-3596
Consolidated with
2010-CP-11320

RECEIVED
APR 05 2013
S.C. SUPREME COURT

Ronald Jarmuth
Plaintiff, Pro Se **Appellant**

v.

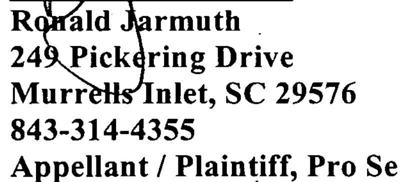
Rosemary Toth,
International Club Homeowners Association, Inc,
K.A. Diehl, Inc.
Defendants **Respondents**

NOTICE OF APPEAL

Ronald Jarmuth appeals the Final Order of the Honorable Ralph P. Stroman, Special Referee, dated September 10, 2012, stayed by virtue of Appellant's Motion for Relief from Judgment, to Amend, or for New Trial filed September 19, 2012, denied by Order of Court entered March 11, 2013.

Appellant received written notice from the Clerk of Court by US Mail of entry of Order Denying Motion to Amend on March 14, 2013.

April 3, 2013



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Other Counsel of Record:

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Attorneys for Rosemary Toth, International Club HOA; and K.A. Diehl

PROOF OF SERVICE OF A NOTICE OF APPEAL

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Plaintiff, Pro Se **Appellant**

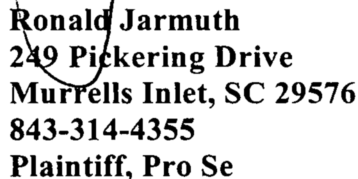
v.

Rosemary Toth,
International Club Homeowners Association, Inc,
K.A. Diehl, Inc.
Defendants **Respondents**

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Rosemary Toth, K.A. Diehl, and International Club Homeowners Association, Inc by depositing a copy of it in the United States Mail, postage prepaid, on April 3, 2013, addressed to their attorney of record, Henrietta U. Golding; McNair Law Firm, P.A.; 2411 Oak Street; Suite 206; Myrtle Beach, SC 29577-3164

April 3, 2013



Ronald Jarmuth
249 Pickering Drive
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Plaintiff, Pro Se

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2009-CP-26-3596

RECEIVED
APR 05 2013
S.C. SUPREME COURT

Ronald Jarmuth,

Plaintiff,

vs.

The International Club Homeowners Association, Inc.,
Rosemary Toth,
and K.A. Diehl & Associates, Inc.

Defendants.

FINAL ORDER DISMISSING PLAINTIFF'S CLAIMS AND AWARDING JUDGMENT AGAINST THE PLAINTIFF IN THE AMOUNT OF $7,326.00 AND GRANTING INJUNCTIVE RELIEF

Ronald Jarmuth,

Plaintiff,

vs.

The International Club Homeowners Association, Inc.

Defendant.

CIVIL ACTION NO.: 2010-CP-26-11320

HORRY COUNTY
12 SEP 10 AM 10: 52
MELANIE HUGGINS-WARD
CLERK OF COURT

The above entitled actions were referred to the undersigned, as Special Referee, by Consent Order filed with the Clerk of Court's office on June 15, 2012. The Parties agreed that this referral to the undersigned is a referral with finality with any appeal being directly to the South Carolina Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules. The trial was held before the undersigned on August 8, 9, and 10, 2012. In accordance with Rule 52, South Carolina Rules of Civil Procedure, the following are my Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. The Plaintiff became a property owner in the International Club subdivision (hereinafter known as the "Community"), when he purchased a home in the Pebble Creek subdivision by Deed dated October 23, 2006.

2. The Community, since it is located in Horry County, is subject to the Horry County zoning ordinances. From the evidence introduced at trial, it appears that this Community was approved as a planned unit development ("PUD") by Horry County Council in the late 1990's.

3. The Community is a residential community consisting of over 670 single family and multi-family units located off of Highway 707 in Horry County approximately 10 miles south of Myrtle Beach. In addition, situated within the Community is the International Club Golf Course (hereinafter "Golf Course"). This Golf Course is privately owned and open to public play.

4. According to the plats introduced as exhibits and the Declaration of Covenants and Restrictions recorded in Deed Book 2117 Page 1353 in Horry County Registar of Deeds Office on February 8, 1999 (hereinafter "Declaration"), the Community currently encompasses over 300 acres.

5. Initially, this Community was named Murrells Inlet Golf Plantation but its name was changed in the first amendment to the Declaration filed in Deed Book 2258 at Page 1453 in the Horry County Registrar of Deeds Office on May 9, 2000 ("First Amendment").

6. The Declaration and the First Amendment for the Community was recorded by Plantation A.D., LLC, the original Developer and Declarant. The Declaration sets forth the real property subject to the restrictive covenants, additional real property that may be added, criteria

for governance, provisions relating to the creation of a homeowners association and an Architectural Review Board (hereinafter "ARB"), and other related provisions. The Developer attached to the Declaration as Exhibit "C" the Bylaws for the homeowners association. The Bylaws were also incorporated into the Declaration by reference pursuant to Section 1.5 of the Declaration. These are the only Bylaws that the Defendant HOA has utilized since its incorporation.

7. Plantation A.D., LLC, as well as its successors and assigns, were defined as the Declarant in the Declaration. Plantation A.D., LLC added acreage to the Community by way of amendments to the Declaration. In 2003, the developer rights were assigned to D.R. Horton, Inc.

8. The Declaration was amended five times and the following are the amendments:

- First Amendment, May 9, 2000: This Amendment changed the name of the Community to "International Club", added the property that was developed as the Villas Horizontal Property Regime; however no property description was attached to this Amendment. With respect to the Villas Horizontal Property Regime only, the Amendment waived the Declarant's rights to certain provisions in the Declaration.
- Second Amendment, April 25, 2003: This Amendment assigned to D.R. Horton, Inc. all the rights and powers of the original Developer, Plantation A.D. LLC, except that Plantation A.D., LLC continued as owner of the roads and streets in the Community. Thus, as of April 25, 2003, the Developer was D.R. Horton.
- Third Amendment, March 26, 2004: This Amendment added approximately 100 acres for the developments known as The Glens, The Meadows, The Links, The Highlands, and The Cambridge, as well amended a provision in the Declaration regarding capital contributions from purchasers.
- Fourth Amendment, December 23, 2004: This Amendment resolved the mistake in the first amendment by attaching the property description for the Villas Horizontal Property Regime. It also required a $150.00 contribution from each multi-family owner for road maintenance.
- Fifth Amendment, June 20, 2008: This Amendment added 14.10 acres for the development of a multi-family phase. This property was also subjected to the Declaration pursuant to Exhibit "A" of the governing documents. The development has not been constructed.

9. The Defendant homeowners association, the International Club Home Owners Association (hereinafter "Defendant HOA"), was incorporated as a South Carolina nonprofit corporation on March 1, 2001. Its status with the South Carolina Secretary of State has not changed since its incorporation.

10. Until 2007, the Defendant HOA was controlled by the Developer. In January 2007, the Developer appointed Community homeowners to a transition committee organized to assist in turning over control of the Defendant HOA to the homeowners. Since September 2007, the Defendant HOA has held annual elections for Directors. According to the Defendant HOA's annual meeting minutes, the Plaintiff ran for election to be a Director in September 2007 and in September 2008, however, neither time was he elected.

11. The Defendant HOA contracts for cable television services and garbage collection services for the single family owners in the Community. By contract dated May 31, 2001, the Defendant HOA contracted with Waste Industries, Inc. for garbage collection. The cable television contract is dated October 30, 2003; this contract is a bulk services contract providing cable, at reduced rates, to the Defendant HOA members. According to the testimony of Denise Ambuhl, a sales representative of HTC, some single family homeowners in the International Club contract for video services through other providers including, however they have the option of utilizing HTC's cable services.

12. The streets and the roads in the Community were initially owned by the Developer. D.R. Horton conveyed Right of Way Easements for International Boulevard and Pickering Drive to Horry County by deed recorded on February 26, 2006. Currently all existing streets and roads in the Community, except in the Glens, the Villas, and the Cambridge, are

maintained by Horry County. Horry County obtained Right of Way easements over the rest of the streets in the International Club, which dedicated the streets.

13. After D.R. Horton assumed the rights of the Declarant and Developer, it entered into a Developer's Agreement on May 16, 2003 with the parties being D.R. Horton and Sunbelt Associates, LLC (hereinafter "Sunbelt Associates"). This agreement sets forth that D.R. Horton agrees to construct an "amenities center" and that "the amenities center will be used as a clubhouse with a pool and other recreational facilities for the use and enjoyment of the Class A members of International Club Homeowners Association or other association to be formed by D.R. Horton..." Sunbelt Associates agreed to pay $1,000.00 to D.R. Horton for each home it previously sold and for each lot sold after the execution of the Agreement with the monies being for the construction of an amenity center (hereinafter "Amenity Center").

14. On October 3, 2003, D.R. Horton entered into a Golf Course Agreement with the parties being D.R. Horton, Plantation Golf A.D., LLC (the owner of the Golf Course at the time) and the Defendant HOA. In this agreement, the Golf Course owner agreed to convey to the Defendant HOA property adjacent to the planned Amenity Center and rights to use its turbine pumps and ponds to irrigate the Community's Common Areas. As consideration, Defendant HOA forgave unpaid assessments before December 31, 2003 from the Golf Course owner and discounted future HOA assessments due from the Golf Course owner through 2014.

15. In addition to the Defendant HOA owning the Amenity Center property, being around 2 acres, D.R. Horton deeded to the Defendant HOA 5.42 acres to be used as the main entrance way into the Community. These properties, as well as other areas in the Community, are landscaped by the Defendant HOA. The Defendant HOA irrigates these Common Areas with water provided by the Golf Course. If the Defendant HOA did not have rights to the Golf

Course water, it would have to construct, and maintain, 2 deep water wells with the necessary pumps and the requisite piping. According to Chris Sullivan, an irrigation contractor, the cost for the installation of the 2 deep water wells is approximately $34,000.00; however, he testified that the cost for the installation of the piping was unknown due to the probable need to install under some of the roads.

16. The Community has an Amenity Center consisting of a clubhouse, swimming pool, and 2 adjacent parking lots. The Amenity Center property and 1 parking lot is owned by the Defendant HOA for it received a Deed from Plantation Golf A.D., LLC recorded on August 22, 2002. The second Amenity Center parking lot, previously owned by the Golf Course, was deeded to the Defendant HOA by deed recorded on August 4, 2004.

17. The Amenity Center is maintained by the Defendant HOA for its members who have a home in a single family subdivision or who live in a multi-family development that does not have separate amenity facilities. According to Section 6.5 of the Declaration, members in multi-family developments within the Community which contain separate recreational amenities do not have a right to use the Amenity Center owned by the Defendant HOA. As a result, the Defendant HOA does not utilize assessments paid by members living in such a multi-family development for expenses relating to the Amenity Center.

18. One neighborhood in the Community is a development known as the Glens. The Glens is a townhome community. Ms. Maureen Sullivan, a former member of the Defendant HOA Board of Directors as well as the President of the Glens homeowners association, testified at trial. Ms. Sullivan purchased her home in the Glens in September 2005, and since that time, has utilized the Defendant HOA's Amenity Center as well as paid the assessments for use of the Amenity Center, because the Glens does not have a separate amenity facility.

19. The Plaintiff has utilized the Amenity Center since his purchase in October 2006. His utilization consists of attending socials at the Amenity Center as well as use of the swimming pool. He also attended Board of Directors meetings since 2007 held in the Amenity Center and took depositions there in 2012.

20. Defendant K.A. Diehl is the manager for the Defendant HOA. Since the early 2000's, it has served the Community in this capacity. It contracts with the Defendant HOA, and since January 1, 2008, this contract has been renewed upon the expiration of the previous contract.

21. Plaintiff filed his Complaint with the Clerk of Court's Office in Horry County on April 7, 2009. Shortly after service of the Complaint on the Defendant HOA, the Defendant HOA's Board of Directors met with the Defendant HOA's attorney, Ms. Golding. According to Maureen Sullivan, a member of the Board of Directors, the Board requested that Ms. Golding prepare a letter regarding the Plaintiff's claims that included information that could be provided to the Community members. On May 27, 2009, Ms. Golding sent a letter to the Board of Directors outlining the Defendant HOA's position as to the various claims asserted by the Plaintiff as well as providing information as to Plaintiff's involvement in previous litigation. A list setting forth cases that the Plaintiff was a party to was included, as well as published Court decisions. The Directors, except for the President Toth, instructed K.A. Diehl to mail Ms. Golding's letter to all Community members.

22. Also, after commencement of this legal action, Plaintiff directed a letter to K.A. Diehl seeking a membership list containing the members' email addresses, phone numbers and their delinquency status. This request was denied by the Defendant HOA's attorney due to the Plaintiff seeking email addresses, phone numbers and information regarding a member's

payment of assessment as well as Plaintiff's failure to set forth a good faith basis for requesting the list. Further, the Defendant HOA maintains a website for its members, and the members list is readily available to Plaintiff; however, Plaintiff has refused to access the website for he does not want to disclose his email address or to accept the website's privacy policy. Plaintiff has also received the membership list in the past and has accessed the Defendant HOA's website through other Community homeowners.

23. On April 20, 2010, the Defendant Board of Directors granted a power line easement to Central Electric Power Cooperative, Inc. ("Central Electric"). As consideration for this easement, the Defendant HOA received $83,000.00 as well as an agreement from Central Electric that it would maintain the easement area in good condition as required by a landscape mitigation agreement with the Defendant HOA.

24. Part of the consideration that the Defendant HOA received from Central Electric was distributed to the members, for each member received $75.00. The Defendant HOA shared the proceeds with its members to refund the assessments that the members annually paid because the Defendant received unbudgeted revenue for 2010.

25. The Declaration required the formation and existence of an ARB. Beginning in the early 2000's, the ARB members were appointed by the Defendant HOA Board of Directors. The Declaration specifically requires that an ARB exist with the authority to approve or disapprove "any building, structure, fence, sidewalk, wall, drive, exterior lighting, painting, landscaping, or other improvement, ... vegetation cover, landscaping, grading, filling, or any other item ... upon any portion ..." of the Community. According to K.A. Diehl's representative Beckie Abel, over the years the Community's ARB has processed hundreds of applications that it has received from Community homeowners.

26. Since 2006, the Plaintiff submitted applications to the ARB for a variety of matters. He sought approval, and obtained approval, for planting a palm bed, installing an outside bench, and a flower bed. In July 2009, Plaintiff applied for the installation of a swing set to be placed on the side of his house. The ARB denied this request in August 2009 for the application proposed that the swing set to be installed on the side of Plaintiff's home and visible to the street. As a result of this denial, Plaintiff filed a discrimination claim with the South Carolina Human Affairs Commission contending that the Defendant HOA discriminated against him due to his foster children. This discrimination claim was dismissed by the South Carolina Human Affairs Commission when it issued its determination of no reasonable cause on December 11, 2009.

27. In the fall of 2010, Plaintiff undertook to modify an existing landscape bed as well as install a brick/stone addition to his yard along the property line. The Defendant ARB issued a Notice Violation requiring Plaintiff to submit an application. Subsequently, Plaintiff submitted an application for a 6 foot high vinyl side yard fence with a brick foundation to be installed on his property line and a flower bed with red brick edgers. The Defendant ARB approved the request for the flower bed and edging in the County easement near a power box as long as the Plaintiff had an encroachment permit but denied his request to install a 6 foot vinyl fence with a brick foundation. Additionally, the ARB fined Plaintiff $50.00 for constructing the brick foundation. The Plaintiff, by letter dated October 11, 2010, disputed the authority of the ARB to deny his request for the fence as well as assess $50.00. He further stated that he disputed the necessity of any appeal.

28. The Plaintiff has refused to remove the brick foundation as required by the Defendant ARB, and as a result, he is being fined $100.00 a month. The Plaintiff has refused to

pay the monthly fine, and as of the date of the trial, he owes the Defendant HOA the sum of $2,326.00.

29. In February 2012, the Plaintiff applied to the Defendant ARB for a landscape modification. By letter dated March 16, 2012, the ARB informed Plaintiff that his application was deferred due to the existing violation that could be remedied by removing the brick work along the property line and restoring the sod. The letter further stated that his account balance as of the date of the letter was $1,735.00.

30. The Defendant HOA has paid $5,000.00 to the McNair Law Firm in attorneys' fees to seek Plaintiff's compliance with the Declaration.

CONCLUSIONS OF LAW

1. The Defendant HOA is the Proper Homeowners Association to Exercise the Powers in the Declaration.

The Declaration provides that there should exist a non-profit corporation for the purpose of exercising the functions set forth in the Declaration and the attached Bylaws. The Declaration identified the association as the "Murrells Inlet Golf Plantation, Inc.". This name was changed by the First Amendment, recorded May 9, 2000, with the name change being to the International Club. On March 1, 2001, the Articles of Incorporation for the Defendant HOA were filed with the South Carolina Secretary of State. The evidence at trial established that the Defendant HOA has been the only non-profit corporation homeowners association to exercise the powers granted in the Declaration and the Bylaws. It is the entity that the original Developer, Plantation A.D., LLC, established in accordance with Article 3 of the Declaration. It is the entity that owns the Common Areas in the Community, that collects the assessments and fines, and that contracts with third parties for maintaining and administering the common facilities and providing

common services. Finally, it is the entity that enforces covenants and restrictions in the Declaration.

In the fall of 2010, the Plaintiff established 2 South Carolina non-profit corporations known as Murrells Inlet Golf Plantation Association, Inc. and International Club Association, Inc. According to the Plaintiff's testimony, he intends to utilize one of these non-profit corporations to manage the affairs of the Community in the event that the Defendant HOA is declared to be without the requisite authority to do so.

At trial, the Plaintiff contended that the Defendant HOA is not the entity entitled to manage the affairs of the Community, for the Defendant HOA is not named in the Declaration. I find this claim to be without merit. The Defendant HOA's Articles of Incorporation were submitted to the Secretary of State by the Community's Developer, and the Developer caused the First Amendment to be filed which changed the name of the Defendant HOA to its present name.

It is basic law that in reading the governing documents of a non-profit organization, including any amendments, they must be read together to determine the intent of the Developer. *Palmetto Dunes Resort v Brown*, 287 S.C. 1, 6, 336 S.E.2d 15, 18 (Ct. App. 1985). Having reviewed the Declaration, together with the amendments, as well as the Defendant HOA's Articles of Incorporation, I find that the Defendant HOA is the proper legal entity designated by the Declaration.

2. The Bylaws are Valid and Binding.

Plaintiff argued that the Bylaws are invalid because the Bylaws were not signed, not indexed to any homeowners association, not adopted by homeowners association Board, not approved by the homeowners, were recorded a year prior to the establishment of the Defendant HOA, and state that they apply to "Murrells Inlet Golf Plantation Association" instead of "International Club Home Owners Association". I find that Plaintiff's claims are without merit.

The Defendant HOA came into existence at the time that the Declaration was filed. The Developer, Plantation A.D., LLC, had certain rights under the Declaration with respect to the Defendant HOA. Section 3.1 states:

> "The Developer has established or will establish the Association for the purpose of exercising powers of maintaining and administering common facilities and providing common services, administering and enforcing covenants, conditions, and restrictions contained herein, and levying, collecting, and disbursing the Assessments and other charges herein created. Further, the Developer reserves the right to convey to the Association, and the Association shall accept, any or all of the Developer's rights and obligations as set forth herein."

The Declaration Recitals, as amended, state:

> "The Developer has or will cause to be incorporated under South Carolina law "International Club Association, Inc." ("the Association") as an eleemosynary corporation for the purpose of exercising some or all of the above functions pursuant to the terms of this Declaration, said Association to be governed by the Bylaws attached hereto as Exhibit "C".

Pursuant to Section 3.1 and the Recitals, the Defendant HOA, whether it was incorporated or not, is governed by the Bylaws. According to the testimony of Jeff King, an expert lawyer in real property development, it is common practice in South Carolina to attach Bylaws as an Exhibit to property restrictive covenants, then record the property restrictive covenants with the attached Bylaws. Mr. King also testified that bylaws are often filed with the property restrictive covenants before an association is incorporated. Notably, the Bylaws are also specifically incorporated into the Declaration by Section 1.5.

Pursuant to South Carolina law "[t]he incorporators or board of directors of a corporation shall adopt bylaws for the corporation." S.C. Code Ann. Section 33-31-206 (1976). The Developer, as the incorporator of the Defendant HOA, adopted the Bylaws by attaching the Bylaws to the Declaration and then recording the Declaration.

The Non Profit Corporation Act ("Act") does not mandate that the Bylaws be signed or separately adopted by the members or the Board. Plaintiff relies upon *Arcadian Shores Homeowners Ass'n v. Cromer*, 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007), which held that Rules and Regulations were invalid, because they conflicted with the recorded Bylaws for the association and were not properly signed, acknowledged, and indexed. The Bylaws in this case are different, because they are attached as an Exhibit to the Declaration, which was properly signed, acknowledged, and recorded with the Horry County Registrar of Deeds Office.

In addition, the Defendant HOA's Bylaws have been utilized for over ten years to govern the Defendant HOA. To declare, at this late stage, that these Bylaws are invalid or ineffective when they have been relied upon by all of the homeowners within the Community would be inequitable. *Buffington v. T.O.E. Enterprises*, 383 S.C. 388, 393-94, 680 S.E.2d 289, 291-92 (2009) (holding that a homeowners' justified reliance on a restrictive covenant weighs in favor of its enforcement). Plaintiff has not pointed to any provision in the Bylaws which is unreasonable (*See Armstrong v. Ledges Homeowners Association, Inc.*, 360 N.C. 547, 633 S.E.2d 78 (2006) (holding that unreasonable covenants are unenforceable)), that is indefinite, or violates public policy (*Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 494 S.E.2d 465, 467 (Ct.App. 1998)(covenants are void if they are indefinite or contravene public policy), *see also*, *Palmetto Dunes Resort*, 287 S.C. at 6, 336 S.E.2d at 18).

3. The Pebble Creek and Meadows' Subdivisions and the Golf Course are Subject to the Declaration.

The Plaintiff contends that two subdivisions in the Community are not subject to the Declaration. The first is Pebble Creek subdivision where Plaintiff resides. The Pebble Creek subdivision was developed by Sunbelt Associates. Sunbelt Associates purchased the property from Plantation A.D., LLC. The Plaintiff introduced two deeds, Plaintiff's Exhibits 544 and 545,

as being deeds relating to the real property developed as Pebble Creek. The Plaintiff testified that since these two deeds are dated prior to the filing of the Declaration, the Pebble Creek subdivision is not subject to the Declaration. However, both deeds describe the real property being conveyed to Sunbelt Associates as being:

> ... conveyed subject to the Declaration of Covenants and Restrictions for Murrells Inlet Golf Plantation (the "Declaration")
> ....

Even though one deed from Plantation A.D., LLC to Sunbelt Associates left blank the particular deed book and page, this does not negate the provision in the property description that real property is subject to the Declaration. Furthermore, the deed Plaintiff received for his property in Pebble Creek clearly states that it is subject to the Declaration.

I find that the Plaintiff's contention that his home in Pebble Creek is not subject to the Declaration is without merit.

As to Plaintiff's contention that the Meadows development in the Community is not subject to the Declaration, this is also without merit. In the Declaration, the Developer specifically provided that additional real properties can be added to the Community and these additional properties were identified in Exhibit "B" attached to the Declaration. The Meadows is part of the real property described in Exhibit "B". The Meadows was added to the Community by the Third Amendment. Therefore, the addition of the Meadows to the Community is proper and, the Meadows is subject to the Declaration.

As to the Golf Course property, this property is subject to the Declaration, for the Golf Course is part of the property described in Exhibit "A" to the Declaration. However, the Golf Course, even though it is subject to the Declaration, is not subject to certain provisions in the Declaration for the Golf Course property is not a "Unit" as defined in Section 1.27 of the Declaration. Therefore the Golf Course owner is not an owner as defined in Section 1.22 of the

Declaration. I find that the Golf Course, even though it is subject to the Declaration, is not subject to all of the covenants in the Declaration since the definitions control the applicability of the specific covenants in the Declaration.

4. The Golf Course is Current in the Payment of its Assessments.

On November 20, 2003, the Golf Course entered into an agreement with D.R. Horton, the Declarant/Developer. This Golf Course Agreement provided for a reduction in the actual dollar amount that the Golf Course pays for assessments in exchange for the Defendant HOA receiving certain real properties. One of the properties that the Defendant HOA received was a parking lot for the Amenity Center. The Defendant HOA President testified that this property was needed in order to obtain a permit to construct the swimming pool. In addition, the Defendant HOA received the right to utilize the Golf Course ponds and pumping system for irrigation of the Community's Common Areas. The Defendant HOA's right to use these ponds and the pumping system is a significant consideration; otherwise, the Defendant HOA would have to construct and maintain 2 deep wells. Further, according to Chris Sullivan, an expert irrigation contractor, additional significant costs are likely for the installation of pipes.

Plaintiff argued that the Defendant HOA had the authority to access the Golf Course irrigation system, without permission, under Section 4.17 of the Declaration, and as a result, the Golf Course Agreement is not supported by consideration. Illogically, he also argued that Section 4.17 of the Declaration was deleted by the First Amendment. The provision provides:

> Wells and Effluent. There is hereby reserved for the benefit of the Developer, the Association, and their respective agents, employees, successors and assigns an alienable, transferable, and perpetual right and easement: (i) to pump water from lagoons, ponds, and other bodies of water located within the Subdivision for the purpose of irrigating any portions of the Subdivision, for fire control and for other purposes; (ii) to drill, install, locate, maintain and use wells, pumping stations, water towers, siltation basins and tanks and related water and sewer treatment facilities

> and systems within the Common Areas, including within any portion of the Recreational Amenities...

Chris Sullivan, an expert in irrigation systems, testified that the Defendant HOA ties into the Golf Course's irrigation system through its pump house and that the Defendant HOA could not simply pump water out of the pond to irrigate the Community. The HOA President, William Freiboth, testified that the Golf Course pump house is not located on Common Area. For these reasons, the Defendant HOA does not have the right or ability to access the irrigation system of the Golf Course without the owner's permission.

The Defendant HOA's decision to accept the parking lot property and obtain its needed water from the Golf Course in exchange for a portion of the assessments is a valid exercise of its powers. The Golf Course owner's payment of this consideration was in lieu of assessments. "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motive and in good faith." *Dockside Ass'n v. Deyton*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct. App. 1987).

Plaintiff also contended that the Golf Course Agreement was invalid due to conflicts of interest in that the Golf Course provided membership opportunities to D.R. Horton, the developer, which, at the time, controlled the Defendant HOA. Even though the Plaintiff, not being a property owner in 2003 lacks standing, the Defendant HOA accepted the benefits, the land and the water, from the Golf Course. Furthermore, the transaction was fair to the corporation at the time that it was entered into, as the Defendant HOA received significant benefits from the agreement. If a transaction is fair, it is not voidable pursuant to the Act, SC Code Ann. § 33-31-831.

The Golf Course Agreement was entered into in 2003 and the Defendant HOA and the Golf Course have abided by this Agreement since its inception. Plaintiff became a property

owner in the Community in October 2006 but did not challenge the Golf Course Agreement until April 2009. Aside from the fact that Golf Course is not a party to this lawsuit, the undue delay on the part of the Plaintiff in challenging the validity of the Golf Course Agreement is prejudicial not only to the Golf Course but to the Defendant HOA. I find that the Plaintiff has waived his rights to assert any claims as to the Defendant HOA's compliance with the Golf Course Agreement (*Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992)), and that his claims are barred by the doctrine of laches. *See Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 519 S.E.2d 583, 598 (Ct.App. 1999). Plaintiff is also estopped from objecting to the agreement regarding assessments pursuant to his failure to object for almost three (3) years. *Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006) (holding that the doctrine of estoppel bars a refund of assessments to homeowner who has paid without objection for several years even if assessments were not properly voted upon). The Golf Course Agreement is an obligation of the Defendant HOA that it properly enforces and the Plaintiff's claim that the Defendant HOA does not have the authority to abide by the agreement is without merit.

Plaintiff lastly contends that the Defendant HOA did not collect funds from the Golf Course pursuant to the terms of the Golf Course Agreement. However, William Freiboth testified that the funds were collected in accordance with the agreement. As a result, I find that that the Defendant HOA properly collected assessments from the Golf Course according to the terms of the Golf Course Agreement.

5. Plaintiff is Obligated to Pay Assessments Relating to the Amenity Center.

As set forth in the Findings of Fact, the Defendant HOA owns the real property upon which is situated the Amenity Center. The Plaintiff contends that he is not obligated to pay the assessments for the Amenity Center. This contention is without merit because, as a member of

the Community, he is subject to the Declaration. Whether he uses or does not use the Amenity Center is not a factor in determining his obligation to pay for the assessments. Restatement (Third) of Property (Servitudes) § 6.5 (T.D. No. 7, 1998) (setting forth that homeowner's obligation to pay assessments is unconditional); *see also*, S.C. Code Ann. § 27-31-190 ("no co-owner may exempt himself from contributing toward such expenses by waiver of the use or enjoyment of the common elements or by abandonment of the apartment belonging to him.").

It appears that Plaintiff believes that because Section 6.5 in the Declaration states that "... both annual and special assessments must be fixed at a uniform rate for all Units ..." the Declaration is being violated by the Defendant HOA since single family owners are assessed for the Amenity Center but multi-family owners who have their own amenities are not. However, this section specifically states that multi-family Unit owners with separate recreational facilities are not assessed for the Amenity Center. I find that the Plaintiff agreed to Section 6.5 by accepting the Deed to his property and that he is obligated to pay assessments for the Amenity Center.

6. The Defendant HOA's Contracts for Bulk Cable Television Services and Garbage Collection are Valid and Enforceable and were Properly Enforced.

The Defendant HOA entered a "Telecommunication Service and Access Agreement" with HTC on October 30, 2003, a contract that commenced on September 30, 2003 and has a duration of fifteen (15) years. The agreement states that the Defendant HOA "shall pay to [HTC] for the Service fee set forth in Exhibit 'B' attached hereto for each and every Unit located on the Premises", which establishes a bulk billing system for the Community unit owners. Ms. Denise Ambuhl testified that the contract is a bulk billing arrangement. The Defendant HOA pays for the cable services with funds from the assessments. In exchange for the bulk billing arrangement, Community homeowners receive cable services at a significantly discounted rate.

The homeowners are not precluded from contracting with third parties for other video services that HTC provides under its contract with the Defendant HOA or upgrading HTC services. In other words, as testified to by Ms. Ambuhl, the HTC contract is not an exclusivity agreement.

The Defendant HOA also entered a contract with Waste Management Industries for the collection of homeowners' garbage on May 31, 2001. The contract has been renewed each year and provides services at a cost of $92,870.00 annually for the Community.

a. The Services "Touch and Concern" the Land.

Plaintiff argues that the assessments used to pay for cable services and waste management are invalid, because the services do not touch and concern the land. As a matter of law, covenants for payment of annual assessments for the operation of property owners associations are covenants running with the land. *21 C.J.S. Covenants § 42*. "Covenants that require property owners to pay to a developer or homeowners' association assessments that have a beneficial effect on the value of the owners' properties touch and concern the land and therefore 'run with the land'." *Queen's Grant II Horizontal Property Regime*, 368 S.C. at 358, 628 S.E.2d at 911. Assessing all owners for cable and garbage collection services lowers the cost of the services for all the units within the Community. Because the assessments have a beneficial effect on the owners' properties, the assessments touch and concern the land and are enforceable.

b. The Defendant HOA's Assessment for Cable Services and the HTC Contract Do Not Violate FCC Regulations.

Plaintiff argues that the HTC Contract is void, therefore, the cable assessment violates public policy. He relies on the following authority:

- *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 22 FCC Rcd 20235, 2007 WL 3353544 (F.C.C. 2007);

- *National Cable & Telecommunications Ass'n v. Federal Communications Commission and United States of America*, 567 F.3d 659 (D.C. Cir. 2009); and
- Exclusive access to multiple dwelling units generally, 47 C.F.R. § 76.2000 (2008).

The Defendant HOA agrees that contracts between video services and Multiple Dwelling Units and other real estate developments (MDU's) containing exclusivity clauses are not consistent with the Code of Federal Regulations. However, the HTC Contract does not contain an exclusivity clause; the contract constitutes a system of bulk billing several owners within an MDU.[1] The Community homeowners are not precluded from contracting with other video services, even if the HTC cable services are available through the Defendant HOA and by paying the assessments to the Defendant HOA. The FCC specifically addressed this issue *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, 25 FCC Rcd. 2460, 2010 WL 709834 (F.C.C. 2010):

> The first issue we address is bulk billing. This is an arrangement in which one MVPD provides video service to every resident of an MDU, usually at a significant discount from the retail rate that each resident would pay if he or she contracted with the MVPD individually. Bulk billing arrangements do not hinder significantly, much less prevent, a second video service providers from providing service in such buildings because residents are already subscribed to the incumbents' services and residents would have to pay for both MVPD's services, albeit one at a discounted rate, but the arrangement itself does not significantly hinder or prevent a second MVPD form providing its services to those residents. The record before us shows that bulk billing arrangements predominantly benefit consumers, through reduced rates and operational efficiencies, and by enhancing deployment of broadband. Based on the evidence of all the effects of bulk billing on consumers, we do not prohibit any MVPD from using bulk billing arrangements.

[1] Section 8 of the HTC Agreement provides that "Owner shall have the right to contract with third parties for supplementary video and/or other services so long as it does not interfere with Company's right to provide Service under this Agreement." This provision specifically allows owners to use other services.

Pursuant to the FCC's 2010 Order, the bulk billing arrangement memorialized by the HTC contract is not invalid under the Federal Code of Regulations. Therefore, Plaintiff's argument that the HOA's assessment for video services violates public policy based upon the 2007 FCC Order is without merit.

c. The Rate Increases and Credit Allocations were Consistent with the HTC Contract.

Plaintiff also testified that the HTC contract increased the rate annually in violation of the terms of the agreement. He also attested that HTC issued credit allocations to the Defendant HOA that were misappropriated by the Board of Directors or K.A. Diehl. however, he did not present evidence that credit allocations were made. In contrast, Ms. Denise Ambuhl testified that the rate increases were consistent with the HTC contract. She also clarified that no credit allocations were made to the Defendant HOA for cable services, because that particular line of business has not been profitable since 2003. Accordingly, I find that the payments made by the Defendant HOA to HTC were proper and that no credit allocations were made to the Defendant HOA.

As noted with the Golf Course Agreement, the cable contract and the contract with Waste Management Industries have been in existence for many years. In fact, Plaintiff was a property owner in the Community for over 2 1/2 years before he challenged the validity of these agreements. Further, it should be noted that neither HTC nor Waste Management were parties in this action.

I find that the Plaintiff's arguments with respect to the HTC Cable Contract and the Waste Management Industries Contract are without merit and the Defendant HOA has the authority to enter into and enforce these Contracts. Furthermore, I find that the Defendant HOA

has the right to assess the Plaintiff and other single family homeowners for the cable services, and the Plaintiff has an obligation to pay the assessments.

7. The Defendant HOA has the Right to Govern Parking in the Amenity Center Parking Lot and the Streets and Roads Within the Community.

Pursuant to the Declaration, the Defendant HOA has the right to restrict parking at the Amenity Center and on the streets within the Community.

a. <u>Street and Amenity Center Parking.</u>

Section 7.25 of the Declaration specifically addresses parking on the streets and Common Areas in the Community. This Section specifically authorizes the Defendant HOA to tow or remove vehicles and enforce parking as it does assessments.

The streets and the parking lots in the Community, with the exception of a small portion of International Club Boulevard and Pickering Drive, are within the property descriptions in the Declaration; therefore, they are subject to the Declaration. Subsequent to the filing of the Declaration, certain Community streets were dedicated to Horry County. Plaintiff argued that the dedication and conveyance precludes the Defendant HOA from enforcing Section 7.25. The dedication documents references plats that show the roads. Plat Book 181, Page 89, one of the referenced plats, shows the portions of International Club Drive. The plat specifically states that the property on the plat, including International Club Boulevard "are subject to all rights and restrictions of record", which include the covenants contained in the Declaration.

"Dedication is the giving of land or an easement for the use of the public by the owner." *Sloan v. City of Greenville*, 111 235 S.C. 277, 111 S.E.2d 573 (1959). "That a dedication, whenever completed, is irrevocable is well settled." *Id.* "Hence: If a dedication is made for a specific or defined purpose, neither the Legislature, a municipality, or its successor, nor the general public has any power to use the property for any other purpose than the one designated,

whether such use be public or private, and whether the dedication is a common-law or a statutory dedication, and this rule is not affected by the fact that the changed use may be advantageous to the public." *Id.*

"The party dedicating land...may impose certain restrictions or reservations." 77 Am. Jur. Proof of Facts 3d 1. "However, the dedicator cannot attach conditions or reservations that are inconsistent with the grant or which violate public policy." *Id.* "Various conditions and reservations have been judicially validated, such as conditions restricting the use of a street for pedestrians, or limiting the use of a road to specific time periods during a year." *Id.* "In order to create conditions or reservations, appropriate and specific language must be used." *Id.*, *See also*, *Olde Severna Park Improvement Ass'n v. Gunby*, 402 Md. 317, 936 A.2d 365 (2007) (holding that a developer's notation on a plat reserving riparian rights served only to ensure that the riparian rights were not dedicated to the public or a governing body). "Generally, acceptance by the public body constitutes agreement to the condition or reservation." *Id.*

Additionally, the Horry County Zoning Department has confirmed that the Declaration roads are enforceable against the owners of a subdivision or PUD. Pursuant to Janet Carter's letter, the Horry County Planning Director and I&R counsel for the Planning & Zoning Department, Horry County does not enforce the covenants governing dedicated roads, but the County does its best not to issue permits that would be in conflict with covenants.

I find that the streets within the Community were dedicated subject to the Declaration and all amendments thereto.

b. Declaration Section 7.25 was not Deleted.

Plaintiff argued that section 7.25 was deleted by the First Amendment due to the language that the Developer waived the architectural controls in certain provisions. I find that

the Developer's waiver of certain rights was solely with respect to the Villas Horizontal Property Regime and did not waive the applicability of the covenants to the rest of the Community or the ARB's or the Board of Directors' ability to enforce the Declaration. It is noted that when the Developer intended to delete a provision in the Declaration, the Developer consistently used the word "delete" in the Amendments.

8. Plaintiff's Request for Members' Information was Properly Denied.

Immediately after Plaintiff commenced this lawsuit, he emailed a demand for a membership list containing members' email addresses, telephone numbers and delinquency status. In response, Defendant HOA's attorney sent a letter denying his request.

The Act sets forth the circumstances that members may inspect a membership list. If a member would like to inspect the membership list, the member's demand for inspection must meet the following requirements: 1) the member's demand provides five days written notice; 2) "the member's demand is made in good faith and for a proper purpose"; 3) "the member describes with reasonable particularity the purpose and the records the member desires to inspect"; and 4) "the records are directly connected with this purpose." *See* S.C. Code Ann. Section 33-31-1602 (1976). If the aforementioned requirements are met, the member can inspect the membership list. *Id.*

Plaintiff failed to state a good faith basis for his request for the voting list as required by the Act. According to his email, he requested the list to "communicate with fellow homeowners" after he filed his complaint in the 2009 Lawsuit. His request was not specific and did not provide the reason for communicating with fellow homeowners; as a result, it was properly denied.

Finally, the evidence established that the Plaintiff always had access to the membership list but he did not choose to access the Defendant HOA's website.

9. The Sale of the Easement to Central Electric was Properly Effectuated and is Valid.

The Defendant HOA Board of Directors has the authority to grant easements pursuant to Sections 4.3 and 4.10 of the Declaration and Article 4, Section II of the Bylaws. Under Bylaws' Article 4, the Board exercises all rights of the Defendant HOA, unless a provision specifically requires a membership vote. Plaintiff stated that his argument that the Defendant HOA improperly transferred the easement to Central Electric is based upon Bylaws, Section 11.1. However, the vote requirement in Article 11 does not apply, because the Defendant HOA did not convey Common Area; it granted an easement over the Common Area owned by the Defendant HOA. Furthermore, condemnation was never threatened; the Board was offered a package of significant value in exchange for the easement, and it granted an easement based on that consideration.

Plaintiff further argued that the Defendant HOA should not have distributed a portion of the monies it received for the easement to members in the Community. Mr. Freiboth, the Defendant HOA's President, testified that this was not a profit distribution but rather for the purpose of passing a benefit to the members. Plaintiff then contended that a portion of the funds for this easement was allocated for the payment of a lawsuit. The Act permits the Defendant HOA to distribute benefits to its members in conformity with its purpose. S.C. Code Ann. § 33-31-140(11)(6). The Defendant HOA had the authority to utilize the funds as it did and therefore there was nothing improper or invalid.

I find that the Defendant HOA properly granted an easement to Central Electric and it properly utilized the funds it received from Central Electric.

10. The Defendant HOA's Committees and the ARB are Consistent with the Act.

Plaintiff testified that the Defendant HOA is in violation of the Act, because the Board of Directors does not appoint members of the Board of Directors to serve on committees. S.C. Code Ann. Section 33-31-825 provides: "[u]nless prohibited or limited by the articles or bylaws, a board of directors may create one or more committees of the board and appoint members of the board to serve on them. Each committee shall have two or more directors who serve at the pleasure of the board."

The ARB is a separate Board of the Defendant HOA created by Article VII of the Declaration. Pursuant to S.C. Code Ann. Section 33-31-801, "[t]he articles may authorize a person or persons to exercise some or all of the powers which would otherwise be exercised by a board. To the extent so authorized, the person or persons shall have the duties and responsibilities of the directors..." Article VII establishes the ARB and grants it with the authority to review and approve applications for improvements on the properties of Community homeowners. The ARB is not a committee of the Board of Directors but instead is a separate board established by the Defendant HOA's governing documents, and therefore, Section 33-31-825 does not apply.

Likewise the Defendant HOA's committees are not committees of the board. The committees consist of members of the Defendant HOA. Therefore, Section 33-31-825 also does not apply to Defendant HOA's committees. Furthermore, the committees are not provided separate authority to act and merely make recommendations to the Board of Directors.

I find that the Defendant HOA complied with the Act and the Declaration in establishing its committees and the ARB.

11. The Architectural Guidelines are valid.

Plaintiff argued that the Architectural Guidelines are invalid and relies upon *Arcadian Shores Homeowners Ass'n v. Cromer*, 373 S.C. 292, 644 S.E.2d 778 (Ct. App. 2007). In *Arcadian Shores*, the restrictive covenants provided that the association had the authority to pass rules and regulations to govern the location of fixtures and appliances on the properties subject to the covenants and to determine the location of mobile homes on the properties. *Id.* The Association passed regulations prohibiting the parking of mobile homes in driveways. *Id.* The Court held that the covenants impliedly allowed mobile homes, and the regulations' prohibition of the vehicles amended the restrictive covenants without approval of the owners as required by the covenants. *Id.*

Here, the Architectural Guidelines are distinguishable from the rules and regulations in *Arcadian Shores*. The Defendant HOA was specifically granted the authority to establish, amend, and enforce architectural guidelines, rules, and regulations, to aid the ARB and Owners in establishing an orderly and efficient procedure for accomplishing its duties pursuant to § 7.2 of the Declaration.[2] The Architectural Guidelines do exactly that, they set specific standards for approval to create uniformity in the application of the covenants and clearly delineate the procedure for applications, approvals, and reviews. This case is different, in that the *Arcadian Shores* association only had the authority to regulate the location of fixtures and appliances, but not to entirely prohibit them. Because the Defendant HOA has the authority to pass the Architectural Guidelines and because those Guidelines are within the scope of authority set forth in the Declaration, they are valid. *See Sea Pines Plantation Company v. Wells*, 294 S.C. 266, 271, 363 S.E.2d 891, 894 (1987) (holding that a refusal to approve plans for aesthetic reasons

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[2] Section 7.2 of the Declaration sets forth: "The Architectural Review Board shall have the right and authority to establish, amend, and enforce architectural guidelines, rules and regulations, to aid the Architectural Review Board and Owners in establishing an orderly and efficient procedure for accomplishing its duties and powers hereunder."

will be upheld where the covenant or appropriate authority has provided guidelines for enforcement and expressed the purpose of the restrictive covenant).

Plaintiff also testified that the parking restrictions in ARB Guidelines invalidates the document. However, no parking restrictions are contained in the ARB Guidelines at issue in this case.

I find that the Plaintiff's claims regarding the ARB Guidelines are without merit.

12. The ARB's denials of Plaintiff's applications for a fence and swing set and the deferral of his application are valid.

When reviewing the actions of an ARB, South Carolina courts first determine whether the board had the authority to approve or disapprove construction proposed and secondly decide whether the board exercised its authority reasonably and in good faith. "When a covenant provides an architectural review board with broad authority for approval of improvements, the architectural review board's discretion is constrained only by reasonableness and good faith." *Id.* (citing *River Hills Prop. Owners Ass'n, Inc. v. Amato*, 326 S.C. 255, 259, 487 S.E.2d 179, 181 (1997)(holding that an HOA board acted reasonably and in good faith in denying approval of a landowner's plan to build a fence and pool based upon aesthetic reasons). The courts will uphold an ARB's rejection of a homeowner's improvements based on aesthetic considerations when the board's decision is not arbitrary but bears a sufficient relation to the subdivision's general plan of development. *Id.* (citing *Sea Pines Plantation Co.*, 294 S.C. at 271, 363 S.E.2d at 894).

a. <u>The ARB has the authority to regulate improvements within the Community</u>.

First, the ARB had the authority to deny Plaintiff's applications for fence and a swing set. Declaration, Section 7.2, Prior Review of all Plans, provides:

> No ... structure, fence, sidewalk...shall be commenced...nor shall any exterior addition or change be made until the plans and specifications...shall have been submitted to and approved in writing as to the harmony of the external design and location in relation to the surrounding structures and topography by the Developer.....this right of approval shall be transferred to an Architectural Review Board for the Association ....Refusal or approval of plans, specifications, and plot plans or any of them may be based on any grounds, including purely aesthetic grounds, which in their sole and uncontrolled discretion the Developer or the Architectural Review Board deem sufficient....

Section 7.4 of the Declaration specifically regulates fences:

> No fences whatsoever shall be erected or allowed to remain in the Subdivision except privacy patio fences or walls approved by the Developer and the Architectural Review Board...

Plaintiff argued that Sections 7.2 and 7.4 were deleted by the First Amendment to the Declaration. Scott Pyle, a principal of the Declarant Plantation A.D., LLC, testified in his deposition that the Declarant deleted Section 3.7 under the First Amendment, but not Sections 7.2 and 7.4. He further testified that the Declarant only intended to waive its rights in a limited way and that the document must be read as a whole. Jeffrey King testified, that in his expert opinion, the Amendment only waived the Declarant's rights with respect to the Villas; the Defendant HOA's rights and therefore the ARB's rights, were unaffected.

Plaintiff argued secondarily that the ARB waived its right to enforce Sections 7.2 and 7.4 by previously approving various other fences. The Plaintiff pointed to privacy fences but these, if approved, are specifically permitted by the Declaration. Also the President of the Defendant HOA testified that there were only a few fences that were not privacy fences but these were erected in the early 2000's while the Developer controlled the Defendant HOA. "A waiver is a voluntary and intentional abandonment or relinquishment of known right." *Janasik*, 307 S.C. at 344, 415 S.E.2d at 388 (holding that an HOA and property management company waived the right to enforce covenants where they had knowledge of unapproved improvements for several

years and made no effort to enforce the covenants against an owner.). "Generally, the party claiming waiver must show that the party against whom waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended." *Id.*

Plaintiff primarily relied upon *Arcadian Shores Homeowners Ass'n*, 373 S.C. 292, 644 S.E.2d 778. The case is illustrative of the doctrine of waiver. In *Arcadian Shores*, testimony revealed that some homeowners did not submit plans or specifications for certain projects to the Association and that the Association never consistently enforced the requirement that applications be submitted. *Id.* In fact, the Association's president testified that he was "fine with the fence" and that the homeowner in violation of the covenants "could have submitted a variance and it could have been approved by the board if he would have been hospitable, but he took it on himself to do whatever." *Id.* The Court held that the Association waived its right to enforce the covenant requiring the Association's approval to build a fence. *Id.*

The facts here are distinguishable from *Arcadian Shores*. Beckie Abel, the Defendant HOA's property manager, testified that the ARB has existed since the early 2000's. Plaintiff applied for other improvements and received approval. Not until his applications for a swing set and subsequently the 6 foot fence were denied did he claim that the ARB waived its right to enforce Article VII. The fact that other fences have been approved within the Community does not support Plaintiff's waiver argument, because either the approved fences are privacy fences as permitted by the Declaration or an existing fence approved by the Developer. Additionally, Mr. Freiboth testified that front yard fences are not permitted in the Community.

As to the swing set, the argument that other swing sets have been approved also does not waive the Defendant ARB's right of denial, because swing sets cannot be built in the side yard, a

rule that has been evenly applied by the ARB. All existing swing sets are actually situated in the backyards. The ARB has consistently rejected applications for swing sets in locations other than the backyard. The South Carolina Human Affairs Commission found the same in its dismissal of the Plaintiff's claim.

b. The ARB acted reasonably and in good faith in denying Plaintiff's applications.

The South Carolina Court of Appeals specifically held that rejecting applications based on aesthetic principles is not arbitrary or capricious. *Sea Pines Plantation Co.*, 294 S.C. at 271, 363 S.E.2d at 894. Similarly, the ARB made decisions based on aesthetic principles. *Id.*

Plaintiff's proposed fence was denied because it was to be situated in the front yard and close to his property line. The swing set was denied because its proposed location was the side yard. The denials of Plaintiff's applications were reasonable and not arbitrary or capricious.

c. The deferral of Plaintiff's application was valid.

On February 27, 2012, Plaintiff submitted an application requesting the approval of two pindo palms and the extension of brick edging surrounding his existing garden. The ARB deferred his application until he removes the brick foundation and his fines in the amount of $1,735.00 are paid. Plaintiff argued that the ARB's knowledge of the outstanding fines is a violation of his privacy. He also contends that the deferral is a breach of the Declaration and the Implied Duty of Good Faith and Fair Dealing, because only acceptance or denial of applications are permitted. He also argued that Mr. Roche, the husband of Defendant Ms. Toth, engaged in a conflict of interest transaction by voting to defer the application and disclosing the fine amount to the other ARB members.

Plaintiff's contentions are without merit. The ARB is the body that determines the fines and their assessment. Further, this information was not disclosed to the ARB through Mr.

Roche, but instead, was provided by K.A. Diehl, the management company. Also, to comply with Plaintiff's request that Mr. Roche refrain from voting on his application leads to the same decision that was reached by the Board on March 16, 2012: a deferral of the application. Without Mr. Roche's vote, the ARB did not have a quorum and would have been forced to defer Plaintiff's application.

d. The ARB complied with the Bylaws when fining Plaintiff for his violations.

Plaintiff argued that the Defendant HOA violated Article 13, Section 13.3 of the Bylaws by assessing fines for his ARB violations. Section 13.3 provides that the Board of Directors shall not fine an owner for violation of the Declaration, Bylaws, or rules and regulations unless an Owner is provided notice of the violation and given a period of 10 days to remedy the violation without further sanction. If the violation is not abated within 2 months, the Defendant HOA "may" provide the Owner with a hearing. Plaintiff was informed that he could appeal but he specifically chose not to appeal. The South Carolina Affairs Commission also found that Plaintiff did not follow the appeal process with respect to the swing set application.

Additionally, Section 13.3 specifically applies to the Board of Directors, not the ARB. The ARB is granted the right to promulgate rules and regulations and to enforce those regulations under Section 7.2 of the Declaration. The $50.00 fine levied by the ARB upon notice of the violation is the procedure set forth in the ARB guidelines as is the $100.00 monthly fine for Plaintiff's continuing refusal to remove the brick foundation and place sod in that area.

I find that the ARB's denials of Plaintiff's applications are proper, as are the fines and the deferment.

13. **The Glens owners are allowed access to the Amenity Center.**

Plaintiff argued that the homes located within the Glens are multi-family homes, and as result, should be precluded from using the Amenity Center. Section 6.5 of the Declaration states: "...the Developer shall have the right, at its sole discretion to create multi-family associations within the subdivision which will contain separate recreational amenities. In such case, the Units within such multi-family associations will not have the right to use recreational amenities located on any Common Area owned by the Association."

Assuming arguendo that the Glen is a multi-family neighborhood, the preclusion of properties that are "multi-family" from using amenities is contingent upon the developer having provided separate amenities for that neighborhood under Section 6.5. Furthermore, according to Ms. Sullivan, the Glens homeowners have paid assessments for the Amenity Center and used the Amenity Center since 2005. The Glens do not have separate amenities, and therefore, the Glens homeowners are entitled to access to the Amenity Center.

14. **Capital contributions and initial assessments from Owners were properly collected and managed.**

Plaintiff argued that the capital contributions and initial assessments owed by International Club homeowners to the Defendant HOA upon purchase of their unit were not properly collected, were mismanaged, and misspent.

The Third Amendment to the Declaration added the Glens, the Highlands, the Links, the Cambridge and the Meadows to the Community and deleted Section 3.5 of the Declaration in its entirety. The Section is replaced with the following covenant: "The Association shall also collect a Capital Contribution equal to two (2) month's assessments for such Unit from each new Owner upon transfer of such Unit either from the Developer or from another Owner. All sums paid are in addition to and not in lieu of regular assessments for common expenses." Under the

Third Amendment, Section 6.7, "Initial Assessment", was deleted and replaced with language that states the Defendant HOA shall collect a Capital Contribution as set forth in Section 3.5.

The Fourth Amendment added the following language: "Owners of Units in the Multi-Family Parcel shall pay the amount of One Hundred and Fifty ($150.00) and no/100 Dollars to the Association at the time a Unit is conveyed from the Developer to a third-party purchaser as a contribution toward the maintenance of the entrance roads of the International Club PUD."

a. <u>Separate Accounting for Capital Contributions.</u>

Plaintiff argued that funds paid as capital contributions must be segregated from the operating funds. No provision in the Declaration, Bylaws, or rules and regulations for the Defendant HOA require it to separate capital contributions from assessments. South Carolina law does not require capital contributions to be separated. However, while capital contributions were collected, they were separately accounted for in the HOA's general ledgers. Therefore, Plaintiff's argument regarding the separation of capital contributions is without merit.

b. <u>Equitable Ownership of Capital Contributions.</u>

Plaintiff asserts that the unit owners equitably own the funds they pay to the Defendant HOA under sections 3.5 and 6.7 of the Declaration. The Declaration does not create equitable ownership in the capital contributions. Once the payment is made to the Defendant HOA, the Defendant owns the funds.

c. <u>Developer's and Defendant HOA's Use of Capital Contributions to construct Infrastructure or Amenities.</u>

The Capital Contribution constitutes an initial assessment of the International Club homeowners. Under Section 6.2 of the Declaration:

> "[a]ssessments levied by the Association must be used exclusively to promote the recreation, health, safety, and welfare of the Owners in a Subdivision...and for the improvement, protection,

> replacement, operation, and maintenance of the Common Areas and the Recreational Amenities including reserves for the replacement of capital items and for the provision of various forms of insurance for the Association, its property..., members, directors, officers, employees and agents, and for the provision of necessary and reasonable services for and other expenses of the Association."

Arguably, the assessment may be used by the Defendant HOA to improve Common Areas and Recreational Amenities. If any Developers controlled the Defendant HOA Board and decided, on behalf of the Defendant HOA, to construct improvements with the Assessments, that action is valid. However, no evidence was presented that the Developer constructed improvements with HOA funds.

d. <u>Assessments from Single Family Owners and Multi-Family Owners.</u>

Plaintiff argued that the capital contributions from single family owners (who can use the Amenity Center) and multi-family owners (who cannot use the Amenity Center) must be separated. The Fourth Amendment provides that capital contributions will be collected from multi-family owners to maintain the entrance road. No similar restriction exists on capital contributions from single family owners. Nothing in the Defendant HOA's governing documents prohibits the pooling of funds, even if the use of the assessment is specified in the Fourth Amendment.

e. <u>Collection and Use of Capital Contributions.</u>

Plaintiff contends that the Capital Contributions were not properly collected and used by the Defendant HOA. He asserted that the funds can only be used for the maintenance of the entranceway. Further, he stated that the roads were dedicated to Horry County, and as a result, the entrance area cannot be maintained by the Defendant HOA and the capital contributions are useless. Lastly, he claimed that the contributions were collected by D.R. Horton in 2004 but they were not deposited into the Defendant HOA's account. I find the Plaintiff's claims without

merit. The evidence reflects that the entrance area is approximately 5.42 acres and owned by the Defendant HOA, and as the owner, the HOA shall maintain the property. Further, the capital contributions may be used for purposes other than the maintenance of the entranceway, including but not limited to, maintenance of the Common Areas, other property in and near the Subdivision, and as reserve funds for future capital expenditures. Finally, William Freiboth testified that the capital contributions collected from 2004 through 2007 were properly accounted for by Defendant HOA.

f. Validity of the Third Amendment.

Plaintiff contends that the Third Amendment is invalid, because it was not approved by the homeowners. However, developers may amend restrictive covenants or impose new restrictive covenants without the consent of homeowners, if five conditions are met:

1) the right to amend the covenants or impose new covenants must be unambiguously set forth in the original declaration of covenants;

2) the developer, at the time of the amended or new covenants, must possess a sufficient property interest in the development;

3) the developer must strictly comply with the amendment procedure as set forth in the declaration of covenants;

4) the developer must provide notice of amended or new covenants in strict accordance with the declaration of covenants and otherwise may be provided by law; and

5) the amended or new covenants must not be unreasonable, indefinite, or contravene public policy."

Queen's Grant II Horizontal Property Regime, 368 S.C. at 350, 628 S.E.2d at 907.

Pursuant to Declaration Section 8.5, the Declarant has the right to amend the Declaration without consent of any owner or mortgagee, provided that the amendment does not materially alter or change the owners' use and enjoyment of their property and does not affect the security, title, or interest of the mortgagee, as determined by the sole judgment of the Declarant.

At the time of the Third Amendment, D.R. Horton added an additional 90 acres of developable property, which constitutes a sufficient interest in the development. *See Queen's Grant II Horizontal Property Regime*, 368 S.C. at 364-65, 628 S.E.2d at 915-15 ("Sufficient Property Interests" include ownership of right of ways, easements, and land held in trust for the association).

D.R. Horton complied with the Declaration, in that the Third Amendment does not materially alter or change the homeowners' use and enjoyment of their property. Importantly, the amount collected under the original Section 3.5 and the Third Amendment is the same. 1/6 of the annual assessment is equal to 2 months of assessments. The capital contribution requirement only applies to new Owners. The existing Owners at the time of the Amendment did not have to make any additional contributions.

D.R. Horton provided notice of the amended covenants by filing the Third Amendment in the chain of title of the owners' properties. This constructive notice is sufficient pursuant to *Queen's Grant II Horizontal Property* Regime. *Id.* at 367-68, at 916-17.

Plaintiff argued that the Third Amendment is in violation of public policy, because it sets forth that each new Owner of a Unit must pay a capital contribution equivalent to two months of assessments at the time the Unit is transferred. However, the Defendant HOA's minutes reflect that counsel for the Defendant HOA advised not to collect a capital contribution in this circumstance. Furthermore, Plaintiff failed to present evidence that contributions were collected upon re-sale of Units. Therefore, I find that the Defendant HOA's enforcement of the Third Amendment was valid.

g. Validity of the Fourth Amendment.

Plaintiff argued that the Fourth Amendment is invalid, because it requires multi-family owners to contribute $150.00 at the time the unit is transferred, rather than two months of assessments as set forth in the Third Amendment. The Declaration sets forth different monetary payments for the single family owners and multi-family owners, because single family owners have access to the Amenity Center and the multi-family owners do not. Because different rights and obligations exist for the class of members under the Declaration, the contribution of $150.00 is reasonable and not in violation of public policy. It is also reasonable to conclude the developers of the multi-family parcels damaged the roads as a result of the construction and the additional assessment was to compensate the HOA for this damage.

15. The Third Amendment's Reference to Developer Contributions is Related to the Developer Agreement.

The Third Amendment designates Sunbelt Associates as a "Designated Builder" as defined by the Declaration. The following sentence was also added to Section 7.2:

> Sunbelt Associates, LLC and Developer have previously entered into a Developer's Agreement wherein Sunbelt Associates, LLC has agreed to contribute One Thousand and 00/100 ($,1,000.00) per home sold to an Owner for capital improvements. Any other builder wishing to construct single family or multi-family dwellings in the subdivision shall contribute to the capital improvements by separate agreement with Developer in order to attain the status of Designated Builder within the Subdivision.

Plaintiff seeks an order as to whether builders that construct homes within the Community are required to contribute $1,000.00 and whether the $1,000.00 contributions may be used for the construction of amenities.

Assuming arguendo that the builders are not necessary parties, the plain and obvious meaning of the covenant is to require all designated builders to pay the Declarant, D.R. Horton, a contribution for the construction of amenities and infrastructure within the Community. This is

clear based upon the requirement that the designated builders enter a separate agreement with the Developer. The Developer Agreement is consistent with this interpretation of the Third Amendment, which sets forth that Sunbelt Associates must pay D.R. Horton, not the International Club HOA, a $1,000.00 capital contribution.

16. **The Defendant HOA's maintenance contracts are proper.**

Plaintiff's claim that the Defendant HOA misspent funds stems from his argument that the Defendant HOA maintains property that it does not own. However, pursuant to Sections 3.1(a) of the Declaration, the Defendant HOA may maintain "all open spaces, lagoons, lakes, swales, ditches, pipes, and other water courses or drainage ways, whether the same are within the Subdivision or in a reasonable proximity to the Subdivision such that their conduction would affect the appearance of the Subdivision as a whole." Therefore, the Defendant HOA has the authority to maintain property that it does not own to ensure that the Community as a whole has a consistent appearance, including property of adjacent owners and property within Horry County's right of way.

17. **The Fairways and Enclave are not subject to the Declaration.**

The Plaintiff argued that the Fairways and Enclave are a part of the PUD and that owners living in these neighborhoods must pay assessments. The Fairways HPR and the Enclave projects are located on tracts adjacent to properties within the Community. These projects also utilize the same entranceway as the other neighborhoods within the International Club and the County dedicated roads. However, I find that the properties that constitute the Fairways HPR and Enclave are not subject to the Declaration, and therefore, the Defendant HOA cannot collect assessments from owners in these neighborhoods.

18. The Highway 17 Connector Association Covenants are valid and the Defendant HOA is obligated to collect the assessments.

Plaintiff challenged the validity of the Declaration of Special Covenants for Highway 17 Connector Road Maintenance District Association, Inc. ("Connector Road Declaration"). Pursuant to the Connector Road Declaration, the developers of property between Highway 707 and Bypass 17 agreed to contribute property to build a connector road between these two roads. The purpose of the Connector Road Declaration, as stated in its whereas clauses, is to provide landscaping along the connector road and to maintain drainage and provide signage. The property subject to the Connector Road Declaration is described in Exhibit "A", attached to the Connector Road Declaration and it includes the Suntech Tract and the Plantation A.D. Tract (except those portions of the Suntech Property which have been previously conveyed). The property description encompasses 2,881.5 acres, less and excepting specific tracts; the specific tracts excluded do not include the International Club. The Connector Road Declaration is signed by Plantation A.D., LLC and Suntech AD, LLC. Since Plantation A.D., LLC agreed to the Connector Road Declaration and it was the property owner at the time, the property now being the Community is subject to the Connector Road Declaration. Therefore, the Connector Road Declaration is valid.

In the Connector Road Declaration, Article V, Section 1, Creation of Lien and Personal Obligation for Assessments, sets forth: "In the event any sub-association is formed which affects all or any portion of the Property, such sub-association shall have the obligation to collect any assessment hereunder." Therefore, the Defendant HOA has the obligation to collect assessments from individual homeowners and pay the assessment to the Highway 17 Connector Association.

19. The Plaintiff's Defamation Claim is Without Merit.

During the trial the Plaintiff represented to the Court that Ms. Golding's letter dated May 2009 is not defamatory. His exact wording was "...nothing in the letter is defamatory." Ms. Golding's letter is a two page letter, an attached list of cases, and reported decisions. Since Plaintiff testified that there was nothing defamatory in Ms. Golding's letter, he can no longer claim defamation; however, even without his stipulation, the Plaintiff had no grounds to contend that the letter was defamatory.

a. The Defense of Absolute Privilege Bars Plaintiff's Claims.

Defamatory statements made during the course of a judicial proceeding are absolutely privileged. *See Redfearn v. Pusser*, 276 S. C. 506, 280 S. E. 2d 206 (1981). This privilege applies even though the statements were made maliciously and with knowledge of their falsity. *Texas Co. v. C. W. Brewer & Co.*, 180 S. C. 325, 185 S. E. 623 (1936). Moreover, the privilege extends to communication that are preliminary to the judicial proceedings. *Crowell v. Herring*, 301 S. C. 424, 392 S. E. 2d 464 (Ct. App. 1990). The privilege protects the statements of judges, parties, and witnesses offered in the course of judicial proceedings. *Id.* It protects not only trial and deposition testimony, but also statements in pleadings, affidavits, communications between counsel, statements by counsel to prospective witnesses, and in general "any utterance arising out of any judicial proceeding and having any reasonable relation to it, including preliminary steps leading to judicial actions of any official nature provided those steps bear reasonable relationship to it." *Id.* Whether a particular statement is "relevant" to the judicial proceeding is for the court to decide, with all doubts resolved in favor of relevancy. *Texas Co.*, 180 S.C. 325, 185 S.E. 623.

Ms. Golding's letter was prepared as a result of Plaintiff's lawsuit and provided to the Defendant HOA Board of Directors. The letter was disseminated to the Community members to provide information regarding the lawsuit. This communication is an utterance arising out of a

judicial proceeding and has a reasonable relationship to it, and therefore, it is absolutely privileged and protects the Defendants from liability.

b. <u>The Defendants' statements are privileged</u>.

"Communications between officers and employees of a corporation are qualifiedly privileged if made in good faith and in the usual course of business." *Murray v. Holnam, Inc.*, 344 S.C. 129, 141, 542 S.E.2d 743, 749 (Ct. App. 2001). "A communication made in good faith on any subject matter in which the person communicating has an interest or duty is qualifiedly privileged if made to a person with a corresponding interest or duty even though it contains matter which, without this privilege, would be actionable." *Constant v. Spartanburg Steel Prods., Inc.*, 316 S.C. 86, 89, 447 S.E.2d 194, 196 (1994).

The Defendant HOA notified its members regarding Plaintiff's lawsuit and his history of filing litigation pro se. The Defendant HOA had a duty to inform its members that Plaintiff has filed several other cases and to inform the members' of the status of this lawsuit. The Board did not exceed the scope of the privilege nor provide an opinion as to the motives of Plaintiff's litigation.

20. The Claims Against the Defendant Rosemary Toth are Without Merit.

The Plaintiff alleged that the Defendant Rosemary Toth, former President of the Defendant HOA, defamed him, invaded his privacy, caused intentional infliction of emotional distress, violated her obligations of good faith and fair dealing, and failed to properly provide to him information. He also alleged that due to the counterclaim asserted by the Defendant HOA, the Defendant Ms. Toth violated the South Carolina Frivolous Proceedings Act.

Board members have immunity under South Carolina law. Pursuant to the Act, S.C. Code § 33-31-834:

> All directors, trustees, or members of governing bodies of not for profit cooperatives, corporations, associations, or organizations described in subsection (b) are immune from suit arising from the conduct of the affairs of these cooperatives, corporations, associations, or organizations. This immunity from suit is removed when the conduct amounts to willful, wanton, or gross negligence.

No evidence was presented that Ms. Toth acted improperly in any way much less acted in a wanton, willful or grossly negligent manner or that she breached any duty to the Defendant HOA or its members.

Plaintiff alleged that Ms. Toth failed to produce documents, that she entered contracts on behalf of International Club HOA that were in violation of the Declaration, she voted in favor of the Central Electric easement, she directed K.A. Diehl to mail a list of lawsuits Plaintiff has been a party to, she made representations about the ownership of the roads and parking lots that were inaccurate, she did not follow the advice of committees, and she failed to disclose the Golf Course Agreement. However, Ms. Toth's actions were consistent with the Declaration and her obligations as a Board member. Ms. Toth did not act individually; instead, all actions were authorized by the Board. The Board had the authority to reject recommendations of committees and to vote in favor of the easement. With respect to the mailing about Plaintiff, Ms. Toth was out of town and did not take part in the decision to send the mailing; the mailing was authorized by the other board members. Regardless, the mailing is privileged and justified under the circumstances.

Even if Ms. Toth was negligent, the governing board of a non-profit corporation homeowners' association is entitled to have the validity of its intra vires action tested by the business judgment rule. *Dockside Ass'n*, 291 S.C. at 216-17, 352 S.E.2d at 715-16. Under the rule, derived from corporate law, as long as a board acts in a reasonable manner, its business judgment is protected from challenge. *Id.* Under the business judgment rule, a court will not

review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motive and in good faith. *Id.*

As long as Ms. Toth acted within her authority under the Declaration and no evidence of bad faith exists, her actions are protected by the business judgment rule. I find that Ms. Toth acted within her authority and in good faith, and therefore, Plaintiff's claims against Ms. Toth are without merit.

21. The Plaintiff's Invasion of Privacy Claim is Without Merit.

Invasion of privacy is the unwarranted appropriation or exploitation of one's personality, the publicizing of one's private affairs with which the public has no legitimate concern, or the wrongful intrusion into one's private activities, in such manner as to outrage or cause mental suffering, shame, or humiliation to a person of ordinary sensibilities. *Meetze v. The Associated Press*, 230 S.C. 330, 335, 95 S.E.2d 606 (1956).

The letter to the Community members was regarding public matters, lawsuits Plaintiff filed.[3] There was no exploitation of Plaintiff's personality, publication of private affairs or intrusion into private activities. Therefore, his invasion of privacy claim is without merit.

22. Plaintiff's Intentional Infliction of Emotional Distress Claim is Without Merit.

To recover for intentional infliction of emotional distress, a Plaintiff must establish that 1) the Defendant intentionally and recklessly inflicted severe emotional distress or was certain or substantially certain that such distress would result from his conduct; 2) the conduct was so "extreme or outrageous" as to exceed all possible bounds of decency and must be regarded as atrocious, and utterly intolerable in a civilized society; 3) the actions of the Defendant caused the Plaintiff emotional distress; and 4) the emotional distress suffered by the Plaintiff was so

[3] In fact, Plaintiff's witness Ms. Pizzi testified that the litigation in which Plaintiff was involved could be googled.

severe that no reasonable man could be expected to endure it. *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 530 S.E.2d 132, 160 (Ct.App. 2000).

Plaintiff's outrage claim is based upon the letter that was sent by the Defendant HOA to its members. Courts rarely grant relief under outrage claims. The Defendant HOA communicated that the Plaintiff is a litigious individual, which is true, and a fact that its members had a right to know based upon the multiple claims asserted in this lawsuit. Plaintiff's claim is without merit.

23. The Defendant K.A. Diehl Properly Performed its Duties as the Community's Manager.

The Plaintiff attacked the Defendant K.A. Diehl on a number of fronts. First he testified that K.A. Diehl obtained monies from capital contributions and these monies are missing. He testified that there were no checks and balances in place to prevent any fraud and it was "more likely than not that K.A. Diehl is responsible . . . ." Then the Plaintiff attacked the practices of K.A. Diehl as a contracting agent for the Defendant HOA. He testified that K.A. Diehl's practices were illegal and in violation of public policy. He pointed to K.A. Diehl having a vendor program. In order to qualify as an approved contractor for any one of the communities managed by K.A. Diehl, the vendor pays a fee for advertising services provided by K.A. Diehl. Plaintiff argued that K.A. Diehl's conduct amounted to a conspiracy to defraud in violation of Section 39-3-140 of the Code of Laws of the State of South Carolina. Aside from the fact that the Plaintiff does not have standing with respect to K.A. Diehl's contracts with third parties, K.A. Diehl's actions in no way constitute a conspiracy to defraud. Nothing in the evidence shows that K.A. Diehl attempted to limit competition in its trade. Furthermore, there was no evidence that the Defendant HOA utilized K.A. Diehl's preferred vendor program.

Plaintiff also testified that K.A. Diehl failed to perform its duty under the Act and the Defendant HOA Bylaws. He testified that when he requested the membership list, K.A. Diehl refused to provide it; however, Plaintiff's request was for a membership list containing homeowners emails, phone numbers and delinquency status. K.A. Diehl's representative, Beckie Abel, testified that Plaintiff's request was denied due to improperly requesting personal information. Further, she testified that the list was available on the Defendant HOA's website which the Plaintiff could easily access. Lastly, Plaintiff was provided a members' directory on at least one previous occasion.

Plaintiff also testified that he did not receive the Defendant HOA publication known as "Friday Facts". However, the Plaintiff, on cross-examination, admitted that he refused to access the Defendant HOA website for he did not want to disclose his email address and therefore he does not receive Friday Facts. The evidence was abundantly clear that membership lists were available to the Plaintiff on the Defendant HOA website which is a restricted website for the Community members.

24. Plaintiff is indebted to the Defendant HOA in the amount of $7,326.00.

Due to the Plaintiff's contesting the enforceability of the Declaration, including the Bylaws, the Defendant HOA paid $5,000.00 to the McNair Law Firm. Declaration Section 13.4, specifically provides that should the Defendant HOA employ legal counsel to enforce the Declaration, Bylaws or its Rules and Regulations, the owner shall pay the attorneys fees incurred by the Defendant HOA.

"The general rule is that attorney's fees are not recoverable unless authorized by contract or statute." *Seabrook Island Property Owners Assoc. v. Berger*, 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct.App. 2005). Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge. *Menne v. Keowee Key Prop. Owners' Ass'n*, 368 S.C. 557, 569, 629

S.E.2d 690, 696-97, (2006). A provision contained in restrictive covenants allowing for the recovery of attorney's fees is enforceable. *Queen's Grant II Horizontal Property Regime*, 368 S.C. at 375, 628 S.E.2d at 920.

"There are six factors to consider in determining an award of attorney's fees: 1) nature, extent, and difficulty of the legal services rendered; 2) time and labor devoted to the case; 3) professional standing of counsel; 4) contingency of compensation; 5) fee customarily charged in the locality for similar services; and 6) beneficial results obtained." *Menne*, 368 S.C. at 569, 629 S.E.2d at 697.

Clearly, the $5,000.00 that the Defendant HOA seeks to recovery from the Plaintiff is reasonable. This action has lasted over 3 years and much discovery has taken place. The trial lasted 3 full days with court starting each day at 9:00 a.m. and ending each day between 5:00 to 6:00 p.m. The issues raised by the Plaintiff were numerous. I conclude that Plaintiff should pay the Defendant HOA the sum of $5,000.00.

As to the ARB fines, as of August 8, 2012, the Plaintiff owes $2,326.00 to the Defendant HOA. As stated hereinabove, the ARB has the authority to assess these fines. Therefore the Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00.

25. Plaintiff must remove the brick foundation.

Since the Plaintiff has intentionally disregarded the ARB's directive to remove the brick foundation, he is hereby ordered to remove the brick foundation and replace with sod within fifteen (15) days from the date of this Order.

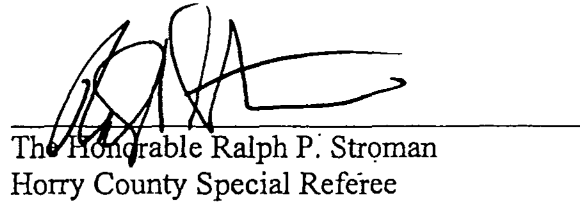
Based upon the above Findings of Fact and Conclusions of Law, it is hereby **ORDERED, ADJUDGED, and DECREED**:

(a) All Plaintiff's claims against the Defendants are dismissed with prejudice;

(b) The Plaintiff is directed to remove, within fifteen (15) days from the date of this Final Order, such date being set forth below, the brick foundation, and all parts thereof, which was directed to be removed by the Architectural Review Board and to cover the ground area with sod;

(c) The Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00.

IT IS SO ORDERED.



The Honorable Ralph P. Stroman
Horry County Special Referee

Conway, South Carolina
Dated: Sept 10 2012

Horry County
Fifteenth Judicial Circuit
Public Index

Ronald Jarmuth VS International Club Homeowners Association Inc , defendant, et al

Case Number:	2009CP2603596	Court Agency:	Common Pleas	Filed Date:	04/07/2009
Case Type:	Common Pleas	Case Sub Type:	Judgment/Other 799	File Type:	Non-Jury
Status:	Judgment	Assigned Judge:	Special Referee G S And C P		
Disposition:	Judgment	Disposition Date:	09/10/2012	Disposition Judge:	Special Referee G S And C P
Original Source Doc:		Original Case #:		Restore Reason:	Reopened Case
Judgment Number:	2009CP2603596	Court Roster:			

Case Parties

Click the icon to show associated parties.

Name	Address	Race	Sex	Date Of Birth	Party Type	Party Status	Last Updated
Dillard, W. Kyle	Ogletree Deakins Nash Smoak&Stewart, PC P.O. Box 2757 Greenville SC 29602				Other Party to Case		05/07/2012
Ellis, Todd Raymond	7911 Broad River Rd., Ste. 100 Irmo SC 29063				Defendant Attorney		03/13/2013
Golding, Henrietta U.	PO Box 336 Myrtle Beach SC 29578				Defendant Attorney		03/13/2013
Golding, Henrietta					Defendant		09/27/2011
International Club Homeowners Association Inc					Defendant		09/11/2012
Jarmuth, Ronald	249 Pickering Drive Murrells Inlet SC 29576				Plaintiff		09/19/2012
Jarmuth, Ronald	249 Pickering Drive Murrells Inlet SC 29576				Plaintiff Pro Se		11/10/2011
K A Diehl & Associates Inc					Defendant		05/13/2010
Merrell, John T	Ogletree Deakins Nash Smoak & Stewart Pc P O Box 2757 Greenville SC 29602				Other Party to Case		02/27/2012
Stepp, Robert E.(Inactive)	Sowell Gray Stepp & Laffitte, LLC P.O. Box 11449 Columbia SC 29211				Defendant Attorney		04/20/2012
Thompson, Alicia E.	Po Box 336 McNair Law Firm, PA Myrtle Beach SC 29578				Defendant Attorney		01/05/2012
Toth, Rosemary					Defendant		05/13/2010

Judgments

For:	International Club Homeowners Association Inc	Against:	Jarmuth, Ronald	Judg. Amount:	$7,326.00	Judgment Date:	09/10/2012
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	09/11/2012 --
Notes:	None						

Judgment Details

Claims Code	Detail Desc.	Detail Amount	Detail Date
None			

For:	Golding, Henrietta	Against:	Jarmuth, Ronald	Judg. Amount:	$1,089.46	Judgment Date:	09/23/2011
Description:	Judgment/Judgment	Disposition:		Disp. Date:		Date Entered/Last Changed	09/27/2011 --
Notes:	None						

Judgment Details

Claims Code	Detail Desc.	Detail Amount	Detail Date
None			

Associated Cases

Agency	Case #	External	Relationship	Description	Case Filed Date	Disposition Date	Case Status	Disposition
Common Pleas	2010CP2611320	N	CNTR	Consolidate for Trial	12/03/2010	09/16/2011	Dismissed	Other / Circuit Civil

Actions

Name	Description	Type	Motion Roster	Begin Date	Completion Date	Documents
Jarmuth, Ronald	COC Mailing Copies of Order/Denying Post-Trial Motions	Action		03/13/2013-11:30		
Jarmuth, Ronald	Certificate/COC Mailing Copies of Court Orders 2/14/13	Action		03/11/2013-14:28		
Jarmuth, Ronald	Order/Denying Plt's Post-Trial Motions	Order		03/11/2013-12:08		
Jarmuth, Ronald	Letter/2nd request for copying file - response from COC	Filing		03/08/2013-12:39		

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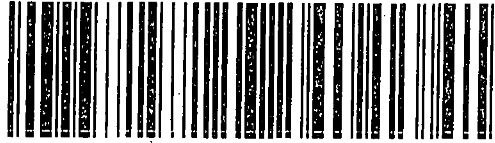

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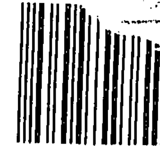

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Columbia, South Carolina 29201-3206

Label 228, January 2008