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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Thomas A. Russo, Circuit Judge

Appellate Case No. 2020-000056

Sterling Hills Homeowners Association, ...Respondent,

v.

Elliot Hayes, ...Appellant.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A No.: 2018-CP-40-04658

Sterling Hills Homeowners' Association, Inc.,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

**ORDER DISMISSING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT,
GRANTING PLAINTIFF'S MOTION TO
DISMISS AND MOTION FOR SUMMARY
JUDGMENT, AND ORDER OF
REFERENCE TO MASTER IN EQUITY**

(011144.00144)

INTRODUCTION

This matter came before the Court on October 14, 2019, for a hearing at the Richland County Courthouse on Plaintiff's Motion to Dismiss Defendant's Counterclaims and for Order of Reference to the Master in Equity, Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaims, and Defendant's Motion for Summary Judgment as to Plaintiff's Claims. Appearing on behalf of Plaintiff was Christian Saville, Esquire, of the firm McCabe, Trotter & Beverly, P.C. Appearing on behalf of Defendant was Andrew S. Radeker, Esquire, of the firm Harrison, Radeker & Smith, P.A.

This Court has reviewed the pleadings, memorandums, affidavits, and evidence filed for these motions and heard arguments from both parties. For the reasons set forth below, this Court grants Plaintiff's Motion to Dismiss Defendant's Counterclaims and for Order of Reference to the Master in Equity, this Court grants Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaims, and this Court denies Defendant's Motion for Summary Judgment as to Plaintiff's Claims. This Court also finds Defendant expressly waived its counterclaim for

Failure to Allow Access Records at the hearing upon Defendant's admission that no written request for access to records had been made by Defendant.

I. PLAINTIFF'S MOTION TO DISMISS DEFENDANT'S COUNTERCLAIMS

On August 12, 2019, Plaintiff filed a Motion to Dismiss as to Defendant's counterclaims for (1) breach of contract and (2) violation of the Unfair Trade Practices Act pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure. This Court finds both above-listed counterclaims fail to state a claim upon which relief can be granted, and Plaintiff's Motion to dismiss these counterclaims is granted accordingly.

Standard of Review

Under Rule 12(b)(6), SCRCP, a party may move to dismiss claims against them for failure to state a claim upon which relief can be granted. When considering a motion to dismiss for failure to state a claim, the trial court must base its ruling solely upon the allegations set forth on the face of the complaint. *Doe v. Marion*, 373 S.C. 390, 645 S.E.2d 245 (2007). The question to be considered is whether, when viewed in the light most favorable to the complainant, the complaint states any valid claim for relief. *Carolina Care Plan, Inc. v. United HealthCare Services, Inc.*, 361 S.C. 544, 550, 606 S.E.2d 752, 755 (2004). A Rule 12(b)(6) motion should not be granted if the facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to any relief on any theory of the case. *Id.*

Discussion

i. Defendant's Counterclaim for Breach of Contract

This Court finds that Defendant's counterclaim for breach of contract shall be dismissed for failing to state a claim upon which relief can be granted. The elements of a cause of action for

a breach of contract are (1) the existence of the contract, (2) its breach, and (3) damages caused by such breach. *Southern Glass & Plastics Co., Inc. v. Kemper*, 399 SC 483, 491-492, 732 S.E.2d 205, 209 (Ct. App. 2012) (citing *Fuller v. E. Fire & Cas. Ins. Co.*, 240 S.C. 75, 89, 124 S.E.2d 602, 610 (1962)). In the present case, Defendant has failed to allege any facts sufficient to identify a *breach* of a contract. In Defendant's counterclaim for breach of contract, Defendant effectively recites the elements of a breach of contract cause of action while alleging with no specificity as to what constituted a breach of the contract. The obligation to provide grounds of entitlement to relief requires more than mere labels and conclusions, and a formulaic recitation of the elements of a cause of action is not adequate. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964-1965 (2007). Defendant includes in his Counterclaim, "The Plaintiff has breached the contract between it and Hayes as noted above," but nowhere in Defendant's Answer and Counterclaim pleading does Defendant articulate what constituted a breach of a contract. It is therefore impossible to deduce the nature of the allegation Plaintiff must defend against with regard to this counterclaim. Therefore, Defendant has failed to allege facts sufficient to support his counterclaim for breach of contract, and accordingly, Plaintiff's motion to dismiss the counterclaim is granted.

ii. Defendant's Counterclaim for Violation of Unfair Trade Practices Act

This Court finds Defendant's counterclaim for violation of the Unfair Trade Practices Act, S.C. Code § 39-5-10 et seq. shall also be dismissed for failing to state a claim upon which relief can be granted because the Unfair Trade Practices Act is inapplicable to Plaintiff and its conduct. S.C. Code § 39-5-20(a) provides that unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are unlawful. S.C. Code § 39-5-10(b) defines "trade" and "commerce" to include advertising, offering for sale, sale or

distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State. This Court finds Plaintiff is a homeowners association and not an entity engaged in trade or commerce as defined by the Unfair Trade Practices Act. Accordingly the Unfair Trade Practices Act is inapplicable, and Defendant's counterclaim under the same fails to state a cognizable claim. Therefore, Plaintiff's motion to dismiss this counterclaim is granted.

II. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

On October 4, 2019, Plaintiff filed a Motion for Summary Judgment as to Defendant's counterclaims for (1) violation of the Unfair Trade Practices Act; (2) failure to allow access to records; (3) breach of contract; and (4) declaratory judgment that Plaintiff has been operating *ultra vires*. As noted above, Defendant expressly waived its counterclaim for failure to allow access to records at the hearing, and is therefore dismissed. Moreover, the counterclaims for violation of the Unfair Trade Practices Act and breach of contract are already dismissed under Rule 12(b)(6), SCRCP, although this Court does observe no evidence has been produced by Defendant to provide any evidentiary support for the two dismissed counterclaims. Therefore, this Court has only Defendant's counterclaim for a declaratory judgment that Plaintiff has been operating *ultra vires* left to consider. This Court finds there is no genuine issue of material fact as to this counterclaim, and for the reasons set forth below, Plaintiff's motion for summary judgment as to Defendant's counterclaim for declaratory judgment is granted.

Standard of Review

A trial court may grant summary judgment "if the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. Rule 56(c), SCRCP. “The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder.” *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

“A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). “When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavit or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial.” Rule 56(e), SCRCP.

Discussion

This court finds there is no general issue of material fact as to Defendant’s counterclaim for declaratory judgment. Defendant has alleged the Board of Directors of Plaintiff Association has been operating *ultra vires* and requests a declaratory judgment to that effect. Defendant’s Answer and Counterclaim merely alleged “Plaintiff is and for quite some time has been operating in an *ultra vires* state.” In support of this assertion, Defendant has claimed in Paragraph 2 of Defendant’s Responses to Plaintiff’s Discovery Request as follows:

Plaintiff is operated unlawfully by persons claiming to be its directors although the required quorum of Plaintiff’s members to elect directors has not participated

in a director's election "since at least 2002; that the supposed "board of directors" of the Plaintiff simply purports to appoint themselves as the Plaintiff's putative directors...

This allegation that Plaintiff's Board of Directors has been operating *ultra vires* merely because there are "holdover" directors on the board is refuted by South Carolina's Nonprofit Corporation Act, S.C. Code § 33-31-101 et seq. Plaintiff is a nonprofit corporation and therefore subject to the provisions of the Nonprofit Corporation Act. Under S.C. Code § 33-31-803(a), a board of directors must consist of no less than three directors. Pursuant to S.C. Code § 33-31-805(d), despite the expiration of a director's term, the director continues to serve until the director's successor is elected, designated or appointed, and qualifies, or until there is a decrease in the number of directors. Therefore, if the required quorum of Members to elect new Directors has not participated, as Defendant's own discovery response indicates, then Plaintiff's Board of Directors is merely complying with the Nonprofit Corporation Act in maintaining its current Directors. Furthermore, this Court has reviewed the affidavits of Director Ella Calvert and Property Manager Kayla Stokes presented by Plaintiff which further assert the historical lack of the requisite quorum of Members necessary to elect new directors.

Therefore, Defendant's allegation concerning *ultra vires* action by Plaintiff is refuted by Defendant's own assertions, the Nonprofit Corporation Act, and the affidavits presented by Plaintiff. Defendant has failed to provide any evidence or legally sufficient basis to evidence invalidity or *ultra vires* status of Plaintiff's Board of Directors despite being requested to produce any evidence supporting his claims in discovery, and has provided no scintilla of evidence to substantiate allegations of *ultra vires* acts to date.. Accordingly, as there exists is no issue of material fact, Plaintiff's motion for summary judgment as to this allegation is granted.

III. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On July 24, 2019, Defendant filed a Motion for Summary Judgment as to Plaintiff's Claims in which Defendant moved for summary judgment on the grounds that Plaintiff would not be able to make a showing of evidence to support each element of its claims; that Plaintiff seeks to enforce restrictive covenants and by-laws so vague that they are unenforceable; that Plaintiff's by-laws, rules, and regulations are unenforceable as they have not been recorded pursuant to S.C. Code Ann. § 27-30-130; and generally that the covenants, by-laws, rules, and/or restrictions are unenforceable. This Court finds that genuine issues of material fact exist as to each of Plaintiff's claims against Defendant, and accordingly, Defendant's motion for summary judgment is hereby denied.

In this action, Plaintiff has enumerated causes of action for (1) breach of covenants; (2) enforcement of said restrictive covenants; (3) specific performance; (4) injunctive relief; and (5) declaratory judgment. In summary, Plaintiff seeks to enforce the provisions of Plaintiff's Declaration enumerated in its Complaint to include the provision regarding underbrush, unfinished yards, and landscaping; the provision for Owners' Maintenance Responsibilities; the provision for remedies for failure to maintain the exterior of a dwelling or lot; and the provision allowing for attorney's fees and costs incurred in enforcement of the covenants.

First, this Court observes that the provisions Plaintiff seeks to enforce are in *the Declaration*, and the Declaration was in fact recorded, contrary to Defendant's claim, in 2000 in the Office of the Register of Deeds for Richland County in Deed Book R413 at Page 92, and the Declaration is not rendered unenforceable as claimed by Defendant.

Moreover, Plaintiff has presented numerous photographs of the subject property as well as an affidavit from Property Manager Kayla Stokes attesting to the property's current and

ongoing condition. This Court has reviewed these materials and found that genuine issues of material fact exist as to each of Plaintiff's allegations. Plaintiff has alleged that Defendant has failed to keep the subject property in a good state of maintenance and repair, to include violations of the Declaration's Article VIII, Section 1 requirements that the Owner be responsible for painting, maintenance, repair, and replacement of fences, siding, fixtures, lawns, shrubs, grass, and numerous other portions and improvements on lots in Sterling Hills. Moreover, Plaintiff alleges Defendant has violated the Declaration's Article II, Section 13 restriction against underbrush, weeds, or other unsightly plants growing upon the lot. The affidavit of Kayla Stokes provided by Plaintiff included photographs of the property and the affirmation that the photographs represent the ongoing and current condition of the property. This Court finds the affidavit as well as photographs provided by Plaintiff do provide ample evidence of violations of the Declaration's provisions regarding the upkeep and maintenance to yards and landscaping pursuant to Article II, Section 13 of the Declaration, as well as the maintenance responsibilities for fences, siding, and fixtures of the dwelling provided by Article VIII, Section 1 of the Declaration. The provisions enumerated in Plaintiff's Complaint clearly and specifically list the features of the property which must be maintained and/or repaired, and Plaintiff's photographs evidence such failures. As Plaintiff noted at the hearing, the photographs evidence unsightly yard conditions, exterior walls in need of pressure-washing, siding in need of maintenance, and fencing in need of maintenance. Accordingly, this Court does find that Plaintiff has produced enough evidence for its claims to create genuine issues of material fact, and Defendant's motion for summary judgment is denied.

IV. ORDER OF REFERENCE TO MASTER IN EQUITY

On August 12, 2019, Plaintiff moved for an Order of Reference to the Master in Equity

under Rule 53, SCRCP. The circuit court may, upon application of any party or upon its own motion, direct a reference of some or all of the causes of action in a case. Rule 53(b), SCRCP. This Court heard arguments from both parties on this matter. In light of the dismissal of Defendant's legal counterclaims, and the fact that Plaintiff's claims resound in equity, Plaintiff's motion for an Order of Reference is granted.

IT IS HEREBY ORDERED that this action is referred to the Honorable Joseph M. Strickland to take testimony and to direct entry of final judgment in this action under Rule 53(b), SCRCP, and all matters arising from or reasonably related to such action and shall retain jurisdiction to perform all necessary acts incident to this action as well as any actions contesting the validity of the specific performance action pursuant to the South Carolina Rules of Civil Procedure. Any appeal shall be to the South Carolina Supreme Court or Court of Appeals, as provided by the South Carolina Appellate Court Rules.

CONCLUSION

As set forth above, IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED, that:

1. Plaintiff's Motion to Dismiss Defendant's Counterclaims is **granted**;
2. Plaintiff's Motion for Summary Judgment as to Defendant's Counterclaims is **granted**;
3. Defendant's Motion for Summary Judgment is **denied**; and
4. Plaintiff's Motion for Order of Reference to Master in Equity is **granted**.

AND IT IS SO ORDERED.

{Signature page to follow}



Richland Common Pleas

Case Caption: Sterling Hills Homeowners Association Inc vs Elliot Hayes

Case Number: 2018CP4004658

Type: Order/Other

So Ordered

s/Thomas A. Russo #2141

Electronically signed on 2019-11-22 10:18:53 page 10 of 10

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2018CP4004658

Sterling Hills Homeowners Association Inc
PLAINTIFF(S)

Elliot Hayes
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

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

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Defendant's motion to reconsider is denied.

ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 12/19/2019 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Richland Common Pleas

Case Caption: Sterling Hills Homeowners Association Inc vs Elliot Hayes

Case Number: 2018CP4004658

Type: Order/Electronic Form 4

So Ordered

s/Thomas A. Russo #2141

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-40-04658

Sterling Hills Homeowners' Association,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

**ORDER GRANTING MOTION
TO AMEND AND COMPELLING
DISCOVERY**

This matter came before me at a hearing on June 25, 2019, on the Plaintiff's motions to amend its complaint and to compel discovery responses. Defendant's counsel advised that he consented to the relief sought in the Plaintiff's motions and that he had advised Plaintiff's counsel of that on the previous day and offered to draft a consent order. In counsel's email exchange, Plaintiff's counsel responded by stating that the motions would only be resolved by consent if the Defendant agreed, to pay "(1) attorneys' fees our client incurred AND WILL INCUR in drafting and filing the motion, drafting and filing the consent order, and preparing for the hearing; AND (2) Discovery is produced within five (5) days." Defendant was not willing to agree to those terms. Defendant's counsel advised that Defendant consented to Plaintiff receiving the relief it sought in its motions – an order permitting amendment and an order compelling discovery – but not the additional relief Plaintiff's counsel stated in his email message.

First of all, the court observes that the Plaintiff's motion to compel did not seek payment of attorneys' fees or any other sanction. It simply sought an order compelling the overdue discovery responses. Rule 7(b)(1), SCRCPP, requires of motions that, among other things, they "shall set forth the relief or order sought." The award of attorneys' fees sought now exceeds the

scope of the relief sought in the motion. Defendant is agreeable to the relief that was stated to be sought in the motion.

In addition, the court notes that it is not mandatory that the court award attorney's fees and costs on a successful motion to compel discovery. Rule 37(a)(4), SCRCP. Defendant's failure to serve discovery responses earlier was the product of counsel's inattention to the case. While that is not laudatory, it is not as though the failure to serve responses timely was part of a calculated scheme to deprive the Plaintiff of its discovery rights. This case has not been set for trial, and the court discerns no prejudice to the Plaintiff that was occasioned by the failure to respond earlier. Defendant has indicated his willingness to be ordered to provide the responses. Discovery sanctions like an award of attorney's fees are usually reserved for situations in which a party has willfully failed to comply with an order compelling discovery. See Ball v. Canadian Am. Express Co., Inc., 314 S.C. 272, 442 S.E.2d 620, 623-24 (Ct. App. 1994). Even then, heavy sanctions may not be appropriate. See Baughman v. Am. Tel. & Telegraph Co., 298 S.C. 127, 129, 378 S.E.2d 599, 601 (1989) (reversing sanctions and imposing \$100 fine where litigants had failed to comply with three orders directing discovery). For this additional reason, the court declines to order any sanctions against Defendant at this time. Should Defendant fail to comply with this order, sanctions may be appropriate.

Accordingly, IT IS THEREFORE HEREBY ORDERED that:

- 1) Plaintiff may file an amended complaint; and
- 2) Defendant shall provide Plaintiff's counsel with responses to Plaintiff's first set of interrogatories and first set of requests for production on or before July 9, 2019.

And IT IS SO ORDERED.

The Honorable Michael G. Nettles
Circuit Judge



Richland Common Pleas

Case Caption: Sterling Hills Homeowners Association Inc vs Elliot Hayes

Case Number: 2018CP4004658

Type: Order/Compel

So Ordered

s/ The Honorable Michael G. Nettles #2140

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STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
Case No.: 2018-CP-40-_____

Sterling Hills Homeowners' Association, Inc.,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

**SUMMONS
(Non-Jury)**

(011144.00144)

TO: THE ABOVE NAMED DEFENDANT:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to the said Complaint on the attorney for the aforesaid Plaintiff, at the Law Firm of McCabe, Trotter, & Beverly, PC, 4500 Fort Jackson Blvd., Suite 250 (29209) Post Office Box 212069, Columbia, South Carolina, 29221, within thirty (30) days after the service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

MCCABE, TROTTER & BEVERLY, PC

/s/ Valerie Garcia Giovanoli
Valerie Garcia Giovanoli (SC Bar 102524)
4500 Fort Jackson Blvd., Suite 250 (29209)
P.O. Box 212069, Columbia, SC 29221
Phone: (803) 724-5000 Fax: (803) 724-5001
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ATTORNEY FOR PLAINTIFF

August 30, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A No.: 2018-CP-40-_____

Sterling Hills Homeowners' Association, Inc.,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

**COMPLAINT
(Non-Jury)**

(011144.00144)

Plaintiff Sterling Hills Homeowners' Association, Inc. ("Plaintiff"), complaining of Defendant Elliot Hayes ("Defendant"), would respectfully show unto this Honorable Court:

PARTIES

1. Plaintiff is a Nonprofit Corporation organized and existing under the laws of the State of South Carolina, with its principal place of business being in Richland County.

2. Upon information and belief, Defendant is a resident of Richland County, State of South Carolina and is the record owner of the real property subject to this action; located at 8 High Glen Ct. Columbia, SC 29229 (TMS#: 23104-02-57).

3. Jurisdiction and venue are proper in this Court.

FACTUAL ALLEGATIONS

4. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

5. On or about February 21, 2006 Defendant took possession of the following described property:

All that piece, parcel or lot of land with all improvements thereon, situate, lying being on the Southern side of High Glen Court, near the City of Columbia, the

County of Richland, State of South Carolina, being shown and delineated as Lot 66 on a plat of Sterling Hills, phase three prepared by Belter and Associates, Inc. dated February 18, 2000, revised April 26, 2000 and recorded in the Office of Register of Deeds for Richland County in Record Book 407 at page 1490, Said lot being more particularly shown on a plat prepared for Dana C. Purdie by Belter and Associates, Inc. dated October 9, 2000 and recorded in Plat book 451 at Page 988; reference being made to said latter plat for a more complete and accurate description, all measurements being a little more or less.

Being the identical property conveyed to Traci L. Gebrosky by deed of Cendant Mortgage Corporation dated March 31, 2004 and recorded April 26, 2004 in the Richland County ROD Office in Book 927 at Page 2291.

TMS# 23104-02-57

Address: 8 High Glen Court, Columbia, SC 29229

6. The herein described Property is subject to the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Sterling Hills (hereinafter “the Declaration”) made by The Mungo Company, Inc. and recorded May 31, 2000 in Deed Book R413 at page 92, ROD Office for Richland County.

7. These Covenants run with the land and by agreeing to be bound by aforesaid Declaration and amendments thereto, Defendants, as owners, agreed to abide by the Declaration, the Bylaws, and the regulations established by the Board of Directors for Sterling Hills Homeowners’ Association, Inc.:

The Declaration provides, amongst other things, the following:

Article II, Section 13. UNDERBRUSH, FINISHED YARDS, AND LANDSCAPING. In the event that the owner of any residential Lot permits any underbrush, weeds, or other unsightly plants to grow upon any lot, or fails to maintain landscaping and grass in a manner in keeping with the Declaration, as determined by the Developer or an Architectural Control Authority, When empowered, from time to time as they see fit, the Developer or Architectural control authority, When Empowered, may issue a compliance demand requiring the Owner of the residential Lot to bring the Lot into keeping with the Declaration, as determined by the Developer or the Architectural Control Authority, When Empowered, if the owner of the residential lot fails to comply within the time required by the notice, the Developer or the Association may enter upon the Lot, bring the Lot into keeping with the Community, as provided above,

and levy against the owner of the lot an Assessment for Non-Compliance and such Assessment shall be a lien upon the Lot.

Article VIII, Section 1. OWNERS MAINTENANCE RESPONSIBILITIES.

Unless specifically identified herein or specifically elected by the developer or the Board of Directors, when Empowered, as being the responsibility of the association, all maintenance and repair of a lot, together with all portions of the Dwelling, and other Structures or the Lot shall be the responsibility of the Owner of Such Lot. The responsibility of each Owner shall include, but not limited to, the painting, maintenance, repair, and replacement of walls or fences, and all siding, exterior doors, fixtures, equipment, and appliances (including, without limitation, the heating and air conditioning system for the Dwelling) and all chutes, flues, ducts, conduits, wires, pipes, plumbing, or other apparatus which are deemed to be apart of the Dwelling or Lot, and the lawns, trees, shrubs, fences, grass, driveways and walkways, on the Lot. The responsibility of the Owner shall also include, but not limited to, the maintenance, repair and replacement of all glass lights and light fixtures (exterior and interior), awnings, window boxes, window screens, and all screens or glass enclosed porches, balconies, or decks that are a part of the Dwelling. Each owner shall also maintain roof, gutters and downspouts in a good state of repair.

Article IX, Section 3. REMEDIES FOR FAILURE TO MAINTAIN EXTERIOR

OF DWELLING OR LOT. In the event that the Owner neglects or fails to maintain his Lot and/or the exterior of his or her Dwelling in the Community, the Developer or the Association, When Empowered, may in addition to any other remedy, provide such exterior maintenance. The Developer or the Association, when Empowered, shall first give written notice to the Owner of the specific items of the exterior maintenance or repair that the Association intends to perform and the Owner shall have the time set forth in said notice within which to perform such exterior maintenance himself or to satisfy the Association that the required maintenance or repair will be completed in a timely manner. [...] In the event the Association performs such exterior maintenance, repairs or replacement together with all costs of collecting from the Owner the cost of such maintenance, repairs or replacement established herein shall be added to and become a part of the Assessment to which the lot is subject.

Article X, Section 11. ATTORNEY'S FEES AND COST. Should the Developer or the Association employ counsel to enforce the Declaration, or the reasonable rules, regulations and policies established or amended by the Developer or the Board of Directors from time to time because of a breach of the same, all costs

incurred in such enforcement, including a reasonable fee for the Developer's or the Association's counsel and other reasonable costs of collection, shall be paid by the Owner of such Lot or Lots in breach thereof.

8. Defendant has failed to keep their lot in a good state of maintenance and repair.
9. Sometime in 2017, Plaintiff informed Defendant of the violations on Defendant's lot and asked Defendant to give the lawn attention and repair, make repairs needed to the fence, install blinds, trim overgrown bushes, paint the garage door white, clean the siding, repair the shutters, and remove the trash and recycling from view.
10. Defendant failed to comply with Plaintiff's request.
11. Plaintiff's property manager again requested Defendant to remedy the violations on their lot by giving the lawn attention and repair, make repairs to the fence, install blinds, trim the overgrown bushes, paint the garage door to white, clean the siding, repair the shutters, and remove the trash and recycling from view.
12. Defendant failed to comply with the requests from Plaintiff's property manager.
13. Plaintiff contracted counsel to enforce the covenants.
14. Plaintiff's counsel sent Defendant a letter dated February 12, 2018 regarding the persisting violations and requested that the Defendant remedy the violations in accordance with Plaintiff's previous requests.
15. Defendant again failed to respond or otherwise comply with the requests contained in the letter from Plaintiff's counsel.
16. Plaintiff's counsel sent Defendant another letter dated March 12, 2018 in which Defendant was demanded to correct the persisting violations.
17. Defendant again failed to respond or otherwise comply with the requests contained in the second letter sent from Plaintiff's counsel.

18. On April 9, 2018 Plaintiff's counsel sent an email to Defendant asking for any acknowledgement of the two letters that were sent and advising Defendant that Plaintiff would proceed with civil action.

19. At the date of this pleading, Defendant has failed to remedy the violations. Specifically, Defendants' lot remains in an extreme state of disrepair.

FOR A FIRST CAUSE OF ACTION
(Breach of Covenants)

20. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

21. Restrictive Covenants are considered voluntary contracts between the Parties.

22. Pursuant to the terms of the Declaration, Defendant has breached the Covenants by failing to maintain his lot, as he has allowed his lot and home to fall into such an extreme state of disrepair that it not only affects the appearance and aesthetics of the community and diminishes the overall value of the homes in the community, but also presents hazardous conditions.

23. Defendant's breach of covenant has caused Plaintiff damages: including diminished aesthetics, diminished value, attorney's fees, and a lack of harmony with the rest of the community.

FOR A SECOND CAUSE OF ACTION
(Enforcement of Restrictive Covenants)

24. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

25. Pursuant to the terms of the Declaration, Defendant has breached the Covenants by failing to maintain his lot, as he has allowed his lot and home to fall into such an extreme

state of disrepair that it not only affects the appearance and aesthetics of the community and diminishes the overall value of the homes in the community, but also presents hazardous conditions.

26. To the extent there is no adequate remedy at law; Plaintiff is entitled to enforcement of the Declaration at equity.

27. The balance of equities favor enforcing the Covenant.

FOR A THIRD CAUSE OF ACTION
(Specific Performance)

28. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

29. The recorded Declaration constitutes a valid agreement between the Parties.

30. Plaintiff has given Defendant due and proper notice, along with the allowance of a specified timeframe to remedy and correct the noted deficiencies.

31. Plaintiff is able and willing to perform its obligations under the Declaration.

FOR A FOURTH CAUSE OF ACTION
(Injunctive Relief)

32. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

33. Plaintiff will suffer irreparable harm if the Covenants are not upheld and enforced, as Plaintiff will be unable to enforce the existing Covenants on other owners should Defendant not repair his lot.

34. Plaintiff has no adequate remedy at law and damages would be unsatisfactory in remedying Defendant's violations.

FOR A FIFTH CAUSE OF ACTION
(Declaratory Judgment per Chapter 53 of Title 15 S.C. Code of Laws)

35. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

36. Pursuant to Article IX, Section 3 of the Declaration, Plaintiff has the right to maintain the lot and charge maintenance costs and expenses to the owner in the form of an assessment:

- a. After due and proper notice is provided to the owner of said lot; and
- b. no corrective measures have been taken by the owner after the specified time written in the notice.

37. Article IX, Section 3 of the Declaration further provides that in the event an owner fails to pay such charges, then such charges shall be collected in the same manner as assessments.

38. Plaintiff is concerned that it may not recover the costs for repairing and replacing Defendant's lot and home and asks this Court to determine whether it may enter the lot, restore the lot and home to a good state of repair and charge the costs of such repair as an assessment, which if not paid when due, shall together with interest and costs of collection become a continuing lien on the property, which may be enforced by action at law or foreclosure, according to Article IX, Section 1 of the Declaration.

WHEREFORE, Plaintiff prays this Honorable Court for judgment against Defendant as follows:

- a. Actual and consequential damages;
- b. enforcement of restrictive covenants;
- c. an order enjoining Defendant to repair his lot and to otherwise restore his lot to a good state of maintenance and repair;

- d. issue a declaratory judgment that Plaintiff has the right to enter the lot, repair the lot and home, and that the costs of repairing Defendant's lot and home are a lien against the property and if delinquent, may be enforced as any other assessment according to the Declaration;
- e. an award of costs and attorney's fees; and
- f. for such other and further relief as this Honorable Court deems just and proper.

Respectfully Submitted,

MCCABE, TROTTER & BEVERLY, PC

/s/ Valerie Garcia Giovanoli

Valerie Garcia Giovanoli (SC Bar 102524)

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ATTORNEY FOR PLAINTIFF

August 30, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-40-04658

Sterling Hills Homeowners' Association,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

**ANSWER AND COUNTERCLAIM
(JURY TRIAL DEMANDED)**

The Defendant (hereinafter "Hayes") in answer to the Plaintiff's Complaint and as counterclaim, answers and alleges as follows:

FOR A FIRST DEFENSE

1. Any allegation of the Complaint not herein admitted, qualified, or explained is denied. Any allegations of the Complaint subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the Complaint subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.

2. Answering the allegations of paragraph 1 of the Complaint, Hayes does not have sufficient knowledge or information to form a belief as to the truth of the allegations of the paragraph.

3. Answering the allegations of paragraphs 2 and 3 of the Complaint, Hayes admits he owns the subject real property and that subject matter jurisdiction and venue are proper in this court; however, as noted below, Hayes has never been served with the summons and complaint in this case, and so he cannot admit that the court has personal jurisdiction of him.

4. No separate response to paragraph 4 of the Complaint is required.

5. Answering the allegations of paragraph 5 of the Complaint, Hayes answers that his present ownership of the subject property began when he purchased it at a foreclosure sale in 2017.

6. Answering the allegations of paragraph 6 of the Complaint, Hayes does not have sufficient knowledge or information to form a belief as to the truth of the allegations of the paragraph.

7. Answering the allegations of paragraph 7 of the Complaint, Hayes does not have sufficient knowledge or information to form a belief as to the truth of the allegations of the paragraph.

8. Answering the allegations of paragraph 8 of the Complaint, Hayes denies the same.

9. Answering the allegations of paragraph 9 of the Complaint, Hayes denies the same as written.

10. Answering the allegations of paragraph 10 of the Complaint, Hayes denies the same as written.

11. Answering the allegations of paragraph 11 of the Complaint, Hayes denies the same as written.

12. Answering the allegations of paragraph 12 of the Complaint, Hayes denies the same as written.

13. Answering the allegations of paragraph 13 of the Complaint, Hayes denies the same as written.

14. Answering the allegations of paragraph 14 of the Complaint, Hayes denies the same as written.

15. Answering the allegations of paragraph 15 of the Complaint, Hayes denies the same as written.

16. Answering the allegations of paragraph 16 of the Complaint, Hayes denies the same as written.

17. Answering the allegations of paragraph 17 of the Complaint, Hayes denies the same as written.

18. Answering the allegations of paragraph 18 of the Complaint, Hayes denies the same as written.

19. Answering the allegations of paragraph 19 of the Complaint, Hayes denies the same as written.

20. No separate response to paragraph 20 of the Complaint is required.

21. Answering the allegations of paragraph 21 of the Complaint, Hayes answers that he admits the same to the extent they accurately state the law.

22. Answering the allegations of paragraph 22 of the Complaint, Hayes denies the same.

23. Answering the allegations of paragraph 23 of the Complaint, Hayes denies the same.

24. No separate response to paragraph 24 of the Complaint is required.

25. Answering the allegations of paragraph 25 of the Complaint, Hayes denies the same.

26. Answering the allegations of paragraph 26 of the Complaint, Hayes denies the same.

27. Answering the allegations of paragraph 27 of the Complaint, Hayes denies the same as written.

28. No separate response to paragraph 28 of the Complaint is required.

29. Answering the allegations of paragraph 29 of the Complaint, Hayes denies the same as written.

30. Answering the allegations of paragraph 30 of the Complaint, Hayes denies the same.

31. Answering the allegations of paragraph 31 of the Complaint, Hayes denies the same.

32. No separate response to paragraph 32 of the Complaint is required.

33. Answering the allegations of paragraph 33 of the Complaint, Hayes denies the same.

34. Answering the allegations of paragraph 34 of the Complaint, Hayes denies the same.

35. No separate response to paragraph 35 of the Complaint is required.

36. Answering the allegations of paragraph 36 of the Complaint, Hayes denies the same as written.

37. Answering the allegations of paragraph 37 of the Complaint, Hayes answers that the Declaration document says what it says, and he denies anything the Complaint alleges that the Declaration document says that is not what that document actually says.

38. Answering the allegations of paragraph 38 of the Complaint, Hayes answers that he does not know what concerns the Plaintiff, though it is irrelevant what the Plaintiff's concerns are, and he denies the remaining allegations of the paragraph.

39. All counterclaims asserted in this action are also asserted as defenses to the extent permitted by law, and vice-versa.

FOR A SECOND DEFENSE
(Failure to Serve Process and Lack of Personal Jurisdiction)

40. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

41. The court does not have personal jurisdiction over Hayes as to the Plaintiff's claims against him.

42. Hayes was never served with the summons and complaint in this action.

43. Contrary to what a filed affidavit states, the summons and complaint in this case was never personally delivered to Hayes. Hayes found the summons and complaint stuck in his door.

44. The Plaintiff's claims should be dismissed for lack of personal jurisdiction and insufficient service of process.

FOR A THIRD DEFENSE
(Unclean Hands)

45. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

46. The Plaintiff has engaged in such conduct with respect to the matters subject of his claims as to make its hands unclean with regard to its claims.

47. This conduct includes, but is not necessarily limited to, refusing to hold elections for directors and operating in flagrant disregard of the covenants the Plaintiff claims bind the property subject of this case.

48. This conduct by the Plaintiff relates directly to the subject matter of this action.

49. The Plaintiff's said conduct has proximately caused Hayes prejudice and injury.

FOR A FOURTH DEFENSE
(Breach of Covenants)

50. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

51. The Plaintiff is itself in breach of the covenants it claims bind Hayes and property involved in this case, as aforesaid.

52. This bars the Plaintiff from recovery in this action.

FOR A FIFTH DEFENSE
(Ultra Vires)

53. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

54. All of the Plaintiff's actions, for a period of many years, have been without any authority and are *ultra vires*.

55. The bringing of this action is one of the Plaintiff's many *ultra vires* actions.

FOR A FIRST COUNTERCLAIM
(Breach of Contract)

56. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

57. The Plaintiff has breached the contract between it and Hayes as noted above.

58. Hayes has sustained damages as a direct and proximate result of the Plaintiff's breach of contract.

59. Hayes is entitled to judgment against the Plaintiff.

FOR A SECOND COUNTERCLAIM
(Violation of Unfair Trade Practices Act)

60. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

61. Actions of the Plaintiff, including, but not necessarily limited to, those stated in this complaint, constitute violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, et seq. These acts offended public policy, which favors and encourages honesty and fair dealing in commerce and which discourages deception and misrepresentation.

62. The Plaintiff has improperly assessed purported fines and assessments and has improperly taken actions against members or purported members of the Plaintiff.

63. These acts were immoral, oppressive, unscrupulous, and substantially injured Hayes.

64. The Plaintiff knew or should have known that these actions were violations of the Unfair Trade Practices Act and constituted unfair and deceptive acts in trade or commerce.

65. These actions have an impact upon the public interest and are capable of repetition.

66. Hayes has suffered damages as a direct, consequent, and proximate result of these actions of the Plaintiff.

67. Hayes is entitled to a judgment against the Plaintiff for treble damages, reasonable attorney's fees, and costs.

FOR A THIRD COUNTERCLAIM
(Declaratory Judgment)

68. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

69. As noted above, the Plaintiff is and for quite some time has been operating in an *ultra vires* state.

70. None of the Plaintiff's actions during this long time period have been lawful or valid.

71. There is a justiciable controversy between Hayes and the Plaintiff about this.

72. The court should issue a declaratory judgment as to the Plaintiff's status and *ultra vires* actions.

FOR A FOURTH COUNTERCLAIM
(Failure to Allow Access to Records)

73. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

74. Hayes has requested to see the Plaintiff's books and records.

75. The Plaintiff maintains that it is a nonprofit corporation of which Hayes is a member.

76. The Plaintiff has refused to allow Hayes access to its books and records.

77. Hayes is entitled to an order directing the Plaintiff to provide the same and is entitled to recover his costs and attorneys' fees in this action.

WHEREFORE, Hayes prays for the court to:

- (a) Issue an order dismissing the Complaint with prejudice;
- (b) Deny the Plaintiff the relief it seeks in this action;
- (c) Issue declaratory judgment as sought above;
- (d) Enter an order directing the Plaintiff to allow Hayes to access its books and records as required by statute;
- (e) Enter judgment for Hayes for actual damages, punitive damages, treble damages, and all applicable statutory penalties;
- (f) Enter judgment in favor of Hayes for reasonable attorney's fees;
- (g) Enter judgment for Hayes for the costs and expenses of this action; and
- (h) Grant Hayes such other and further relief as the court deems just and proper.

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
S.C. Bar No. 73743
HARRISON, RADEKER & SMITH, P.A.
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ATTORNEY FOR DEFENDANT
ELLIOT HAYES

Columbia, South Carolina
October 10, 2018

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A No.: 2018-CP-40-04658

Sterling Hills Homeowners' Association, Inc.,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

**PLAINTIFF'S REPLY TO DEFENDANT'S
ANSWER & COUNTERCLAIMS**

(011144.00144)

COMES NOW, Plaintiff Sterling Hills Homeowners' Association, Inc. (the "Plaintiff"), by and through its undersigned counsel, hereby gives its Reply to Defendant Elliot Hayes' ("Defendant"), Answer and Counterclaims in the above-captioned matter.

FOR A FIRST DEFENSE
(General Denial)

1. Plaintiff denies all paragraphs and allegations contained in the Answer and Counterclaims of Defendant Elliot Hayes unless herein specifically admitted or denied.

FOR A SECOND DEFENSE
(Specific Denial)

2. Paragraphs 1 through 39 do not appear to contain any allegations against Plaintiff; thus, Plaintiff believes no response is required as to Paragraphs 1 through 39. To the extent that Paragraphs 1 through 39 do contain any allegations that may be construed against Plaintiff, it denies all allegations inconsistent with its Complaint and this Reply.

3. Plaintiff denies the allegations contained in Paragraphs 40 through 44 and demands strict proof thereof.

4. Plaintiff denies the allegations contained in Paragraphs 45 through 49 and demands strict proof thereof.

5. Plaintiff denies the allegations contained in Paragraphs 50 through 55 and demands strict proof thereof.

AS TO DEFENDANT'S FIRST COUNTERCLAIM
(Breach of Contract)

6. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 5 as if fully set forth herein.

7. Plaintiff denies the allegations contained in Paragraphs 56 and 57 and demands strict proof thereof.

8. Plaintiff denies the allegations contained in Paragraphs 58 and 59 and demands strict proof thereof.

AS TO DEFENDANT'S SECOND COUNTERCLAIM
(Violation of Unfair Trade Practices Act)

9. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 8 as if fully set forth herein.

10. Plaintiff denies the allegations contained in Paragraphs 60 through 62. Plaintiff is a homeowners association, not an entity "in commerce" as contemplated under the Act.

11. Plaintiff denies the allegations contained in Paragraphs 63 through 65 and demands strict proof thereof.

12. Plaintiff denies the allegations contained in Paragraph 66 and demands strict proof thereof.

13. Plaintiff denies the allegations contained in Paragraph 67.

AS TO DEFENDANT'S THIRD COUNTERCLAIM
(Declaratory Judgment)

14. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 13 as if fully set forth herein.

15. Plaintiff denies the allegations contained in Paragraphs 68 through 70 and demands strict proof thereof.

16. Plaintiff denies the allegations contained in Paragraphs 71 and 72 and demands strict proof thereof.

AS TO DEFENDANT'S FOURTH COUNTERCLAIM
(Failure to Allow Access to Records)

17. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 16 as if fully set forth herein.

18. Plaintiff denies the allegations contained in Paragraphs 73 and 74 and demands strict proof thereof.

19. Plaintiff admits the allegations contained in Paragraph 75.

20. Plaintiff denies the allegations contained in Paragraph 76 and demands strict proof thereof.

21. Plaintiff denies the allegations contained in Paragraph 77 and demands strict proof thereof.

22. Plaintiff further denies each and every allegation contained in Defendant's "WHEREFORE" clause and its prayer for relief.

FOR A SEVENTH DEFENSE
(Motion to Dismiss Pursuant to Rule 12(b)(6), SCRPC)

23. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 22 as if fully set forth herein.

24. Plaintiff is not an entity contemplated to be bound by the Unfair Trade Practices Act and does not participate “in commerce” as required under the Act; therefore, Defendant fails to allege facts sufficient to state a cause of action upon which relief can be granted.

25. That, with regard to the allegations of Unfair Trade Practices, there is no adverse impact to the public.

26. Plaintiff pleads lack of adverse public impact as a complete and affirmative defense.

27. Some or all of Defendant’s remaining counterclaims fail to allege facts sufficient to state a cause of action upon which relief can be granted.

28. Some or all of Defendant’s counterclaims should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR AN EIGHTH DEFENSE
(Waiver)

29. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 28 as if fully set forth herein.

30. Some or all of Defendant’s claims may be barred by the doctrine of waiver.

FOR A NINTH DEFENSE
(Laches)

31. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 30 as if fully set forth herein.

32. Some or all of Defendant's claims may be barred by the doctrine of laches.

FOR A TENTH DEFENSE
(Unclean Hands)

33. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 32 as if fully set forth herein.

34. Some or all of Defendant's claims may be barred by the doctrine of unclean hands.

FOR AN ELEVENTH DEFENSE
(Estoppel)

35. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 34 as if fully set forth herein.

36. Some or all of Defendant's claims may be barred by the doctrine of estoppel.

37. Plaintiff reserves any additional or further defenses as may be revealed by additional information that may be acquired throughout discovery or otherwise.

WHEREFORE, Plaintiff Sterling Hills Homeowners' Association, Inc., having fully replied to Defendant's Answer and Counterclaims, requests this Honorable Court:

- a. Enter judgment dismissing Defendant's counterclaims;
- b. Enter judgment in favor of Plaintiff as requested in its Complaint, awarding costs and attorneys' fees incurred; and
- c. For such other and further relief as this Court deems just and proper.

INTENTIONALLY LEFT BLANK

/s/ Valerie Garcia Giovanoli
Valerie Garcia Giovanoli (SC Bar 102524)
4500 Fort Jackson Blvd., Suite 250 (29209)
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ATTORNEY FOR PLAINTIFF

December 5, 2018
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A No.: 2018-CP-40-04658

Sterling Hills Homeowners' Association, Inc.,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

AMENDED COMPLAINT

(011144.00144)

TO: ANDREW S. RADEKER, ATTORNEY FOR DEFENDANT

Plaintiff Sterling Hills Homeowners' Association, Inc. ("Plaintiff"), complaining of Defendant Elliot Hayes ("Defendant"), would respectfully show unto this Honorable Court the following:

PARTIES

1. Plaintiff is a Nonprofit Corporation organized and existing under the laws of the State of South Carolina, with its principal place of business being in Richland County.
2. Upon information and belief, Defendant is a resident of Richland County, State of South Carolina and is the record owner of the real property subject to this action; located at 8 High Glen Court, Columbia, SC 29229 (TMS#: 23104-02-57).
3. Jurisdiction and venue are proper in this Court.

FACTUAL ALLEGATIONS

4. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

5. On or about February 21, 2006, Defendant took possession of the following described property:

All that piece, parcel or lot of land with all improvements thereon, situate, lying being on the Southern side of High Glen Court, near the City of Columbia, the County of Richland, State of South Carolina, being shown and delineated as Lot 66 on a plat of Sterling Hills, phase three prepared by Belter and Associates, Inc., dated February 18, 2000, revised April 26, 2000 and recorded in the Office of Register of Deeds for Richland County in Record Book 407 at Page 1490, Said lot being more particularly shown on a plat prepared for Dana C. Purdie by Belter and Associates, Inc. dated October 9, 2000 and recorded in Plat Book 451 at Page 988; reference being made to said latter plat for a more complete and accurate description, all measurements being a little more or less.

Being the identical property conveyed to Traci L. Gebrosky by deed of Cendant Mortgage Corporation dated March 31, 2004 and recorded April 26, 2004 in the Richland County ROD Office in Book 927 at Page 2291.

TMS# 23104-02-57

Address: 8 High Glen Court, Columbia, SC 29229

6. The herein described Property is subject to the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Sterling Hills (hereinafter the "Declaration") made by The Mungo Company, Inc. and recorded May 31, 2000 in Deed Book R413 at Page 92, ROD Office for Richland County.

7. These Covenants run with the land and by agreeing to be bound by aforesaid Declaration and amendments thereto, Defendant, as owner, agreed to abide by the Declaration, the Bylaws, and the regulations established by the Board of Directors for Sterling Hills Homeowners' Association, Inc.:

The Declaration provides, amongst other things, the following:

Article II, Section 5. OFFENSIVE ACTIVITIES. No noxious, offensive or illegal activities as determined by the Developer or the Board of Directors, When Empowered, shall be carried on upon any Lot, Common Area, street nor shall anything be done thereon which

is or may become an annoyance or nuisance to any Owner in the Community. (See Article X for the Association's Remedies for Violation.)

Article II, Section 13. UNDERBRUSH, FINISHED YARDS, AND LANDSCAPING. In the event that the owner of any residential Lot permits any underbrush, weeds, or other unsightly plants to grow upon any Lot, or fails to maintain landscaping and grass in a manner in keeping with the Declaration, as determined by the Developer or an Architectural Control Authority, When empowered, from time to time as they see fit, the Developer or Architectural Control Authority, When Empowered, may issue a compliance demand requiring the Owner of the residential Lot to bring the Lot into keeping with the Declaration, as determined by the Developer or Architectural Control Authority, When Empowered, if the owner of the residential Lot fails to comply within the time required by the notice, the Developer or the Architectural Control Authority, When Empowered, if the owner of the residential Lot fails to comply within the time required by the notice, the Developer or the Association may enter upon the Lot, bring the Lot into keeping with the Community, as provided above, and levy against the Owner of the Lot an Assessment for Non-Compliance and such Assessment shall be a lien upon the Lot...

Article VIII, Section 1. OWNERS MAINTENANCE RESPONSIBILITIES. Unless specifically identified herein or specifically elected by the Developer or the Board of Directors, When Empowered, as being the responsibility of the Association, all maintenance and repair of a Lot, together with all portions of the Dwelling, and other Structures or the Lot shall be the responsibility of the Owner of Such Lot. The responsibility of each Owner shall include, but not limited to, the painting, maintenance, repair, and replacement of walls or fences, and all sidings, exterior doors, fixtures, equipment, and appliances (including, without limitation, the heating and air conditioning system for the Dwelling) and all chutes, flues, ducts, conduits, wires, pipes, plumbing, or other apparatus which are deemed to be apart of the Dwelling or Lot, and the lawns, trees, shrubs, fences, grass, driveways and walkways, on the Lot. The responsibility of the Owner shall also include, but not limited to, the maintenance, repair and replacement of all glass, lights and light fixtures (exterior and interior), awnings, window boxes, window screens, and all screens or glass-enclosed porches, balconies, or decks which are a part of the Dwelling. Each owner shall also maintain roof, gutters and downspouts in a good state of repair.

Article IX, Section 3. REMEDIES FOR FAILURE TO MAINTAIN EXTERIOR OF DWELLING OR LOT. In the event that the Owner neglects or fails to maintain his Lot and/or the exterior of his or her Dwelling in the Community, the Developer or the Association, When Empowered, may in addition to any other remedy, provide such exterior maintenance. The Developer or the Association, When Empowered, shall first give written notice to the Owner of the specific items of the exterior maintenance or repair that the Association intends to perform and the Owners shall have the time set forth in said notice within which to perform such exterior maintenance himself or to satisfy the Association that the required maintenance or repair will be completed in a timely manner. [...] In the event the Association performs such exterior maintenance, repairs or replacement together with all costs of collecting from the Owner the cost of

such maintenance, repairs or replacement established herein shall be added to and become a part of the Assessments to which the Lot is subject.

Article IX, Section 4. ADDITIONAL REMEDIES. Enforcement of the Declaration, By-Laws of the Association, and the Regulations in addition to any other remedy set out herein, may be carried out by the Developer, the Association, When Empowered, or the Owner through any proceeding at law or in equity against any person or persons violating or attempting to violate any covenant or restriction in the Declaration, By-Laws, and Regulations established by the Developer or the Association, When Empowered, either to prevent or restrain violations, to recover damages or to compel compliance to the terms thereof....

Article X, Section 11. ATTORNEY'S FEES AND COST. Should the Developer or the Association employ counsel to enforce the Declaration, or the reasonable rules, regulations and policies established or amended by the Developer or the Board of Directors from time to time because of a breach of the same, all costs incurred in such enforcement, including a reasonable fee for the Developer's or the Association's counsel and other reasonable costs of collection, shall be paid by the Owner of such Lot or Lots in breach thereof.

8. Defendant has failed to keep the Lot in a good state of maintenance and repair.
9. Sometime in 2017, Plaintiff informed Defendant of the violations on Defendant's Lot and requested that Defendant give the lawn attention and repair, make repairs needed to the fence, install blinds, trim overgrown bushes, paint the garage door white, clean the siding, repair the shutters, and remove the trash and recycling from view.
10. Defendant failed to comply with Plaintiff's request.
11. Plaintiff's property manager again requested that Defendant remedy the violations attributable to the Lot by giving the lawn attention and repair, make repairs to the fence, install blinds, trim the overgrown bushes, paint the garage door white, clean the siding, repair the shutters, and remove the trash and recycling from view.
12. Defendant failed to comply with the requests from Plaintiff and Plaintiff's property manager.
13. Plaintiff contracted counsel to enforce the covenants.

14. Plaintiff's counsel sent Defendant a letter, dated February 12, 2018, regarding the persisting violations and requested that Defendant remedy the violations in accordance with Plaintiff's requests.

15. Defendant again failed to respond or otherwise comply with Plaintiff's requests contained in the letter from Plaintiff's counsel.

16. Plaintiff's counsel sent Defendant another letter, dated March 12, 2018, in which Plaintiff demanded Defendant correct the persisting violations.

17. Defendant, again, failed to respond or otherwise comply with the demands contained in the second letter sent from Plaintiff's counsel.

18. On April 9, 2018, Plaintiff's counsel sent an email to Defendant requesting any acknowledgement of the two letters and advised Defendant that Plaintiff would proceed with civil action.

19. Upon information and belief, Defendant has allowed and continues to allow an individual to reside and/or sleep on a porch attached to the Dwelling for an extended period of time.

20. The individual on the porch urinates into a bucket or other similar item when using the restroom.

21. The individual urinate and/or changes clothes while on the porch, exposing himself to members of the community.

22. Allowing an individual to urinate, to change clothes, or to do other offensive and illegal actions is prohibited under the Declaration.

23. Allowing an individual to reside on Defendant's porch is offensive, an annoyance, and a nuisance to other owners in the Sterling Hills community.

24. As of the date of this pleading, Defendant has failed to correct the violations; specifically, Defendant's Lot remains in an extreme state of disrepair, Defendant's Lot continues to be used and Defendant continues to allow activities offensive to the community upon the Lot.

FOR A FIRST CAUSE OF ACTION
(Breach of Covenants)

25. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

26. Restrictive Covenants are considered voluntary contracts between the Parties.

27. Pursuant to the terms of the Declaration, Defendant has breached the Covenants by allowing an individual to reside and/or sleep on a porch attached to his Dwelling.

28. Defendant's conduct constitutes an annoyance and a nuisance for other owners within the Sterling Hills Community.

29. Defendant has further breached the Covenants in allowing his Lot to fall into such an extreme state of disrepair.

30. Defendant's breach affects the appearance and aesthetics of the Community and diminishes the overall value of the homes in the Community.

31. Defendant's breach of covenants has caused Plaintiff to incur damages, including: diminished aesthetics, diminished property value, attorneys' fees, and a lack of harmony with the rest of the Community.

FOR A SECOND CAUSE OF ACTION
(Enforcement of Restrictive Covenants)

32. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

33. Pursuant to the terms of the Declaration, Defendant has breached the Covenants by allowing an individual to reside and/or sleep on a porch attached to his Dwelling and by failing to maintain his Lot, as he has allowed his Lot and Dwelling to fall into such an extreme state of

disrepair that it not only affects the appearance and aesthetics of the Community and diminishes the overall value of the homes in the Community, but also presents hazardous and unsafe conditions.

34. To the extent there is no adequate remedy at law; Plaintiff is entitled to equitable enforcement of the Declaration.

35. The balance of the equities favors enforcing the Declaration.

FOR A THIRD CAUSE OF ACTION
(Specific Performance)

36. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

37. The recorded Declaration constitutes a valid agreement between the Parties.

38. Plaintiff has given Defendant due and proper notice, along with the allowance of a specified timeframe to remedy and correct the noted deficiencies.

39. Plaintiff is ready, willing, and able to perform its obligations under the Declaration.

FOR A FOURTH CAUSE OF ACTION
(Injunctive Relief)

40. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

41. Plaintiff has and will continue to suffer irreparable harm if the Declaration is not upheld and enforced, as Plaintiff will be unable to enforce the existing Covenants on other owners should Defendant not repair his Lot and refrain from using his Lot in a manner which violates the Declaration.

42. Plaintiff has no adequate remedy at law and damages would be unsatisfactory in remedying Defendant's violations.

FOR A FIFTH CAUSE OF ACTION
(Declaratory Judgment per Chapter 53 of Title 15 S.C. Code of Laws)

43. Plaintiff incorporates by reference its previous paragraphs as if repeated herein verbatim.

44. Pursuant to Article IX, Section 3 of the Declaration, Plaintiff has the right to maintain the Lot and charge maintenance costs and expenses to the Owner in the form of an Assessment:

- a. After due and proper notice is provided to the Owner of said Lot; and
- b. No corrective measures have been taken by the Owner after the specified time written in the notice.

45. Article IX, Section 3 of the Declaration further provides that in the event an Owner fails to pay such charges, then such charges shall be collected in the same manner as Assessments.

46. Plaintiff is concerned that it may not recover the costs for any repair, replacement, and maintenance of Defendant's Lot and Dwelling and asks this Court to determine whether it may enter the Lot, restore the Lot and Dwelling to a good state of repair and charge the costs of such as an Assessment, which if not paid when due, shall together with interest and costs of collection become a continuing lien on the property, which may be enforced by an action at law or foreclosure, in accordance with Article IX, Section 1 of the Declaration.

WHEREFORE, Plaintiff prays this Honorable Court enter judgment against Defendant as follows:

- a. Actual and consequential damages;
- b. Enforcement of the Declaration;
- c. An Order enjoining Defendant from allowing individuals to reside and/or sleep on any portion of the Dwelling's exterior;
- d. An Order requiring Defendant to repair his Lot and to otherwise restore his Lot to a state of good maintenance and repair;
- e. Issue a declaratory judgment that Plaintiff has the right to enter upon the Lot, repair the Lot and Dwelling, and that the costs of repairing Defendant's Lot and

Dwelling constitute a lien against the property and if delinquent, may be enforced as any other Assessment in accordance with the Declaration;

- f. An award of attorneys' fees and costs; and
- g. For such other and further relief as the Court deems just and proper.

MCCABE, TROTTER & BEVERLY, PC

/s/ Alexander P. Zuraff

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ATTORNEY FOR PLAINTIFF

June 27, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-40-04658

Sterling Hills Homeowners' Association,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

**ANSWER AND COUNTERCLAIM
 TO AMENDED AMENDED
 COMPLAINT**

The Defendant (hereinafter "Hayes") in answer to the Plaintiff's Amended Complaint and as counterclaim, answers and alleges as follows:

FOR A FIRST DEFENSE

1. Any allegation of the Amended Complaint not herein admitted, qualified, or explained is denied. Any allegations of the Amended Complaint subject of qualified admissions made herein are denied insofar as the allegations are not qualifiedly admitted, and any allegations of the Amended Complaint subject of any other qualifications or explanations herein are denied insofar as they are not otherwise qualified or explained.

2. Answering the allegations of paragraph 1 of the Amended Complaint, Hayes does not have sufficient knowledge or information to form a belief as to the truth of the allegations of the paragraph.

3. Answering the allegations of paragraphs 2 and 3 of the Amended Complaint, Hayes admits he owns the subject real property and that subject matter jurisdiction and venue are proper in this court; however, while Hayes now voluntarily submits to personal jurisdiction in this action, he was never served with the summons and complaint in this case. Contrary to what a filed affidavit states, the summons and complaint in this case was never personally delivered to Hayes.

Hayes found the summons and complaint stuck in his door. Perhaps Plaintiff's counsel needs to have a talk with the process server.

4. No separate response to paragraph 4 of the Amended Complaint is required.

5. Answering the allegations of paragraph 5 of the Amended Complaint, Hayes answers that his present ownership of the subject property began when he purchased it at a foreclosure sale in 2017, as the Plaintiff well knows.

6. Answering the allegations of paragraph 6 of the Amended Complaint, Hayes does not have sufficient knowledge or information to form a belief as to the truth of the allegations of the paragraph. It appears likely that the Plaintiff's actions have invalidated the covenants for a number of reasons.

7. Answering the allegations of paragraph 7 of the Amended Complaint, Hayes does not have sufficient knowledge or information to form a belief as to the truth of the allegations of the paragraph. It appears likely that the Plaintiff's actions have invalidated the covenants for a number of reasons.

8. Answering the allegations of paragraph 8 of the Amended Complaint, Hayes denies the same.

9. Answering the allegations of paragraph 9 of the Amended Complaint, Hayes denies the same as written.

10. Answering the allegations of paragraph 10 of the Amended Complaint, Hayes denies the same as written.

11. Answering the allegations of paragraph 11 of the Amended Complaint, Hayes denies the same as written.

12. Answering the allegations of paragraph 12 of the Amended Complaint, Hayes denies the same as written.

13. Answering the allegations of paragraph 13 of the Amended Complaint, Hayes denies the same as written.

14. Answering the allegations of paragraph 14 of the Amended Complaint, Hayes denies the same as written.

15. Answering the allegations of paragraph 15 of the Amended Complaint, Hayes denies the same as written.

16. Answering the allegations of paragraph 16 of the Amended Complaint, Hayes denies the same as written.

17. Answering the allegations of paragraph 17 of the Amended Complaint, Hayes denies the same as written.

18. Answering the allegations of paragraph 18 of the Amended Complaint, Hayes denies the same as written.

19. Answering the allegations of paragraph 19 of the Amended Complaint, Hayes denies the same.

20. Answering the allegations of paragraph 20 of the Amended Complaint, Hayes denies the same.

21. Answering the allegations of paragraph 21 of the Amended Complaint, Hayes denies the same.

22. Answering the allegations of paragraph 22 of the Amended Complaint, Hayes denies the same.

23. Answering the allegations of paragraph 23 of the Amended Complaint, Hayes lacks sufficient knowledge or information to form a belief as to the truth or falsity of the same.

24. Answering the allegations of paragraph 24 of the Amended Complaint, Hayes denies the same.

25. No separate response to paragraph 25 of the Amended Complaint is required

26. Answering the allegations of paragraph 26 of the Amended Complaint, Hayes admits the same to the extent that they accurately state the law.

27. Answering the allegations of paragraph 27 of the Amended Complaint, Hayes denies the same.

28. Answering the allegations of paragraph 28 of the Amended Complaint, Hayes denies the same.

29. Answering the allegations of paragraph 29 of the Amended Complaint, Hayes denies the same.

30. Answering the allegations of paragraph 30 of the Amended Complaint, Hayes denies the same.

31. Answering the allegations of paragraph 31 of the Amended Complaint, Hayes denies the same.

32. No separate response to paragraph 32 of the Amended Complaint is required.

33. Answering the allegations of paragraph 33 of the Amended Complaint, Hayes denies the same.

34. Answering the allegations of paragraph 34 of the Amended Complaint, Hayes denies the same.

35. Answering the allegations of paragraph 35 of the Amended Complaint, Hayes denies the same.

36. No separate response to paragraph 36 of the Amended Complaint is required.

37. Answering the allegations of paragraph 37 of the Amended Complaint, Hayes does not have sufficient knowledge or information to form a belief as to the truth of the allegations of the paragraph. It appears likely that the Plaintiff's actions have invalidated the covenants for a number of reasons.

38. Answering the allegations of paragraph 38 of the Amended Complaint, Hayes denies the same.

39. Answering the allegations of paragraph 39 of the Amended Complaint, Hayes denies the same.

40. No separate response to paragraph 40 of the Amended Complaint is required.

41. Answering the allegations of paragraph 41 of the Amended Complaint, Hayes denies the same.

42. Answering the allegations of paragraph 42 of the Amended Complaint, Hayes denies the same.

43. No separate response to paragraph 43 of the Amended Complaint is required.

44. Answering the allegations of paragraph 44 of the Amended Complaint, Hayes denies the same as written.

45. Answering the allegations of paragraph 45 of the Amended Complaint, Hayes answers that the covenants document reads as it reads.

46. Answering the allegations of paragraph 46 of the Amended Complaint, Hayes does not have sufficient knowledge or information to form a belief as to the truth of the allegations of the paragraph.

47. All counterclaims asserted in this action are also asserted as defenses to the extent permitted by law, and vice-versa.

FOR A SECOND DEFENSE
(Failure to Comply with S.C. Code Ann. § 27-30-130)

48. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

49. The Plaintiff is seeking to enforce by-laws and, to the extent they exist, rules and regulations that have never been recorded as required by S.C. Code Ann. § 27-30-130.

50. Such by-laws and rules and regulations are unenforceable.

FOR A THIRD DEFENSE
(Unclean Hands)

51. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

52. The Plaintiff has engaged in such conduct with respect to the matters subject of his claims as to make its hands unclean with regard to its claims.

53. This conduct includes, but is not necessarily limited to, refusing to hold elections for directors and operating in flagrant disregard of the covenants the Plaintiff claims bind the property subject of this case.

54. This conduct by the Plaintiff relates directly to the subject matter of this action.

55. The Plaintiff's said conduct has proximately caused Hayes prejudice and injury.

FOR A FOURTH DEFENSE
(Breach of Covenants)

56. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

57. The Plaintiff is itself in breach of the covenants it claims bind Hayes and property involved in this case, as aforesaid.

58. This bars the Plaintiff from recovery in this action.

FOR A FIFTH DEFENSE
(*Ultra Vires*)

59. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

60. All of the Plaintiff's actions, for a period of many years, have been without any authority and are *ultra vires*.

61. The bringing of this action is one of the Plaintiff's many *ultra vires* actions.

FOR A FIRST COUNTERCLAIM
(Breach of Contract)

62. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

63. The Plaintiff has breached the contract between it and Hayes as noted above.

64. Hayes has sustained damages as a direct and proximate result of the Plaintiff's breach of contract.

65. Hayes is entitled to judgment against the Plaintiff.

FOR A SECOND COUNTERCLAIM
(Violation of Unfair Trade Practices Act)

66. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

67. Actions of the Plaintiff, including, but not necessarily limited to, those stated in this Amended Complaint, constitute violations of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, et seq. These acts offended public policy, which favors and encourages honesty and fair dealing in commerce and which discourages deception and misrepresentation.

68. The Plaintiff has improperly assessed purported fines and assessments and has improperly taken actions against members or purported members of the Plaintiff.

69. These acts were immoral, oppressive, unscrupulous, and substantially injured Hayes.

70. The Plaintiff knew or should have known that these actions were violations of the Unfair Trade Practices Act and constituted unfair and deceptive acts in trade or commerce.

71. These actions have an impact upon the public interest and are capable of repetition.

72. Hayes has suffered damages as a direct, consequent, and proximate result of these actions of the Plaintiff.

73. Hayes is entitled to a judgment against the Plaintiff for treble damages, reasonable attorney's fees, and costs.

FOR A THIRD COUNTERCLAIM
(Declaratory Judgment)

74. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

75. As noted above, the Plaintiff is and for quite some time has been operating in an *ultra vires* state.

76. None of the Plaintiff's actions during this long time period have been lawful or valid.

77. There is a justiciable controversy between Hayes and the Plaintiff about this.

78. The court should issue a declaratory judgment as to the Plaintiff's status and *ultra vires* actions.

FOR A FOURTH COUNTERCLAIM
(Failure to Allow Access to Records)

79. Each assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.

80. Hayes has requested to see the Plaintiff's books and records.

81. The Plaintiff maintains that it is a nonprofit corporation of which Hayes is a member.

82. The Plaintiff has refused to allow Hayes access to its books and records.

83. Hayes is entitled to an order directing the Plaintiff to provide the same and is entitled to recover his costs and attorneys' fees in this action.

WHEREFORE, Hayes prays for the court to:

- (a) Issue an order dismissing the Amended Complaint with prejudice;
- (b) Deny the Plaintiff the relief it seeks in this action;
- (c) Issue declaratory judgment as sought above;
- (d) Enter an order directing the Plaintiff to allow Hayes to access its books and records as required by statute;
- (e) Enter judgment for Hayes for actual damages, punitive damages, treble damages, and all applicable statutory penalties;
- (f) Enter judgment in favor of Hayes for reasonable attorney's fees;
- (g) Enter judgment for Hayes for the costs and expenses of this action; and
- (h) Grant Hayes such other and further relief as the court deems just and proper.

Respectfully submitted,

/s/ Andrew S. Radeker

Andrew S. Radeker

S.C. Bar No. 73743

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ATTORNEY FOR DEFENDANT

ELLIOT HAYES

Columbia, South Carolina
July 11, 2019

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A No.: 2018-CP-40-04658

Sterling Hills Homeowners' Association, Inc.,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

**PLAINTIFF'S REPLY TO DEFENDANT'S
ANSWER AND COUNTERCLAIM TO
AMENDED COMPLAINT**

(011144.00144)

COMES NOW, Plaintiff Sterling Hills Homeowners' Association, Inc. ("Plaintiff"), by and through its undersigned counsel, hereby gives its Reply to Defendant Elliot Hayes' ("Defendant") Answer and Counterclaims to Plaintiff's Amended Complaint in the above-captioned matter as follows:

FOR A FIRST DEFENSE
(General Denial)

1. Plaintiff denies all paragraphs and allegations contained in Defendant's Answer and Counterclaims to Plaintiff's Amended Complaint unless herein specifically admitted or qualified.

FOR A SECOND DEFENSE
(Specific Denial)

2. Paragraphs 1 through 47 do not appear to contain any allegations against Plaintiff; thus, Plaintiff believes no response is required as to Paragraphs 1 through 47. To the extent that Paragraphs 1 through 47 do contain any allegations that may be construed against Plaintiff, it denies all allegations inconsistent with its Amended Complaint and this Reply.
3. Plaintiff denies the allegations contained in Paragraphs 48 through 61 and further demands strict proof thereof.

**AS TO DEFENDANT'S FIRST COUNTERCLAIM
AND THIRD DEFENSE
(Breach of Contract)**

4. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 3 as if fully set forth herein verbatim.
5. Plaintiff denies the allegations contained in Paragraphs 62 through 65 and demands strict proof thereof.

**AS TO DEFENDANT'S SECOND COUNTERCLAIM
AND FOURTH DEFENSE
(Violation of Unfair Trade Practices Act)**

6. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 5 as if fully set forth herein verbatim.
7. Plaintiff denies the allegations contained in Paragraphs 66 through 67.
8. Plaintiff denies the allegations contained in Paragraphs 68 through 73 and demands strict proof thereof.

**AS TO DEFENDANT'S THIRD COUNTERCLAIM
AND FIFTH DEFENSE
(Declaratory Judgment)**

9. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 8 as if fully set forth herein verbatim.
10. Plaintiff denies the allegations contained in Paragraphs 74 through 77 and demands strict proof thereof.
11. Plaintiff denies the allegations contained in Paragraph 78.

**AS TO DEFENDANT'S FOURTH COUNTERCLAIM
AND SIXTH DEFENSE
(Failure to Allow Access to Records)**

12. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 11 as if fully set forth herein verbatim.
13. Plaintiff denies the allegations contained in Paragraphs 79 and 80 and demands strict proof thereof.

14. Plaintiff admits the allegations contained in Paragraph 81.
15. Plaintiff denies the allegations contained in 82 and 83 and demands strict proof thereof.
16. Plaintiff further denies each and every allegation contained in Defendant's "WHEREFORE" clause and its prayer for relief.

FOR A SEVENTH DEFENSE
(Motion to Dismiss Pursuant to Rule 12(b)(6), SCRPC)

17. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 16 as if fully set forth herein verbatim.
18. Plaintiff is a homeowners association. not an entity contemplated to be bound by the Unfair Trade Practices Act and does not participate "in commerce" as required under the Act; therefore, Defendant fails to allege facts sufficient to state a cause of action upon which relief can be granted.
19. That, with regard to the allegations of Unfair Trade Practices, there is no adverse impact to the public.
20. Plaintiff pleads lack of adverse public impact as a complete and affirmative defense.
21. Some or all of Defendant's remaining counterclaims fail to allege facts sufficient to state a cause of action upon which relief can be granted.
22. Some or all of Defendant's counterclaims should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR AN EIGHTH DEFENSE
(Business Judgment Rule)

23. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 22 as if fully set forth herein verbatim.
24. Upon information and belief, Plaintiff's actions are subject to the Business Judgment Rule, and Plaintiff asserts the Business Judgment Rule as a defense to Defendant's claims, and for that reason, Defendant cannot recover from Plaintiff any sum whatsoever.

FOR A NINTH DEFENSE
(Laches)

- 25. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 24 as if fully set forth herein verbatim.
- 26. Some or all of Defendant's claims may be barred by the doctrine of laches.

FOR A TENTH DEFENSE
(Unclean Hands)

- 27. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 26 as if fully set forth herein verbatim.
- 28. Some or all of Defendant's claims may be barred by the doctrine of unclean hands.

FOR AN ELEVENTH DEFENSE
(Estoppel & Waiver)

- 29. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 28 as if fully set forth herein verbatim.
- 30. Some or all of Defendant's claims may be barred by the doctrines of estoppel and waiver.

FOR A TWELFTH DEFENSE
(Statute of Limitations)

- 31. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 30 as if fully set forth herein verbatim.
- 32. Some or all of Defendant's claims may be barred by the applicable statute of limitations.

FOR A THIRTEENTH DEFENSE
(Compliance with S.C. Code Ann. § 33-31-830)

- 33. Plaintiff reaffirms each and every response set forth in Paragraphs 1 through 32 as if fully set forth herein verbatim.
- 34. Upon information and belief, Plaintiff, acting through its Board of Directors, complied with the applicable standard of care set forth in S.C. Code Ann. § 33-31-830; therefore, Defendant cannot recover from Plaintiff any sum whatsoever.

35. Plaintiff reserves any additional or further defenses as may be revealed by additional information that may be acquired throughout discovery or otherwise.

WHEREFORE, Plaintiff Sterling Hills Homeowners' Association, Inc., having fully replied to Defendant's Answer and Counterclaims to Plaintiff's Amended Complaint, requests this Honorable Court:

- a. Enter judgment dismissing Defendant's counterclaims;
- b. Enter judgment in favor of Plaintiff as requested in its Complaint, awarding costs and attorneys' fees incurred; and
- c. For such other and further relief as this Court deems just and proper.

Respectfully submitted,

MCCABE, TROTTER & BEVERLY, P.C.

/s/ Alexander P. Zuraff

Alexander P. Zuraff, SC Bar No. 103824

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ATTORNEY FOR PLAINTIFF

July 26, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-40-04658

Sterling Hills Homeowners' Association,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

DEMAND FOR JURY TRIAL

The Defendant, pursuant to Rule 38, SCRPC, hereby demands a jury trial in the above-captioned action.

Respectfully submitted,

/s/ Andrew S. Radeker

Andrew S. Radeker

S.C. Bar No. 73743

HARRISON, RADEKER & SMITH, P.A.

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ATTORNEY FOR DEFENDANT

ELLIOT HAYES

Columbia, South Carolina

August 1, 2019

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-40-04658

Sterling Hills Homeowners' Association,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

**MOTION FOR
SUMMARY JUDGMENT AS TO
PLAINTIFF'S CLAIMS**

YOU WILL PLEASE TAKE NOTICE that the Defendant hereby moves, pursuant to Rule 56, SCRPC, and as well as pursuant to all other applicable law, for an order granting him summary judgment as to the Plaintiff's claims in the above-captioned action.

Defendant makes this motion on the following grounds:

1. Upon motion, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56, SCRPC.
2. The Defendant is entitled to summary judgment for a number of reasons.
3. The Plaintiff will not be able to make a showing of evidence to support each element of its claims.
4. The Plaintiff seeks to enforce restrictive covenants that are so vague that they are unenforceable.
5. The Plaintiff seeks to enforce by-laws that are also so vague that they are unenforceable.

6. The Plaintiff's by-laws, rules, and regulations have not been recorded with the office of the Register of Deeds for Richland County and are, thus, unenforceable. S.C. Code Ann. § 27-30-130.
7. The Plaintiff seeks to enforce unenforceable covenants, by-laws, rules, and/or regulations.
8. This motion is also based upon all applicable statutory law, case law, common law, and the record in this action, as well as any memoranda or further material that the Defendant may submit.

As this is a motion for summary judgment, no consultation with opposing counsel in advance of making this motion is required.

Respectfully submitted,

/s/ Andrew S. Radeker
Andrew S. Radeker
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ATTORNEY FOR DEFENDANT
ELLIOT HAYES

Columbia, South Carolina
July 24, 2019

STATE OF SOUTH CAROLINA) DECLARATION OF COVENANTS, CONDITIONS,
) RESTRICTIONS, EASEMENTS, CHARGES AND
COUNTY OF RICHLAND) LIENS FOR STERLING HILLS

THIS Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for STERLING HILLS is made MAY 31, 2000, by THE MUNGO COMPANY, INC., a corporation organized and existing under the laws of the State of South Carolina, (the "Developer"). Any defined terms used herein shall have the meaning set out in Article I hereafter:

RECITALS

- 1. The Developer, is the owner of the real property described in Schedule A of this Declaration, and desires to develop thereon a Community together which may include common lands and facilities, for the sole use and benefit of the Owner of each Lot to be located in such Community.
- 2. The Developer has or may from time to time acquire additional real property which it may desire to develop as additional phases of such Community which the Developer may incorporate as additional phases of this Community and bring same under this Declaration.
- 3. The Developer is desirous of maintaining design criteria, location, Plans and construction specifications, and other controls to assure the integrity of the Community. Each purchaser of a Lot or Dwelling in the Community will be required to maintain, modify, change, and construct the Dwelling and any Structure in accordance with the design criteria contained herein and established by the Developer or Architectural Control Authority, When Empowered, as hereinafter provided.
- 4. The Developer desires to provide for the preservation of the value and amenities in such Community and for the maintenance of such common lands and facilities.
- 5. The Developer desires to subject the real property described in Schedule A to the covenants, conditions, restrictions, easements, charges, and liens, hereinafter set forth and to the guidelines, policies, procedures, rules and regulations adopted by the Developer or the Association, When Empowered. Each and all of which is and are binding upon and for the benefit of the Developer, the Community and each Owner and shall run with the title to the land.

THIS AGREEMENT IS SUBJECT TO BINDING ARBITRATION PURSUANT TO THE SOUTH CAROLINA UNIFORM ARBITRATION ACT (S.C. CODE ANN. § 15-48-10 ET SEQ., AS AMENDED

Book 00413-0092
2000041134 06/01/2000 11:38:46:96
Fee: \$36.00 County Tax: \$0.00 State Tax: \$0.00
Declaration of Coven.
2000041134 John G. Norris
Richland County REC

6. The Developer has deemed it desirable, for the efficient preservation of the values and the amenities in the Community, to create the Association to which will be delegated and assigned as further described herein, the powers of maintaining and administering any Common Area, of administering and enforcing the Declaration; of establishing and amending the reasonable rules, regulations and policies for the proper management of the Association and for the promotion of the health, safety and welfare of the residents of the Community; and of levying, collecting and disbursing the Assessments and charges hereinafter created.

7. The Developer has caused or will cause the Association to be incorporated under the laws of the State of South Carolina, as a nonprofit corporation, for the purpose of exercising the aforesaid functions, among others.

NOW, THEREFORE, The Developer declares that the real property described in Schedule A, annexed hereto and forming a part hereof, and any additions thereto which the Developer may incorporate from time to time in the Community is and shall be held, transferred, sold, conveyed, and occupied subject to the covenants, restrictions, easements, charges, and liens hereinafter set forth which shall run with the title to The Property and all Lots therein and which shall be binding on all Owners.

ARTICLE I DEFINITIONS

Section 1. DEFINITIONS. The following capitalized words when used in this Declaration, any Supplement, or any Supplemental Declaration (unless the context shall prohibit) shall have the following meaning:

(A) "ADDITIONAL ASSOCIATIONS" when and if created, shall mean and refer to any other separate association owning land within The Property, or being given authority to control, manage or maintain portions of The Property owned or maintained by the Association.

(B) "ARCHITECTURAL CONTROL AUTHORITY" shall mean and refer to any appointee of the Developer, or a board appointed by the Developer, while the Developer retains all or part of the rights and authority for architectural control in the Community, and the Board of Directors of the Association, When Empowered or an architectural control board appointed by the Board of Directors of the Association, When Empowered.

(C) "ARCHITECTURAL GUIDELINES" shall mean and refer to the set of policies, rules and procedures promulgated and/or amended by the Developer or the Architectural Control Authority, When Empowered, which shall act as a guide for the architectural control and review process and for the maintenance, construction or renovation of Structures in the Community.

(D) "ASSESSMENTS" shall have the meaning specified in Article VII.

(E) "ASSOCIATION" shall mean and refer to the STERLING HILLS HOMEOWNERS' ASSOCIATION, INC., its successors and assigns.

(F) "BOARD OF DIRECTORS" shall mean and refer to the members of the board of directors of the Association whether elected or appointed.

(G) "BY-LAWS" shall mean and refer to the by-laws of the Association.

(H) "COMMON AREA" shall mean and refer to those areas of land shown as "Common Area", on any recorded subdivision map of The Property or so designated in any conveyance to the Association by the Developer including, but not limited to, any and all entrance signs, lights, sprinklers, shrubs, landscaping, parking places, drainage or other easements used, owned or maintained by the Association or the Developer for benefit of the Community, whether or not located within the street right-of-ways which have been dedicated to a governmental agency or a Lot. Such areas are intended to be devoted to the common use and enjoyment of Members of the Association, subject to the Regulations established and amended from time to time by the Developer or the Board of Directors of the Association, When Empowered, and are not dedicated for use by the general public. NO REPRESENTATION FROM ANY PARTY OR SALES AGENT, INCLUDING THOSE OF THE DEVELOPER, OR OTHER ENTITY AS TO THE EXISTENCE OF A COMMON AREA, SIZE, SHAPE, OR COMPOSITION OF THE COMMON AREA, OTHER THAN THOSE PROVIDED HEREIN OR PROVIDED IN WRITING BY THE DEVELOPER, SHALL BE RELIED UPON, NOR SHALL IT IN ANY WAY REQUIRE THE DEVELOPER TO COMPLY WITH THAT REPRESENTATION. The Community may not contain Common Area, and the fact that there are provisions in this Declaration referencing Common Area does not mean there is or will be Common Area in the Community.

(I) "COMMUNITY" shall mean and refer to the subdivision on The Property.

(J) "DECLARATION" shall mean and refer to this Declaration of Covenants, Conditions, Restrictions, Easements, Charges, and Liens, any amendment or modification thereof, and supplements that annex additional land.

(K) "DIRECTOR" shall mean and refer to a member of the Board of Directors.

(L) "DEVELOPER" shall mean and refer to THE MUNGO COMPANY, INC., a corporation organized and existing under and pursuant to the laws of the State of South Carolina, its successors and assigns.

(M) "DWELLING" shall mean and refer to a dwelling unit including, but not limited to, a single family home, a patio home, a townhouse, or an apartment, if constructed in the Community.

(N) "LOT" shall mean and refer to any plot of land with such improvements, Structures and Dwellings as may be erected thereon, shown on any recorded subdivision map of The Property, but shall not include the Common Area or the streets in the Community.

(O) "MASTER ASSOCIATION" when and if created, shall mean and refer to any incorporated or unincorporated association to which or from which is delegated specific authority,

the Members of which are common to the Association, Additional Associations or Sub-Associations to which or from which the authority is granted.

(P) "MASTER PLAN" shall mean and refer to the drawing, sketch or map that represents the conceptual land plan for the future development of the Community. Since the concept of the future development of the undeveloped portions of the Community, including, but not limited to the Lots, streets and the Common Area are subject to continuing revision and change at the discretion of the Developer, present and future references to the "Master Plan" shall be references to the latest revision thereof. In addition, no implied reciprocal covenants or obligation to develop shall arise with respect to lands that have been retained by the Developer for future development. **THE DEVELOPER SHALL NOT BE BOUND BY ANY MASTER PLAN, USE OR RESTRICTION OF USE SHOWN ON ANY MASTER PLAN, AND MAY IN ITS SOLE DISCRETION AT ANY TIME CHANGE OR REVISE SAID MASTER PLAN, DEVELOP OR NOT DEVELOP THE REMAINING UNDEVELOPED PROPERTY OR COMMON AREA OR AMENITIES SHOWN ON ANY MASTER PLAN.**

(Q) "MEMBER" shall mean and refer to any Owner, as provided in Article III hereof.

(R) "OWNER" shall mean and refer to the record owner or owners, whether one (1) or more persons or entities, of the fee simple title of any of the Lots, but shall not mean or refer to any mortgagee or subsequent holder of a mortgage unless and until such mortgagee or holder has acquired title to the Lot pursuant to foreclosure or any proceedings in lieu of the foreclosure. Said term "Owner" shall also refer to the heirs, successors, and assigns of any Owner.

(S) "PLANS" shall mean and refer to and encompass the plans, specifications, elevations and exterior designs of any Structure built or to be built on any Lot, or Common Area, as well as a site plan showing building set backs and locations of all Structures within the Lot or Common Area.

(T) "REGULATIONS" shall mean and refer to the guidelines, rules, policies, and procedures, including, but not limited to, the Architectural Guidelines, adopted by the Developer, the Board of Directors, When Empowered, or the Architectural Control Authority, When Empowered.

(U) "STRUCTURE" shall mean and refer to any thing, object, tree or landscaping, the placement, size, shape, color, height and quality of which upon any Lot or Common Area may affect such Lot or Common Area, including by way of illustration and not limitation, any home, building or part thereof, garage, porch, shed, greenhouse, or bathhouse, coop or cage, covered or uncovered patio, playgrounds, playground equipment, tree houses and yard art, statuary, basketball goals (permanent or temporary), or other temporary or permanent sports equipment, swimming pool, fence, curbing, paving, driveways, wall or hedge, radio, television, wireless cable, or video antenna, satellite dishes, landscaping, well, septic system, sign, appurtenance, or signboard, whether temporary or permanent; any excavation, fill, ditch, diversion dam or other thing or device which affects or alters the natural flow of waters from, through, under or across any Lot or Common Area, or which affects or alters the flow of any waters in any natural or artificial stream, wash or drainage

channel from, upon or across any Lot or Common Area; and any change in the grade of any Lot or Common Area of more than six (6) inches.

(V) "SUB-ASSOCIATIONS" when and if created, shall mean and refer to any other Additional Associations within The Property, all of the members of which are Members of the Association or the Master Association and which operates under authority granted by the Developer or the Association.

(W) "THE PROPERTY" shall mean and refer to all property, including but not limited to, the Lots, streets and Common Area, subjected to this Declaration, which are described in Schedule A, together with any additional land that may be developed pursuant hereto and annexed or incorporated in The Property by amendments or supplemental Declarations.

(X) "WHEN EMPOWERED" shall mean when the Developer has transferred the right of performing some function to the Association's Board of Directors or another entity by the recordation of a document in the office of The Register of Deeds for the county in which The Property is located, or by giving written notice to the Association at the Association's address of record, or to all Owners attending a duly called meeting for that purpose. The transfer of all functions to the Association and the rights and authority of the Developer for architectural control in the Community shall automatically occur when one hundred (100%) percent of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale or when the Class B Membership terminates, whichever occurs first.

ARTICLE II USES OF PROPERTY AND EASEMENTS

Section 1. RESIDENTIAL USE OF PROPERTY. Unless otherwise designated in a supplemental Declaration filed by the Developer for additional land annexed to the Community, all Lots shall be used for single-family residential purposes only, and no commercial, business or business activity shall be carried on or upon any Lot at any time, except with the written approval of the Developer, its designee(s), or the Association, When Empowered; provided, however, that nothing herein shall prevent the Developer, its agents, representatives, employees, or any builder of homes in the Community, approved by the Developer, from using any Lot owned by the Developer or such builder of homes for the purpose of carrying on business related to the Community or related to the improvement and sale of Lots or Dwellings in the Community; operating a construction office, business office, or model home, and displaying sign, and from using any Lot for such other facilities as in the sole opinion of the Developer may be required, convenient, or incidental to the completion, improvement, and sale of the Lots, Dwellings, or the Community; and provided, further that, to the extent allowed by applicable zoning laws, "home occupation", as defined in the Architectural Guidelines or in the zoning ordinances of the governmental authority having jurisdiction over the Lot, may be maintained in a Dwelling located on any of the Lots as approved in writing by the Developer or the Architectural Control Authority, When Empowered and the governmental authority having jurisdiction over the Lot, so long as the "home occupation" complies with any and all conditions of such approvals.

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Section 2. CONSTRUCTION IN ACCORDANCE WITH PLANS. EXCEPT AS PROHIBITED BY LAW, INCLUDING 47 CFR/4000 (WHICH LIMITS, BUT DOES NOT PROHIBIT, CONTROL BY THE ASSOCIATION OF THE SIZE AND LOCATION OF SATELLITE DISHES), NO STRUCTURE SHALL BE CONSTRUCTED, ERECTED, MAINTAINED, STORED, PLACED, REPLACED, CHANGED, MODIFIED, ALTERED OR IMPROVED ON ANY LOT UNLESS APPROVED BY THE DEVELOPER OR ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED AND OTHER APPROPRIATE OR APPLICABLE GOVERNMENTAL ENTITY AND USE OF APPROVED STRUCTURES SHALL COMPLY WITH THE REGULATIONS ISSUED BY THE DEVELOPER OR ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED, FROM TIME TO TIME. NO CONSTRUCTION, RECONSTRUCTION, ERECTION, REPAIR, CHANGE, MODIFICATION SHALL VARY FROM THE APPROVED PLANS. The Developer and the Architectural Control Authority, When Empowered, shall have complete discretion to approve or disapprove any Structure. The Developer and the Architectural Control Authority, When Empowered, may issue from time to time Architectural Guidelines and Regulations to assist it in the approving of Structures and may change such Architectural Guidelines and Regulations at any time and from time to time without notice to the Owners. (For definition of Structure, see Article I, Section 1(U).) Notwithstanding anything herein to the contrary, until one hundred (100%) percent of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale, the Developer may, at its sole option, approve or disapprove any Plans approved or rejected by the Architectural Control Authority appointed by the Developer or overturn any other action of such Architectural Control Authority. Such action by the Developer shall supersede and nullify the action taken by such Architectural Control Authority.

Section 3. SUBDIVISION OF LOTS OR COMBINATION OF LOTS. One or more Lots or parts thereof may be subdivided or combined only if approved by the Developer, and the Architectural Control Authority, When Empowered.

Section 4. LIVESTOCK AND PETS. No animals, livestock or poultry of any kind shall be raised, bred or kept on any Lot, except that dogs, cats or other small household pets may be kept, subject to applicable leash laws or Regulations established and amended by the Developer or by the Board of Directors of the Association, When Empowered, from time to time, provided that they are not kept, bred or maintained for any commercial purpose. Such household pets must not constitute a nuisance as determined by the Board of Directors in its sole discretion within the Community or cause unsanitary conditions within the Community, and no animal kept outside the Dwelling shall be kept in a manner which disturbs the quiet enjoyment of the Community or any other Owner. While not in a fully confined area, all pets shall be restrained by leashes and no pet shall enter upon any Lot without the express permission of that Owner or on the Common Area without express permission of the Developer, or the Association, When Empowered. The pet owner will be responsible for clean up and removal of fecal matter deposited by such pet and shall be liable for, indemnify and hold harmless any other Owner, the Developer and the Association from any loss, cost, damage or expense incurred by such Owner, the Developer, the Association as a result of any violation of this provision. (See Article X for the Association's Remedies for Violation.)

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Section 5. OFFENSIVE ACTIVITIES. No noxious, offensive or illegal activities as determined by the Developer or the Board of Directors, When Empowered, shall be carried on upon any Lot, Common Area, street nor shall anything be done thereon which is or may become an annoyance or nuisance to any Owner in the Community. (See Article X for the Association's Remedies for Violation.)

Section 6. TRAILERS, TRUCKS, BUSES, BOATS, PARKING, ETC. No buses, trailers or mobile homes, motorcycles, boats, boat trailers, all terrain vehicles, go-carts, campers, vans or vehicles on blocks, unlicensed vehicles, or like vehicles shall be kept, stored, used, or parked overnight either on any street within the Community, in the Common Area or on any Lot, without the approval of the Developer or the Association, When Empowered. No unsafe parking shall be allowed on any streets in the Community. The Developer or the Association, When Empowered, may in its sole discretion determine what is unsafe and issue regulations to control on and off street parking. (See Article X for the Association's Remedies for Violation.)

Section 7. EXCAVATIONS OR CHANGING ELEVATIONS. No Owner shall excavate or extract earth for any business or commercial purpose.

Section 8. SEWAGE SYSTEM. Sewage disposal shall be through the public or private system or by septic tank approved by appropriate State and local agencies. If there is a public or private system serving the Community, the Owner shall be obligated to use the system unless authorized otherwise by the Developer.

Section 9. WATER SYSTEM. Water shall be supplied through a public or private system or any other system or well approved by appropriate State and local agencies. If there is a public or private system serving the Community, the Owner shall be obligated to use the system unless authorized otherwise by the Developer.

Section 10. UTILITY FACILITIES. The Developer reserves the right to approve the necessary construction, installation and maintenance of utility facilities, including but not limited to telephone, cable T.V., electricity, gas, water and sewage systems, which may be in variance with these restrictions.

Section 11. WAIVER OF SETBACKS, BUILDING LINES AND BUILDING REQUIREMENTS. The Developer, and Architectural Control Authority, When Empowered may waive violations of the setbacks and building lines shown on any plat of the Community. Such waiver shall be in writing and recorded by the Owner in the County Register of Deeds. A document executed by the Developer or the Architectural Control Authority, When Empowered shall be, when recorded, conclusive evidence that the requirements hereof have been complied with. The Developer and Architectural Control Authority, When Empowered may also, from time to time as they see fit, eliminate violations of setbacks and boundary lines by amending the Plat. Nothing contained herein shall be deemed to allow the Developer or the Architectural Control Authority, When Empowered, to waive violations which must be waived by an appropriate governmental authority without the Owner obtaining a waiver from such authority.

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Section 12. EASEMENT FOR UTILITIES AND COMMON FACILITIES. The Developer reserves unto itself, its permittees, its successors and assigns, a perpetual, alienable, easement and right of ingress and egress, over, upon, across and under each Lot and all Common Area, if any, as are necessary or convenient for the erection, maintenance, installation, and use of electrical systems, irrigation systems, landscaping, telephone wires, cables, conduits, sewers, water mains, and other suitable equipment for the conveyance and use of electricity, telephone equipment, gas, sewer, water or other public convenience or utilities including easements for privately owned televisions and other communications cable and equipment, and the Developer may further cut drainways for surface water when such action may appear by the Developer to be necessary in order to maintain reasonable standards of health, safety, and appearance, or to correct deviations from approved development drainage Plans provided such easement shall not encroach on or cross under existing buildings or Dwellings on the Lot or Common Area. The Developer further reserves an easement on behalf of itself, its permittees, its successors and assigns, over six (6') feet along each side Lot line of each Lot for the purpose of construction or maintenance of utilities, as well as drainage installation or maintenance, and over the rear twelve feet (12') of each Lot line of each Lot for the purpose of construction or maintenance of utilities, as well as drainage installation or maintenance, and over the front ten feet (10) of each Lot and over such other area of each Lot as is shown on recorded plats of the Community for utility installations, utility rights of way and maintenance thereof, as well as drainage installations, drainage rights of ways, and maintenance thereof. These easements and rights expressly include the right to cut any trees, bushes, or shrubbery, make any grading of soil, or to take any other similar action reasonably necessary to provide economical and safe utility or other installation and to maintain reasonable standards of health, safety and appearance. It further reserves the right to locate signs, entrances, landscaping, sprinklers and other improvements related to the Common Area or common facilities of the Community including, but not limited to, entrances, wells, pumping stations, and tanks, within residential areas on any walkway or any residential Lot in the area designated for such use on any applicable plat of the residential subdivision, or locate same on the adjacent Lot with the permission of the Owner of such adjacent Lot. Such right may be exercised by the licensee of the Developer, but this reservation shall not be considered an obligation of the Developer to provide or maintain any such utility service. No Structures, including, but not limited to, walls, fences, paving or planting shall be erected upon any part of The Property which will interfere with the rights of ingress and egress provided for in this paragraph and no Owner shall take any action to prevent the Association, the Developer, or any public or private utility, or any of their agents, contractors or employees from utilizing the easements reserved herein. **THE DEVELOPER, THE ASSOCIATION, THE ARCHITECTURAL CONTROL AUTHORITY, THEIR AGENTS, EMPLOYEES AND OFFICERS SHALL NOT BEAR RESPONSIBILITY FOR THE REPAIR OR REPLACEMENT OF ANY LANDSCAPING PLANTED, SPECIAL GRADING ESTABLISHED, OR STRUCTURE CONSTRUCTED WITHIN AN EASEMENT, WHETHER PLANTED ESTABLISHED OR CONSTRUCTED INTENTIONALLY OR INADVERTENTLY AND WHETHER APPROVED OR NOT BY THE DEVELOPER OR THE ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED.** All such easements and rights shall be shown and designated on the recorded plats of the Community. The Developer, its successors and assigns, expressly reserves the right to alter any easement described in this paragraph. Such right to alter shall be limited to such extent as will allow the Owner of the Lot and Structure to convey marketable title. The rights and easements

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conferred and reserved herein shall be appurtenant to any property whether or not subject to this Declaration and shall be an easement in gross of a commercial nature for the benefit of the Developer, its permittees, successors and assigns to serve any property whether or not subject to this Declaration.

Section 13. UNDERBRUSH, FINISHED YARDS, AND LANDSCAPING. In the event that the Owner of any residential Lot permits any underbrush, weeds, or other unsightly plants to grow upon any Lot, or fails to maintain landscaping and grass in a manner in keeping with the Declaration, as determined by the Developer or an Architectural Control Authority, When Empowered, from time to time as they see fit, the Developer or the Architectural Control Authority, When Empowered, may issue a compliance demand requiring the Owner of the residential Lot to bring the Lot into keeping with the Declaration, as determined by the Developer or the Architectural Control Authority, When Empowered, if the Owner of the residential Lot fails to comply within the time required by the notice, the Developer or the Association may enter upon the Lot, bring the Lot into keeping with the Community, as provided above, and levy against the Owner of the Lot an Assessment for Non-Compliance and such Assessment shall be a lien upon the Lot. Any entry by the Association or the Developer or their agents, employees, officers or contractors under the terms of this Section shall not be deemed a trespass, and an easement in gross of a commercial nature is reserved to the Developer and to the Association for the purpose of entry onto any residential Lot for the purpose of enforcing this paragraph. This provision shall not be construed as an obligation on the part of the Developer, the Association or their assigns to provide garbage or trash removal services. As provided herein, these rights may be assigned by the Developer to the Association, or other appropriate entities. The Owner shall hold harmless the Developer, its agents and employees, officers and contractors and the Board of Directors or the Architectural Control Authority, When Empowered, from any liability incurred arising out of correcting the Owner's breach of this Section.

Section 14. ACCESS BY DEVELOPER OR ASSOCIATION, WHEN EMPOWERED. For the purpose of performing its function under this or any other Article of the Declaration, to correct any violation of this Declaration, and to make necessary surveys in connection therewith, the Association, its duly authorized agent and employees, or the Developer shall have the right to enter upon any Lot.

Section 15 EMERGENCY ACCESS. There is hereby reserved and granted to the Developer, the Association, When Empowered, their directors, officers, agents, employees, and managers and to all policemen, firemen, ambulance personnel and all similar emergency personnel an easement to enter upon The Property, any part thereof or Lot in the proper performance of their respective duties. Except in the event of emergencies, the rights under this Section shall be exercised only during reasonable daylight hours, and then, whenever practicable, only after advance notice to the Owner affected thereby. The rights granted herein to the Association includes reasonable right of entry upon any Lot or Dwelling to make emergency repairs and to do other work reasonably necessary for the proper maintenance and operation of the Community.

Section 16 CONSTRUCTION EASEMENT FOR THE DEVELOPER During the period that Developer owns any Lot primarily for the purpose of sale or owns any interest in any portion of The Property, Developer and its duly authorized representative, agents, and employees shall have

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a transferable right and easement on, over, through, under and across the Common Properties for the purpose of constructing Dwellings on the Lots and making such other improvements to The Property as are contemplated by this Declaration and to The Property as Developer, in its sole discretion, desires, and for the purposes of installing, replacing, and maintaining all Dwellings and other improvements within the Community, as well as utilities servicing The Property or any portion thereof, and for the purpose of doing all things reasonably necessary and proper in connection therewith, provided in no event shall Developer have the obligation to do any of the foregoing.

Section 17. LEASES OF LOTS. Any lease agreement between an Owner and a tenant for the lease of such Owner's Dwelling on the Lot shall provide that the terms of the lease shall be subject in all respects to the provisions of the Declaration, the Articles of Incorporation and by-laws of the Association, and any Regulations promulgated by the Association. The Owner shall incorporate in any lease of any Lot or Dwelling a provision stating that failure to comply with the terms of such documents shall be default under the terms of the lease. All leases of Lots shall be in writing and a copy of the executed lease upon, written demand, must be provided to the Developer or the Board of Directors, When Empowered.

Section 18. STREET LIGHTING CHARGE. Each Owner shall pay a proportional share of the monthly charge for street lighting service as prescribed by the South Carolina Public Service Commission. The electric utility company shall bill the Owner for this charge as part of the monthly electric utility bill.

ARTICLE III MEMBERSHIP AND VOTING RIGHTS IN THE ASSOCIATION

Section 1. MEMBERSHIP. It is mandatory that every person or entity who is an Owner of any Lot shall be a Member of the Association. Membership shall be mandatory to and may not be separated from ownership of any Lot.

Section 2. VOTING RIGHTS. The Association shall have two (2) classes of voting Membership.

(a) **CLASS "A".** Class "A" Members shall be all Owners excepting the Developer. Class "A" Members shall be entitled to one (1) vote for each Lot they own. When more than one (1) person holds such interest or interests in any Lot, the entire vote attributable to such Lot shall be exercised by one (1) individual who is duly authorized in writing by all of the Owners of that Lot. In no event shall more than one (1) vote or a partial vote be cast with respect to any such Lot. When more than one person holds such an interest or interests in a Lot, it shall be the responsibility of those Owners to provide the Developer or the Association with written notification, with the signatures of all of those persons owning an interest in the Lot affixed, of the name and mailing address of that person authorized to receive notification from the Association and to cast said vote.

(b) **CLASS "B".** The sole Class "B" Member shall be the Developer. The Class "B" Member shall be entitled to cast the greater of four (4) votes for each Lot for which it holds title or one more vote than the total votes of the Class "A" Members. Class "B" Membership shall end

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when one hundred (100%) percent of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale, or at such times as the Developer voluntarily relinquishes these voting rights, provided, however, that the one hundred (100%) percent may be reduced at the option of the Developer.

ARTICLE IV PROPERTY RIGHTS IN THE COMMON AREA

Section 1. MEMBER'S EASEMENTS OF ENJOYMENT. Subject to the provisions of Section 3 of this Article IV, the right of the Association to suspend the use of the Common Area as set out in Article X, and the Regulations established and amended from time to time, every Member shall have a right and easement of enjoyment in and to the Common Area, and such easement shall be appurtenant to and shall pass with the title to every Lot. (See Article IX for the Association's Remedies for Violations.)

Section 2. TITLE TO COMMON AREA. On or before the conveyance of the last Lot owned by the Developer, the Developer or its successors and assigns will convey to the Association, by limited warranty deed, fee simple title to the Common Area, free and clear of all encumbrances and liens, except those created by or pursuant to this Declaration, and further except for easements and restrictions existing of record prior to the purchase of The Property by the Developer, none of which will make the title unmarketable.

This section shall not be amended, as provided for in Article X, Section 5 to eliminate or substantially impair the obligation for the maintenance and repair of the Common Area.

Section 3. EXTENT OF MEMBER'S EASEMENTS. The rights and easements created hereby shall be subject to the following rights which are hereby reserved to the Developer or the Association's Board of Directors, When Empowered:

(a) The right of the Developer, and of the Association, When Empowered, to dedicate, transfer, or convey all or any part of the Common Area, with or without consideration, to any governmental body, district, agency, or authority, or to any utility company, and the right of the Developer and of the Association, When Empowered, to convey with consideration all or any part of the Common Area upon affirmative vote of more than fifty (50%) percent of the total votes of the Members, cast at a duly called meeting of the Members or a recorded resolution signed by the Members holding more than fifty (50%) percent of the vote of the Members.

(b) The right of the Developer, and of the Association, When Empowered, to grant and reserve easements and rights of way through, under, over, and across Common Area, for the installation, maintenance, and inspection of lines and appurtenances for public and private water, sewer, drainage, and other utility services, including a cable or community antenna television system and irrigation or lawn sprinkler systems, and the right of the Developer to grant and reserve easements and rights of way through, over and upon and across the Common Area for the operation and maintenance of the Common Area.

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(c) The right of visitors, invitees, and guests to ingress and egress in and over those portions of Common Area that lie within any private roadways, parking lots and/or driveways (and over any other necessary portion of the Common Area in the case of landlocked adjacent Owners) to the nearest public highway.

(d) The right of the Association, in accordance with the law, its Articles of Incorporation and By-Laws, to borrow money for the purpose of improving the Common Area and, in pursuance thereof, to mortgage or encumber the Common Area.

Section 4. DELEGATION OF RIGHTS OF ENJOYMENT. Any Owner may delegate, in accordance with the By-Laws of the Association, his right of enjoyment to the Common Area and facilities to his employees, tenants, invitees, or licensee, subject to the Regulations established and amended from time to time. Any Owner shall at all times be responsible for and liable for the actions of that Owner's family, tenants, invitees, guests or licensees, employees, pets, and animals, and shall further be responsible for the paying of any Assessments for non-compliance levied for their non-compliance with this Declaration, the By-Laws of the Association or the Regulations established and amended from time to time, which Assessment shall become a continuing lien on the Lot of such Owner.

Section 5. ADDITIONAL STRUCTURES. Neither the Association nor any Owner shall, without the prior written approval of the Developer, so long as the Developer owns one (1) Lot permitted by the Master Plan of the Community, or without written approval of the Architectural Control Authority, When Empowered, erect, construct, or otherwise locate any Structure or other improvement in the Common Area. The Developer, so long as the Developer owns one (1) Lot permitted by the Master Plan of the Community, reserves the right to erect, construct, or otherwise locate any additional Structure or other improvement in the Common Area.

ARTICLE V COMPLETION, MAINTENANCE, AND OPERATION OF COMMON AREA AND FACILITIES

Section 1. COMPLETION OF COMMON AREA BY THE DEVELOPER. The Developer will complete the construction of the Common Area, streets and roadways for the Community as shown on the recorded plats of the Community.

Section 2. MAINTENANCE AND OPERATION OF COMMON AREA. The Association at its sole cost and expense, shall operate and maintain the Common Area and provide the requisite services in connection therewith. It shall further be the responsibility of the Association to maintain all entrances including entrance signs, lights, sprinklers, shrubs, and to pay the cost of utility bills and other such requisite services in connection with the maintenance of such entrance ways. Until one hundred (100%) percent of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale, if the Association fails to operate, maintain or repair the Common Area to the satisfaction of the Developer or fails to employ contractors which the Developer, in its

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sole discretion, determines to be able to properly operate or maintain the Common Area, the Developer may, but is not required to, notify the Association to correct the maintenance problem or remove the contractor. If the Association fails to do so within the time set forth in the notice, the Developer may, but is not required to, correct said maintenance problem or remove and replace such contractor. The Association shall reimburse the Developer for any and all costs incurred by the Developer and the cost including collection costs incurred by the Developer shall be a lien on the Common Area. This Section shall not be amended or removed without the written consent of the Developer. Any entry by the Developer under the terms of this Section shall not be deemed a trespass, and an easement in gross of a commercial nature is reserved to the Developer for the purpose of entry onto the Common Area for the purpose of enforcing this paragraph. This provision shall not be construed as an obligation on the part of the Developer or its assigns to provide garbage or trash removal services. As provided herein, these rights may be assigned by the Developer. The Association shall hold harmless the Developer, its agents, officers, directors, and employees from any liability arising out of correcting the Association's breach of this Section. The maintenance, operation, and repair of the Common Area shall include, but not be limited to, repair of damage to pavements, roadways, walkways, outdoor lighting, buildings, if any, recreational equipment, if any, fences, storm drains, and sewer and water lines, connections, and appurtenances, except when such responsibilities are accepted by responsible parties, including public bodies, governmental bodies, districts, agencies or authorities and only for so long as they properly perform.

ARTICLE VI ASSESSMENTS

Section 1. ASSESSMENTS

(a) Each and every Owner of any Lot or Lots within The Property, by acceptance of a deed therefore, whether or not it shall be so expressed in any such deed or other conveyance, shall be personally obligated to pay to the Association, the Assessments, and the Association's collection fees, attorneys fees and court cost incurred in collecting the Assessments, or in enforcing or attempting to enforce the Declaration, By-Laws and the Architectural Guidelines and Regulations of the Developer or the Board of Directors, When Empowered.

(b) Assessments, together with such interest thereon, and other costs of collection; including the Association collection fees, attorney fees and court costs shall be a charge on the land and shall be a continuing lien upon the Lot or Lots against which such Assessments are levied. Owners of any Lot shall share in the obligation of any other Owner of that Lot and shall be jointly and severally liable for any Assessments, the cost of collection, attorney fees and court costs that are attributable to that Lot.

(c) The Association shall, upon demand at any time, furnish to any Owner or attorney representing the prospective purchaser of a Lot, a certificate in writing signed by an officer of the Association, setting forth whether said Assessments have been paid. Such certificate shall be conclusive evidence of payment of any Assessments therein stated to have been paid. At all times the Association's records with respect to payments made or due shall be deemed correct unless proper documentation to the contrary can be produced.

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This Article shall not be amended as provided in Article X, Section 5, to eliminate or substantially impair the obligation to fix the Assessments at an amount sufficient to properly operate the Association, maintain and operate the Common Area and perform the maintenance required to be performed by the Association under this Declaration without the written consent of the Developer.

(e) The Assessment shall be five (5) types: (1) Regular Assessments; (2) Assessments for non-compliance with this Declaration, the by-laws of the Association, and the Regulations established and amended from time to time; (3) Assessments for Capital Improvements as described in Section 4 below; (4) Assessments for Working Capital Fund as described in Section 5 below; and (5) Assessments for Budgetary Shortfall as described in Section 6 below. Such Assessments to be fixed, established, and collected from time to time as herein after provided. (See Section IX for Remedies of the Association for Violation.)

Section 2. REGULAR ASSESSMENTS.

(a) The Regular Assessments levied by the Association shall be used exclusively for the purposes of the general operation of the Association, reserves and the promotion of the health, safety, and welfare of the residents of the Community, and in particular for the improvement and maintenance of the Common Area, including but not limited to, the payment of mortgages, taxes and insurance thereon, and repair, replacement, and additions thereof, the cost of labor, equipment, materials, management, Treasurer fees, and supervision thereof, and the cost of lawn and landscaping maintenance, and refuse collection; reserves for the replacement of the Association property and improvements to the Common Area; and all other obligations or debts incurred by the Association.

(b) The Developer or the Board of Directors of the Association, When Empowered, shall at all times fix the Regular Assessment based on the Association's budget for the period of the Regular Assessment. The amount of the Regular Assessment shall be uniform for each Lot except as set forth herein and shall be assessed against all Lots at the time of the Assessment. The Developer or Board of Directors, When Empowered, shall once each year create a budget and fix the date of commencement, the size and number of installments, the method of determining the amount of all Regular Assessments against each Owner of a Lot, and shall, at that time, prepare a roster of the Owners and the Assessments applicable thereto. The roster shall be kept in the office of the Association and shall be opened to inspection by any Owner. If the Developer or the Board of Directors, When Empowered, fails to set a Regular Assessment, then the previous Assessment or the previous installment schedule shall continue until the Regular Assessment is set. A copy of the budget or any amended budget and written notice of the Regular Assessment and adjustment thereof, shall be sent to every Owner subject thereto, identifying the amount(s), due date(s), and the address to which payments are to be sent, at least thirty (30) days in advance of the due date of the first (or only) installment of each Regular Assessment. Until one hundred (100%) percent of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale, the Developer shall have the option of approval of any portion of the budget.

(c) The Developer or the Board of Directors, When Empowered, shall have the right to adjust the amount and installment schedule of the Regular Assessment without Membership approval for the purpose of meeting the budgetary obligations of the Association and in times of an unexpected cashflow shortfall. The Developer or the Board of Directors, When Empowered, may, at its sole discretion, set estimated Regular Assessments until the Regular Assessment is set and the budget completed, or may delay the billing of Regular Assessments until the budget is complete and then bill the Owners for the Regular Assessment for the entire budget period.

(d) Until one hundred (100%) percent of the Dwellings permitted by the Master Plan have certificates of occupancy issued thereon and have been conveyed to Owners other than builders holding title for purposes of development and sale, the Developer may also choose the option of either (1) paying the Regular Assessments attributable to the Lots owned by the Developer at the time that the Regular Assessments are due and paying a prorated Regular Assessment for the incorporation of additional Lots in the Community during the budget period or (2) paying the deficits in the expenses and capital reserves (but not contingencies) of the Association not paid by the Regular Assessments, so long as the responsibilities of the Association within the approved budget are properly met. Any expenses of the Association paid by and any advances paid to the Association by the Developer which are in excess of the amount due from the Developer for Regular Assessments for Lots owned by the Developer, or if the Developer chooses to pay deficit expense, the amount paid by the Developer to or for the Association which exceeds the actual deficit, at the option of the Developer, shall be considered a loan to the Association, repayable under terms established by the Developer, and which are reasonably acceptable to the Board of Directors of the Association.

(e) Any Regular Assessment against Lots owned by the Developer (including those Lots added to the Community after the date of the Assessment) shall not be due until the end of the period for which the Regular Assessment is established, provided, however, if the Developer has elected not to pay Regular Assessments and instead to pay the deficits in the expenses and capital reserves of the Association and fails to pay such deficits within thirty (30) days after the end of the budget period, the Regular Assessment for Lots owned by the Developer shall be due in thirty (30) days after the Association notifies the Developer of its failure to pay the deficits at the end of the budget period.

(f) At the time of the closing of a Lot owned by the Developer, if the Regular Assessment for that period has been paid by the Developer, that portion of the Regular Assessment that is attributable to the balance of the period shall be collected and paid to the Developer by the purchaser of the Lot. Any sums not reimbursed to the Developer, shall also be a lien on the Lot. All other Assessments, when levied, shall be the responsibility of the Owner of record on the date that the Assessment is authorized by the Developer or by the Board of Directors of the Association, When Empowered.

Section 3. ASSESSMENTS FOR NON-COMPLIANCE. In the event that any Owner, their guests or invitees fail to comply with any of the provisions of the Declaration, the By-Laws of the Association, the Architectural Guidelines and Regulations established and amended by the Developer or the Board of Directors, When Empowered, from time to time, the Developer, or the

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Board of Directors, When Empowered, may issue Assessments in amounts as it determines in its sole discretion, which shall be an Assessment for Non-Compliance and which shall be a lien on the Lot or Lots of that Owner. (See Section IX for Remedies of the Association.)

Section 4. ASSESSMENTS FOR CAPITAL REPAIR OR IMPROVEMENTS. In addition to the Regular Assessments, the Association may levy, in any period, an Assessment (which must be fixed at a uniform rate for all Lots) for the purpose of defraying, in whole or in part, the cost of any construction or any reconstruction, unexpected repair or replacement of a capital improvement upon the Common Area, including the necessary fixtures, equipment and personal property relating thereto, provided that such Assessment shall have the assent of more than fifty (50%) percent of the votes of the Members who are voting in person or by proxy at a meeting duly called for this purpose, written notice of which shall be sent to all Members not less than thirty (30) days and no more than sixty (60) days in advance of the meeting provided, however, these periods for notice may be shorter as necessary to obtain funds for emergency repairs to the Structures on the Common Area. Subject to the provisions of Section 2, the due date or due dates of any installment of any such Assessment shall be fixed in the resolution authorizing such Assessment.

Section 5. ASSESSMENT FOR WORKING CAPITAL FUND. At the time of acquiring title to a Lot from the Developer or from a contractor who purchased the Lot from the Developer and completed the Dwelling and Structures on the Lot, the Owner acquiring title to the Lot shall, at the option of the Developer or the Board of Directors, When Empowered, deposit with the Association a reserve fund payment in a sum to be determined from time to time by the Developer or Board of Directors, When Empowered, to provide for a working capital fund for the obligations of the Association. Such working capital fund payment shall in no way be considered a prepayment of the Regular Assessment. Such working capital fund payments shall be used for the purposes as determined from time to time by the Developer or the Board of Directors of the Association, When Empowered.

Section 6. ASSESSMENTS FOR BUDGETARY SHORTFALL. In addition to the Regular Assessment, the Developer or the Board of Directors, When Empowered, may, at its option, draw from the appropriate reserve funding or working capital funds or may levy, in any period, an Assessment (which must be fixed at a uniform rate for all Lots), subject to the provisions of Section 2, applicable to that period only, to cover any unexpected shortfall in the cashflow of the Association. Said Assessment shall not require the approval of the Membership.

Section 7. SUBORDINATION OF THE LIEN TO MORTGAGES. The liens provided for herein shall be subordinate to the lien of any first lien, mortgage or deed of trust recorded prior to the recording of the Notice of Lien by the Association or the Developer in the Office of the Register of Deeds for the County in which the Lot is located. Sale or transfer of any Lot shall not affect the liens provided for in the preceding section. However, the sale or transfer of any Lot which is subject to any such first lien, mortgage or deed of trust, pursuant to a foreclosure thereof or any proceeding in lieu of foreclosure thereof, shall extinguish the lien of Assessments under the Notice of Lien when recorded prior to such mortgage as to the payment thereof which becomes due prior to such sale or transfer but shall not relieve any Owner in possession of a Lot prior to such foreclosure sale or deed of trust from any personal obligation defined herein for the payment of Assessments. No such sale

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or transfer shall relieve such Owner from liability for any Assessments thereafter becoming due or from the lien thereof, but the liens provided for herein shall continue to be subordinate to the lien of any subsequent first lien, mortgage or deed of trust, except for liens for Assessment due from subsequent Owners of the Lot if the Notice of Lien is recorded prior to the subsequent first lien mortgage.

Section 8. EXEMPT PROPERTY. The following properties subject to this Declaration shall be exempt from the dues, Assessments, charges, and liens created herein: (a) All Common Area, as defined in Article I, Section 1 hereof and (b) Streets. Notwithstanding any provision herein, no Lots shall be exempt from said liens.

ARTICLE VII ARCHITECTURAL CONTROL

Section 1. ARCHITECTURAL CONTROL AUTHORITY. The Architectural Control Authority when established by the Developer or the Board of Directors of the Association, When Empowered, shall be composed of three (3) or more representatives appointed by the Developer until it transfers this right to the Association.

Section 2. PROCEDURES.

(a) Any person desiring to construct, maintain, place, replace, reconstruct any Structure on any Lot or Common Area or to make any improvements, alteration or changes to any Structure shall submit Plans and any other required documentation required by the Architectural Guidelines to the Developer or the Architectural Control Authority, When Empowered, which shall evaluate, approve or disapprove in writing such Plans in light of the purpose of the Declaration. Any person using any Structure shall comply with the Regulations established and amended from time to time. An aggrieved Owner may appeal the final decision of the Architectural Control Authority to the Developer or the Board of Directors, When Empowered, through the processes set forth in the Architectural Guidelines or the Regulations.

(b) The Developer, or the Architectural Control Authority, When Empowered, may charge a reasonable review fee for its initial review, the amount of which shall be established by the Developer or the Architectural Control Authority in the Architectural Guidelines, from time to time. The Developer or the Architectural Control Authority, When Empowered, may at its option, employ outside professional services for initial review and may pay them accordingly for this service. The charging of fees and the hiring of professionals for this purpose by the Architectural Control Authority must be approved by the Developer or the Board of Directors of the Association, When Empowered. Subsequent reviews may require additional fees.

(c) APPROVAL BY THE DEVELOPER, BOARD OF DIRECTORS OR THE ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED, OF ANY PLANS AND SPECIFICATIONS OR THE GRANTING OF A VARIANCE WITH RESPECT TO ANY OF THE ARCHITECTURAL GUIDELINES AND REGULATIONS, WHEN ESTABLISHED, SHALL NOT IN ANY WAY BE CONSTRUED TO SET A PRECEDENT

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FOR APPROVAL, ALTER IN ANY WAY THE PUBLISHED ARCHITECTURAL GUIDELINES, WHEN ESTABLISHED, OR BE DEEMED A WAIVER OF THE DEVELOPER'S OR OF THE ARCHITECTURAL CONTROL AUTHORITY'S, WHEN EMPOWERED, RIGHT IN ITS DISCRETION, TO DISAPPROVE SIMILAR PLANS AND SPECIFICATIONS, USE OF ANY STRUCTURE OR ANY OF THE FEATURES OR ELEMENTS WHICH ARE SUBSEQUENTLY SUBMITTED FOR USE IN CONNECTION WITH ANY OTHER LOT. Except for the right of the Developer or Board Of Directors to approve or disapprove the Plans on appeal, approval of the Plans relating to any Lot shall be final as to that Lot and such approval may not be reviewed or rescinded thereafter by the Architectural Control Authority, provided that there has been adherence to, and compliance with the Plans as approved in writing, and any conditions attached to any such approval and the Regulations.

(d) The Developer or Architectural Control Authority, When Empowered, may, at it's option, require the Owner to make a deposit to insure compliance with the approval or the Regulations in an amount and upon conditions to be determined by the Developer or Architectural Control Authority, When Empowered. The setting of an amount as a compliance deposit or of conditions for compliance for any one Lot, shall not in any way act to set a precedent or effect in any way the setting of an amount or conditions of compliance for any other Lot or for any other set of Plans which are to be or have been approved within the Architectural Control Authority. The terms for waiver of any deposit and for the determination of the deposit amount, conditions of payment and the release to an Owner of any remaining portion of said compliance deposit, shall be defined in the Architectural Guidelines and Regulations. Nothing herein shall be deemed to waive or limit in any way any other remedies of the Developer, including those to insure compliance with the Architectural Guidelines and Regulations, or any Owner under this Declaration or at law.

(e) NEITHER THE DEVELOPER, ITS AGENTS, EMPLOYEES, DIRECTORS, OFFICERS NOR ANY OTHER MEMBER OF AN ARCHITECTURAL CONTROL AUTHORITY, SHALL BE RESPONSIBLE OR LIABLE IN ANY WAY FOR THE DEFECTS, STRUCTURAL OR OTHERWISE, IN ANY PLANS OR SPECIFICATIONS APPROVED BY THE DEVELOPER OR THE ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED, NOR FOR ANY DEFECTS IN ANY WORK DONE ACCORDING TO THE PLANS AND SPECIFICATIONS APPROVED BY THE DEVELOPER, THE BOARD OF DIRECTORS OR ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED. FURTHER, NEITHER THE DEVELOPER, THE ASSOCIATION, ARCHITECTURAL CONTROL AUTHORITY, OR THEIR RESPECTIVE SHAREHOLDERS, DIRECTORS, OFFICERS, EMPLOYEES, AGENTS, OR ATTORNEYS SHALL BE LIABLE TO ANYONE BY REASON OF MISTAKE IN JUDGMENT, NEGLIGENCE, MISFEASANCE, MALFEASANCE OR NONFEASANCE ARISING OUT OF OR IN CONNECTION WITH THE APPROVAL OR DISAPPROVAL OR FAILURE TO APPROVE OR DISAPPROVE ANY SUCH PLANS OR SPECIFICATIONS OR THE EXERCISE OF ANY OTHER POWER OR RIGHT OF THE DEVELOPER OR THE ARCHITECTURAL CONTROL AUTHORITY PROVIDED FOR IN THIS DECLARATION. EVERY PERSON WHO SUBMITS PLANS AND SPECIFICATIONS TO THE DEVELOPER OR THE ARCHITECTURAL CONTROL AUTHORITY, WHEN EMPOWERED, FOR APPROVAL AGREES, BY SUBMISSION OF SUCH PLAN AND

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SPECIFICATIONS, AND EVERY OWNER OF ANY LOT AGREES, THAT HE WILL NOT BRING ANY ACTION OR SUIT AGAINST THE DEVELOPER, THE ASSOCIATION, THE MEMBERS OF ITS BOARD OF DIRECTORS OR THEIR AGENTS, EMPLOYEES AND OFFICERS, OR ANY MEMBER OR AGENTS OF THE ARCHITECTURAL CONTROL AUTHORITY, TO RECOVER ANY DAMAGES ARISING OUT OF SUCH APPROVAL OR DISAPPROVAL, AND, EACH OWNER BY ACCEPTANCE OF THE DEED TO THE LOT, RELEASES, REMISES, QUIT CLAIMS, AND COVENANTS NOT TO SUE FOR, ALL CLAIMS, DEMANDS, AND CAUSES OF ACTION ARISING OUT OF OR IN CONNECTION WITH SUCH APPROVAL OR DISAPPROVAL, NOTWITHSTANDING, ANY LAW WHICH PROVIDES THAT A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS, DEMANDS AND CAUSES OF ACTION NOT KNOWN AT THE TIME THE RELEASE IS GIVEN.

ARTICLE VIII OWNER'S MAINTENANCE RESPONSIBILITIES

Section 1. OWNER'S MAINTENANCE RESPONSIBILITIES. Unless specifically identified herein or specifically elected by the Developer or the Board of Directors, When Empowered, as being the responsibility of the Association, all maintenance and repair of a Lot, together with all portions of the Dwelling, and other Structures or the Lot shall be the responsibility of the Owner of Such Lot. The responsibility of each Owner shall include, but not limited to, the painting, maintenance, repair, and replacement of walls or fences, and all siding, exterior doors, fixtures, equipment, and appliances (including, without limitation, the heating and air-conditioning system for the Dwelling) and all chutes, flues, ducts, conduits, wires, pipes, plumbing or other apparatus which are deemed to be a part of the Dwelling or Lot, and the lawns, trees, shrubs, fences, grass, driveways and walkways, on the Lot. The responsibility of the Owner shall also include, but not limited to, the maintenance, repair, and replacement of all glass, lights and light fixtures (exterior and interior), awnings, window boxes, window screens, and al screens or glass-enclosed porches, balconies, or decks which are a part of the Dwelling. Each owner shall also maintain roof, gutters and downspouts in a good state of repair.

Section 2. OWNER MUST PROVIDE INSURANCE OF DWELLING. Each Owner shall, at its own expense, insure the Dwelling and all other insurable improvements on the Lot in an amount not less than the then current maximum insurable replacement value thereof. Such coverage shall afford protection against loss or damage by fire and other hazards covered by the standard extended coverage endorsements and such other risks as from time to time customarily shall be covered with respect to buildings similar in construction, location and use, including, but not limited to, vandalism, malicious mischief, windstorm and water damage.

Section 3. RECONSTRUCTION OR REPAIR OF DAMAGED DWELLING. If any Dwelling shall be damaged by casualty, the Owner of such Dwelling shall promptly reconstruct or repair it so as to restore such Dwelling nearly as possible to its condition prior to suffering the damage. All such reconstruction and repair work shall be done in accordance with plans and specifications therefor, approved by the Developer, or Board of Directors, When Empowered. Encroachments upon or in favor of Dwelling or Lots, which may be necessary for or created as a

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result of such reconstruction or repair, shall not constitute a claim or basis of a proceeding or action by the Owner on whose Dwelling or Lot such encroachment exists, provided that such reconstruction or repair is done substantially in accordance with the plans and specifications approved by the Developer, or Architectural Control Authority, When Empowered, or as the building was originally constructed.

ARTICLE IX REMEDIES

Section 1. REMEDIES FOR NONPAYMENT OF ASSESSMENTS. Any Assessments not paid within thirty (30) days after the due date shall bear interest from the due date at the rate of sixteen percent (16%) per annum or the highest rate allowed by law, whichever is higher. Said interest shall be charged at the discretion of the Developer or the Association's Board of Directors, When Empowered. In addition, the Developer or the Board of Directors of the Association, When Empowered, shall have the right to charge an Association collection fee or late charge on any Assessment or installment thereof which shall not have been paid by its due date. In the event that the Developer or the Board of Directors of the Association, When Empowered, chooses an installment schedule for the method of payment for an Assessment or as a method of allowing an Owner to pay past due Assessments, and in the event that any installment is delinquent, the Developer or the Board of Directors of the Association, When Empowered, shall have the right to accelerate and immediately make due all or part of the Assessment due from that Owner of that Lot for that budgeted period. The Developer or the Board of Directors of the Association, When Empowered, may bring an action at law against the Owner personally obligated to pay the same or foreclose the lien created herein against the Lot in the same manner as prescribed by the laws of the State of South Carolina for the foreclosure of mortgages on Time Shares or for the foreclosure of mortgages by judicial proceedings, and may seek a deficiency judgment, and interest, court costs, all costs of collection, including reasonable attorney's fees. No Owner may waive or otherwise escape liability for the Assessments provided for herein by non-use of the Common Area or abandonment of his Lot nor shall damage to or destruction of any improvements on any Lot by fire or other casualty result in any abatement or diminution of the Assessments provided for herein. No disagreement on the part of any Owner with respect to the budget; the amount or installment schedule for any Assessment; any change to the amount or installment schedule for the Assessment; the Regulations established or amended by the Developer or the Board of Directors of the Association, When Empowered; the actions or lack of action on the part of the Developer or the Association; the purpose for any Assessment for Capital Repair or Improvements; or the amount or purpose of any Assessment for Budgetary Shortfall shall be reason for any Owner to fail to pay any Assessment at the time that it is due. Also, the Developer or Board of the Association, When Empowered, may at any time notify the holders of mortgages of the Lot of the failure of the Owner to pay Assessments or any other violation of the Declaration.

Section 2. REMEDIES FOR NONPAYMENT OF AD VALOREM TAXES OR LEVIES FOR PUBLIC IMPROVEMENTS BY THE ASSOCIATION. Upon default by the Association in the payment to the governmental authority entitled thereto of any ad valorem taxes levied against the Common Area or Assessments levied for public improvements to the Common Area, which default shall continue for a period of six (6) months, each Owner of a Lot shall become personally

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obligated to pay to the taxing or assessing governmental authority a portion of such unpaid taxes or Assessments in an amount determined by dividing the total taxes and/or Assessments due the governmental authority by the total number of Lots in the Community. If such sum is not paid by the Owner within thirty (30) days following receipt of notice of the amount due, then such sum shall become a continuing lien, subordinate to all other mortgages, on the Lot of the then Owner, his or their heirs, devisees, personal representatives and assigns, and the taxing or assessing governmental authority may either bring an action at law or may elect to foreclose the lien against the Lot of the Owner.

Section 3. REMEDIES FOR FAILURE TO MAINTAIN EXTERIOR OF DWELLING AND LOT. In the event that the Owner neglects or fails to maintain his Lot and/or the exterior of his or her Dwelling in the Community, the Developer or the Association, When Empowered, may in addition to any other remedy, provide such exterior maintenance. The Developer or the Association, When Empowered, shall first give written notice to the Owner of the specific items of the exterior maintenance or repair that the Association intends to perform and the Owner shall have the time set forth in said notice within which to perform such exterior maintenance himself or to satisfy the Association that the required maintenance or repair will be completed in a timely manner. The determination as to whether an Owner has neglected or failed to maintain his Lot and/or Dwelling in a manner consistent with other Lots and Dwellings in the Community shall be made by the Developer or the Board of Directors of the Association, When Empowered, in its sole discretion, or an entity authorized to do so by the Developer or the Board of Directors of the Association, When Empowered.

In the event the Association performs such exterior maintenance, repair or replacements repair, the costs of such maintenance, repairs or replacement together with all costs of collecting from the Owner the cost of such maintenance, repairs or replacement established herein shall be added to and become a part of the Assessment to which that Lot is subject.

In the event that the Association determines that the need for maintenance, repair or replacement, which is the responsibility of the Association hereunder, is caused through the willful or negligent act of an Owner, or the family, guests, employees, lessees, or invitee(s) of any Owner, then the Association may perform such maintenance, repair or replacement at such Owner's sole cost and expense, and all costs thereof, together with any Assessments for Non-Compliance levied by the Association for non-compliance and all costs of the collection shall be added to and become a part of the Assessment to which such Owner is subject and shall become a lien against the Lot of such Owner. Each Owner is responsible for the actions of and the compliance with these documents and the Regulations by the family, guests, lessees, employees or invitee(s) of that Owner and shall further be responsible for the payment of any Assessments levied for that non-compliance.

Section 4. ADDITIONAL REMEDIES.

(a) Enforcement of the Declaration, By-Laws of the Association, and the Regulations in addition to any other remedy set out herein, may be carried out by the Developer, the Association, When Empowered, or the Owner through any proceeding at law or in equity against any person or persons violating or attempting to violate any covenant or restriction in the Declaration, By-Laws, and Regulations established by the Developer or the Association, When Empowered, either to prevent or restrain violations, to recover damages or to compel a compliance to the terms thereof. Any failure by the Developer, the Association, When Empowered, or any Owner to enforce any covenant or restriction herein contained or contained in the Declaration or By-Laws or to enforce any of the Regulations shall in no event be deemed a waiver of a right to do so thereafter. In addition to the foregoing, the Developer or the Board of Directors of the Association, When Empowered, shall have the right wherever there shall have been built on any Lot any Structure which is in violation of the Declaration, Architectural Guidelines or Regulations to enter upon the Lot where such violation exists and summarily abate or remove the same at the expense of the Owner, if after written notice of such violation, it shall not have been corrected by the Owner within the time required by the notice of violation. Any such entry and abatement or removal shall not be deemed a trespass.

(b) The Developer or the Association, When Empowered, may, in addition to any other remedy, may suspend the Common Area enjoyment rights of any Owner, family member, lessee, licensee, employee or guest, pet or animal of an Owner for an appropriate period of time to be determined on a case by case basis by the Developer or the Board of Directors, When Empowered, for any non-compliance with the provisions of the Declaration, the By-Laws or of the Regulations, including, but not limited to, violations of Article II, Section 2, CONSTRUCTION IN ACCORDANCE WITH PLANS, Article II, Section 5, OFFENSIVE ACTIVITIES, Article II, Section 13, UNDERBRUSH, FINISHED YARDS, LANDSCAPING and Article VIII, OWNER'S MAINTENANCE RESPONSIBILITIES. The right, however, of a Member to ingress and egress over the roads and/or parking areas shall not be suspended.

(c) The Owner grants to the Developer and the Association the right and permission to enter the Lot to remove or correct any violation of the Declaration, By-Laws or Regulations, including but not limited to, the maintenance of Lots or any Structure (as defined in Article I, Section 1) thereon, and the removal of abandoned automobiles considered by the Board to be in violation with the Regulations, Declaration, By-Laws or to be a nuisance.

(d) In addition to the remedies outlined in this Article, the Developer or the Association, When Empowered, may, but shall not be required to, enter upon any Lot(s) or Common Area, seize and either deliver to the animal control authority at the Owner's cost, any pet or other animal that is not in compliance with the Declaration, By-Laws, or the Regulations or to be a nuisance. Notice of non-compliance shall be given to any Owner whose pets or animal are not in compliance, except when said non-compliance creates an emergency as determined by the Developer or the Board of the Association, When Empowered. The departure, while not under the restraint of a leash, of any pet or other animal from the Lot of its Owner, shall immediately constitute an emergency and there shall be no requirement for notice to be given.

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(e) In addition to the remedies outlined above in this Article, the Developer, or the Association, When Empowered, shall have the right to arrange for the removal, at the Owners expense, of any vehicle that is parked in violation of the Declaration or the Regulations after notice to the Owner of the Lot on or beside which the vehicle is parked. Notice of non-compliance shall be given to any Owner where the parking of a vehicle or vehicles, except when said non-compliance creates an emergency as determined by the Developer or the Board of the Association, When Empowered. The parking of a vehicle which impedes the passage of any emergency vehicle or school bus, shall immediately constitute an emergency and there shall be no requirement for notice to be given.

ARTICLE X GENERAL PROVISIONS

Section 1. DURATION. The covenants and restrictions of this Declaration shall run with and bind the land, and shall inure to the benefit of and be enforceable by the Developer, the Association, or the Owner(s) of any land subject to this Declaration, and the irrespective legal representatives, heirs, successors, and assigns. All covenants, conditions, limitations, restrictions, and affirmative obligations set forth in this Declaration, and amended as provided in Article X section 5 and 6 of this Declaration from time to time, shall be binding and run with the land and continue until twenty one years from the date of execution hereof, after which time said covenants shall be automatically extended for successive periods of ten (10) years unless an instrument signed by two-thirds (2/3) of the then Owners affected by the same has been recorded, agreeing to change the same in whole or in part; provided, however, that all property rights and other rights reserved to the Developer shall continue forever to the Developer, its successors and assigns, except as otherwise herein provided.

Section 2. NOTICE. Any notice required to be sent to any Member or Owner under the provision of this Declaration and service of any legal proceedings shall be deemed to have been properly sent and received when personally delivered or mailed, post paid, to the last known address of the person who appears as that person authorized to receive notice or to vote as shown on the records of the Association at the time of such mailing. It shall at all times be the responsibility of any Owner to file written notice with the Association of the name and address of the person authorized to receive notification from the Association or the Developer as to Assessments, or infractions of the Regulations. Proof of the authority to receive notice and to vote shall be presented to the Association in the form of a certificate signed by the Owner of a Lot or HUD Settlement. Such certificate shall be deemed valid until revoked by a subsequent certificate. The Association does not have to send notice or service to any other address. If the Owner does not file such certificate, the notice or service shall be sufficient if delivered, posted or mail post paid to the Lot

Section 3. SETTLEMENT STATEMENT AUTHORIZATION. The Owner by acceptance of the deed authorizes and directs the closing attorney to provide the Association with a copy of the Settlement Statement from the closing transferring the Lot and/or Dwelling to the Owner.

Section 4. SEVERABILITY. In the event that any one or more of the foregoing conditions, covenants, restrictions, or reservations shall be declared for any reason by a court of competent jurisdiction to be null and void, such judgment or decree shall not in any manner whatsoever effect, modify, change, aberrant, or nullify any of these covenants, conditions, and restrictions not so declared to be void but all remaining covenants, conditions, reservations and restrictions not so expressly held to be void shall continue unimpaired and in full force and effect.

Section 5. AMENDMENT. With respect to the minimum square footage requirements in the Community, the Developer reserves the right to alter, from time to time, the minimum square footage requirements as established by the Developer or as set out the Architectural Guidelines and Regulations, when established. In addition to any other manner herein provided for the amendment of this Declaration, the covenants, restrictions, easements, charges, and liens for this Agreement may be amended, changed, added to, derogated or deleted at any time and from time to time upon the execution and recordation of any instrument executed by Owners holding not less than a majority of votes of the Owners of the Membership of the Association, provided that so long as the Developer is the Owner of any Lot affected by this Declaration, the Developer's consent must be obtained. Provided, further, that the provisions for voting of Class A and Class B Members as herein contained in this Declaration shall also be effective in voting changes in this Declaration. Without limiting the foregoing, the Association, and so long as the Developer owns at least one (1) Lot in the Community, the Developer or the Board of Directors, When Empowered, shall, at any time and from time to time as the Developer or Board of Directors, When Empowered, see fit, have the right to cause this document to be amended to correct any clerical or scrivener's error(s) or to conform to the requirements of the Federal Housing Administration or the Veterans Administration or the Federal National Mortgage Corporation, FNMA or any other insurer or purchaser of mortgage secured by the Lots as the same may be amended from time to time.

Section 6. AMENDMENT PRIOR TO SALE BY THE DEVELOPER. At any time prior to the closing of the first sale of Lots by the Developer, the Developer, and any mortgage holder, if any, may amend this Declaration by their mutual consent. The closing of the first sale shall mean transfer of title and delivery of a deed and not execution of contract of sale or like document.

Section 7. EFFECTIVE DATE. This Declaration shall become effective upon its recordation in the office of The Register of Deeds for the county in which The Property is located.

Section 8. PAID PROFESSIONAL MANAGER. The Developer or the Board of Directors, When Empowered, may employ a professional manager or managerial firm to supervise all work, labor, services, and material required in the operation and maintenance of the Common Area and in the discharge of the Association's duties throughout the Community.

Section 9. BINDING EFFECT. This Declaration shall inure to the benefit of and be binding upon the parties hereto, and the purchasers of Lots, their heirs, personal representatives, successors and assigns.

Section 10. WAIVER. The failure to enforce any rights, reservations, restrictions, or conditions contained in this Declaration, however long continued, shall not be construed to constitute

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a precedent or be deemed a waiver of the right to do so hereafter as to the same breach or as to a breach occurring prior or subsequent thereto and shall not bar or affect its enforcement.

Section 11. ATTORNEY'S FEES AND COST. Should the Developer or the Association employ counsel to enforce the Declaration, or the reasonable rules, regulations and policies established or amended by the Developer or the Board of Directors from time to time because of a breach of the same, all costs incurred in such enforcement, including a reasonable fee for the Developer's or the Association's counsel and other reasonable costs of collection, shall be paid by the Owner of such Lot or Lots in breach thereof.

Section 12. DEVELOPER LIABILITY AND HOLD HARMLESS. The Developer herein shall not in any way or manner be liable or responsible for any violation of the Declaration by any person other than itself. The Owners and the Association shall hold harmless the Developer from any liability, loss or cost arising out of their or their agents, guests or invitees violation of the Declaration.

Section 13. TIME REDUCTION. In the event that any of the provisions hereunder are declared void by a court of competent jurisdiction by reason of the period of time herein stated for which same shall be effective, then and in that event such terms shall be reduced to a period of time which shall not violate the rule against perpetuities or any other law of the State of South Carolina and such provisions shall be fully effective for such period of time.

Section 14. BINDING ARBITRATION. The Owner and the Association by acceptance of a deed agree that any dispute arising out of use, occupancy, ownership of a Lot or on the Common Area or the enforcement of any Covenant, condition, rule or restriction or regulation and any complaint to the Developer shall be settled by binding arbitration pursuant to the South Carolina Arbitration Act.

Section 15. DRAINAGE. ALL GRADING, DURING AND AFTER CONSTRUCTION, SHALL AT ALL TIMES BE PERFORMED IN ACCORDANCE WITH (A) ANY APPLICABLE PORTIONS OF THE STORM WATER MANAGEMENT AND SEDIMENT CONTROL PLAN FILED FOR THE COMMUNITY AND BUILDINGS TO BE CONSTRUCTED WITHIN THE COMMUNITY WHICH CONFORMS TO REGULATIONS PROMULGATED BY THE SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL CONTROL AND/OR (B) ANY OTHER APPLICABLE LEGISLATION, LAW, STATUTE OR ORDINANCE GOVERNING THE CONTROL OF DRAINAGE. ANY LOT OWNER OR CO-OWNER SHALL AT ANY TIME REQUESTED BY THE DEVELOPER OR AUTHORITY EXECUTE A "CO-PERMITTEE AGREEMENT" BINDING THAT LOT OWNER OR CO-OWNER TO THE ABOVE MENTIONED PLAN AND INDEMNIFYING AND HOLDING THE DEVELOPER, THE ASSOCIATION AND THE AUTHORITY HARMLESS FROM ANY AND ALL DEVIATIONS BY THE LOT OWNER OR CO-OWNER FROM THAT PLAN OR FROM THE LOT OWNER'S OR CO-OWNERS FAILURE TO COMPLY WITH ANY APPLICABLE LEGISLATION, LAWS, STATUTES OR ORDINANCES.

ALL GRADING, TEMPORARY AND PERMANENT, SHALL BE PERFORMED IN A MANNER TO ALLOW FOR PROPER DRAINAGE AND TO CONTROL EROSION. APPLICANT SHALL, DURING AND AFTER CONSTRUCTION, BE RESPONSIBLE FOR GRADING AND SURFACE DRAINAGE SO THAT SURFACE RUN-OFF WILL NEITHER CAUSE SEDIMENT LOSS TO WASH ONTO OR ACCUMULATE ON ADJACENT LOTS, OTHER ADJACENT PROPERTIES, OR ONTO THE STREETS OF THE COMMUNITY, NOR SHALL IT ADVERSELY AFFECT ANY STRUCTURE(S) ON THAT APPLICANT'S LOT OR ANY PORTION OF ANY ADJOINING LOT OR PROPERTIES. APPLICANT SHALL PROVIDE RIP-RAP, GRAVEL EXITS, WATER BARS, BERMS, SEDIMENT FENCES OR OTHER FORMS OF EROSION CONTROL AS MAY BE REQUIRED BY THE DEVELOPER OR AUTHORITY OR ANY GOVERNMENTAL AGENCY.

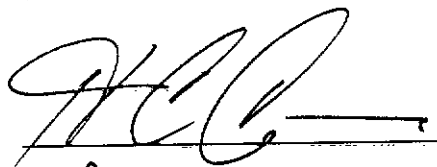
ARTICLE XI

ADDITIONAL MATTERS DEALING WITH PHASED COMMUNITY

Section 1. ANNEXATION OF ADDITIONAL PHASES AND CREATION OF A MASTER ASSOCIATION. The Developer shall have the right to annex additional Phases and Common Area into The Property by the filing of an Amendment or Addendum to this Declaration which describes The Property annexed, and imposes this Declaration upon such property annexed. All property annexed in this manner shall be a part of the Association as fully as if it had been a part thereof from the filing of this Declaration. The Developer or the Board of Directors, When Empowered, may create an incorporated or unincorporated Master Association for the purpose of owning property and/or for the purpose of maintaining and operating some or all of the Common Area within the Community and upon its creation may delegate part or all of the responsibilities and authority of this Association to that Master Association or make this Association a Sub-Association of that Master Association.

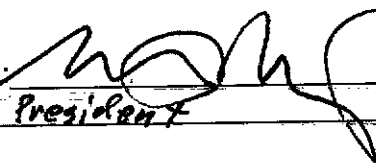
Section 2. VOTING RIGHTS. As each phase, if any, is added to the Community, the Lots comprising such additional phase shall be counted for the purpose of voting rights.

IN WITNESS WHEREOF, the Developer, has caused this instrument to be executed by its proper officers and its corporate seal to be affixed thereto on the day and year first above written.



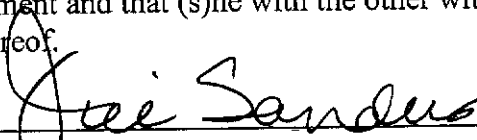
Joe Sanders

DEVELOPER: _____
THE MUNGO COMPANY, INC.

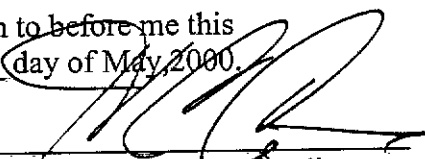
By: 
Its: President

STATE OF SOUTH CAROLINA)
) PROBATE
COUNTY OF RICHLAND)

PERSONALLY APPEARED before me the undersigned witness who on oath says that (s)he saw the within named Developer by its duly authorized officer as indicated above, sign, seal and as its act and deed, deliver the within written instrument and that (s)he with the other witness whose name appears above, witnessed the execution thereof.



Witness

Sworn to before me this
31 day of May, 2000.


Notary Public for South Carolina
My Commission Expires: 12/18/00

SCHEDULE "A"

STERLING HILLS PHASE ONE

All those certain pieces, parcels or lots of land, with the improvements thereon, if any, situate, lying and being in the County of Richland, State of South Carolina, being shown and delineated as Lots 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 169, 170, 171, 172, 173, 174, and 175 on a plat of STERLING HILLS PHASE ONE prepared by BELTER & ASSOCIATES, INC. dated February 18, 2000, and recorded in the Office of the R.O.D. for Richland County in Record Book 407, at Page 1488; reference being made to the said plat which is incorporated herein by reference for a more complete and accurate description; all measurements being a little more or less.

and also

STERLING HILLS PHASE TWO

All those certain pieces, parcels or lots of land, with the improvements thereon, if any, situate, lying and being in the County of Richland, State of South Carolina, being shown and delineated as Lots 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 165, 166, 167, and 168 on a plat of STERLING HILLS PHASE TWO prepared by BELTER & ASSOCIATES, INC. dated March 18, 2000, last revised April 28, 2000, and recorded in the Office of the R.O.D. for Richland County in Record Book 407, at Page 1489; reference being made to the said plat which is incorporated herein by reference for a more complete and accurate description; all measurements being a little more or less.

and also

STERLING HILLS PHASE THREE

All those certain pieces, parcels or lots of land, with the improvements thereon, if any, situate, lying and being in the County of Richland, State of South Carolina, being shown and delineated as Lots 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 151,

152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, and 164 on a plat of STERLING HILLS PHASE THREE prepared by BELTER & ASSOCIATES, INC. dated February 18, 2000, last revised April 26, 2000, and recorded in the Office of the R.O.D. for Richland County in Record Book 407, at Page 1490; reference being made to the said plat which is incorporated herein by reference for a more complete and accurate description; all measurements being a little more or less.

and also

STERLING HILLS PHASE FOUR

All those certain pieces, parcels or lots of land, with the improvements thereon, if any, situate, lying and being in the County of Richland, State of South Carolina, being shown and delineated as Lots 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, and 150 on a plat of STERLING HILLS PHASE FOUR prepared by BELTER & ASSOCIATES, INC. dated March 18, 2000, last revised April 28, 2000, and recorded in the Office of the R.O.D. for Richland County in Record Book 407, at Page 1491; reference being made to the said plat which is incorporated herein by reference for a more complete and accurate description; all measurements being a little more or less.

and also

STERLING HILLS PHASE FIVE

All those certain pieces, parcels or lots of land, with the improvements thereon, if any, situate, lying and being in the County of Richland, State of South Carolina, being shown and delineated as Lots 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, and 132; COMMON AREA PHASE FIVE containing 1.91 ACRES TOTAL; and AUTUMN GLEN ROAD; STERLING CROSS DRIVE; STERLING CROSS COURT; and BARONY PLACE ROAD on a plat of STERLING HILLS PHASE FIVE prepared by BELTER & ASSOCIATES, INC. dated March 18, 2000, last revised April 28, 2000, and recorded in the Office of the R.O.D. for Richland County in Record Book 407, at Page 1492; reference being made to the said plat which is incorporated herein by reference for a more complete and accurate description; all measurements being a little more or less.

DERIVATIONS:

Deed from M. STEWART MUNGO and STEVEN W. MUNGO to THE MUNGO COMPANY, INC. dated March 7, 2000, and recorded March 8, 2000 in the Office of the R.O.D. for Richland County in Record Book 390, at page 1551.

Deed from WESTBROOK SUMMIT, LLC to THE MUNGO COMPANY, INC. dated June 22, 1999, and recorded June 23, 1999 in the Office of the ROD for Richland County in Record Book 318, at page 2399.

BY-LAWS OF THE STERLING HILLS HOMEOWNERS' ASSOCIATION, INC.

ARTICLE I NAME AND LOCATION

These are the By-Laws of the Sterling Hills Homeowners Association, Inc., hereinafter referred to as the "Association." The principal office of the Corporation shall be located at 441 Western Lane., Columbia, S.C., but meetings of Members and Directors may be held at such places as may be designated by the Board of Directors from time to time.

ARTICLE II DEFINITIONS

The capitalized terms used herein shall have the same meaning as the defined terms set out in the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Sterling Hills dated May 31, 2000 and recorded June 1, 2000 in the Office of the ROD for Richland County in Record Book 413 at Page 92.

ARTICLE III PURPOSE AND POWERS OF THE ASSOCIATION

This Association does not contemplate pecuniary gain or profit to the Members thereof, and the specific purposes for which it is formed are to provide for maintenance, preservation, and architectural control of the residential Lots and Common Area within those certain tract(s) and/or lot(s) of Property described in Schedule A attached to the Declaration and incorporated by reference, and to promote the health, safety and welfare of the residences within the Community and any additions thereto as may hereafter be brought within the jurisdiction of the Association, and for this purpose to:

- (a) Exercise all of the powers and privileges and to perform, or delegate to an

appropriate person or entity the authority to perform, all of the duties and obligations of the Association, including the establishment and amendment of the Regulations of the Association and the use and maintenance of the Common Area, as set forth in the Declaration as the same may be amended from time to time as therein provided, said Declaration being incorporated herein as set forth in length;

(b) Fix, levy, collect and enforce payment by any lawful means, all Assessments pursuant to the terms of the Declaration; pay all expenses in connection therewith; and pay all office and other expenses incident to the conduct of the business of the Association, including all licenses, taxes, or governmental charges levied or imposed against the Property of the Association;

(c) Acquire (by gift, purchase or otherwise), own, hold, improve, build upon, operate, maintain, convey, sell, lease, transfer, or otherwise dispose of real or personal property including, but not limited to the Common Area, as determined advisable by the Board of Directors;

(d) Borrow money, mortgage, pledge, deed in trust, or hypothecate any and all of its real or personal property including, but not limited to the Common Area, as security for money borrowed or debts incurred upon arrival by the affirmative casting of two-thirds (2/3) of all Class A and B votes of the Association;

(e) Participate in mergers and consolidations with other nonprofit corporations organized for the same purpose or annex additional residential property and Common Area, provided that any such merger, consolidation, or annexation shall have the assent of Members of the Association controlling a majority of all Class A and B votes of the Association, provided, however, that this shall not affect the right of the Developer to add additional Property to the Community and Association as set out in the Declaration;

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(f) Make, by decision of the Board of Directors, and subject to applicable law, any election of a fiscal year for the Association, as the Board of Directors shall determine from time to time;

(g) To have and exercise any and all powers, rights, and privileges which a corporation organized under the nonprofit corporation law of the state of South Carolina by law may now or hereafter have or exercise including the right to enter into agreement with other Associations and entities for the management and maintenance of Common Area of such Association or entities;

(h) Notwithstanding the purposes and powers of the Association enumerated above, the Association, after passage of control to the Owners and Co-owners by converting Class B stock to Class A stock as set forth in the Declaration, shall not enter into, either directly or indirectly, contracts or leases with the Developer (including a management contract) unless there is a right of termination of any such contract or lease, without cause, which is exercisable without penalty at any time after transfer of control in accordance with the Declaration, upon not more than ninety (90) days notice to the other party to the said contract or lease.

ARTICLE IV MEETING OF MEMBERS

Section 1. Annual Meetings. The first annual meeting of the Members shall be held at a time, date, and place established by the Developer within twelve (12) months after the organization of the Association. Subsequent annual meetings of the Members shall be held at a time, date and place established by the Board of Directors each year so long as no annual meetings of the Members shall be scheduled on a legal holiday. As long as the Developer maintains its Class B membership, the Developer shall appoint the Board of Directors and the only purpose of the annual

meeting will be (1) to serve as a town forum in which the president and officers report on and answer reasonable questions concerning the activities and financial condition of the Association; and (2) consider matters raised consistent with the requirements of Section 7.05 and 7.23(b) of the Non-Profit Corporation Act of South Carolina.

Section 2. Special Meetings. Special Meetings of the Members may be called at any time by the Developer, President or by the Board of Directors, or upon written demand signed by the Members who are the holders of at least five (5%) percent of the voting power of the Association. Only those matters that are within the purpose or purposes described in the meeting notice may be conducted at a special meeting.

Section 3. Notice of Meetings. Written notice specifying the place, day and hour of the meeting of the Members, and, in the case of the special meeting, also specifying the purpose of each meeting and the description of the matter for which the meeting was called, shall be given by, including the developer, any fair and reasonable manner. The mailing of a copy of such notice of a special or annual meeting by first class mail or registered mail, postage prepaid, at least ten (10) days if notice is mailed by other than first class or registered mail at least thirty (30) days and not more than sixty (60) days before such meeting date to each Member entitled to vote at the meeting, addressed to the Members' address last appearing on the books of the Association, or supplied by such Member to the Association for the purpose of notice shall be considered fair and reasonable. The notice requirement may be waived by a Member before or after the date and time of the meeting as stated in the notice. The waiver must be in writing, be signed by the Member and be delivered to the Association for inclusion in the minutes in filing with the Association's records, except that the attendance of a Member at a meeting waives notice unless the Member at the

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beginning of the meeting objects to holding the meeting or transacting business at the meeting. Also, an Emergency Meeting may be called with a twenty-four (24) hour notice to those members entitled to vote, upon the unanimous vote of the Association's Board in the event an issue requires the immediate attention of the Members of the Association.

Section 4. Quorum. The presence at a meeting of Members entitled to cast, or of proxies entitled to cast, one-tenth (1/10) of the votes of each class of Membership shall constitute a quorum for any action except as otherwise provided in the Articles of Incorporation, the Declaration, or these By-Laws. If, however, such quorum shall not be present or represented at any meeting, the Members present shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting of the new date, time and place. The quorum at the new meeting shall be reduced to five percent (5%) of each Class of Members.

Section 5. Proxies. Votes may be cast in person or by proxy. All appointment of proxies shall be by written appointment form, signed either personally or by an attorney-in-fact form and filed with the Secretary prior to the start of the meeting in the case of a vote that is taken at a scheduled meeting and by the deadline established by the appropriate notification of a vote to be taken in any other manner. Except as otherwise allowed herein or by written authorization of the Board of Directors of the Association, no appointment form shall confer on the proxy a broader authority than to vote on the matter(s) or at the meeting(s) than is defined on the appointment form. Every proxy shall be revocable at the pleasure of the Owner or any one of the Co-owners issuing it, up to the time that the vote for which it was issued is cast and shall automatically cease upon conveyance by the Owner or any of the Co-owners of that Lot, the Member attending any meeting and voting in person, the member signing, and delivery to the Secretary in writing revoking the

appointment, or upon receipt of notice by the Secretary or the officer or agent authorized to tabulate the vote prior to the proxy casting vote of the death of the Member.

Section 6. Parliamentary Rules. Robert's Rules of order (latest edition) or such other rules as the Board of Directors may adopt shall govern the conduct of corporate proceedings when not in conflict with the Declaration, the Articles of Incorporation, these By-Laws or with the statutes of the State of South Carolina.

Section 7. Failure to Hold Meetings. The failure to hold an annual or regular meeting at a time stated in or fixed in accordance with these By-Laws does not affect the validity of a corporate action.

Section 8. Authorization to Vote and Notice by Owner. It shall at all times be the responsibility of any Lot Owner and all Co-owners to keep current with the Association, the name and address of the person authorized to cast the vote assigned to that Lot and to receive notification from the Association as to any meetings which the Association may be required to send. Proof of the authority to receive notice and to vote shall be presented to the Association in the form of a certificate signed by the Owner or all of the Co-owners of the Lot. Such certificate shall be deemed valid until revoked by a subsequent certificate.

Section 9. Record Date. The Board of Directors shall set the record date for determining the Members entitled to notice of a Members meeting; to vote at a Members meeting; and to exercise any rights in respect of any other lawful action. The record date shall not be more than seventy (70) days before the meeting or action requiring a determination of the Members occurs.

Section 10. Voting Requirements. Unless otherwise required in these By-Laws, the Declaration, the Articles of Incorporation, or the law, the affirmative vote of the votes represented

and voting, which affirmative vote also constitute a majority of the required quorum is the act of the Members.

Section 11. Action by Written Ballot. Any action that may be taken at any annual, regular or special meeting of Members may be taken without a meeting if the Association delivers a written ballot to every Member entitled to vote on the matter and number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action and the number of approvals equals or exceeds the number of votes that would be required to approve the matter of the meeting. See South Carolina Non-Profit Corporation Act, Section 33-31-708.

ARTICLE V

BOARD OF DIRECTORS; SELECTION; TERM OF OFFICE

Section 1. Number. The affairs of this Association shall be managed by a Board of not less than three (3) Directors, who need not be Members of the Association; provided, however, that so long as the Developer maintains its Class B Membership there shall be only three (3) Directors, all of whom shall be appointed by the Developer. At any time the Developer so long as it maintains its Class B Membership or the Association thereafter by the affirmative vote of a majority (51%) of all of the Members votes may increase or decrease the number of Directors of the Association so long as there are never less than three (3) Directors at any given point.

Section 2. Term of Office. At the first annual meeting after the termination of the Developer's Class B votes, the Members shall elect two (2) Directors for a term of one (1) year, two (2) Directors for a term of two (2) years, and one (1) Director for a term of three (3) years; and at each annual meeting thereafter, the Members shall elect successor Directors for terms of three (3) years. The term of any Director shall be automatically extended and shall not expire until the

annual meeting at which a successor for that Director is elected.

Section 3. Removal. At any time, any Director(s) appointed by the Developer may be removed from the Board, with or without cause, by the Developer by giving written notice of removal to the Director and either the presiding officers of the Board of Directors or the Association President or Secretary. Any Director(s) elected by the Association may be removed from the Board of Directors, with or without cause, by the affirmative casting of a majority (51%) of all of the votes of the Association. In the event of death, resignation, or removal of a Director, a successor shall be selected by the Developer, if that Director was appointed by the Developer, or the remaining Members of the Board of Directors, if elected by the Members of the Association and shall serve for the unexpired term of his predecessor.

Section 4. Compensation. Compensation of any director shall require the affirmative casting of a majority (51%) of all of the Class A and B votes. This provision shall in no way require the members approval of or preclude the Board of Directors from compensating a Director for his duties as an officer of the Association, from employing a Director as an employee of the Association, or shall it preclude the Association from contracting with and thereafter compensating a Director for the management of the Association.

Section 5. Action Taken Without a Meeting. The Directors shall have the right to take any action in the absence of a meeting which they could take at a meeting by obtaining the written consent of a majority (51%) of the Directors, which shall represent a quorum. Any action so approved shall have the same effect as though taken at a meeting of the Directors.

Section 6. Reversal of Board of Directors. A decision of the Board of Directors, an officer or a committee of the Association may be reversed or modified by the Developer as long as the

Developer has a Class B vote, and thereafter by the affirmative vote of two-thirds (2/3) of all of the Members.

ARTICLE VI NOMINATION AND ELECTION OF DIRECTORS

Section 1. Nomination. Except where Directors are appointed or replaced by the Developer or the Board of Directors, nomination for election for the Board of Directors shall be made by a nominating committee or by the Members of the Association. Nominations made by Members of the Association shall be made in writing to the Developer, or the Board of Directors of the Association or Nominating Committee, When Empowered, at least twenty-four (48) hours prior to the time and date set for the Annual Meeting. In order to be valid a nomination must be accompanied by a petition of nomination signed by at least (10%) of the members entitled to cast all of the Class A or the Class B votes. The nominating committee, when created, shall consist of a Chairman, who shall be a member of the Board of Directors, and two (2) more Members of the Association. The nominating committee shall be appointed by the Board of Directors. Members of the Nominating Committee shall serve from the close of the annual meeting until the close of the next annual meeting. The nominating committee shall make as many nominations for election to the Board of Directors as it shall in its discretion determine, but not less than the number of vacancies that are to be filled. Such nominations may be made from among members or non-members.

Section 2. Election. Unless agreed otherwise by the affirmative vote of a majority (51%) of Class A and Class B Members present at the meeting, election to the Board of Directors shall be by secret ballot. At such election, the Members or their proxies may cast, in respect to each vacancy,

as many votes as they are entitled to exercise under the provisions of these By-Laws and the Declaration. The person receiving the largest number of votes shall be elected. Cumulative voting, voting more than one (1) time for any Director, is not permitted.

ARTICLE VII MEETING OF DIRECTORS

Section 1. Regular Meetings. Until the end of the Class B vote or the permanent and voluntary transfer of control of the Association by the Developer, special meetings of the Board of Directors shall be held at dates, times and places and as frequently as is deemed prudent by the Developer. Upon the end of the Class B vote or the permanent and voluntary transfer of control of the Association by the Developer, regular meetings of the Board of Directors shall be held monthly, or more frequently, and at dates, times and places determined by a majority (51%) of the Board of Directors. Without the approval of all of the Directors, no meeting shall fall upon a legal holiday. No notice shall be required for regular meetings.

Section 2. Special Meetings. Special Meetings of the Board of Directors shall be held when called by the President of the Association or any two (2) Directors, after not less than two (2) days notice is given, either personally, by mail, or by telephone, to each Director, unless waived in writing signed by the Director or by attendance of the meeting without objection or participation.

Section 3. Quorum. A majority (51%) of the number of Directors shall constitute a quorum for the transaction of business. Every act or decision authorized by a majority (51%) of the Directors either by written consent or when present at a duly held meeting at which a quorum is present shall be regarded as an act of the Board.

ARTICLE VIII POWERS AND DUTIES OF THE BOARD OF DIRECTORS

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Section 1. Powers. The Board of Directors, When Empowered, shall have the power to perform such duties as authorized by the Declaration, included but not limited, on law to:

(a) Adopt, amend and publish the Architectural Guidelines for the Community and Regulations of the Association governing the use of the Common Area and facilities thereon and the personal conduct of the Members and their guests, and to establish Assessments for the infraction thereof;

(b) Suspend the voting rights and right to use the recreational facilities on the Common Areas of a Member during any period in which each Member shall be in default in the payment of any Assessment levied by the Association or infraction of the Association's Regulations. Such rights may also be suspended after notice for infraction of the Association's Regulations;

(c) Exercise for the Association of all of the powers, duties, and authority vested in or delegated to the Association and not reserved to the Membership by other provisions of these By-Laws, the Articles of Incorporation, or the Declaration;

(d) Declare the office of a member of the Board of Directors to be vacant in the event such member shall be absent from three (3) consecutive regular meetings of the Board of Directors unless such absence shall have been excused by the Chairman of the Board of Directors or other person(s) authorized to do so;

(e) Employ a manager, an independent contractor, Treasurer of the Association or such other employees as they may deem necessary, to prescribe their duties and;

(f) Levy Assessments and to collect from the members all costs of collection,

including but not limited to court costs and reasonable attorney fees, after required notice and hearing, for all infractions of the Association's Regulations, the Architectural Guidelines, the Declaration, Articles of Incorporation or these By-laws.

(g) Delegate, in part or in total, to any employee, agent, director, officer, contractor, manager or other appropriate entity, any power or authority given to the Board of Directors by the Covenants and Restrictions for the Community or these By-laws.

(h) To perform the following discretionary services the cost of which may be made a part of the Assessment, unless two-thirds (2/3) of the Members vote otherwise at duly called meeting:

(i) Provide police protection and security to Community including the employment of police and security guards.

(ii) The services necessary or desirable in the judgment of the Board of Directors of the Association to carry out the Association's obligations and business under the terms of this document.

(iii) Provide garbage and trash collection to each Patio Home with Community.

(iv) Maintain a security system for the Community and for each Dwelling. The maintenance of the equipment in each Dwelling shall be the obligation of the Owner of the Dwelling.

(v) Maintenance and upkeep of the landscaping and shrubbery, including cutting grass, in the front and side yard of each Lot.

(vi) Provide for pressure washing each Dwelling and the other

Structures on the Lot.

(vii) Provide for the painting of each Dwelling and other Structures on the Lot.

(viii) Maintain, repair and replace the patio walls and patio fences surrounding the back yard of each Lot.

Section 2. Duties. It shall be the duty of the Board of Directors to:

(a) Cause to be kept a complete record of all of its acts and corporate affairs and to present a statement hereof to the Members at the annual meeting of the Members, or at any special meeting;

(b) Supervise all officers, agents and employees of this Association, and to see that their duties are properly performed;

(c) Perform such other duties as required by the Declaration, the Articles of Incorporation or the By-laws.

(d) Foreclose, where it is deemed prudent and to be in the best interest of the Association by the Board of Directors, the lien against any Lot for which Assessments are not paid within thirty (30) days after the due date or to bring an action at law against the Owner or Co-owners personally obligated to pay the same as provided in the Declaration, or both;

(e) Issue, or cause an appropriate officer to issue, upon demand by any person, a certificate setting forth whether or not any assessment has been paid. At all times the Association records with respect to payments made or due shall be deemed correct unless proper documentation to the contrary can be produced. If a certificate states an assessment has been paid, such certificate shall be conclusive evidence of such payment. A reasonable charge may be

made by the Board for the issuance of these certificates;

(f) Procure and maintain liability and hazard insurance on property owned by the Association in amounts established by the Board of Directors in its sole discretion and with insurance companies licensed to do business in South Carolina with a Best rating of AA or better;

(g) Cause and pay for all officers or employees having fiscal responsibilities to be bonded, as it may deem appropriate by the Board of Directors;

(h) Cause the Common Area to be maintained.

ARTICLE IX OFFICERS AND THEIR DUTIES

Section 1. Enumeration of Offices. The offices of this Association shall be a President and Vice President, who shall at all times be Members of the Board of Directors, a Secretary and a Treasurer, and such other officers as the Board of Directors from time to time by resolution create. Compensation for the officers and the employees of the Association shall be fixed by the Board of Directors of the Association. The Board of Directors may employ a Director as an employee of the Association, and may contract with and thereafter compensate that Director for the management of the Association.

Section 2. Appointment of Officers. All officers shall be appointed by the Board of Directors.

Section 3. Term. Officers of this Association shall be appointed annually by the Board, and each shall hold office for one (1) year unless he shall sooner resign, or shall be removed, or other wise disqualified to serve.

Section 4. Special Appointments. The Board of Directors may appoint such other officers as the affairs of the Association may require, each of whom shall hold office for such period, have such authority and perform such duties as the Board of Directors may, from time to time, determine.

Section 5. Resignation and Removal. Any Officer may be removed from office with or without cause by a majority (51%) vote of the Board of Directors. Any Officer may resign at any time giving written notice to the Board of Directors, the President or Secretary. Such resignation shall take effect on the date of receipt of such notice or at any later time specified therein, and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

Section 6. Vacancies. A vacancy in any office may be filled by appointment by the Board of Directors. The Officer appointed to such vacancy shall serve for the remainder of the term of the Officer he replaces.

Section 7. Multiple Offices. The offices of Secretary and Treasurer may be held by the same person. No person shall simultaneously hold more than one (1) of any of the other offices except in the case of special offices created pursuant to Section 4 of this Article.

Section 8. Duties. The duties of the Officers are as follows:

(a) President. The President shall preside at all meetings of the Board of Directors; see that the orders and resolutions of the Board of Directors are carried out; shall sign all leases, mortgages, promissory notes, deeds and other written instruments and shall be authorized, along with the Treasurer and other authorized parties, to sign on all checking accounts.

(b) Vice President. The Vice President shall act in the place and stead of the

President in the event of his absence, inability or refusal to act, and shall exercise and discharge such other duties as may be required of him by the Board of Directors.

(c) Secretary. The Secretary shall record the votes and keep the minutes of all meetings and proceedings of the Board of Directors and of the Members; keep the corporate seal of the Association and affix it on all papers requiring said seal; serve notice of meetings of the Board of Directors and of the Members; keep appropriate current records showing Members of the Association together with their addresses, authenticate the records of the Association and shall perform such other duties as required by the Board.

(d) Treasurer. The Treasurer shall receive and deposit in appropriate bank accounts all moneys of the Association and shall disburse such funds as directed by Resolution of the Board of Directors; shall sign all checks and promissory notes of the Association; keep proper books of accounts; cause a reconciliation of the Association books to be made by a Public Accountant at the completion of each fiscal year; and shall prepare an annual budget and a statement of income and expenditures to be presented to the Membership.

ARTICLE X

COMMITTEES AND ARCHITECTURAL CONTROL AUTHORITY

When Empowered, the Association's Board of Directors by majority vote shall appoint an Architectural Control Authority as provided in the Declaration. In addition, the Board of Directors shall appoint other committees as deemed appropriate in carrying out its purpose, including the establishment of a nominating committee as required herein. Compensation for committee members and for any employees of the Association assigned to or hired by these committees shall be fixed or approved by the Board of Directors of the Association.

ARTICLE XI BOOKS, RECORDS, AND PUBLICATIONS

The books, records, publications, and papers of the Association shall at all times, during reasonable business hours, or other reasonable circumstances, be subject to inspection by any member and by any holder, insurer, or guarantor of any first mortgage. The Declaration, the Articles of Incorporation and the By-Laws of the Association shall be available for inspection by any member, lender, holder, insurer, or guarantor of any first mortgage at the principal office of the Association, where copies of any of the documents addressed in this paragraph may be purchased at a reasonable cost.

Upon request, any Owner or Co-owner or the holder, insurer, or guarantor of any first mortgage on any Lot, shall be entitled to a copy of the reconciliation statement of the financial condition of the Association and copy of the tax return of the Association for the immediately preceding fiscal year. A reasonable fee may be charged by the Association for copies of these documents.

ARTICLE XII FUNDS AND BONDS

Section 1. Payments and Depositories All monies collected by the Association shall be treated as the separate property of the Association and such monies may be applied by the said Association to the payment of any of the expense of operating and managing the Association, or to the proper undertaking of all acts and duties imposed upon it by virtue of these By-Laws, the Articles of Incorporation and the Declaration. As the moneys for any Assessment is paid unto the Association by any Owner or Co-owner of a Lot the same may be commingled with the monies paid to the Association by the other Owners or Co-owners of Lots. All funds and other assets of the

Association, and any increments thereto or profits derived therefrom, or from the leasing or use of the Common Areas, shall be held for the benefit of the members of the Association.

The depository of the Association shall be such bank or other Federally Insured depository as shall be designated from time to time by the Board of Directors and in which the moneys of the Association shall be deposited. Withdrawal of moneys from such accounts shall only be by checks signed by such persons as are authorized by the Board of Directors.

Section 2. Bonds. At the discretion of the Board of Directors, fidelity bonds shall be required on all members of the Board of Directors, the Officers of the Association and any other persons, employees or entities handling or responsible for the funds of the Association. The amounts of such bonds shall be determined by the Directors, but shall be at least equal to the amounts to be handled at any point by that person or entity. Unless verification that the bonds have been provided by such person or entity is obtained by or provided for the Board of Directors, the premiums for these bonds shall be paid by the Association as a common expense.

ARTICLE XIII CORPORATE SEAL

The Association may have a seal in circular form having within its circumference the words: Sterling Hills Homeowners' Association, Inc.

ARTICLE XIV AMENDMENTS

Section 1. Except as otherwise required herein, by law, by this Declaration or by the Articles of Incorporation of the Association, these By-Laws may be amended, by mail or at a regular or special meeting of the Members, by the affirmative casting of a majority (51%) of all of the Class A votes of the Association present in person or by proxy and all of the Class B vote, except that the Federal Housing Administration or the Veterans Administration shall have the right to veto amendments while there is Class B Membership. Without limiting the foregoing, the Association, and for so long as the Developer owns at least one (1) Lot in the development, the Developer, shall, at any time and from time to time as they see fit, have the right to cause this document to be amended to correct any clerical or scrivener s error(s) or to conform to the requirements of the Federal Housing Administration or the Veterans Administration or the Federal National Mortgage Corporation, FHLMC and such other secondary market agencies as the same may be amended from time to time.

Section 2. In the case of any conflict of any Articles of Incorporation and these By-Laws or the Regulations of the Association, the Articles shall control; and in the case of any conflict between the Declaration, the Regulations, and these By-Laws, the Declaration shall control.

ARTICLE XV MISCELLANEOUS

Section 1. In case of any conflict with the provisions of the South Carolina Non-profit Corporation laws, such laws shall control. Such laws are incorporated herein by reference as if fully set out herein.

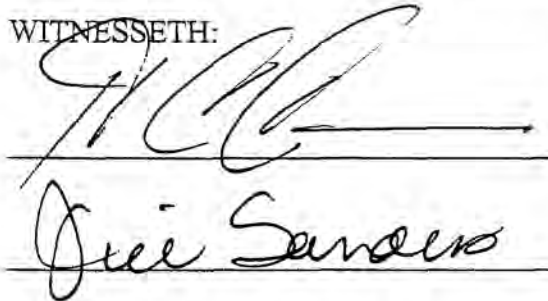
Section 2. The fiscal year of the Association shall begin on the 1st day of January and end

on the 31st day of December of every year, except that the first fiscal year shall begin on the date of incorporation.

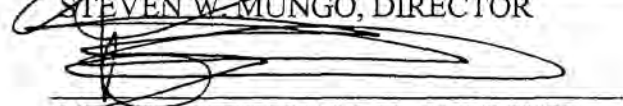
Section 3. The Association shall indemnify an individual made a party to a proceeding because the individual is or was a director, or officer against liability incurred in the proceeding if the individual complies with the requirements of the South Carolina Non-Profit Corporation Act Section 33-31-851 and shall pay for or reimburse the reasonable expenses incurred by the director or officer who is a party to a proceeding in advance of final disposition of the proceeding if the director complies with the terms of the South Carolina Non-Profit Corporation Action Section 33-31-853.

IN WITNESS WHEREOF we, being all of the Directors of the Sterling Hills Homeowners Association, Inc. have hereunto set our hands and seals on June 21, 2000..

WITNESSETH:


Julie Sanders


M. STEWART MUNGO, DIRECTOR

STEVEN W. MUNGO, DIRECTOR

V. BRYAN GRAHAM, JR. DIRECTOR

STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

Sterling Hills Homeowners' Association, Inc.,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A No.: 2018-CP-40-04658

**PLAINTIFF'S MOTION TO DISMISS
DEFENDANT'S COUNTERCLAIMS AND
FOR ORDER OF REFERENCE TO THE
MASTER IN EQUITY**

(011144.00144)

TO: DREW RADEKER, ATTORNEY FOR DEFENDANT ELLIOT HAYES:

YOU WILL PLEASE TAKE NOTICE that at such time and place as is set by the Court, Plaintiff Sterling Hills Homeowners' Association, Inc. (the "Plaintiff") will move to dismiss and/or strike the counterclaims against Plaintiff submitted by Defendant Elliot Hayes (the "Defendant") in his Amended Answer and Counterclaims Against Plaintiff, pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and to further request this case be referred to the Master in Equity pursuant to Rule 53 of the South Carolina Rules of Civil Procedure. This Motion is brought on the following grounds:

1. When considering a motion to dismiss for failure to state a claim, the question is whether, in the light most favorable to the Defendant, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. Plyler v. Burns, 373 S.C. 637, 647 S.E.2d 188 (2007).
2. Plaintiff is a homeowners association and is not an entity contemplated to be bound by the Unfair Trade Practices Act and it does not participate "in commerce" as required under the Act; therefore, Defendant fails to allege facts sufficient to state a cause of action upon which relief may be granted. S.C. Code Ann. § 39-5-20(a) ("Unfair methods of competition and unfair or deceptive acts or practices *in the conduct of* any trade or commerce are hereby declared unlawful." (emphasis added)); S.C. Code Ann. § 39-5-10(b) (defining "trade" and "commerce" as

“the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.”).

3. Defendant’s counterclaim for breach of contract fails to allege any facts sufficient to distinguish in what way Plaintiff breached a contract between Defendant and Plaintiff; therefore, Defendant’s counterclaim against Plaintiff for breach of contract fails to allege facts sufficient to state a cause of action upon which relief may be granted. Accordingly, Defendant’s counterclaim for breach of contract should be dismissed or, alternatively, designated as an affirmative defense.
4. Defendant’s allegations do not present a sufficient factual basis that would amount to a cause of action; the allegations in Defendant’s Amended Answer and Counterclaims do not provide a factual basis as to any cause of action against Plaintiff.
5. Therefore, Defendant’s counterclaims should be dismissed and, because all or most of the causes of action in this case are in equity, this matter referred to the Master in Equity pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure.

This Motion may be further supported by legal memoranda and any other materials as permitted by the Court.

/s/ Alexander P. Zuraff
 Alexander P. Zuraff, SC Bar No.: 103824
 4500 Fort Jackson Boulevard, Suite 250 (29209)
 P.O. Box 212069, Columbia, SC 29221
 Phone: (803) 724-5000 Fax: (803) 724-5001
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ATTORNEY FOR PLAINTIFF

August 12, 2019
 Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS
FOR THE FIFTH JUDICIAL CIRCUIT
C/A No.: 2018-CP-40-04658

Sterling Hills Homeowners' Association, Inc.,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

**PLAINTIFF'S NOTICE OF MOTION
AND MOTION FOR SUMMARY
JUDGMENT AS TO DEFENDANT'S
COUNTERCLAIMS**

(011144.00144)

TO: ANDREW RADEKER, COUNSEL FOR DEFENDANT

Plaintiff Sterling Hills Homeowners' Association, Inc. ("Plaintiff" or the "Association"), by and through the undersigned counsel, hereby file this Notice of Motion, Motion for Summary Judgment and Memorandum of Law in Support thereof.

FACTS

Plaintiff is a nonprofit corporation serving as the homeowners' association for the Sterling Hills subdivision. Defendant is the owner of that certain real property designated as Lot 66, located in the Sterling Hills subdivision, bearing the address of 8 High Glen Court, Columbia, South Carolina 29229 ("Subject Property"). The Subject Property is subject to the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Sterling Hills (the "Declaration"), recorded May 31, 2000 in Deed Book R413 at Page 92, ROD Office for Richland County.

By taking ownership of the Subject Property, Defendant agreed to be bound by the Declaration. However, Defendant has continuously and repeatedly violated numerous provisions of the Declaration to include its prohibitions against offensive activities and its provisions that

the landscaping and exterior features of Lots be maintained. In addition to Defendants' lack of maintenance concerning the unkempt conditions of his landscaping and exterior of the Subject Property, Defendant has and continues to allow an individual to reside and/or sleep on the home's porch. This individual has on multiple occasions exposed himself to residents of Sterling Hills Subdivision by urinating in a bucket as well as changing clothes on the porch. Despite the Association's multiple warnings and notifications to Defendant regarding the violations and remedial measures necessary, the violations persist.

Having exhausted all other avenues, Plaintiff was eventually forced to file its Amended Complaint on June 27, 2019, raising causes of action against Defendant for breach of covenants, enforcement of restrictive covenants, specific performance, injunctive relief, and declaratory judgment. On July 11, 2019, Defendant filed its Answer and Counterclaim to the Amended Complaint raising counterclaims for breach of contract, violation of the unfair trade practices act, declaratory judgment, and failure to allow access to records. This motion for summary judgment follows.

STANDARD OF REVIEW

A trial court may grant summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. Rule 56(c), SCRCP. "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). Summary judgment should be granted when it is perfectly clear that no genuine issue of material fact exists and inquiry into facts is not desirable to clarify application of the law. *See Wortman v. Spartanburg*, 310 S.C. 1, 4, 425 S.E.2d 18, 20

(1992). When plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted. *Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 822 (Ct. App. 2004).

“A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). “When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavit or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.” Rule 56(e), SCRCP.

ARGUMENT

I. Should the claim not be dismissed under Rule 12(b)(6), SCRCP, Plaintiff is entitled to summary judgment as to Defendant’s counterclaim under the Unfair Trade Practices Act because Plaintiff is not subject to the Unfair Trade Practices Act.

Defendant has raised a counterclaim against Plaintiff for violation of South Carolina’s Unfair Trade Practices Act (“the Act”). The Act has no application to this action as Plaintiff is a nonprofit corporation uninvolved in trade and commerce and is therefore not within the Act’s purview. Under S.C. Code § 39-5-20, the Act declared unlawful all unfair methods of competition and unfair or deceptive acts or practices in the conduct of any *trade or commerce*. The Act defines “trade” and “commerce” as the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce

directly or indirectly affecting the people of this State. S.C. Code § 39-5-10(b). Again, Plaintiff is a nonprofit corporation established to administer and enforce the governing documents of Sterling Hills and accordingly given the authority to levy, collect, and disburse assessments and charges in furtherance of those obligations. Plaintiff has not and does not engage in commercial or trade activity, and Defendant has brought this claim under an inapplicable statutory scheme. In fact, respectfully, Counsel for Defendant has at least once before unsuccessfully attempted to raise claims against a homeowners association under the Act. In *Brown v. Spring Valley Homeowners Association, Inc.*, 2016 WL 3595791 (Ct. App. 2016) (Not Reported), the Court of Appeals affirmed summary judgment against Brown on an allegation under the Act and also cited to the Act's definition of trade and commerce.¹ As Plaintiff is in no way involved in the conduct contemplated by the Act, there is demonstrably no genuine issue as to any material fact and Plaintiff is entitled to summary judgment as a matter of law on this claim.

II. Plaintiff is entitled to summary judgment as to Defendant's counterclaim for "failure to allow access to records" because Defendant cannot dispute that he never requested said records and Plaintiff never denied him access to the records.

In his Answer and Counterclaim, Defendant alleges Plaintiff refused to allow him access to its books and records and requests an order directing Plaintiff to provide such access as well as a reimbursement of costs and attorneys' fees. Defendant presumably intends to bring this claim pursuant to S.C. Code § 33-31-1602 or other relevant sections of the South Carolina Nonprofit Corporation Act, which provide, amongst other things, that members are entitled to inspect and copy certain records of the corporation under various conditions. Of note, S.C. Code § 33-31-1602(a) and (b) provide the inspection of these records is available "if the member gives the

¹ Plaintiff notes this is an unreported opinion from the South Carolina Court of Appeals, and offers it not as a submission of binding precedent, but rather of relevant interest to this Court concerning the application of South Carolina's Unfair Trade Practices Act.

corporation written notice or a written demand...” There is no evidence whatsoever of such a written notice or demand from Defendant. In fact, Defendant’s discovery responses reveal Defendant never provided a written notice or demand for the inspection of Plaintiff’s records. Despite having been directed to set forth a list of any written statements or other documents that relate to the claims or defenses in this case and to produce any and all documents or items that constitute or contain evidence concerning Defendant’s allegations, Defendant has failed to produce any evidence of a written demand or notice for the inspection of Plaintiff’s records. Furthermore, the affidavit provided herewith also refutes any allegation that Plaintiff has refused requests for review of its records.

Being that Defendant cannot produce any evidence that he ever made a written notice or demand to inspect Plaintiff’s records and the evidence shows this fact is undisputed, Defendant cannot possibly prevail on a claim that Plaintiff failed to comply with a request to inspect its records. Accordingly, there is no issue of material fact and summary judgment is appropriate as a matter of law.

III. Defendant’s counterclaim for a declaratory judgment that Plaintiff has been operating *ultra vires* gives rise to no issue of material fact and is meritless as a matter of law.

Plaintiff is entitled to summary judgment as to Defendant’s counterclaim for declaratory judgment that Plaintiff has been operating *ultra vires*. Defendant has merely alleged, “Plaintiff is and for quite some time has been operating in an *ultra vires* state,” and that none of Plaintiff’s actions during this “long time period” have been lawful or valid. Defendant’s basis for these allegations is apparent from Defendant’s Responses to Plaintiff’s Discovery Requests, in which Defendant set forth his bases for this allegation as follows:

Plaintiff is operated unlawfully by persons claiming to be its directors, even though the required quorum of Plaintiff’s members to elect directors has not participated in a director’s election since at least 2002; that the supposed “board

of directors” of the Plaintiff simply purports to appoint themselves as the Plaintiff’s putative directors...

Defendant’s Responses to Plaintiff’s Discovery Requests at ¶ 2.

To the extent Defendant alleges Plaintiff’s Board of Directors has been operating *ultra vires* merely because there are “holdover” directors on the board, that allegation is refuted by the Nonprofit Corporation Act. Pursuant to S.C. Code § 33-31-805(d), despite the expiration of a director’s term, the director continues to serve until the director’s successor is elected, designated or appointed, and qualifies, or until there is a decrease in the number of directors. Defendant conceded in his discovery response that “the required quorum of members to elect directors has not participated in a directors’ election since at least 2002.” If the required quorum of Members to elect new Directors has not assembled, as Defendant states, then Plaintiff is merely complying with the Nonprofit Corporation Act in maintaining its current Directors. Furthermore, as articulated in the attached affidavit, the Plaintiff homeowners association has failed to establish the requisite quorum necessary to elect directors by the membership. Not only is this a common problem among homeowner associations, it is a problem that can be, and has been in this case, remedied under § 33-31-805(d) of the Nonprofit Corporation Act.

Therefore, Defendant’s allegation concerning *ultra vires* action by Plaintiff is refuted by Defendant’s own assertions. Moreover, Defendant failed to provide any evidence or legally sufficient basis to evidence invalidity or *ultra vires* status of Plaintiff’s Board of Directors despite being requested to produce any evidence supporting his claims in discovery. Accordingly, as there exists is no issue of material fact, Plaintiff is entitled to summary judgment as to this allegation.

IV. Should the claim not be dismissed pursuant to Rule 12(b)(6), SCRCF, Plaintiff is entitled to summary judgment as to Defendant’s counterclaim for breach of contract as the Subject Property indisputably remains in a state of disrepair and

noncompliance with the Declaration, and Defendant cannot substantiate any contractual failures on the part of Plaintiff.

Plaintiff is entitled to summary judgment on Defendant's counterclaim for breach of contract as there is no issue of material fact as to not only Defendant's noncompliance with the Declaration, but also Plaintiff's compliance with the Declaration. Defendant's only conceivable support for a breach of contract claim against Plaintiff is his assertion that Plaintiff selectively enforces the covenants of the Declaration. Defendant's Responses to Plaintiff's Discovery Requests at ¶ 2. However, Defendant has provided no specification as to what covenants Plaintiff has breached or failed to enforce. Notwithstanding the Declaration's provision in Article X, Section 10 that the failure to enforce any rights, reservations, restrictions, or conditions shall not be construed to constitute a waiver of the right to do so by the Association, this Court has no justiciable controversy to address when it has not been notified of any specific covenant Plaintiff is alleged to have breached or failed to enforce.

Moreover, Defendant cannot dispute Plaintiff's claims that the Subject Property is not in compliance with the Declaration as the unkempt nature of the property is undeniable and readily apparent, as demonstrated by the photographs and affidavit provided herewith. Therefore, the fact that Defendant has failed to maintain the exterior of the Subject Property may be determined as a matter of law with no issue of material fact existing, and summary judgment should be granted on this claim.

CONCLUSION

Therefore, in light of the foregoing arguments and the materials provided herewith, this Court should grant summary judgment in favor of Plaintiff as to Defendant's counterclaims.

Respectfully submitted,

/s/ Christian Saville

Christian Saville (SC Bar No. 103272)

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ATTORNEY FOR PLAINTIFF

October 4, 2019
Columbia, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-40-04658

Sterling Hills Homeowners' Association,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

MOTION TO RECONSIDER

YOU WILL PLEASE TAKE NOTICE that the Defendant moves before this court pursuant to Rules 52 and 59, SCRCP, for an order reconsidering, altering, amending, and/or clarifying the order filed November 22, 2019, in this action.

The Defendant so moves on the following grounds:

1. The Defendant is entitled to a jury trial in this case. Compulsory, at-law counterclaims made by a defendant in a case in which the plaintiff has asserted only causes of action that sound in equity must be tried by a jury if a jury demand has been made on the claim. *Wachovia Bank, N.A. v. Blackburn*, 407 S.C. 321, 755 S.E.2d 437 (2014); *Johnson v. S.C. Nat. Bank*, 292 S.C. 51, 54-56, 354 S.E.2d 895 (1987). The Defendant's counterclaims are compulsory. They arise out of the same set of actions on which the Plaintiff bases its claims.
2. Furthermore, the Plaintiff pled a breach of contract claim against the Defendant seeking a judgment for damages. That is an at-law claim. See, e.g., *First Citizens Bank & Trust Co. of S.C. v. Hucks*, 305 S.C. 296, 408 S.E.2d 222, 223 (1991). A defendant waives his right to a jury trial if he asserts a legal but permissive counterclaim where the plaintiff's complaint pleads only equitable causes of action. *Blackburn*, 407 S.C. at 330; *Johnson*, 292 S.C. at 54-56.

3. Under the South Carolina Constitution, “[t]he right of trial by jury is preserved inviolate.” S.C. Const. art. I, § 14. “This guarantee preserves the right to a jury trial in those cases where jury trials were allowed at the time of the adoption of the Constitution in 1868.” Cooper v. Poston, 326 S.C. 46, 48, 483 S.E.2d 750 (1997). “Under the common law, legal actions for the recovery of money were triable by a jury.” Id. Consequently, our South Carolina Constitution preserves the right to a jury trial in an action in which the plaintiff seeks a money judgment. Id.
4. The Defendant has retained his right to a jury trial on the Plaintiff’s damages claim against him and on his at-law claims against the Plaintiff.
5. The court’s order, however, has violated the Defendant’s constitutional right to a jury trial. See S.C. Const. art. I, § 14; Cooper, 326 S.C. at 48.
6. Despite the Defendant articulating good reasons at the hearing why the case should not be referred to the Honorable Joseph M. Strickland if it was to be referred to anyone, the court ignored the Defendant’s well-founded concerns that Judge Strickland might not be able to provide the Defendant with a fair trial in light of previous proceedings in another case in which the Defendant appeared in Judge Strickland’s courtroom and argument got quite heated. Instead, the court just accepted the Plaintiff’s suggestion and referred to the case over the Defendant’s objection to reference to this particular master-in-equity. Indeed, the court’s order does not even discuss the issue of whether Judge Strickland might not be the appropriate judge to hear this case.
7. The court should not have dismissed the Defendant’s counterclaims for breach of contract and for violation of the South Carolina Unfair Trade Practices Act, S.C.

Code Ann. § 39-5-10, *et seq.* Dismissal cannot be properly granted when, viewed in the light most favorable to the non-moving party, “the facts alleged [in the non-moving party’s pleadings] and inferences reasonably deducible therefrom would entitle the [non-moving party] to any relief on any theory of the case.” Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601 (1995). The court did not apply this standard.

8. The court determined that the Defendant did not plead how he claimed the Plaintiff breached the contract contained in the covenants. That is not true. All of the Defendant’s affirmative defenses and counterclaims (including the one for breach of contract) in his pleading begin with the statement “[e]ach assertion set forth in this pleading that is consistent with the following is incorporated herein by reference as if here set forth verbatim.” The Defendant’s pleading states the following things, any of which would be breaches of the covenants contract: that the Plaintiff has “refus[ed] to hold elections for directors and operat[ed] in flagrant disregard of the covenants the Plaintiff claims bind the property subject of this case” and that “[t]he Plaintiff has improperly assessed purported fines and assessments and has improperly taken actions against members or purported members of the Plaintiff.”
9. The court’s assessment that the Unfair Trade Practices Act does not apply to a homeowners’ association is just wrong. It is not supported by the language of the Act or of opinions interpreting it. (To the extent the court relied on the unpublished opinion improperly offered by the Plaintiff at the hearing, that, too, was error.)

10. An action for violation of the Unfair Trade Practices Act lies where there is a violation of the Act (i.e., an unfair or deceptive act in trade or commerce that impacts the public interest) that proximately causes damages to the party asserting the claim. See, e.g., Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 417, 458 S.E.2d 431 (Ct. App. 1995). “‘Trade’ and ‘commerce’ shall include the . . . distribution of any services and any property, tangible or intangible, . . . and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.” S.C. Code Ann. § 39-5-10(b). Trade and commerce are interpreted broadly for purposes of the Unfair Trade Practices Act. The text of S.C. Code Ann. § 39-5-10(b) states that:

“Trade” and “commerce” shall include the advertising, offering for sale, sale or distribution of any services and any property, tangible or intangible, real, personal, or mixed, and any other article, commodity or thing of value wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State.

11. Our Court of Appeals has held that “[t]he statute’s use of the words ‘shall include’ clearly suggests the legislature did not intend to limit ‘trade’ and ‘commerce’ to only the listed transactions.” Baker v. Chavis, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603 (Ct. App. 1991). “[T]he UTPA ‘should be given a liberal construction.’” McTeer v. Provident Life and Accident Ins., 712 F. Supp. 512, 515 (D.S.C. 1989) (quoting Connolly v. People’s Life Ins. Co., 294 S.C. 355, 359, 364 S.E.2d 475, 477 (Ct. App. 1988)).

12. A homeowner's association like the Plaintiff provides the services of a homeowners' association: maintenance of common elements, for example. That is "trade" or "commerce" for these purposes.
13. The Plaintiff was not entitled to summary judgment on the Defendant's counterclaims in this case. "[S]ummary judgment may be rendered only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Additionally, it must be shown that further inquiry into the facts of the case is not desirable to clarify the application of the law." Folkens v. Hunt, 290 S.C. 194, 196, 348 S.E.2d 839, 841 (Ct. App. 1986). "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party. Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004). Respectfully, the Defendant must note that the court did not view the record and draw reasonable inferences from it in the light most favorable to the Defendant. The record contained at least a scintilla of evidence (more, really) to support each element of the Defendant's causes of action.
14. But, perhaps more importantly, the Plaintiff never made a factual showing to the effect that it was entitled to summary judgment on the counterclaims. "The party seeking summary judgment has the burden of clearly establishing by the record properly before the court the absence of a triable issue of fact." Owens v. Magill,

308 S.C. 556, 562, 419 S.E.2d 786, 790 (1992) (emphasis added). “A party who fails to show the absence of genuine issue of material fact is not entitled to summary judgment even though his adversary does not come forward with opposing materials.” Standard Fire v. Marine Contracting, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990). The Plaintiff’s affidavits are sparse at best and certainly do not provide evidence tending to show that the Defendant is wrong about anything he has contended. For example, the affidavits do not show that Ella Calvert took office as a duly elected director of the Plaintiff. The Plaintiff never got the record to summary judgment readiness to begin with.

15. The court should have granted the Defendant’s motion for summary judgment as to the Plaintiff’s claims. The Plaintiff presented no evidence of damages or ongoing harm. The Plaintiff’s own pleadings show that it complains, basically, of two kinds of breaches of duty by the Defendant: breaches of non-existent covenants and regulations (such as him not painting his garage door white) and “breaches” of covenants so vague that there is no objective standard by which one could reckon whether the Defendant violated them. With no set of guidelines or rules to guide those living in the subdivision at issue about whether their conduct violates these indefinite covenants, our law is settled that they are unenforceable. Sea Pines Plantation Co. v. Wells, 294 S.C. 266, 363 S.E.2d 891 (1987).
16. Given the passage of less than 20 minutes between when Plaintiff’s counsel submitted the proposed order that became the court’s order in this case and when the court electronically signed and filed it, the undersigned would be amazed (and impressed) to discover that the judge who did that signing and filing actually read

the order before doing so. A studied consideration of the proposed order would surely have prompted the court to refuse to file it.

17. This motion is also based upon all applicable statutory law, case law, common law, and the record in this action. Further, the Defendant specifically incorporates into this motion by reference all arguments he made at the hearing on the motions that produced the November 22, 2019, order, as well as incorporating the chart previously filed in this case that shows that the Plaintiff lacked evidence to support its claims against the Defendant. The Defendant also reserves the right to submit a memorandum in connection with this motion.

Pursuant to Rule 11, SCRCPP, the undersigned affirms that no consultation in advance of the making of this motion would have served a useful purpose.

Respectfully submitted,

/s/ Andrew S. Radeker
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 ELLIOT HAYES

Columbia, South Carolina
 December 2, 2019

Drew Radeker

From: Christian Saville <Christian.Saville@mccabetrotter.com>
Sent: Friday, November 22, 2019 10:33 AM
To: Russo, Thomas A. Law Clerk (John Elliott)
Cc: Drew Radeker
Subject: Proposed Order - Sterling Hills HOA v. Hayes - 2018CP400658
Attachments: 182957.docx

Good morning Mr. Elliott,

I hope everyone has been doing well. I have attached a Word version of the requested Proposed Order in Sterling Hills v. Hayes as I know sometimes a Word copy is desired in case of need for edits and revisions.

Please do not hesitate to let me know if his Honor would like me to provide anything further.

Thank you,

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Drew Radeker

From: efiledonotreply@sccourts.org
Sent: Friday, November 22, 2019 10:52 AM
To: Drew Radeker
Cc: Rhonda Schaub
Subject: Courtesy NEF RE: 2018CP4004658

******* IMPORTANT NOTICE - READ THIS INFORMATION *******
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A filing has been submitted to the court RE: 2018CP4004658

Official File Stamp: 11-22-2019 10:51:23 AM
Court: CIRCUIT COURT
Common Pleas
Richland
Case Caption: Sterling Hills Homeowners Association Inc vs Elliot Hayes
Document(s) Submitted: Order Dismissing Defendant's Motion for Summary Judgment Gra Order Dismissing Defendant's Motion for Summary Judgment Granting Plaintiff's Motion to Dismiss and Motion for Summary Judgment and Order of Reference to Master in Equity
Filed by or on behalf of: Thomas A. Russo

This notice was automatically generated by the Court's auto-notification system.

The following people were served electronically:

Alexander Paul Zuraff for Sterling Hills Homeowners Association Inc
Andrew Sims Radeker for Elliot Hayes
Valerie Garcia Giovanoli for Sterling Hills Homeowners Association Inc
Christian Saville for Sterling Hills Homeowners Association Inc

The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:

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1 STATE OF SOUTH CAROLINA ) GENERAL SESSION  
2 COUNTY OF RICHLAND ) 2018-CP-40-04658  
3 STERLING HILLS HOMEOWNERS )  
4 ASSOCIATION, INC., )  
5 PLAINTIFF )  
6 VS. )  
7 ELLIOT HAYES, )  
8 DEFENDANT )

9 OCTOBER 14, 2019  
10 COLUMBIA, SOUTH CAROLINA

11 B-E-F-O-R-E:

12 HONORABLE THOMAS RUSSO, JUDGE

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

14 FOR THE PLAINTIFF:

15 CHRISTIAN SAVILLE, ESQ.

16 FOR THE DEFENDANT:

17 ANDREW S. RADEKER, ESQ.

18

19

20

21

22

23

24

25

1 THE COURT: The next matter is Sterling Hills  
2 Homeowners Association Inc vs. Elliot Hayes.

3 MR. SAVILLE: Good afternoon, Your Honor.

4 THE COURT: Good afternoon.

5 MR. SAVILLE: And Ma'am, Court Reporter, my name  
6 is Christian Saville, S-a-v-i-l-l-e.

7 MR. RADEKER: And I am Drew Radeker. That's  
8 R-a-d-e-k-e-r. I'm here for the defendant.

9 THE COURT: All right. And Mr. Radeker, this is  
10 your Motion, is that correct, sir?

11 MR. RADEKER: That's our Motion for Summary  
12 Judgment, just as a matter of housekeeping. There's like  
13 four Motions on the docket. One of them, which is the  
14 Plaintiff's Motion to Compel. They're withdrawing that.

15 MR. SAVILLE: Yes, Your Honor, we are withdrawing  
16 --

17 THE COURT: Oh, you know what, I didn't look pass  
18 the first one. I see, now.

19 All right, so the Plaintiff's Motion to Compel is  
20 resolved?

21 MR. SAVILLE: Yes, Your Honor.

22 THE COURT: All right.

23 MR. SAVILLE: And uh -- chronologically, all the  
24 Motions that were picked up, today, we filed a Motion to  
25 Dismiss on -- 6. After which point, Mr. Radeker filed a

1 Motion for Summary Judgment. And then, we filed a Motion  
2 for Summary Judgment.

3 THE COURT: Okay. All right.

4 MR. RADEKER: Your Honor, but we filed for Summary  
5 Judgment, first --

6 MR. SAVILLE: Well, it really doesn't matter when  
7 they were filed --

8 THE COURT: No. We're going to hear everyone.

9 MR. RADEKER: I was like -- I was sitting here  
10 thinking I lost my mind for a second.

11 Your Honor, I would like to hand up a copy of some  
12 documents.

13 I've, already, provided these to Mr. Saville.

14 THE COURT: Okay. All right. Thank you.

15 MR. RADEKER: Whether or not, which is important  
16 for Summary Judgment purposes -- they start out with a  
17 chart, which is, basically, what it is that the plaintiff  
18 says, My client did wrong. Or what he is doing wrong.

19 This is a Real Property Covenant Enforcement  
20 Action. It doesn't seem to like foreclose, to make any  
21 assessment, or anything like that.

22 The plaintiff's premise is that my client pays his  
23 -- using his lot in ways, that violate their covenants. And  
24 we very much disagree with that.

25 THE COURT: Okay.

1 MR. RADEKER: Against this chart. And I'm going  
2 to kind of go through it, not being verbatim. Because, it's  
3 kind of long. But, if you look at the Plaintiff's Amended  
4 Complaint.

5 They quote some provisions from the covenants  
6 indicating that -- um -- and the whole copy of the covenants  
7 was filed earlier in the case.

8 Indicating that, perhaps, they're saying, That my  
9 client violated these things.

10 And one of them is the Prohibition on not just  
11 offensive or illegal activities as determined by the  
12 developer or the board of directors being carried out on the  
13 while with the files.

14 Record says, That I've got -- cause there's no  
15 evidence of the record that the incidence has occurred.

16 There's no evidence of any illegal activity.  
17 There is no evidence of any obnoxiousness or offensiveness  
18 which is kind of indefinite. And that's a problem, too.

19 And there's no evidence of any determination by  
20 the developers or the board of directors. There is not a  
21 scintilla of evidence of illegal activities. And, probably,  
22 percentage of the case is in the materials, that we handed  
23 up -- the -- and the Sea Pine Planation Case.

24 Other than the prohibition of illegal activities.  
25 This language is, probably, too indefinite to be enforced in

1 any event. Because, how does one determined what is  
2 obnoxious or offensive? These are subjected standards.

3 And that's something that Mr. Hayes points out in  
4 his affidavit was, I've only ever seen the vagueness request  
5 from the plaintiff to changed what I'm doing. I can't tell  
6 how I'm suppose to change what I'm doing with regards to  
7 their request.

8 The second thing that they say, Is that my client  
9 violated the direction of the covenants, nor that anything  
10 be done on the lot, which is maybe kind of annoyance or  
11 nuisance to any homeowners in the community. Not, only, is  
12 that, also, probably too indefinite to be enforced. Because  
13 how can you tell what is an annoyance or a nuisance? There  
14 is no evidence in the record of any other subdivision having  
15 been annoyed or nuisance by anything that my client has  
16 done, or anything that has happened on his lot. And there's  
17 no evidence in the record of any potential for anyone to  
18 become annoyed or nuisance by any such events. So, there's  
19 not a scintilla of evidence of annoyance or nuisance.

20 Another thing that the plaintiff says, Is that  
21 after demands for lawn maintenance compliance were made.

22 And the covenant says, It have to be made by the  
23 developer or architectural control about it. That Mr. Hayes  
24 has failed to comply with lawn maintenance. What the record  
25 says about that is nothing in any statement or any affidavit

1 to the effect that this provision has been violated.

2 There's a statement in my client's affidavit that he --

3 again -- that there was only ever heard from vagueness

4 request and demands from plaintiff about what it perceives

5 to established and maintain the property. While the things

6 they complain about are very petty.

7 Here it says, The complaints were also surveyed.

8 There was no way for him to objectively measure whether he

9 was complying or not.

10 And he gives an example with that. And that is,

11 "Yard needs attention."

12 There's, also, no evidence that any such demands

13 was made by the developer, or by an architectural controller

14 about it. The only evidence in the record about whether

15 there's been an architectural controller or architectural

16 review board, or such established here, is that there has

17 not been one established.

18 So, there's no scintilla of evidence, they're in

19 such demand that was ever made in this case.

20 Uh -- the one that is on this third page of this

21 chart is very, very, long. So, I won't go into it.

22 But, it goes to -- it provides the covenants to

23 fail to maintain the lot of the structure, and it has this

24 long list parts of the expense that would have to be

25 maintain. There's no statement in any affidavit in this

1 case to the effect that this provision has been filed.

2 In fact, there is a statement in my client's  
3 affidavit that, "I have not fail to maintain my house and  
4 lot, that are involved in this case. I have taken good care  
5 of them. And they are in good state of repairs.

6 So, there is not a scintilla of evidence that he's  
7 violated that. Also, probably, at least to parts of that  
8 covenant setout is too indefinite to me.

9 There's another covenant provision where -- and  
10 this is quoting from the Amended Complaint.

11 They sum up, basically, that last one in saying,  
12 That the defendant has failed to keep the lot in a good stay  
13 of maintenance and repair.

14 Again, there is no statement in any affidavit  
15 that, that's true.

16 Um -- and Mr. Hayes' statement in his affidavit,  
17 That he's kept his house and lot in good repair.

18 So, there is no scintilla of evidence about that.

19 They, also, say in an Amended Complaint, That the  
20 defendant has failed to give the lawn attention and repair.

21 This is contradicted by photographs that are in  
22 the record, that are attached to the affidavits. There was  
23 an affidavit by Kayla Stokes. So, she works for the  
24 property management company for the plaintiff. And an  
25 affidavit from my client we submitted on Thursday which is

1 attached photographs that were taken that day. They show  
2 that they are disclaiming there is wrongness between when  
3 the pictures were taken, and show the condition of the  
4 house. And it looks just fine.

5 And anyway, my client notes, And this is how it  
6 looks. And, honestly, I haven't gotten around to cutting  
7 the lawn in about three weeks. And it really looks just  
8 fine in the pictures.

9 So, there's no scintilla of evidence that he fails  
10 to give the lawn attention and repair. But, that's,  
11 probably, too indefinite to be enforced in this.

12 They, also, say, That my client has failed to make  
13 repairs needed to the fence.

14 In the various pictures that are submitted,  
15 there -- the fence of the left side of house, at the time,  
16 that Kayla said, This photograph was taken -- was broken in  
17 those older picture.

18 But, there's no evidence of any present failure to  
19 comply with the demands to repair the fence.

20 And Mr. Hayes' affidavit makes it clear, that  
21 what's in the said affidavit does not represent the present  
22 condition of the house.

23 So, there is no scintilla of evidence that the  
24 broken fence is an ongoing condition.

25 And that's important because the primary relief

1 that the plaintiff seeks is an order in joining my client to  
2 change the way that he's dealing with the lot. So, there's  
3 no evidence that there is a broken fence out there, now.  
4 That he needs to go fix.

5 They, also, say, that the defendant has failed to  
6 install blinds.

7 There's a couple like this. There's no  
8 requirement in the covenant of bylaws to install blinds.  
9 The photograph shows that the windows have curtains. And  
10 there is no indication that, that was violated by the  
11 covenants or bylaws. So, there is no obligation of my  
12 client to do that.

13 There's an allegation that my client has failed to  
14 trim the overgrown bushes.

15 Again, there's evidence showing that the bushes  
16 have been trimmed between the time that Kayla says, These  
17 photographs have been taken and the present.

18 So, he's out there trimming the bushes. No  
19 evidence of any present failure to comply with the demand to  
20 trim the bushes. And there's really not an scintilla of  
21 evidence that there's overgrown bushes ever, really, or that  
22 there are ongoing conditions. If you were to determine  
23 looking at the earlier photographs, that they were  
24 overgrown, at that time. They are not like that, now.

25 Uh -- they, also, say, they complain that my

1 client failed to paint his garage door white.

2 There's no requiring of the covenant or the bylaws  
3 that he paints his garage door white. The photograph shows  
4 that the garage door was painted, just not white. But, he  
5 doesn't have an obligation to paint it white.

6 They, also, say, that he has failed to repair the  
7 shutters. There is no evidence in this record that the  
8 shutters are broken or needs repair. There's no statement  
9 in anybody's affidavit to that effect. The photographs  
10 don't show any broken shutters. I'm not sure of the  
11 shutters. But, they are not broken.

12 So, there's not a scintilla of evidence that the  
13 shutters are broken and needs repairs.

14 They, also, say, That my client has failed to  
15 clean the sidings. The photographs shows that the siding is  
16 not dirty. In fact, it shows that it's been clean between  
17 when the photographs were taken.

18 So, there's no scintilla of evidence that the  
19 dirty siding is some ongoing condition that needs to be  
20 remedied. If it gets dirty. My client doesn't it.

21 And they, also, says, He failed to remove the  
22 trash and recycling from view. But, the covenants and  
23 bylaws doesn't require that the trash can or the recycling  
24 can be kept from view in any way. It's kept neatly.  
25 There's a photograph that show on the side of the house.

1 I guess, they want them to be behind the house.  
2 But, there's no requirements they be behind the fence, or  
3 that they be kept from view in any way.

4 And this one is very interesting. Because, they  
5 were adamant about this. They amended their complaint that  
6 says something about this.

7 They say, That my client has allowed and continues  
8 to allows an individual to reside or sleep on a porch, that  
9 is attached to his house for an extended periods of time.  
10 There is, absolutely, no evidence in the record that, that  
11 has ever occurred.

12 In fact, the only evidence in the record about it  
13 is that Mr. Hayes' statement that, I never let anybody do  
14 that, and I wouldn't.

15 So, there's no scintilla of evidence about that.

16 They, also, say, That, that individual who they  
17 cannot identify. And can't provide any proof that he was  
18 ever there. Urinates into a bucket off of the porch, and or  
19 change his clothes while on the porch, exposing himself.

20 Again, there is no evidence that this has ever  
21 happened in the record.

22 Except Mr. Hayes' statement that says, I would not  
23 allow someone to do that in my house.

24 They, also, say, That my client's breach of the  
25 covenants, whatever those might be, affects the appearance

1 and the aesthetics of the community. And diminishes the  
2 overall values of the homes of the communities. There's  
3 been no evidence that my client breached any covenants.

4 And further, there's been no evidence of any  
5 diminishing appearance or diminished value of any property  
6 in the suburbs. There was no scintilla of evidence about  
7 that.

8 They say, That the defendant's breach of the  
9 covenants has caused the plaintiff to incur attorney's fees.  
10 No evidence breached of the covenant.

11 There's, also, no evidence they've incurred any  
12 attorney's fees about it.

13 In fact, we asked them in discovery to give the  
14 information of attorney's fees, since they sought it.

15 And they said, We weren't entitled to anything.

16 So, there is no evidence about that.

17 Finally, they say, the defendant's breach of  
18 covenant has caused lack of harmony and progress of  
19 community.

20 Again, no evidence breach of covenants. No  
21 evidence of the lack of harmony.

22 They say, they contend they have suffered and will  
23 continue to suffer irreparable harm, if they don't bring an  
24 injunction. There is no evidence my client breach a  
25 covenant. No evidence of the plaintiff having suffered any

1 harm. No evidence of anybody who will suffer harm in the  
2 future.

3 And they finally said, That there's no adequate  
4 remedy of law and damage to be unsatisfactory to remedy my  
5 client's violations, submits no evidence of any violations.  
6 There is no evidence that any remedy of law won't be  
7 adequate, no evidence to damages being sufficient. That's  
8 their whole case. Those are the facts that they alleged on  
9 which they base their case.

10 And it's their obligation at Summary Judgment to  
11 come forward as to factual showing as to each essential  
12 element of their case. They haven't done that.

13 So, we ask, That you grant Summary Judgment on  
14 their client. Thank you.

15 THE COURT: Okay. Thank you, Mr. Radeker.

16 All right. I will give you a chance to respond,  
17 Mr. Saville.

18 MR. SAVILLE: Yes, Your Honor.

19 Mr. Radeker is right. This is just, essentially,  
20 an outstanding attorney's fees. This case is all about  
21 covenant enforcement.

22 The association wishes we weren't here, today.

23 Your Honor, I believe, we have some photographs  
24 that weren't attached to our Motion for Summary Judgment  
25 that we filed, a couple weeks ago.

1           Those included photographs that are referenced in  
2 the affidavit of the property manager who actually took the  
3 photos. And I noticed that it's perhaps not the best  
4 photography, that you're seeing.

5           But, it does strongly evidence an unkept yard. A  
6 home that is in dire need of pressure washing.

7           I've had shutters. And if you look closely, I  
8 wish it was little more seen convenient.

9           But, I think, the photograph from the passenger's  
10 seat of the vehicle where it shows the fence -- should be  
11 the top of the fence, that's in disrepair.

12           Also, attached to our affidavit were photos that  
13 were filed in our complaints. And we do notice from  
14 receiving Mr. Radeker's photographs that he filed, that his  
15 client has, apparently, mowed his lawn, which we do  
16 appreciate it. And we are glad that this lawsuit was able  
17 to inspire that behavior.

18           But, the fact remains -- this is clear of the face  
19 of the photographs, that this home is in serious condition  
20 for repair. And is effecting the harmony and aesthetics of  
21 the community.

22           If you look at the front porch -- and I should  
23 note that, what was referenced, regarding, an individual  
24 staying on the front porch and exposing himself to residents  
25 that is a significant concern. And we are, actively,

1 looking for a police report that, we believe, will  
2 substantiate that allegation.

3           However, it is our understanding that he is no  
4 longer staying there. So, to the extent, that is true, no  
5 one has substantiated that. We appreciate that.

6           I think, if you look at the pictures of the front  
7 porch, which has a good bit of just sort of trash and  
8 unsightly furniture --

9           THE COURT: Is there any other way that we can  
10 look at yours?

11           MR. SAVILLE: I'm sorry, Your Honor.

12           Would you like for me to approach?

13           THE COURT: We got the pictures, here. But, I  
14 just don't know -- are they numbered? Are your pictures  
15 numbered?

16           MR. SAVILLE: They are, unfortunately, not. I  
17 wish they were. Actually, some of them will have the file  
18 name at the top --

19           I think, if you look at the photo that the file  
20 name that ends in 49, in the top center.

21           That a good showing of the front of the house,  
22 which faces the street, the unkept exterior, the unkept  
23 yard.

24           I do, respectfully, disagree with Mr. Radeker's  
25 assessment of the shutters.

1           Now, we do show that we have ample photographic  
2 evidence of a breach with the covenants here --

3           THE COURT: Let me ask you this, there's a lot of  
4 -- let me go through a few things Mr. Radeker was pointing  
5 out that -- like for example, the garage door being painted  
6 white. Is that in the covenants? If it's not in the  
7 covenants why is there a claim?

8           MR. SAVILLE: Your Honor, candidly, he do not  
9 think that there is a exclusive provision requiring the  
10 garage door to be painted white.

11           It is our understanding that the association  
12 believes that the painting of the garage door is unsightly.  
13 And therefore, it falls under the Article 8 Section 1  
14 Provision of Declaration regarding homeowner's maintenance  
15 and responsibilities.

16           But, Judge, I would submit that the primary  
17 concerns here are the actual, physical, upkeep of the  
18 exterior.

19           THE COURT: Yeah.

20           MR. SAVILLE: The pressure washing and the yard.

21           THE COURT: Is there anything in the covenant that  
22 says, You have to keep the recycling and trash cans out of  
23 the public view?

24           MR. SAVILLE: Not specifically, Your Honor.

25           The Provision of Article 8 Section 1 regarding

1 owner's maintenance, responsibilities, and provides that it  
2 shall be the responsibility of owner of lot to include, but  
3 not be limited to the painting, maintenance, repair, and  
4 replacements. And, then, it lists various parts of the  
5 yard, which are deemed which to dwellings and lots, and the  
6 lawns, trees, shrubs, fences, grass, driveways and walkways  
7 of the lot.

8 We would feel that, that would indicate the  
9 owner's responsibility to keep in good repair and status.

10 Respectfully, as to Mr. Radeker's argument that  
11 these provisions are too vagued to be enforced,  
12 particularly, with the section regarding underbrush and the  
13 finished yards, and landscaping. This is a typical -- these  
14 are typical provisions you see in Homeowner's Association  
15 documents. And it's a matter of just common practice. This  
16 is why people choose to live in Homeowner's Association and  
17 pay the assessment of staying.

18 I understand, that they are going to take care of  
19 their yard.

20 They are going to keep their house looking nice.  
21 It's a pretty clear -- It, specifically, list.

22 THE COURT: Well, let me ask you something. Do  
23 they have any covenant, like -- uh, if a homeowner violates  
24 one of the covenants. Is there a provision under the  
25 covenant for a fine, or some type of monetary value?

1 MR. SAVILLE: There is not a fining authority in  
2 --

3 THE COURT: Cause if you got to come to court  
4 every time someone does this. You're going to continue to  
5 run into a thing where -- like -- and I don't know if this  
6 happened. But, that Mr. Radeker's client gets sued. You  
7 serve him with this paperwork.

8 And the next thing you know, he's cut his grass.  
9 He's washed his siding. He's cleaned up the area.

10 And, now, it's all moot.

11 MR. SAVILLE: Well, Your Honor --

12 THE COURT: Then, you know, it just seems like a  
13 very inefficient way of enforcing the covenants.

14 MR. SAVILLE: It is, always, desirable to have the  
15 fining authority in the covenants.

16 Unfortunately, it is our position that without  
17 these exclusive provision in the covenants. He can't resort  
18 in that.

19 Um -- I do want the Court to know that bringing a  
20 suit has been the last resort of the association. They have  
21 sent multiple notices to Mr. Hayes. Our law firm has sent  
22 notice to Mr. Hayes. This has been a pretty long, ongoing  
23 problem with Mr. Hayes.

24 And the fact that he -- and while he -- it looks  
25 like he did mow his lawn. It still appears that the front

1 of the house is unsightly. And there are some repairs that  
2 are needed.

3 And we feel that anything short of an Order in  
4 joining him to comply with these provisions, this is going  
5 to result to them just kind of skating by, again, waiting  
6 for the association to sue him, again.

7 THE COURT: Okay. All right. Anything further?  
8 I know they set this Motion?

9 MR. SAVILLE: On his Motion, Your Honor?

10 I will defer to the Complaint, there are specific  
11 provisions. And I do feel that with our photographs which  
12 were taken, you know, these were taken last week or so.  
13 Maybe two weeks ago, providing that the affidavits of both  
14 the property manager and the president's HO report. This is  
15 an ongoing problem.

16 THE COURT: All right.

17 MR. SAVILLE: Your Honor, we feel like this is an  
18 ongoing problem which, you know, will undoubtedly be  
19 repeated.

20 Thank you, Your Honor.

21 THE COURT: Thank you, sir.

22 MR. RADEKER: If I could speak to some of it,  
23 briefly?

24 THE COURT: Yes, sir.

25 MR. RADEKER: There's -- you know, they,

1 certainly, feel the garage door is an unsightly admission to  
2 be able to decide -- there's no affidavit or any evidence in  
3 the record from anyone to the effect, that they feel or even  
4 perceive that to be unsightly.

5 I guess, I will say this, Is the Motion that I  
6 filed, that these photographs were taken just a couple of  
7 weeks ago is supplied by Mr. Hayes' affidavit, in which, he  
8 says, This is the condition of my lawn as it was on Thursday  
9 morning. And it hadn't been cut in three weeks.

10 He saying, I was -- you know, I was kind of  
11 worried. I started getting a little jagged, at first. And  
12 it's a whole lot shorter than it is on those other pictures.

13 Furthermore, since, there's no evidence of any  
14 ongoing condition that needs to be met. And there's no  
15 evidence of the association having suffered any damages, and  
16 anything that's in the record. There's nothing for the  
17 Court to address.

18 Opposing Counsel talked about, This is why people  
19 want to be in, you know, homeowner's associations to have  
20 somebody look out for the estate's consideration.

21 In the SEA PINES PLANTATION COMPANY vs. Well case  
22 that we handed up. The Supreme Court discussed another case  
23 which the Court of Appeals upheld, basically, action taken  
24 in their refusal to approve plans for aesthetics reasons,  
25 specifically, covenant would be upheld, rare covenant were

1 appropriate as for providing guidelines for the enforcement.  
2 Here, there are no guidelines for enforcing. All there is  
3 is the covenants and the bylaws.

4 And if there's something else.

5 One, it hasn't produced discovery to this.

6 Two, pursuant to, relative to Section  
7 20-27-30-130, it would not be enforceable. Because, it's  
8 never been recorded in Register of Deeds.

9 So, basically, the association's position is it's  
10 got to look like we want it. We don't have to tell you how  
11 that is. But, it's got to look like we want it to look. We  
12 don't have to make rules to tell you, that this got to look  
13 a certain way. It's just got to look, however, we would  
14 like for it to look.

15 And we can tell you even in the vagueness terms  
16 possible to make it better, until it satisfies us, according  
17 to standard of being not a typical home.

18 So, I guess, I'm just going to say this, That does  
19 not a case make.

20 THE COURT: Anything further, Mr. Saville?

21 MR. SAVILLE: Thank you, Your Honor.

22 I would just like to, briefly, point out that  
23 Article 8 Section 1 of the Declaration, specifically, list  
24 walls, fences, sidings, exterior doors, fixtures, lawns,  
25 trees. It, specifically, enumerates what need to be kept

1 up.

2 And we have photographic documentation of those  
3 things, Your Honor.

4 And the --

5 THE COURT: How long was this copy before this  
6 hearing date? As I read some of these restrictions to these  
7 covenants in manner of keeping. How would anyone view any  
8 unsightliness to lot, or fail to maintain landscaping,  
9 grass, in the manner of keeping with the term of the  
10 developer or architectural controller? How is someone  
11 suppose to know? How are they suppose to follow that?

12 MR. SAVILLE: Well --

13 THE COURT: I don't know if the developer would  
14 find it unsightly if I chose to let my yard be like  
15 Southwestern book is cactus and dirt, instead of grass and  
16 rocks? Do they find that unsightly? And tell me I have to  
17 change the house?

18 MR. SAVILLE: Well, Your Honor, I think, that Mr.  
19 Hayes would have understood that the architectural relief  
20 that he founded unsightly, had they provided them notice  
21 that his yard was being repaired.

22 As just to matter of public policy, it's  
23 ultimately, impossible to say, once yard grass grows to 3  
24 2/4 inches or something to that extent, then it's unsightly  
25 or unkept.

1 I think, that's just the nature of equitable  
2 action of restrictive covenants. And that it requires  
3 common sense application.

4 And I understand, Your Honor, what the two parties  
5 are agreed to be bound by.

6 And I don't feel that the pictures shown in front  
7 of the house, and in the front yard, then to any reasonable  
8 interpretations of good management through the area.

9 THE COURT: All right. Let's see -- now does that  
10 -- and I don't -- and Mr. Saville, if it doesn't, you tell  
11 me.

12 I'm assuming that the basis of your Motion is that  
13 --- and maybe I should just kind of see, and let you tell me  
14 the basis of your Motion.

15 MR. SAVILLE: Sure, Your Honor, our Motion to  
16 Dismiss.

17 We file as to two of Mr. Hayes' Counterclaims.

18 The first one was for Breach of Contract. He  
19 alleged that -- he alleged that the blanket elements for  
20 Breach of Contracts in his Counterclaim.

21 I could only assume that he's referring to the  
22 declaration -- the covenants we're seeking to coincide to  
23 see if that's the contest, he's alleging.

24 But as to the breach of a contract, he just simply  
25 says, We have breached the contracts.

1 I don't know what I'm supposed to do. The  
2 defendant gets -- it hasn't been articulate that I have  
3 breached. He does alleged damages, just in the form of  
4 damages, not how, or what type of damages?

5 But, particularly, the lack of a designated breach  
6 of a contract, leads us to dismiss some cases that don't  
7 exist.

8 So, that would be to the First Counterclaim, Your  
9 Honor.

10 As to the Second Counterclaim, Mr. Radeker filed a  
11 counterclaim under the Unfair Trade Practices Acts for South  
12 Carolina.

13 Now, under a Trade Practices Acts regulates  
14 business involved in trades or commerce. Commerce is,  
15 actually, defined as the advertising, offering for sale,  
16 sale or distribution of any services and any property,  
17 tangible or intangible, real, personal or mixed, and any  
18 other article, commodity or thing of value wherever it  
19 situate.

20 Your Honor, if I may approach?

21 I have a copy for Mr. Radeker as well. I should  
22 note that this is an unpublished opinion --

23 THE COURT: Then, we would object to it being  
24 used.

25 MR. SAVILLE: As matter of fact, all of this is

1 present. I just want to note that this matter has been  
2 involved before. It's on the last -- next to the last page.

3 THE COURT: Also, let me just make -- you know,  
4 we've gone to digital. We don't have Case Law -- and for  
5 whatever reason, I don't know if it's my hard thumb drive or  
6 whatever. What is it, guidelines?

7 MR. RADEKER: It's -- yes. It's Motion on Summary  
8 Judgment --

9 THE COURT: It comes up as gibberish. I can't  
10 read it.

11 MR. SAVILLE: Oh no.

12 THE COURT: I don't know. Because in the  
13 mainframe, it's clear. Maybe it could just be junk around  
14 it.

15 MR. SAVILLE: Would that be Notice of our Motions?

16 THE COURT: Yes, it's all the Motions.

17 MR. RADEKER: What would you like for us to do  
18 about that?

19 Because, I'm sure each of us has a copy, here. I  
20 don't want to hamstring my opponent or anything. And I'm  
21 not doing what I was here supporting this argument. We can,  
22 certainly, ask -- expect to get our hearing in an email to  
23 you.

24 THE COURT: That would be what I would suggest.  
25 And I'll hear you. And I read notes. And I hear from

1 y'all, if you could email to us a copy of the Motion, and  
2 anything that you submitted in support of that.

3 MR. RADEKER: Yes, sir.

4 THE COURT: That will be helpful. If you just  
5 send that to us.

6 MR. RADEKER: Yes, Your Honor, thank you.

7 MR. SAVILLE: May I approach with my copy of my  
8 Motion?

9 THE COURT: I'm sorry?

10 MR. SAVILLE: May I approach with my a copy of  
11 Motion --

12 THE COURT: Yeah. Yeah. That will be fine.

13 MR. SAVILLE: Mr. Radeker, do you want to bring it  
14 up on yours?

15 MR. RADEKER: No. Well, I might it for a Motion  
16 you've already argued.

17 MR. SAVILLE: Case if you need to refer to it.

18 THE COURT: Okay. Thank you.

19 MR. SAVILLE: Your Honor, the case that I just,  
20 actually, passed up before, then. It involves the Spring  
21 Valley Home Association, in which the same argument was  
22 made. That it was a violation of the Unfair Trade Practices  
23 Act. And the Summary Judgment was granted on the basis that  
24 the HOA is not following the Unfair Trade Practices Act.  
25 And that was upheld by the Court of Appeals. I, actually,

1 made one for Mr. Radeker.

2 So, we would, also, like to move to dismiss that  
3 counterclaim on that basis.

4 And, then, Your Honor, we have that Motion for  
5 Summary Judgment.

6 I understand it's two different standards. I  
7 won't go through the Breach of Contract Counterclaim, and  
8 the Unfair Trade Practices Counterclaim, again. I'll just  
9 let you know that we are moved to dismiss on six. And if  
10 not on -- six, then my Summary Judgments.

11 THE COURT: Okay.

12 MR. SAVILLE: And Your Honor, we did move for  
13 Summary Judgment as to the defendant's Counterclaim for  
14 Declaratory Judgments.

15 It alleges that the Board association was  
16 operating ultra vires. It's wasn't articulated, how they  
17 are operating ultra vires. We're left to imagine to the  
18 extent that they were concerned with the longevity of the  
19 board members' term. We got affidavits from the property  
20 managers and president of the association, that for as long  
21 as they've been involved a quorum of members has not been  
22 present to actually hold a new election for new board  
23 members. It happens a lot in associations where it's just  
24 not all members were not interested in it.

25 THE COURT: Yes.

1           MR. SAVILLE: And the Nonprofit Corporation Act,  
2 actually, requires that there be certain amount of  
3 directors, to the directors are enforced to stay on as to  
4 their initially designated terms.

5           So, we would ask -- we would move for a Summary  
6 Judgment on that basis. That there's been no improprieties.  
7 And they are not operating ultra vires.

8           And, then, as another matter on Summary Judgments.  
9 The defendant alleged that we were denying him access to  
10 records of the association.

11           I imagine, the defendant is relying on the  
12 Provision of the Nonprofit Corporation Acts, South Carolina  
13 Code Section 33-31-1602, which does provide that a  
14 association or a nonprofit corporation should turn over its  
15 corporate records upon a written request or a demand.

16           Now, our affidavits that we provided for this  
17 Motion both property manager and the president, who are both  
18 responsible for the keeping of the corporate records, as  
19 well as the providing to the corporate records. They had  
20 both sworn they had never receive a written request or  
21 demand to see the records.

22           Likewise, nothing, in Discovery has turned up a  
23 written request or demand to see the records. So to the  
24 extent that, there is a counterclaim that we have been  
25 denying Mr. Hayes access to the records. There's,

1 absolutely, no evidence that he made a written request or  
2 demanded it. Therefore, there is no obligation to share the  
3 records. Should he like to see the records upon a written  
4 request or a demand, we would be glad to provide them. But,  
5 we do not feel there is an issue in material facts in that  
6 regard.

7 And, Your Honor, I think, that for now address the  
8 Motion of Summary Judgment.

9 THE COURT: All right, Mr. Radeker.

10 MR. RADEKER: All right. Thank you. Let me take  
11 the last, first. That's the easy one. They're entitled to  
12 have these records cause of action dismissed. Mr. Hayes  
13 requested these record by oral and not in writing.

14 And statute says, They got to be in writing.

15 So, if he makes some written request in the future  
16 and they refuses. Then, we will be back on that matter.

17 THE COURT: Sure.

18 MR. RADEKER: And they might do that.

19 But, all right. Looking at their Motions to  
20 Dismiss.

21 First, of all, they say, We can't tell what's in  
22 the breach of the contract is.

23 Is one, they refused to hold elections for the  
24 directors. And they've operated in a way of disregard of  
25 covenants by demanding that my client be made, but not

1 required by the covenants.

2 And that's under a heading where it says, First  
3 Counterclaim for Breach of Contract. But, there is a  
4 paragraph that I put under every such heading in every  
5 assertion of his pleadings are consistent with us. This  
6 incorporates a hearing by reference. That's above that  
7 under the unclaimed -- so, that would apply cause of action  
8 for breaching of the covenants upon contractual relationship  
9 between the parties.

10 As for the violations under the Trade Practices  
11 Act Cause of Action, not only are those thing true.

12 We've, also, alleged in our Unfair Trade Practices  
13 Act Cause of Action, that the plaintiff has improperly  
14 assessed reported fines and assessments. And has,  
15 improperly, taken action against members or board members of  
16 plans. The plaintiff, though, seems to be taking the  
17 position defecting what we're saying is because homeowner's  
18 association aren't involved as trade of commerce.

19 The plaintiff has actually set out the definition  
20 in their Motion from the Unfair Trade Practices act of what  
21 constitutes trade of commerce.

22 One, is cases that say, Construed at law.

23 Two, within the definition, it includes the  
24 distribution of any services.

25 Homeowner's association distributes the services

1 for the homeowner's association provides to its owners.  
2 That's trade of commerce under that extremely broad  
3 definition. As for Brown vs. Spring Valley Homeowner's  
4 Association, unpublished opinion are unpublished for a  
5 reason.

6           Somebody didn't want to say, This is the law.

7           And so, it's not the law. And doesn't constitute  
8 any precedent. Thank you.

9           THE COURT: All right. Well, if y'all email us  
10 your -- well, I've got some Motions, here.

11           MR. SAVILLE: And Your Honor --

12           THE COURT: Yes.

13           MR. SAVILLE: I should note -- I know there was  
14 kind of bunch of different things thrown in, today. But  
15 there was an actual Motion to Refer to Master and Equity, as  
16 well, so we filed as part of a Motion to Dismiss.

17           THE COURT: Okay.

18           MR. SAVILLE: If you would like to hear from me on  
19 that.

20           THE COURT: Yeah. Go ahead.

21           MR. SAVILLE: We do feel that should, Your Honor,  
22 be incline to grant our Motion to Dispose of Breach of  
23 Contract Claim, and the Unfair Trade Practices Act Claim,  
24 all we are left with our equitable claims and counterclaims,  
25 which has become the enforcement suit.

1           Therefore, it would be appropriate for a Master of  
2   Equity to hear this proceeding.

3           To the extent that, Your Honor, is not inclined to  
4   Dismiss the Breach of Contract Claim and/or the Unfair Trade  
5   Practices Act Claim. We still feel this would be the  
6   appropriate for master and equity. The association lies  
7   only with equitable causes of actions. The defendant raised  
8   two counterclaims, which I do call for legal remedies.

9           However, it's our position that those are  
10   permissive counterclaim and not compulsory. And that set of  
11   laws be raised in permissive counterclaim searching for a  
12   legal remedy. He still would waive his right to a jury  
13   trial. And it's in response to their counterclaim.

14           So, therefore, even if those two are not  
15   dismissed. We feel, we are entitled to have this heard by  
16   master and equity.

17           And I will go into the reason I feel these are  
18   permissive counterclaims, is that the defendant is  
19   attempting to make the case about corporate governments.  
20   He's challenging the priority of the board of directors, the  
21   prefaces of the Unfair Trade Rights. He has referenced  
22   their fighting, or foreclosure, or collection, or  
23   enforcement procedures against other people in the  
24   neighborhood. He briefly touched on. That's not the same  
25   transactions or occurrence as the owner failing to maintain

1 his yard and house. And we're bring this suit to make him  
2 clean it up. That's just not part of the same matter.

3 Any homeowner in this neighborhood through the  
4 private Covenant Enforcement Act Action for him to have to  
5 abide by the declaration. And, clearly, the quorums and the  
6 priorities of the board of directors have no response to  
7 file a lawsuit against the defendant.

8 Therefore, we do feel like those issues are  
9 separate apart from the current matter.

10 Therefore, permissive counterclaims.

11 And, therefore, he is not entitled to a jury  
12 trial.

13 Thank you, Your Honor.

14 THE COURT: All right.

15 MR. RADEKER: Speaking to that briefly, not only  
16 have we pled couple legal expository counterclaims. Well,  
17 the plaintiffs were -- their first off reaction is for  
18 Breach of Contract. And they plead that there weren't  
19 damages. Now, they haven't showed me evidence that there  
20 are counter damages. So we will be entitled to Summary  
21 Judgment on that. But, it's not like they pled this purely  
22 equitable case. And so, we don't get to the issue of  
23 whether the counterclaim are compulsory or permissive.  
24 We're entitled to a jury trial on that cause of action that  
25 they pled against. So, if they bring a new complaint. We

1 can get right to a jury trial.

2 Also, with regards to references, if you were to  
3 disagree with me on this and say, You shouldn't.

4 But, if you were. As decided with us to refer  
5 this case to someone, it should not be to master and equity.  
6 That's because, probably, master would recuse himself. He  
7 had heard a prior case that my client was involved in pro  
8 se.

9 I guess, to put it fairly possible for everyone  
10 involved.

11 Say, Things got rather heated, during the  
12 presentation of that case. And here he's is in emphatic  
13 viewpoints.

14 And so, I have known Judge Strickland long enough  
15 to know that it's likely, he would just recuse himself. So,  
16 that's all I have to say about --

17 MR. SAVILLE: Briefly, Your Honor, please?

18 THE COURT: Yeah.

19 MR. SAVILLE: Your Honor, I do think that would be  
20 up to the wisdom of Judge Strickland --

21 THE COURT: Sure.

22 MR. SAVILLE: To decide whether he's going to hold  
23 that Contempt Order against Mr. Hayes.

24 But, I did want to move that the first cause of  
25 action was a Breach of Covenant.

1           Thank you, Your Honor.

2           THE COURT: All right. I need y'all to send us  
3 the things we asked for. And I'll look at these and read  
4 what you send us.

5           MR. SAVILLE: Thank you, Your Honor.

6           MR. RADEKER: Thank you, Your Honor.

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1 STATE OF SOUTH CAROLINA)

2 COUNTY OF RICHLAND )

3 CERTIFICATE OF REPORTER

4 I, Thelma Salters, hereby certify that I  
5 reported the preceding case entitled Sterling Hills  
6 Homeowners Association Inc. vs. Elliot Hayes Docket  
7 No. 2018-CP-40-04658 Richland County Courthouse,  
8 October 14, 2019.

9 I FURTHER CERTIFY that the foregoing pages  
10 03 through 37 constitute a true, accurate and full  
11 transcript of said trial.

12 I FURTHER CERTIFY that I am not employed  
13 by any of the parties hereto and I have no financial  
14 interest in the outcome of said case.

15 IN WITNESS WHEREOF, I have heretofore set  
16 my hand and seal at Richland County on this day of  
17 July 23, 2020.

18 

19 Thelma Salters, Court  
20 Reporter and Notary  
21 Public for the  
22 State of South  
23 Carolina my  
24 Commission Expires:  
25

**STATE OF SOUTH CAROLINA**  
**COUNTY OF RICHLAND**

**IN THE COURT OF COMMON PLEAS**

**Case No. 2018-CP-40-04658**

**Sterling Hills Homeowners' Association,**

**Plaintiff,**

**vs.**

**Elliot Hayes,**

**Defendant.**

**DEFENDANT'S RESPONSES TO  
 PLAINTIFF'S DISCOVERY  
 REQUESTS**

The Defendant hereby answers the Plaintiff's interrogatories as follows:

(These answers are numbered to correspond with the numbering of the interrogatories to which they respond.)

**1. Witnesses:**

|                                                                             |                                       |           |
|-----------------------------------------------------------------------------|---------------------------------------|-----------|
| <b>Elliot Hayes</b>                                                         | <b>c/o counsel</b>                    | <b>No</b> |
| <b>Michael Taylor</b>                                                       | <b>10 High Glen Ct., Columbia, SC</b> | <b>No</b> |
| <b>Putative members<br/>of Plaintiff's purported<br/>board of directors</b> | <b>addresses known to Plaintiff</b>   | <b>No</b> |

- 2. The Defendant Elliot Hayes, is aware of facts supportive of his defenses and counterclaims in this case, including, but not necessarily limited to, that the Plaintiff's allegations are untrue; that the Plaintiff is operated unlawfully by persons claiming to be its directors, even though a the required quorum of Plaintiffs' members to elect directors has not participated in a director's election since at least 2002; that the supposed "board of directors" of the Plaintiff simply purports to appoint themselves as the Plaintiff's putative directors; that he has not violated the covenants; that the by-laws and any other purported rules and regulations of the Plaintiff are not recorded in the office of the Register of Deeds for Richland County, South Carolina; that the Plaintiff's purported notices of violations of the covenants are unspecific and vague; that the Plaintiff engages in selective enforcement of the covenants and what the Plaintiff believes the applicable rules are; that the Plaintiff has allowed obvious violations of covenants by others to go utterly unchecked; that the Plaintiff's violation of and failure to consistently and correctly enforce the subject covenants has causally contributed to a loss in value of his real property subject of this case; that the summons and complaint in this case were never**



served on him but that, rather, he found them stuck in the door to his house; that the Plaintiff itself has repeatedly and does routinely violate the covenants; that the Plaintiff has purchased real estate in violation of the covenants; that the Plaintiff as a regular practice routinely purports to impose improper fines and assessments on its members; that the Plaintiff is not a governmental entity; that the Plaintiff has refused to allow the Defendant access to its books and records after due request; that the Plaintiff has incurred attorneys' fees and costs; and, further, that the factual allegations made in the Defendant's pleadings in this action are true. Michael Taylor is believed to be aware of things similar to what the Plaintiff is aware of, as are the purported directors of the Plaintiff.

3. See the documents filed in this case, produced in discovery, and otherwise exchanged between the parties.
4. The Defendant has not named an expert witness but reserves the right to do so.
5. The Defendant has not named an expert witness but reserves the right to do so.
6. See answer to Interrogatory 2 and the documents filed in this case, produced in discovery, and otherwise exchanged between the parties.
7. See answer to Interrogatory 2 and the documents filed in this case, produced in discovery, and otherwise exchanged between the parties. The Defendant has not violated the covenants; however, if it is determined that he did, the Plaintiff still violated them first.
8. See answer to Interrogatory 2 and the documents filed in this case, produced in discovery, and otherwise exchanged between the parties. Any such requests used vague, unspecific, and subjective terminology. See documents stamped Hayes prod 2 and Hayes prod 4.
9. See answer to Interrogatory 2 and the documents filed in this case, produced in discovery, and otherwise exchanged between the parties. The Defendant has not violated the covenants.
10. See the documents filed in this case, produced in discovery, and otherwise exchanged between the parties.

The Defendant hereby answers the Plaintiff's Requests for Production as follows:

The Defendant notes that he is producing what he has been able to find; other documents that are subject of these requests may exist, but the Defendant has not been able to find them. Subject to these objections, see the documents produced herewith and that have been served or otherwise exchanged by the parties.

The only documents being withheld are attorney-client communications, attorney work product, and notes prepared for or in anticipation of litigation.

I have provided these responses to opposing counsel on the date given below.

Respectfully submitted,



---

Andrew S. Radeker  
S.C. Bar No. 73743  
HARRISON, RADEKER & SMITH, P.A.  
Post Office Box 50143  
Columbia, South Carolina 29250  
(803) 779-2211  
(803) 779-6700 (facsimile)  
drew@harrisonfirm.com (email)  
ATTORNEY FOR DEFENDANT  
ELLIOT HAYES

Columbia, South Carolina  
July 9, 2019

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT

C/A No.: 2018-CP-40-04658

Sterling Hills Homeowners' Association, Inc.,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

**AFFIDAVIT OF ELLA CALVERT**

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. My name is Ella Calvert I am of the age of majority and am fully competent to testify to the facts set forth in this Affidavit. Further, I have personal knowledge of the matters set forth herein.

2. I am the President of Plaintiff Sterling Hills Homeowners Association, Inc. and have served on the Board of Directors since 2015. Since that time, a quorum has not been established at a Members meeting for the election of new directors, and therefore, new directors have not been elected.

3. As a Director of the Association, I have access to the corporate records for Sterling Hills Homeowners' Association, Inc. and am authorized to provide access to the corporate records to Members of the Association who request to do so in writing.

4. I have not received, nor can I find, any record of a written notice or demand from Elliot Hayes for the inspection of the Association's records.

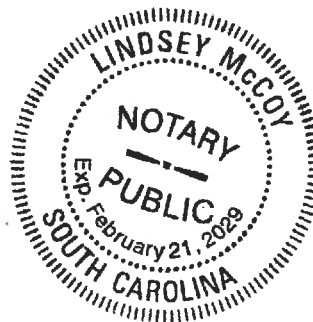
FURTHER AFFIANT SAYETH NOT!

*{Signature on following page}*

  
Ella Calvert

SWORN to before me this  
4 day of October, 2019.

  
Notary Public for the State of South Carolina  
My Commission Expires 2/21/2029



STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Sterling Hills Homeowners' Association, Inc.,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT  
C/A No.: 2018-CP-40-04658

**AFFIDAVIT OF KAYLA STOKES**

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and says:

1. My name is Kayla Stokes. I am of the age of majority and am fully competent to testify to the facts set forth in this Affidavit. Further, I have personal knowledge of the matters set forth herein.

2. I am a Licensed Property Manager for William Douglas Property Management Co. ("WD"), the property management company managing Sterling Hills.

3. As the Property Manager for Sterling Hills, I maintain the corporate records for Sterling Hills Homeowners' Association, Inc.

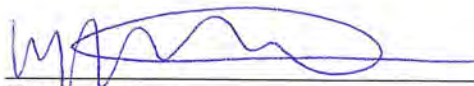
4. Neither I, nor William Douglas Property Management has any record of a written notice or demand from Elliot Hayes for the inspection of the Association's records.

5. The photos provided with this affidavit represent the ongoing and current condition of the property subject to the above-captioned action, that is, the property at 8 High Glen Court, Columbia, SC 29229.

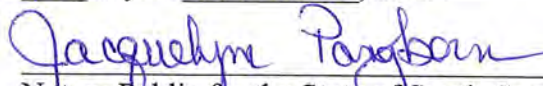
6. I have never known a quorum to be established at an annual members meeting for the purposes of electing directors. Without a quorum, Sterling Hills is unable to hold elections.

FURTHER AFFIANT SAYETH NOT!

*[Signature to follow]*

  
Kayla Stokes

SWORN to before me this  
4<sup>th</sup> day of October, 2019.

  
Notary Public for the State of South Carolina  
My Commission Expires 5-12-2025















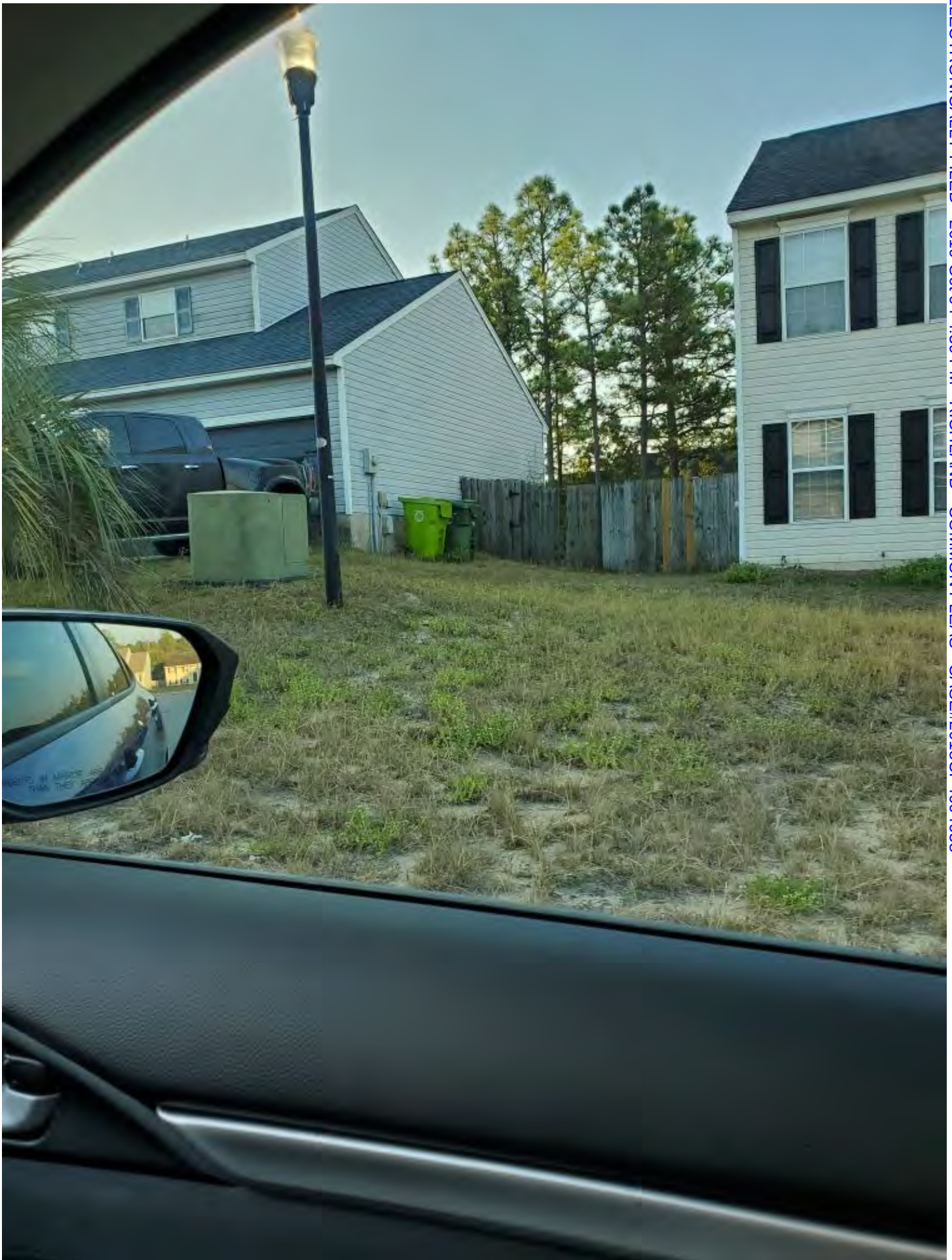








Record on Appeal - Sterling Hills HOA v. Hayes 190





**STATE OF SOUTH CAROLINA****COUNTY OF RICHLAND****IN THE COURT OF COMMON PLEAS****Case No. 2018-CP-40-04658****Sterling Hills Homeowners' Association,****Plaintiff,****vs.****Elliot Hayes,****Defendant.****AFFIDAVIT OF ELLIOT HAYES**

Personally appeared before me Elliot Hayes, who, first being duly sworn, deposes and says as follows:

1. My name is Elliot Hayes. I am the defendant in this case. I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.
2. I have not failed to maintain my house and lot that are involved in this case. I have taken good care of them and they are in a good state of repair. I have only ever heard the vaguest requests and demands from the Plaintiff in this case about what it perceives to be my failure to maintain my property. While the things that the Plaintiff has complained about are extremely petty, the complaints were also so vague that there was no way to measure objectively whether I complied with them or not. For example: "yard needs attention."
3. Submitted with this affidavit are Exhibits A through E, which actually do represent the present condition of the house and lot, as they were taken this morning. These pictures represent the condition of the house and lot as they have been for some time. In fact, the lawn has not been mowed in about three weeks, and the grass is not nearly as high as it is in the pictures submitted with Kayla Stokes' affidavit, which do not represent the condition of the property. Those pictures must be from an earlier time.
4. I have never given anyone permission to reside on my porch. I do not know what it is that the Plaintiff is talking about when it claims that I have been allowing an individual to do this for an extended period of time. I have not given anyone permission to urinate

or defecate or change clothes or be naked or expose himself on my porch or in any other part of the outside of my house or my yard.

5. I actually never was served with the summons and complaint in this case, on September 11, 2018, or on any other day. I never saw any process server. I found the summons and complaint when I opened my front door from the inside. It must have been stuck into the space between the door and the frame from the outside. Also, the supposed affidavit of service gives my height as between 5'10" and 6' and my weight as between 200 and 240 pounds. I am 6'3" and weigh 285 pounds (or more, depending on fluctuation and time of year). I doubt that anyone would mistake me for a 240-pound, 5'11" man.
6. From reading the covenant provisions involved in this case, I cannot tell exactly what they require of a lot owner. The plaintiff in this case takes the position, though, that they require many things that the covenants simply do not speak to at all.
7. There is no architectural control authority that has ever been established for the association involved in this case

FURTHER AFFIANT SAYETH NOT.

  
Elliot Hayes

SWORN to before me this  
9th day of October, 2019.

 (L.S.)

Notary Public for South Carolina

My Commission Expires: 3/29/27











STATE OF SOUTH CAROLINA

COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS

Case No. 2018-CP-40-04658

Sterling Hills Homeowners' Association,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

AFFIDAVIT OF ANDREW RADEKER

Personally appeared before me Andrew S. Radeker, who, first being duly sworn, deposes and says as follows:

1. My name is Andrew S. Radeker. I represent the defendant in this case. I have personal knowledge of the facts set forth in this affidavit and am competent to testify about them.
2. We served discovery requests in this case, to which the Plaintiff responded. I have reviewed the Plaintiff's responses to our requests to produce. Those requests included, among other things, a request for the production of "[a]ny and all documents, whether written, recorded, or otherwise, that relate to the claims and defenses in this action."
3. The Plaintiff's responses to our requests to produce did not contain any documents purporting to be rules or regulations for the Plaintiff association other than the covenants at issue and the by-laws and solar panel guideline submitted with this affidavit as Exhibit A.
4. I have searched the Richland County Register of Deeds database to see if there is some other recorded document setting out rules or regulations for the Plaintiff association and have found none.

FURTHER AFFIANT SAYETH NOT.

Andrew S. Radeker

SWORN to before me this  
10th day of October, 2019.

Notary Public for South Carolina

My Commission Expires:

9 Jan 29

Book 2410-810  
2019049934 7/15/2019 13:28:56:803 ByLaws - HOA  
Fee: \$31.00 County Tax: \$0.00 State Tax: \$0.00  
2019049934 John T. Hopkins II Richland County R.O.D.

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

**STERLING HILLS HOMEOWNERS'  
ASSOCIATION, INC.**

**RECORDING OF DOCUMENTS PURSUANT  
TO THE SOUTH CAROLINA HOMEOWNERS  
ASSOCIATION ACT (S.C. CODE ANN. §§ 27-30-  
110 TO -170):**

1. **BY-LAWS OF THE STERLING HILLS  
HOMEOWNERS' ASSOCIATION, INC.**
2. **SOLAR PANEL GUIDELINE**

**CROSS REFERENCE: DECLARATION OF COVENANTS, CONDITIONS, RESTRICTIONS, EASEMENTS,  
CHARGES AND LIENS FOR STERLING HILLS recorded in Deed Book 413, at Page 92.**

WHEREAS, the South Carolina Homeowners Association Act (S.C. Code Ann. §§ 27-30-110 to -170) requires Homeowners Associations to record Governing Documents, Rules, Regulations, and amendments thereto; and

WHEREAS, the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Sterling Hills was recorded on June 1, 2000 in the Office of the Register of Deeds for Richland County in **Deed Book 413, at Page 92** (as amended and supplemented, the "**Declaration**"); and

WHEREAS, pursuant to the Declaration, Sterling Hills Homeowners' Association, Inc. is the Homeowners Association for Sterling Hills; and

NOW THEREFORE, Sterling Hills Homeowners' Association, Inc. does hereby record the following pursuant to the South Carolina Homeowners Association Act:

1. By-Laws of the Sterling Hills Homeowners' Association, Inc.; attached as **Exhibit A**; and
2. Solar Panel Guideline; attached as **Exhibit B**.

(collectively, the "**Documents**")

The Board of Directors of Sterling Hills Homeowners' Association, Inc. hereby unanimously adopts, re-adopts, ratifies, and validates the Documents this 6 day of May, 2019 (the "**Effective Date**");

MTB File No.: 011144.00148

After recording, please return to:  
McCabe, Trotter & Beverly, P.C.  
P.O. Box 212069, Columbia, SC 29221  
Page 1 of 3

Exhibit A to Rademaker Affidavit

**BOARD OF DIRECTORS  
STERLING HILLS HOMEOWNERS' ASSOCIATION, INC.:**

By: [Signature]  
Print Name: ELLA C. CALVERT

By: [Signature]  
Print Name: Vinnetta Osborne

By: [Signature]  
Print Name: Monica Aiken

By: [Signature]  
Print Name: Myra Cunningham

By: [Signature]  
Print Name: Torri Toland

The Documents are being recorded in an effort to ensure compliance with the recording requirements Homeowners Association Act; however, nothing herein shall be construed as an admission that some or all of the Documents are required to be recorded under the requirements of the Homeowners Association Act.

IN WITNESS WHEREOF, Sterling Hills Homeowners' Association, Inc. has by its duly authorized officer set its hand and seal this 6 day of MAY, 2019, and by doing so certifies, acknowledges, and affirms that the Board of Directors has unanimously adopted, re-adopted, ratified, and validated the Documents as of the Effective Date first written above.

**[SIGNATURE PAGE TO FOLLOW]**



**EXHIBIT A****BY-LAWS OF THE STERLING HILLS HOMEOWNERS' ASSOCIATION, INC.****ARTICLE I**  
**NAME AND LOCATION**

These are the By-Laws of the Sterling Hills Homeowners Association, Inc., hereinafter referred to as the "Association." The principal office of the Corporation shall be located at 441 Western Lane., Columbia, S.C., but meetings of Members and Directors may be held at such places as may be designated by the Board of Directors from time to time.

**ARTICLE II**  
**DEFINITIONS**

The capitalized terms used herein shall have the same meaning as the defined terms set out in the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Sterling Hills dated May 31, 2000 and recorded June 1, 2000 in the Office of the ROD for Richland County in Record Book 413 at Page 92.

**ARTICLE III**  
**PURPOSE AND POWERS OF THE ASSOCIATION**

This Association does not contemplate pecuniary gain or profit to the Members thereof, and the specific purposes for which it is formed are to provide for maintenance, preservation, and architectural control of the residential Lots and Common Area within those certain tract(s) and/or lot(s) of Property described in Schedule A attached to the Declaration and incorporated by reference, and to promote the health, safety and welfare of the residences within the Community and any additions thereto as may hereafter be brought within the jurisdiction of the Association, and for this purpose to:

- (a) Exercise all of the powers and privileges and to perform, or delegate to an

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appropriate person or entity the authority to perform, all of the duties and obligations of the Association, including the establishment and amendment of the Regulations of the Association and the use and maintenance of the Common Area, as set forth in the Declaration as the same may be amended from time to time as therein provided, said Declaration being incorporated herein as set forth in length;

(b) Fix, levy, collect and enforce payment by any lawful means, all Assessments pursuant to the terms of the Declaration; pay all expenses in connection therewith; and pay all office and other expenses incident to the conduct of the business of the Association, including all licenses, taxes, or governmental charges levied or imposed against the Property of the Association;

(c) Acquire (by gift, purchase or otherwise), own, hold, improve, build upon, operate, maintain, convey, sell, lease, transfer, or otherwise dispose of real or personal property including, but not limited to the Common Area, as determined advisable by the Board of Directors;

(d) Borrow money, mortgage, pledge, deed in trust, or hypothecate any and all of its real or personal property including, but not limited to the Common Area, as security for money borrowed or debts incurred upon arrival by the affirmative casting of two-thirds (2/3) of all Class A and B votes of the Association;

(e) Participate in mergers and consolidations with other nonprofit corporations organized for the same purpose or annex additional residential property and Common Area, provided that any such merger, consolidation, or annexation shall have the assent of Members of the Association controlling a majority of all Class A and B votes of the Association, provided, however, that this shall not affect the right of the Developer to add additional Property to the Community and Association as set out in the Declaration;

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Exhibit A \_\_Page 2 of 20

Exhibit A to Rademaker Affidavit

(f) Make, by decision of the Board of Directors, and subject to applicable law, any election of a fiscal year for the Association, as the Board of Directors shall determine from time to time;

(g) To have and exercise any and all powers, rights, and privileges which a corporation organized under the nonprofit corporation law of the state of South Carolina by law may now or hereafter have or exercise including the right to enter into agreement with other Associations and entities for the management and maintenance of Common Area of such Association or entities;

(h) Notwithstanding the purposes and powers of the Association enumerated above, the Association, after passage of control to the Owners and Co-owners by converting Class B stock to Class A stock as set forth in the Declaration, shall not enter into, either directly or indirectly, contracts or leases with the Developer (including a management contract) unless there is a right of termination of any such contract or lease, without cause, which is exercisable without penalty at any time after transfer of control in accordance with the Declaration, upon not more than ninety (90) days notice to the other party to the said contract or lease.

#### ARTICLE IV MEETING OF MEMBERS

Section 1. Annual Meetings. The first annual meeting of the Members shall be held at a time, date, and place established by the Developer within twelve (12) months after the organization of the Association. Subsequent annual meetings of the Members shall be held at a time, date and place established by the Board of Directors each year so long as no annual meetings of the Members shall be scheduled on a legal holiday. As long as the Developer maintains its Class B membership, the Developer shall appoint the Board of Directors and the only purpose of the annual

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**Exhibit A \_\_Page 3 of 20**

**Exhibit A to Radcliff v. Hayes**

meeting will be (1) to serve as a town forum in which the president and officers report on and answer reasonable questions concerning the activities and financial condition of the Association; and (2) consider matters raised consistent with the requirements of Section 7.05 and 7.23(b) of the Non-Profit Corporation Act of South Carolina.

Section 2. Special Meetings. Special Meetings of the Members may be called at any time by the Developer, President or by the Board of Directors, or upon written demand signed by the Members who are the holders of at least five (5%) percent of the voting power of the Association. Only those matters that are within the purpose or purposes described in the meeting notice may be conducted at a special meeting.

Section 3. Notice of Meetings. Written notice specifying the place, day and hour of the meeting of the Members, and, in the case of the special meeting, also specifying the purpose of each meeting and the description of the matter for which the meeting was called, shall be given by, including the developer, any fair and reasonable manner. The mailing of a copy of such notice of a special or annual meeting by first class mail or registered mail, postage prepaid, at least ten (10) days if notice is mailed by other than first class or registered mail at least thirty (30) days and not more than sixty (60) days before such meeting date to each Member entitled to vote at the meeting, addressed to the Members' address last appearing on the books of the Association, or supplied by such Member to the Association for the purpose of notice shall be considered fair and reasonable. The notice requirement may be waived by a Member before or after the date and time of the meeting as stated in the notice. The waiver must be in writing, be signed by the Member and be delivered to the Association for inclusion in the minutes in filing with the Association's records, except that the attendance of a Member at a meeting waives notice unless the Member at the

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**Exhibit A \_\_Page 4 of 20**

**Exhibit A to Rademaker Affidavit**

beginning of the meeting objects to holding the meeting or transacting business at the meeting. Also, an Emergency Meeting may be called with a twenty-four (24) hour notice to those members entitled to vote, upon the unanimous vote of the Association's Board in the event an issue requires the immediate attention of the Members of the Association.

Section 4. Quorum. The presence at a meeting of Members entitled to cast, or of proxies entitled to cast, one-tenth (1/10) of the votes of each class of Membership shall constitute a quorum for any action except as otherwise provided in the Articles of Incorporation, the Declaration, or these By-Laws. If, however, such quorum shall not be present or represented at any meeting, the Members present shall have power to adjourn the meeting from time to time, without notice other than announcement at the meeting of the new date, time and place. The quorum at the new meeting shall be reduced to five percent (5%) of each Class of Members.

Section 5. Proxies. Votes may be cast in person or by proxy. All appointment of proxies shall be by written appointment form, signed either personally or by an attorney-in-fact form and filed with the Secretary prior to the start of the meeting in the case of a vote that is taken at a scheduled meeting and by the deadline established by the appropriate notification of a vote to be taken in any other manner. Except as otherwise allowed herein or by written authorization of the Board of Directors of the Association, no appointment form shall confer on the proxy a broader authority than to vote on the matter(s) or at the meeting(s) than is defined on the appointment form. Every proxy shall be revocable at the pleasure of the Owner or any one of the Co-owners issuing it, up to the time that the vote for which it was issued is cast and shall automatically cease upon conveyance by the Owner or any of the Co-owners of that Lot, the Member attending any meeting and voting in person, the member signing, and delivery to the Secretary in writing revoking the

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**Exhibit A \_\_Page 5 of 20**

**Exhibit A to Radeker Affidavit**

appointment, or upon receipt of notice by the Secretary or the officer or agent authorized to tabulate the vote prior to the proxy casting vote of the death of the Member.

Section 6. Parliamentary Rules. Robert's Rules of order (latest edition) or such other rules as the Board of Directors may adopt shall govern the conduct of corporate proceedings when not in conflict with the Declaration, the Articles of Incorporation, these By-Laws or with the statutes of the State of South Carolina.

Section 7. Failure to Hold Meetings. The failure to hold an annual or regular meeting at a time stated in or fixed in accordance with these By-Laws does not affect the validity of a corporate action.

Section 8. Authorization to Vote and Notice by Owner. It shall at all times be the responsibility of any Lot Owner and all Co-owners to keep current with the Association, the name and address of the person authorized to cast the vote assigned to that Lot and to receive notification from the Association as to any meetings which the Association may be required to send. Proof of the authority to receive notice and to vote shall be presented to the Association in the form of a certificate signed by the Owner or all of the Co-owners of the Lot. Such certificate shall be deemed valid until revoked by a subsequent certificate.

Section 9. Record Date. The Board of Directors shall set the record date for determining the Members entitled to notice of a Members meeting; to vote at a Members meeting; and to exercise any rights in respect of any other lawful action. The record date shall not be more than seventy (70) days before the meeting or action requiring a determination of the Members occurs.

Section 10. Voting Requirements. Unless otherwise required in these By-Laws, the Declaration, the Articles of Incorporation, or the law, the affirmative vote of the votes represented

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**Exhibit A \_\_Page 6 of 20**

**Exhibit A to Radcliff v. Hayes**

and voting, which affirmative vote also constitute a majority of the required quorum is the act of the Members.

Section 11. Action by Written Ballot. Any action that may be taken at any annual, regular or special meeting of Members may be taken without a meeting if the Association delivers a written ballot to every Member entitled to vote on the matter and number of votes cast by ballot equals or exceeds the quorum required to be present at a meeting authorizing the action and the number of approvals equals or exceeds the number of votes that would be required to approve the matter of the meeting. See South Carolina Non-Profit Corporation Act, Section 33-31-708.

#### ARTICLE V BOARD OF DIRECTORS; SELECTION; TERM OF OFFICE

Section 1. Number. The affairs of this Association shall be managed by a Board of not less than three (3) Directors, who need not be Members of the Association; provided, however, that so long as the Developer maintains its Class B Membership there shall be only three (3) Directors, all of whom shall be appointed by the Developer. At any time the Developer so long as it maintains its Class B Membership or the Association thereafter by the affirmative vote of a majority (51%) of all of the Members, votes may increase or decrease the number of Directors of the Association so long as there are never less than three (3) Directors at any given point.

Section 2. Term of Office. At the first annual meeting after the termination of the Developer's Class B votes, the Members shall elect two (2) Directors for a term of one (1) year, two (2) Directors for a term of two (2) years, and one (1) Director for a term of three (3) years; and at each annual meeting thereafter, the Members shall elect successor Directors for terms of three (3) years. The term of any Director shall be automatically extended and shall not expire until the

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**Exhibit A Page 7 of 20**

**Exhibit A to Rademaker v. Hayes**

annual meeting at which a successor for that Director is elected.

Section 3. Removal. At any time, any Director(s) appointed by the Developer may be removed from the Board, with or without cause, by the Developer by giving written notice of removal to the Director and either the presiding officers of the Board of Directors or the Association President or Secretary. Any Director(s) elected by the Association may be removed from the Board of Directors, with or without cause, by the affirmative casting of a majority (51%) of all of the votes of the Association. In the event of death, resignation, or removal of a Director, a successor shall be selected by the Developer, if that Director was appointed by the Developer, or the remaining Members of the Board of Directors, if elected by the Members of the Association and shall serve for the unexpired term of his predecessor.

Section 4. Compensation. Compensation of any director shall require the affirmative casting of a majority (51%) of all of the Class A and B votes. This provision shall in no way require the members approval of or preclude the Board of Directors from compensating a Director for his duties as an officer of the Association, from employing a Director as an employee of the Association, or shall it preclude the Association from contracting with and thereafter compensating a Director for the management of the Association.

Section 5. Action Taken Without a Meeting. The Directors shall have the right to take any action in the absence of a meeting which they could take at a meeting by obtaining the written consent of a majority (51%) of the Directors, which shall represent a quorum. Any action so approved shall have the same effect as though taken at a meeting of the Directors.

Section 6. Reversal of Board of Directors. A decision of the Board of Directors, an officer or a committee of the Association may be reversed or modified by the Developer as long as the

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Exhibit A \_\_Page 8 of 20

Exhibit A to Radtke v. Hayes

Developer has a Class B vote, and thereafter by the affirmative vote of two-thirds (2/3) of all of the Members.

ARTICLE VI  
NOMINATION AND ELECTION OF DIRECTORS

Section 1. Nomination. Except where Directors are appointed or replaced by the Developer or the Board of Directors, nomination for election for the Board of Directors shall be made by a nominating committee or by the Members of the Association. Nominations made by Members of the Association shall be made in writing to the Developer, or the Board of Directors of the Association or Nominating Committee, When Empowered, at least twenty-four (48) hours prior to the time and date set for the Annual Meeting. In order to be valid a nomination must be accompanied by a petition of nomination signed by at least (10%) of the members entitled to cast all of the Class A or the Class B votes. The nominating committee, when created, shall consist of a Chairman, who shall be a member of the Board of Directors, and two (2) more Members of the Association. The nominating committee shall be appointed by the Board of Directors. Members of the Nominating Committee shall serve from the close of the annual meeting until the close of the next annual meeting. The nominating committee shall make as many nominations for election to the Board of Directors as it shall in its discretion determine, but not less than the number of vacancies that are to be filled. Such nominations may be made from among members or non-members.

Section 2. Election. Unless agreed otherwise by the affirmative vote of a majority (51%) of Class A and Class B Members present at the meeting, election to the Board of Directors shall be by secret ballot. At such election, the Members or their proxies may cast, in respect to each vacancy,

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**Exhibit A \_\_Page 9 of 20**

**Exhibit A to Rademaker Affidavit**

as many votes as they are entitled to exercise under the provisions of these By-Laws and the Declaration. The person receiving the largest number of votes shall be elected. Cumulative voting, voting more than one (1) time for any Director, is not permitted.

## ARTICLE VII MEETING OF DIRECTORS

Section 1. Regular Meetings. Until the end of the Class B vote or the permanent and voluntary transfer of control of the Association by the Developer, special meetings of the Board of Directors shall be held at dates, times and places and as frequently as is deemed prudent by the Developer. Upon the end of the Class B vote or the permanent and voluntary transfer of control of the Association by the Developer, regular meetings of the Board of Directors shall be held monthly, or more frequently, and at dates, times and places determined by a majority (51%) of the Board of Directors. Without the approval of all of the Directors, no meeting shall fall upon a legal holiday. No notice shall be required for regular meetings.

Section 2. Special Meetings. Special Meetings of the Board of Directors shall be held when called by the President of the Association or any two (2) Directors, after not less than two (2) days notice is given, either personally, by mail, or by telephone, to each Director, unless waived in writing signed by the Director or by attendance of the meeting without objection or participation.

Section 3. Quorum. A majority (51%) of the number of Directors shall constitute a quorum for the transaction of business. Every act or decision authorized by a majority (51%) of the Directors either by written consent or when present at a duly held meeting at which a quorum is present shall be regarded as an act of the Board.

## ARTICLE VIII POWERS AND DUTIES OF THE BOARD OF DIRECTORS

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**Exhibit A \_\_Page 10 of 20**

**Exhibit A to Radeker Affidavit**

Section 1. Powers. The Board of Directors, When Empowered, shall have the power to perform such duties as authorized by the Declaration, included but not limited, on law to:

(a) Adopt, amend and publish the Architectural Guidelines for the Community and Regulations of the Association governing the use of the Common Area and facilities thereon and the personal conduct of the Members and their guests, and to establish Assessments for the infraction thereof;

(b) Suspend the voting rights and right to use the recreational facilities on the Common Areas of a Member during any period in which each Member shall be in default in the payment of any Assessment levied by the Association or infraction of the Association's Regulations. Such rights may also be suspended after notice for infraction of the Association's Regulations;

(c) Exercise for the Association of all of the powers, duties, and authority vested in or delegated to the Association and not reserved to the Membership by other provisions of these By-Laws, the Articles of Incorporation, or the Declaration;

~~(d) Declare the office of a member of the Board of Directors to be vacant in the~~  
event such member shall be absent from three (3) consecutive regular meetings of the Board of  
~~Directors unless such absence shall have been excused by the Chairman of the Board of Directors~~  
or other person(s) authorized to do so;

(e) Employ a manager, an independent contractor, Treasurer of the Association or such other employees as they may deem necessary, to prescribe their duties and;

(f) Levy Assessments and to collect from the members all costs of collection,

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**Exhibit A \_\_Page 11 of 20**

**Exhibit A to Rademaker Affidavit**

including but not limited to court costs and reasonable attorney fees, after required notice and hearing, for all infractions of the Association's Regulations, the Architectural Guidelines, the Declaration, Articles of Incorporation or these By-laws.

(g) Delegate, in part or in total, to any employee, agent, director, officer, contractor, manager or other appropriate entity, any power or authority given to the Board of Directors by the Covenants and Restrictions for the Community or these By-laws.

(h) To perform the following discretionary services the cost of which may be made a part of the Assessment, unless two-thirds (2/3) of the Members vote otherwise at duly called meeting:

(i) Provide police protection and security to Community including the employment of police and security guards.

(ii) The services necessary or desirable in the judgment of the Board of Directors of the Association to carry out the Association's obligations and business under the terms of this document.

(iii) Provide garbage and trash collection to each Patio Home with Community.

(iv) Maintain a security system for the Community and for each Dwelling. The maintenance of the equipment in each Dwelling shall be the obligation of the Owner of the Dwelling.

(v) Maintenance and upkeep of the landscaping and shrubbery, including cutting grass, in the front and side yard of each Lot.

(vi) Provide for pressure washing each Dwelling and the other

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**Exhibit A \_\_Page 12 of 20**

**Exhibit A to Radeker affidavit**

Structures on the Lot.

(vii) Provide for the painting of each Dwelling and other Structures on the Lot.

(viii) Maintain, repair and replace the patio walls and patio fences surrounding the back yard of each Lot.

Section 2. Duties. It shall be the duty of the Board of Directors to:

(a) Cause to be kept a complete record of all of its acts and corporate affairs and to present a statement hereof to the Members at the annual meeting of the Members, or at any special meeting;

(b) Supervise all officers, agents and employees of this Association, and to see that their duties are properly performed;

(c) Perform such other duties as required by the Declaration, the Articles of Incorporation or the By-laws.

(d) Foreclose, where it is deemed prudent and to be in the best interest of the Association by the Board of Directors, the lien against any Lot for which Assessments are not paid within thirty (30) days after the due date or to bring an action at law against the Owner or Co-owners personally obligated to pay the same as provided in the Declaration, or both;

(e) Issue, or cause an appropriate officer to issue, upon demand by any person, a certificate setting forth whether or not any assessment has been paid. At all times the Association records with respect to payments made or due shall be deemed correct unless proper documentation to the contrary can be produced. If a certificate states an assessment has been paid, such certificate shall be conclusive evidence of such payment. A reasonable charge may be

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**Exhibit A \_\_Page 13 of 20**

**Exhibit A to Radtke Affidavit**

made by the Board for the issuance of these certificates;

(f) Procure and maintain liability and hazard insurance on property owned by the Association in amounts established by the Board of Directors in its sole discretion and with insurance companies licensed to do business in South Carolina with a Best rating of AA or better;

(g) Cause and pay for all officers or employees having fiscal responsibilities to be bonded, as it may deem appropriate by the Board of Directors;

(h) Cause the Common Area to be maintained.

#### ARTICLE IX OFFICERS AND THEIR DUTIES

Section 1. Enumeration of Offices. The offices of this Association shall be a President and Vice President, who shall at all times be Members of the Board of Directors, a Secretary and a Treasurer, and such other officers as the Board of Directors from time to time by resolution create. Compensation for the officers and the employees of the Association shall be fixed by the Board of Directors of the Association.. The Board of Directors may employ a Director as an employee of the Association, and may contract with and thereafter compensate that Director for the management of the Association.

Section 2. Appointment of Officers. All officers shall be appointed by the Board of Directors.

Section 3. Term. Officers of this Association shall be appointed annually by the Board, and each shall hold office for one (1) year unless he shall sooner resign, or shall be removed, or other wise disqualified to serve.

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**Exhibit A \_\_Page 14 of 20**

**Exhibit A to Radcliff v. Hayes**

Section 4. Special Appointments. The Board of Directors may appoint such other officers as the affairs of the Association may require, each of whom shall hold office for such period, have such authority and perform such duties as the Board of Directors may, from time to time, determine.

~~Section 5. Resignation and Removal.~~ Any Officer may be removed from office with or without cause by a majority (51%) vote of the Board of Directors. Any Officer may resign at any time giving written notice to the Board of Directors, the President or Secretary. Such resignation shall take effect on the date of receipt of such notice or at any later time specified therein, and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

~~Section 6. Vacancies.~~ A vacancy in any office may be filled by appointment by the Board of Directors. ~~The Officer appointed to such vacancy shall serve for the remainder of the term of the~~ Officer he replaces.

Section 7. Multiple Offices. The offices of Secretary and Treasurer may be held by the same person. No person shall simultaneously hold more than one (1) of any of the other offices except in the case of special offices created pursuant to Section 4 of this Article.

Section 8. Duties. The duties of the Officers are as follows:

(a) President. The President shall preside at all meetings of the Board of Directors; see that the orders and resolutions of the Board of Directors are carried out; shall sign all leases, mortgages, promissory notes, deeds and other written instruments and shall be authorized, along with the Treasurer and other authorized parties, to sign on all checking accounts.

(b) Vice President. The Vice President shall act in the place and stead of the

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**Exhibit A \_\_Page 15 of 20**

**Exhibit A to Radeker affidavit**

President in the event of his absence, inability or refusal to act, and shall exercise and discharge such other duties as may be required of him by the Board of Directors.

(c) Secretary. The Secretary shall record the votes and keep the minutes of all meetings and proceedings of the Board of Directors and of the Members; keep the corporate seal of the Association and affix it on all papers requiring said seal; serve notice of meetings of the Board of Directors and of the Members; keep appropriate current records showing Members of the Association together with their addresses, authenticate the records of the Association and shall perform such other duties as required by the Board.

(d) Treasurer. The Treasurer shall receive and deposit in appropriate bank accounts all moneys of the Association and shall disburse such funds as directed by Resolution of the Board of Directors; shall sign all checks and promissory notes of the Association; keep proper books of accounts; cause a reconciliation of the Association books to be made by a Public Accountant at the completion of each fiscal year, and shall prepare an annual budget and a statement of income and expenditures to be presented to the Membership.

#### ARTICLE X COMMITTEES AND ARCHITECTURAL CONTROL AUTHORITY

When Empowered, the Association's Board of Directors by majority vote shall appoint an Architectural Control Authority as provided in the Declaration. In addition, the Board of Directors shall appoint other committees as deemed appropriate in carrying out its purpose, including the establishment of a nominating committee as required herein. Compensation for committee members and for any employees of the Association assigned to or hired by these committees shall be fixed or approved by the Board of Directors of the Association.

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**Exhibit A \_\_Page 16 of 20**

**Exhibit A to Rademaker Affidavit**

**ARTICLE XI**  
**BOOKS, RECORDS, AND PUBLICATIONS**

The books, records, publications, and papers of the Association shall at all times, during reasonable business hours, or other reasonable circumstances, be subject to inspection by any member and by any holder, insurer, or guarantor of any first mortgage. The Declaration, the Articles of Incorporation and the By-Laws of the Association shall be available for inspection by any member, lender, holder, insurer, or guarantor of any first mortgage at the principal office of the Association, where copies of any of the documents addressed in this paragraph may be purchased at a reasonable cost.

Upon request, any Owner or Co-owner or the holder, insurer, or guarantor of any first mortgage on any Lot, shall be entitled to a copy of the reconciliation statement of the financial condition of the Association and copy of the tax return of the Association for the immediately preceding fiscal year. A reasonable fee may be charged by the Association for copies of these documents.

**ARTICLE XII**  
**FUNDS AND BONDS**

Section 1. Payments and Depositories All monies collected by the Association shall be treated as the separate property of the Association and such monies may be applied by the said Association to the payment of any of the expense of operating and managing the Association, or to the proper undertaking of all acts and duties imposed upon it by virtue of these By-Laws, the Articles of Incorporation and the Declaration. As the moneys for any Assessment is paid unto the Association by any Owner or Co-owner of a Lot the same may be commingled with the monies paid to the Association by the other Owners or Co-owners of Lots. All funds and other assets of the

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**Exhibit A \_\_Page 17 of 20**

**Exhibit A to Rademaker Affidavit**

Association, and any increments thereto or profits derived therefrom, or from the leasing or use of the Common Areas, shall be held for the benefit of the members of the Association.

The depository of the Association shall be such bank or other Federally Insured depository as shall be designated from time to time by the Board of Directors and in which the moneys of the Association shall be deposited. Withdrawal of moneys from such accounts shall only be by checks signed by such persons as are authorized by the Board of Directors.

Section 2. Bonds. At the discretion of the Board of Directors, fidelity bonds shall be required on all members of the Board of Directors, the Officers of the Association and any other persons, employees or entities handling or responsible for the funds of the Association. The amounts of such bonds shall be determined by the Directors, but shall be at least equal to the amounts to be handled at any point by that person or entity. Unless verification that the bonds have been provided by such person or entity is obtained by or provided for the Board of Directors, the premiums for these bonds shall be paid by the Association as a common expense.

ARTICLE XIII  
CORPORATE SEAL

The Association may have a seal in circular form having within its circumference the words: Sterling Hills Homeowners' Association, Inc.

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Exhibit A to Rademaker Affidavit

ARTICLE XIV  
AMENDMENTS

Section 1. Except as otherwise required herein, by law, by this Declaration or by the Articles of Incorporation of the Association, these By-Laws may be amended, by mail or at a regular or special meeting of the Members, by the affirmative casting of a majority (51%) of all of the Class A votes of the Association present in person or by proxy and all of the Class B vote, except that the Federal Housing Administration or the Veterans Administration shall have the right to veto amendments while there is Class B Membership. Without limiting the foregoing, the Association, and for so long as the Developer owns at least one (1) Lot in the development, the Developer, shall, at any time and from time to time as they see fit, have the right to cause this document to be amended to correct any clerical or scrivener s error(s) or to conform to the requirements of the Federal Housing Administration or the Veterans Administration or the Federal National Mortgage Corporation, FHLMC and such other secondary market agencies as the same may be amended from time to time.

Section 2. In the case of any conflict of any Articles of Incorporation and these By-Laws or the Regulations of the Association, the Articles shall control; and in the case of any conflict between the Declaration, the Regulations, and these By-Laws, the Declaration shall control.

ARTICLE XV  
MISCELLANEOUS

Section 1. In case of any conflict with the provisions of the South Carolina Non-profit Corporation laws, such laws shall control. Such laws are incorporated herein by reference as if fully set out herein.

Section 2. The fiscal year of the Association shall begin on the 1st day of January and end

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**Exhibit A \_\_Page 19 of 20**

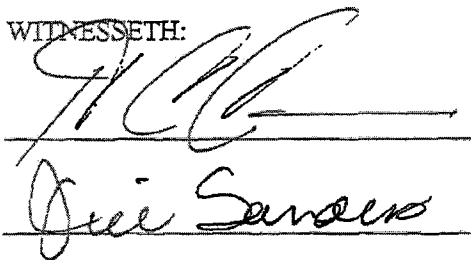
**Exhibit A to Radtke Affidavit**

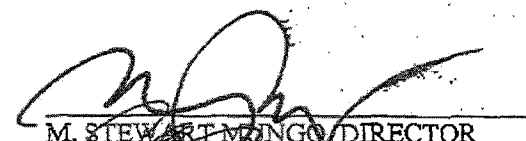
on the 31st day of December of every year, except that the first fiscal year shall begin on the date of incorporation.

Section 3. The Association shall indemnify an individual made a party to a proceeding because the individual is or was a director, or officer against liability incurred in the proceeding if the individual complies with the requirements of the South Carolina Non-Profit Corporation Act Section 33-31-851 and shall pay for or reimburse the reasonable expenses incurred by the director or officer who is a party to a proceeding in advance of final disposition of the proceeding if the director complies with the terms of the South Carolina Non-Profit Corporation Action Section 33-31-853.

IN WITNESS WHEREOF we, being all of the Directors of the Sterling Hills Homeowners Association, Inc. have hereunto set our hands and seals on June 21, 2000..

WITNESSETH:

  
Julie Sanders

  
M. STEWART MUNGO, DIRECTOR  
  
STEVEN W. MUNGO, DIRECTOR  
  
V. BRYAN GRAHAM, JR. DIRECTOR

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Exhibit A to Radaker Affidavit

**EXHIBIT B****SOLAR PANEL GUIDELINE**

Date: 9-28-15

**1.0 PURPOSE**

- 1.1. Whereas, Solar Panels are allowed, but the location must be reviewed and approved by the Architectural Committee as directed by the Covenants. Location and placement will be allowed as required for homeowners to install a system size that is up to and within the limitations of the current net metering code.

**2.0 REQUIREMENTS**

- 2.1 The State of South Carolina is one of ten States that does not have laws on Solar Panels and Home Owners Association thus, they rely on the Manufacturers' Engineering and Development Staff for Installation requirements.
- 2.2 A Residential Building Permit must be completed and approved prior to construction, applications are available from the City of Columbia Planning and Development Dept.
- 2.3 A Home Owners Architectural Request Form for Home Improvements is available from Homeowners Association Management Company, William Douglas Co. located at 1722 Main St Suite 150 Columbia, SC 29201 . Phone #: 803-758 – 1066.

**3.0 RECOMMENDED INSTALLATION GUIDELINE**

- 3.1 Size – Limit size to within current net metering code limitations
- 3.2 Size – A typical residential installation is between 3KW and 12KW
- 3.3 Place – Prefer rear of building unless this interferes with collection of energy then either side of the roof is acceptable.
- 3.4 Manner of Placement - Wiring and components concealed as much as possible.
- 3.5 Manner of Placement - Installation parallel to roof line
- 3.6 Manner of Place- Design must be in compliance with current building codes.
- 3.7 Place - Ground mount systems are only allowed if there is sufficient space and property and the building is such that a ground mount system is required for collection of energy.
- 3.8 Panels – Should be as flush to the roof as possible and as the design allows.

**Exhibit B \_\_Page 1 of 2****Exhibit A to Radtke Affidavit**

#### **4.0 RESTRICTIONS**

- 4.1 Panels restricted from front of building and yard.
- 4.2 Panels restricted from porch roofs
- 4.3 Ground installations must be enclosed with a privacy fence.

#### **5.0 GENERAL INFORMATION**

- 5.1 Credit for this information goes to The Maryland, DC, and Virginia Solar Energy Industries Association. - MDV-SEIA
- 5.2 The Home Owners Association strictly limits its acceptance of Solar Energy and its equipment to the uniformity and cosmetic aspects of this community.

**Exhibit B \_\_Page 2 of 2**

**Exhibit A to Radeker Affidavit**

**STATE OF SOUTH CAROLINA**  
**COUNTY OF RICHLAND**

**IN THE COURT OF COMMON PLEAS**

**Case No. 2018-CP-40-04658**

**Sterling Hills Homeowners' Association,**

**Plaintiff,**

**vs.**

**Elliot Hayes,**

**Defendant.**

**FILING OF CHART TO BE  
SUBMITTED AT HEARING**

The Defendant, hereby files the chart submitted herewith, which is intended to be provide to the court at the motions hearing today in the above-captioned action.

Respectfully submitted,

/s/ Andrew S. Radeker

Andrew S. Radeker

S.C. Bar No. 73743

HARRISON, RADEKER & SMITH, P.A.

Post Office Box 50143

Columbia, South Carolina 29250

(803) 779-2211

(803) 779-6700 (facsimile)

drew@harrisonfirm.com (email)

ATTORNEY FOR DEFENDANT

ELLIOT HAYES

Columbia, South Carolina  
October 14, 2019

| Claimed by Plaintiff                                                                                                                                            | What record contains                                                                                                                                                                                      | What law says                                                                                                                        |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| Defendant violated prohibition on “noxious, offensive, illegal activities as determined by the Developer or Board of Directors” being carried out on Hayes’ lot | <p>No evidence this has occurred.</p> <p>No evidence of illegal activity.</p> <p>No evidence of noxiousness or offensiveness.</p> <p>No evidence of determination by Developer or Board of Directors.</p> | <p>Not a scintilla of evidence of illegal activity.</p> <p>Other than as to “illegal activities,” too indefinite to be enforced.</p> |
| Defendant violated directive that “nor shall anything be done [on lot] which is or may become an annoyance or nuisance to any Owner in the Community”           | <p>No evidence of an owner in subdivision being annoyed or nuisanced.</p> <p>No evidence of potential for an owner in subdivision to become annoyed or nuisance.</p>                                      | <p>Not a scintilla of evidence of annoyance or nuisance.</p> <p>Too indefinite to be enforced.</p>                                   |

|                                                                                                                                                                                         |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                             |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>After demands for lawn maintenance compliance “by the Developer or an Architectural Control Authority, When Empowered,” Hayes has failed to comply with lawn maintenance demands</p> | <p>No statement in any affidavit to effect that this provision has been violated.</p> <p>Statement in Hayes’ affidavit that “I have only ever heard the vaguest requests and demands from the Plaintiff in this case about what it perceives to be my failure to maintain my property. While the things that the Plaintiff has complained about are extremely petty, the complaints were also so vague that there was no way to measure objectively whether I complied with them or not. For example: ‘yard needs attention.’”</p> <p>No evidence demand was made by developer or an architectural control authority.</p> <p>Statement in Hayes’ affidavit that “There is no architectural control authority that has ever been established for the association involved in this case.”</p> | <p>Demand must be made be made by developer or an empowered architectural control authority.</p> <p>Not a scintilla of evidence that such a demand ever made by developer or empowered architectural control authority.</p> |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

|                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                             |                                                                                                                                                                                                                                                                                         |                                                                                                                       |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------|
| <p>Defendant has failed to maintain lot, dwelling, and other structures, “includ[ing,] but not limited to the painting, maintenance, repair, and replacement of walls or fences, and all sidings, exterior doors, fixtures, equipment, and appliances [including HVAC] and all chutes, flues, ducts, conduits, wires, pipes, plumbing or other apparatus which are deemed to be part of the Dwelling or Lot, and the lawns, trees, shrubs, fences, grass, driveways and walkways, on the Lot . . . [including] maintenance, repair and replacement of all glass, lights and light fixtures (exterior an interior), awning, window boxes, window screens, and all screens or glass-enclosed porches, balconies, or decks which are a part of the Dwelling . . . [and] maintain roof, gutters, and downspouts in a good state of repair.”</p> | <p>No statement in any affidavit to effect that this provision has been violated.</p> <p>Statement in Hayes’ affidavit that “I have not failed to maintain my house and lot that are involved in this case. I have taken good care of them and they are in a good state of repair.”</p> | <p>Not a scintilla of evidence of this.</p> <p>At least parts of this provision are too indefinite to be enforced</p> |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------|

|                                                                                          |                                                                                                                                                                                                                                                                                                                                                                   |                                                                                                                                                            |
|------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>“Defendant has failed to keep the Lot in a good state of maintenance and repair.”</p> | <p>No statement in any affidavit to effect that this provision has been violated.</p> <p>Statement in Hayes’ affidavit that “I have not failed to maintain my house and lot that are involved in this case. I have taken good care of them and they are in a good state of repair.”</p>                                                                           | <p>Not a scintilla of evidence of this.</p> <p>Perhaps too indefinite to be enforced, anyway.</p>                                                          |
| <p>Defendant has failed to “give the lawn attention and repair”</p>                      | <p>Contradicted by photographs showing lawn maintenance has occurred.</p> <p>No statement in any affidavit to effect that this provision has been violated.</p> <p>Statement in Hayes’ affidavit that “I have not failed to maintain my house and lot that are involved in this case. I have taken good care of them and they are in a good state of repair.”</p> | <p>Not a scintilla of evidence of demand ever made by developer or an empowered architectural control authority.</p> <p>Too indefinite to be enforced.</p> |

|                                                               |                                                                                                                                                                                                                                                                                                                                                                          |                                                                            |
|---------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------|
| <p>Defendant has failed to “make repairs needed to fence”</p> | <p>Fence on left side of house (when looking from street) broken in older pictures.</p> <p>No evidence of any present failure to comply with demand to repair fence.</p> <p>Statement in Hayes’ affidavit that “pictures submitted with Kayla Stokes’ affidavit, which do not represent the condition of the property. Those pictures must be from an earlier time.”</p> | <p>Not a scintilla of evidence that broken fence is ongoing condition.</p> |
| <p>Defendant has failed to “install blinds”</p>               | <p>No requirement in covenants or by-laws to install blinds.</p> <p>Photographs show windows have curtains.</p>                                                                                                                                                                                                                                                          | <p>No obligation of Hayes to do this exists.</p>                           |

|                                                              |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |                                                                                                                                                     |
|--------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------|
| <p>Defendant has failed to “trim overgrown bushes”</p>       | <p>Photographs show bushes are not overgrown and show they have been trimmed.</p> <p>No evidence of any present failure to comply with demand to trim bushes.</p> <p>Statement in Hayes’ affidavit that “pictures submitted with Kayla Stokes’ affidavit, which do not represent the condition of the property. Those pictures must be from an earlier time.”</p> <p>Statement in Hayes’ affidavit that “I have not failed to maintain my house and lot that are involved in this case. I have taken good care of them and they are in a good state of repair.”</p> | <p>Not a scintilla of evidence of that overgrown bushes are an ongoing condition.</p> <p>Meaning of “overgrown” perhaps too indefinite, anyway.</p> |
| <p>Defendant has failed to “paint the garage door white”</p> | <p>No requirement in covenants or by-laws to paint garage door white.</p> <p>Photographs show that garage door is painted, just not white.</p>                                                                                                                                                                                                                                                                                                                                                                                                                      | <p>No obligation of Hayes to do this exists.</p>                                                                                                    |

|                                                  |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |                                                                            |
|--------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------|
| Defendant has failed to<br>“repair the shutters” | <p>No evidence that shutters are broken or need repair.</p> <p>Statement in Hayes’ affidavit that “I have not failed to maintain my house and lot that are involved in this case. I have taken good care of them and they are in a good state of repair.”</p>                                                                                                                                                                                                                                                                   | Not a scintilla of evidence that shutters broken or otherwise need repair. |
| Defendant has failed to<br>“clean the siding”    | <p>Photographs show siding is not dirty.</p> <p>No evidence of any present failure to comply with demand to clean siding.</p> <p>Statement in Hayes’ affidavit that “pictures submitted with Kayla Stokes’ affidavit, which do not represent the condition of the property. Those pictures must be from an earlier time.”</p> <p>Statement in Hayes’ affidavit that “I have not failed to maintain my house and lot that are involved in this case. I have taken good care of them and they are in a good state of repair.”</p> | Not a scintilla of evidence that dirty siding is ongoing condition.        |

|                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                           |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------|
| Defendant has failed to “remove the trash and recycling from view”                                                                                     | Covenants and by-laws do not require that trash can or recycling can be kept from view.                                                                                                                                                                                                                                                                                                                                                                                                        | No obligation of Hayes to do this exists. |
| “Defendant has allowed and continues to allow an individual to reside and/or sleep on a porch attached to the Dwelling for an extended period of time” | <p>No evidence this has occurred.</p> <p>Statement in Hayes’ affidavit that “I have never given anyone permission to reside on my porch. I do not know what it is that the Plaintiff is talking about when it claims that I have been allowing an individual to do this for an extended period of time. I have not given anyone permission to urinate or defecate or change clothes or be naked or expose himself on my porch or in any other part of the outside of my house or my yard.”</p> | Not a scintilla of evidence of this.      |

|                                                                                                                                                          |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |                                      |
|----------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------|
| Said individual urinates into bucket or from porch and/or changes clothes while on the porch, exposing himself                                           | <p>No evidence this has occurred.</p> <p>Statement in Hayes' affidavit that "I have never given anyone permission to reside on my porch. I do not know what it is that the Plaintiff is talking about when it claims that I have been allowing an individual to do this for an extended period of time. I have not given anyone permission to urinate or defecate or change clothes or be naked or expose himself on my porch or in any other part of the outside of my house or my yard."</p> | Not a scintilla of evidence of this. |
| Defendant's breach of covenants "affects the appearance and aesthetics of the Community and diminishes the overall value of the homes in the Community." | <p>No evidence of breach of covenants.</p> <p>No evidence of diminished appearance, diminished aesthetics, or diminished value of any property.</p>                                                                                                                                                                                                                                                                                                                                            | Not a scintilla of evidence of this. |
| Defendant's breach of covenants has caused Plaintiff to incur attorney's fees                                                                            | <p>No evidence of breach of covenants.</p> <p>No evidence that attorney's fees have been incurred.</p>                                                                                                                                                                                                                                                                                                                                                                                         | Not a scintilla of evidence of this. |

|                                                                                                                    |                                                                                                                                                                                                                                                        |                                      |
|--------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------|
| Defendant's breach of covenants has caused "a lack of harmony with the rest of the Community."                     | <p>No evidence of breach of covenants.</p> <p>No evidence of lack of harmony.</p>                                                                                                                                                                      | Not a scintilla of evidence of this. |
| "Plaintiff has and will continue to suffer irreparable harm" as a result of Defendant's conduct.                   | <p>No evidence of breach of covenants.</p> <p>No evidence of Plaintiff having suffered harm.</p> <p>No evidence of likelihood Plaintiff will suffer harm in future.</p>                                                                                | Not a scintilla of evidence of this. |
| "Plaintiff has no adequate remedy at law and damages would be unsatisfactory in remedying Defendant's violations." | <p>No evidence of breach of covenants.</p> <p>No evidence that remedy at law wouldn't be adequate even if Defendant had violated covenants.</p> <p>No evidence that damages would be insufficient remedy even if Defendant had violated covenants.</p> | Not a scintilla of evidence of this. |

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

IN THE COURT OF COMMON PLEAS  
FOR THE FIFTH JUDICIAL CIRCUIT  
C/A No.: 2018-CP-40-04658

Sterling Hills Homeowners' Association, Inc.,

Plaintiff,

vs.

Elliot Hayes,

Defendant.

**MEMORANDUM IN OPPOSITION TO  
DEFENDANT'S MOTION TO  
RECONSIDER**

(011144.00144)

Plaintiff Sterling Hills Homeowners' Association, Inc. ("Plaintiff" or the "Association"), by and through the undersigned counsel, hereby files this Memorandum in Opposition to Defendant's Motion to Reconsider filed December 2, 2019 which requested the Honorable Thomas A. Russo reconsider his Order signed November 22, 2019.

First and foremost, Defendant's allegation pertaining to the Trial Judge's attentiveness, found at Paragraph 16 of the Motion to Reconsider, is based on a demonstrably incorrect chronology. The allegation reads as follows:

Given the passage of less than 20 minutes between when Plaintiff's counsel submitted the proposed order that became the court's order in this case and when the court electronically signed and filed it, [Defendant's Counsel] would be amazed (and impressed) to discover that the judge who did that signing and filing actually read the order before doing so. A studied consideration of the proposed order would surely have prompted the court to refuse to file it.

Notwithstanding Defendant's bemusing accusation that the Trial Judge would sign an order without first reading it, the allegation is baseless and clearly refuted by the timestamps on the e-filings. Defendant attached to his Motion an email from Plaintiff's Counsel providing an additional "Word" file version of the Proposed Order at 10:33am on November 22 in case the Trial Judge preferred a proposed order in Word format. Note this Proposed Order had already

been e-filed in the form of a “PDF” file over a week prior on November 13, so the implication that the Order was signed twenty minutes after submission is inaccurate. Furthermore, the timestamp on the signed Order clearly shows the Order was actually e-signed at 10:18am on November 22, fifteen minutes *before* Plaintiff’s Counsel even sent the aforementioned email with the Word version of the Proposed Order. Again, Plaintiff is perplexed by Defendant’s allegation that the Trial Judge would sign a Proposed Order he has not read in response to an email sent *after the Trial Judge had already signed the order*. Copies of the e-filings of the Proposed Order, Signed Order, and email, provided herewith as **Exhibit A**, include highlighted time stamps in order to demonstrate the inaccuracy of the allegation. Therefore, this is no basis for the reconsideration of the Order, and certainly no basis to impugn the Trial Judge’s conduct.

Plaintiff would show unto this Court that there exists no basis or justification to alter or reconsider the Order, and as to Defendant’s arguments for reconsideration, Plaintiff submits as follows:

**I. Defendant is not entitled to a jury trial as this action resounds in equity, all of Defendant’s counterclaims have been properly dismissed, and Defendant’s counterclaims were not compulsory regardless.**

Defendant’s reliance on its at-law counterclaims to support its purported right to a jury trial is misplaced. Defendant raised at-law counterclaims for (1) breach of contract; and (2) violation of the Unfair Trade Practice and expressly waived a counterclaim for (3) failure to allow access to records. All of Defendant’s counterclaims were properly dismissed in this Court’s Order and therefore provide no basis to permit Defendant a jury trial.

Notwithstanding, even if the counterclaims had not been dismissed, they would not prohibit a referral to the Master in Equity as the counterclaims were not compulsory. A party does not waive its right to a jury trial on a counterclaim asserted in an equity action if the counterclaim is legal and *compulsory* in nature. *North Carolina Federal Sav. And Loan Ass’n v.*

*DAV Corp.*, 298 S.C. 514, 517, 381 S.E.2d 903, 905 (1989) (emphasis added). By definition, a counterclaim is compulsory only if it arises out of the same transaction or occurrence as the opposing party's claim. *Id.* at 517 (citing Rule 13(a), SCRCP). Here, Defendant's dismissed at-law counterclaims for violation of the Unfair Trade Practices Act and breach of contract in no way originated from the same transactions or occurrences as Plaintiff's claims and therefore were not compulsory counterclaims. Plaintiff brought claims to enforce the covenants of Sterling Hills concerning the lack of upkeep and maintenance being performed by Defendant on his Lot which he has kept in an unkempt and unsightly condition. Defendant's allegations under the Unfair Trade Practices Act pertain to alleged improprieties regarding fines, assessments, and actions "against members or purported members of Plaintiff." It is clear this counterclaim did not merely arise from the same transaction or occurrence which led Plaintiff to bring suit in order to compel the upkeep of Defendant's property. Moreover, it is unclear precisely how Defendant alleges that Plaintiff breached a contract, which is why the counterclaim was dismissed pursuant to Rule 12(b)(6), but it is not conceivable that such a breach of contract claim arises from the claims brought by Plaintiff to enjoin Defendant to comply with the covenants of Sterling Hills. Again, these counterclaims were properly dismissed regardless, but it is clear that they would not have been a basis for a jury trial even if they had survived.

As Plaintiff explained at the hearing on October 14, 2019, this is an equitable action involving claims raised by Plaintiff for the purpose of enforcing the restrictive covenants applicable to the Subject Property. The purpose and scope of the action is for the restrictive covenants to be enforced and the Lot be brought into compliance with the restrictive covenants referenced in the Complaint. While the Complaint enumerates that Defendant's breach of the restrictive covenants has caused damages to include diminished aesthetics, diminished property value, attorney's fees, and damage to community harmony, this does not constitute a legal action

which would resound anywhere outside of the realm of equity. The recovery of attorney's fees is not a legal action, but rather a remedy the Association is entitled to pursuant to the restrictive covenants. The action is merely a textbook example of an equitable action brought by a homeowners' association to enforce the restrictive covenants found in its governing documents. For all these reasons, the Court properly referred this case to the Master in Equity, and the Order should not be altered or amended.

**II. The Order should not be altered on the basis that Defendant would prefer not to appear before the Honorable Joseph M. Strickland.**

At the hearing, Defendant's Counsel requested that if the case was to be referred, that it not be referred to the Honorable Joseph M. Strickland. Defendant's Counsel argued he felt that Judge Strickland would recuse himself from the case based on Defendant's prior appearances before him where there were an argument "got heated." As the undersigned noted at the hearing, such a decision would best be left to the wisdom of Judge Strickland, and Plaintiff has every confidence Judge Strickland can fairly and impartially hear the present case.

**III. Defendant's counterclaim for breach of contract was properly dismissed.**

Plaintiff reiterates that mere labels and conclusions, and a formulaic recitation of the elements of a cause of action are not adequate to state a cause of action. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1555, 1964-1965 (2007). To the extent that Defendant now argues his assertion of "ultra vires" acts lodged in his "Fifth Defense" provide the basis for breach of contract, Plaintiff still cannot deduce what conduct constituted a breach of a contract, a "contract" which Plaintiff is only left to assume is the Declaration of Covenants, Conditions, Restrictions, Easements, Charges and Liens for Sterling Hills. The fact remains that Defendant enumerated no purported breach of a contract, merely recited the elements of the claim, Plaintiff is still left to speculate how it allegedly breached a contract, and therefore the Order dismissing the counterclaim for breach of contract should not be altered.

**IV. Defendant's counterclaim for violation of the Unfair Trade Practices Act was properly dismissed.**

Defendant asserts that the Court's determination was "just wrong" in dismissing his Counterclaim for violation of the Unfair Trade Practices Act. This Court properly found that Plaintiff is not engaged in the conduct contemplated by the Act, but is rather a nonprofit homeowners association wholly uninvolved in trade and commerce as defined by the Act in S.C. Code § 39-5-10. Defendant's recitation of the definition provides no basis for alteration of this Court's Order. This Court's Order itself provided the definition of trade and commerce from the Act and properly found that Plaintiff not under its purview. Defendant's reliance on *Baker v. Chavis*, 306 S.C. 203, 410 S.E.2d 600 (Ct. App. 1991) is misplaced. While the court in *Baker* found the words "trade" and "commerce" were not limited only to the transactions listed," the case was analyzing the Act within the context of a for-profit time-share, and merely held that the term "trade" was broad enough to encompass the buying and selling of leases in a time-share, reasoning "Broadly defined, the word 'trade' includes the business of buying as well as the business of selling." *Id.* at 209 (citing *May v. Sloan*, 101 U.S. 231, 237, 25 L.Ed. 797, 799 (1879)). This does not support Defendant's apparent allegation that Plaintiff's maintenance of the common elements, which Plaintiff owns, constitutes a trade or commerce. Again, Plaintiff is clearly not involved in the type of business contemplated by the Act. This Court did not need to rely on the unpublished opinion from a case in which Counsel for Defendant previously unsuccessfully raised this argument, as it is clear the Act is inapplicable to Plaintiff's conduct. Accordingly, the Order shall not be altered.

**V. This Court properly granted summary judgment as to Defendant's counterclaim for a declaratory judgment upon ample legal basis supported by Plaintiff's affidavits and exhibits demonstrating the lack of triable issue.**

"A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is completely

appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner.” *David v. McLeod Reg’l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006). A trial court may grant summary judgment “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law. Rule 56(c), SCRCP. “When a motion for summary judgment is made and supported as provided in this Rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavit or as otherwise provided in this Rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not respond, summary judgment, if appropriate, shall be entered against him.” Rule 56(e), SCRCP.

As set forth in the Order, Defendant allegation of *ultra vires* acts on the part of Plaintiff merely because there were holdover directors on the Board of Directors is refuted by South Carolina’s Nonprofit Corporation Act, S.C. Code § 33-31-803(a), which provides a board of directors must consist of no less than three directors, and pursuant to S.C. Code § 33-31-805(d) a director continues to serve until a successor is put in place even when the director’s term has expired. The affidavits of Director Ella Calvert and Property Manager Kayla Stokes demonstrate the compliance with the Nonprofit Corporation Act in maintaining the holdover directors, and as noted, to not have the holdover directors would constitute a violation of the Act.

**VI. This Court properly denied Defendant’s Motion for Summary Judgment as to Plaintiff’s claims.**

Defendant contends this Court should have granted Defendant’s motion for summary judgment as to Plaintiff’s claims. As stated in the Order, Plaintiff’s Complaint alleges that Defendant has, amongst other things, violated Article VII, Section 1 of the Declaration’s requirements that the Owner be responsible for “painting, maintenance, repair, and replacement

of fences, siding, fixtures, lawns, shrubs, grass...” Plaintiff’s Complaint also cited to Article II, Section 13 of the Declaration restricting against underbrush, weeds, or other unsightly plants from growing on a lot. This Court reviewed the numerous photographs and affidavits provided by Plaintiff which provide ample evidence of violations of the cited covenants to include a lack of maintenance of fences, siding, and fixtures. The provisions cited in the Complaint specifically list the numerous features of property which must be maintained and/or repaired, and the photographs depicting unsightly growth, weeds, unkempt lawn, and fences and siding in need of repair, amongst other things, and affidavits evidenced such failures and breaches of the covenants.

### CONCLUSION

Therefore, in light of the foregoing arguments and the materials provided herewith, Defendant’s Motion for Reconsideration should be dismissed and this case should proceed to the Master in Equity without further delay accordingly.

Respectfully submitted,

/s/ Christian Saville

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## Certificate of Electronic Notification

### Recipients

**Christian Saville** - Notification transmitted on 11-13-2019 11:32:26 AM.

**Valerie Giovanoli** - Notification transmitted on 11-13-2019 11:32:26 AM.

**Alexander Zuraff** - Notification transmitted on 11-13-2019 11:32:26 AM.

**Andrew Radeker** - Notification transmitted on 11-13-2019 11:32:26 AM.

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**Court:**

CIRCUIT COURT

Common Pleas

Richland

**Case Caption:**

Sterling Hills Homeowners Association Inc vs  
Elliot Hayes

**Event(s):**

Order/Order Cover Sheet \$25.00

**Document(s) Submitted:**

Proposed Order/Other

**Filed by or on behalf of:**

Christian Saville

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-

**The following people were served electronically:**

Alexander Paul Zuraff for Sterling Hills  
Homeowners Association Inc

Andrew Sims Radeker for Elliot Hayes

Valerie Garcia Giovanoli for Sterling Hills  
Homeowners Association Inc

Christian Saville for Sterling Hills Homeowners  
Association Inc

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

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Richland Common Pleas

**Case Caption:** Sterling Hills Homeowners Association Inc vs Elliot Hayes  
**Case Number:** 2018CP4004658  
**Type:** Order/Other

So Ordered

s/Thomas A. Russo #2141

Electronically signed on 2019-11-22 10:18:53 page 10 of 10

**Christian Saville**

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**From:** Christian Saville  
**Sent:** Friday, November 22, 2019 10:33 AM  
**To:** 'Russo, Thomas A. Law Clerk (John Elliott)'  
**Cc:** 'Drew Radeker'  
**Subject:** Proposed Order - Sterling Hills HOA v. Hayes - 2018CP400658  
**Attachments:** 182957.docx

Good morning Mr. Elliott,

I hope everyone has been doing well. I have attached a Word version of the requested Proposed Order in Sterling Hills v. Hayes as I know sometimes a Word copy is desired in case of need for edits and revisions.

Please do not hesitate to let me know if his Honor would like me to provide anything further.

Thank you,

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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas  
Thomas A. Russo, Circuit Judge

Appellate Case No. 2020-000056

Sterling Hills Homeowners Association, .....Respondent,

v.

Elliot Hayes, .....Appellant.

CERTIFICATE OF COUNSEL

I certify that the record on appeal contains all material proposed to be included by any of the parties (not including matter stricken from the Respondent's designation) and not any other material.

Respectfully submitted,

/s/ Andrew S. Radeker  
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September 20, 2021