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SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas, Ninth Judicial Circuit  
Hon. Bentley D. Price, Circuit Court Judge

Appellate Case No. 2020-001030

Maybank 2754, LLC, .....Appellant,

v.

Eugene Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo  
Living Trust Dated December 11,1997; 1776, LLC; Beach Fenwick, LLC;  
The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny  
Creek Associates, LLC; John Doe and Mary Roe .....Respondents.

RECORD ON APPEAL  
VOLUME V

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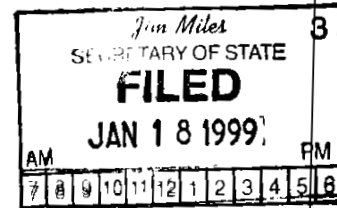
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CERTIFIED TO BE A TRUE AND CORRECT COPY  
AS TAKEN FROM AND COMPARED WITH THE  
ORIGINAL ON FILE IN THIS OFFICE

Jul 13 2021  
REFERENCE ID: 824972

*Mark Hammond*  
SECRETARY OF STATE OF SOUTH CAROLINA

STATE OF SOUTH CAROLINA  
SECRETARY OF STATE  
JIM MILES  
ARTICLES OF ORGANIZATION  
LIMITED LIABILITY COMPANY



The undersigned deliver the following articles of organization to form a South Carolina limited liability company pursuant to § 33-44-202 and § 33-44-203 of the 1976 South Carolina Code, as amended.

1. The name of the limited liability company which complies with § 33-44-105 of the South Carolina Code of 1976, as amended is **Penny Creek Associates, L.L.C.**

2. The office of the initial designated office of the limited liability company in South Carolina is:

**4 Nicklaus Lane**

Street address

**Kiawah Island, South Carolina**

City

**29455**

Zip Code

3. The initial agent for service of process of the limited liability company is

**Michel LaPlante**

Name

and the street address in South Carolina for this initial agent for service of process is:

**4 Nicklaus Lane**

Street address

**Kiawah Island, South Carolina**

City

**29455**

Zip Code

4. The name and address of each organizer is:

(a) **Scott Y. Barnes**

Name

**171 Church Street**

Street address

**Charleston**

City

**South Carolina**

State

**29401**

Zip Code

(b)

Name

Street address

City

State

Zip Code

(Add additional lines if necessary)

99-002789CC

CERTIFIED TO BE A TRUE AND CORRECT COPY  
AS TAKEN FROM AND COMPARED WITH THE  
ORIGINAL ON FILE IN THIS OFFICE

5. Jul 13 2021  Check this box only if the company is to be term company. If so, provide the  
REFERENCE ID: 801072 specified:

*Mark Hammond*  
SECRETARY OF STATE OF SOUTH CAROLINA

January 1, 2020

6.  Check this box only if management of the limited liability company is vested in a manager or managers. If this company is to be managed by managers, specify the name and address of each initial manager:

(a) **Michel LaPlante**

Name

**4 Nicklaus Lane**

Street address

**Kiawah Island**

**South Carolina**

**29455**

City

State

Zip Code

(b)

Name

Street address

City

State

Zip Code

(c)

Name

Street address

City

State

Zip Code

(d)

Name

Street address

City

State

Zip Code

(Add additional lines if necessary)

7.  Check this box only if one or more of the members of the company are to be liable for its debts and obligations under Section 33-44-303(c). If one or more members are so liable, specify which members, and for which debts, obligations or liabilities such members are liable in their capacity as members.

CERTIFIED TO BE A TRUE AND CORRECT COPY  
AS TAKEN FROM AND COMPARED WITH THE  
ORIGINAL ON FILE IN THIS OFFICE

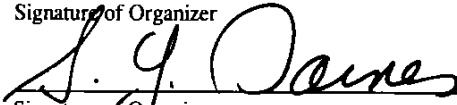
Jul 13 2021  
8  
REFERENCE ID: 824972

Unless a delayed effective date is specified, these articles will be effective when endorsed for filing by the Secretary of State. Specify any delayed effective date and time:

  
SECRETARY OF STATE OF SOUTH CAROLINA

9. Set forth any other provisions not inconsistent with law which the organizers determine to include, including any provisions that are required or are permitted to be set forth in the limited liability company operating agreement.
10. Signature of each organizer:

Signature of Organizer



Signature of Organizer

Date: January 15, 1999

#### FILING INSTRUCTIONS

1. File two copies of this form, the original and either a duplicate original or a conformed copy.
2. If space on this form is not sufficient, please attach additional sheets containing a reference to the appropriate paragraph in this form, or prepare this using a computer disk which will allow for expansion of the space on the form.
3. This form must be accompanied by the filing fee of \$110.00 payable to the Secretary of State.

Form Approved by South Carolina  
Secretary of State Jim Miles, June 1996



BK P 352PG613

PREPARED BY: Jean Dooley  
RETURN TO: Quality Control  
First Union National Bank  
P.O. Box 13327  
Roanoke, Virginia 24040-7391

### MORTGAGE AND ABSOLUTE ASSIGNMENT OF LEASES

This MORTGAGE (hereafter referred to as "Mortgage") made August 7, 2000, by and between, PENNY CREEK ASSOCIATES, L.L.C., whose address is 4 Nicklaus Lane, Kiawah Island, South Carolina 29455 ("Mortgagor") and FIRST UNION NATIONAL BANK, a national banking association, whose address is 55 Beattie Place, Greenville, South Carolina 29602 ("Bank").

#### WITNESSETH:

To secure payment and performance of obligations under a Promissory Note (the "Note") of even date herewith, in the amount of \$5,300,000.00, made by Mortgagor payable to Bank, this Mortgage, other loan documents as defined in the Note (the "Loan Documents"), and swap agreements between Bank and Mortgagor as defined in 11 U.S.C. § 101, all other indebtedness of Mortgagor to Bank whenever borrowed or incurred, and any renewals, extensions, novations, or modifications of the foregoing (collectively the "Obligations"), and in consideration of these premises and for other consideration, Mortgagor does mortgage, grant and convey unto Bank, its successors and assigns, all of Mortgagor's right, title and interest now owned or hereafter acquired in and to each of the following (collectively, the "Property"): (i) all those certain tracts of land in the County of Charleston, State of South Carolina described in EXHIBIT A attached hereto and made part hereof (the "Land"); (ii) all buildings and improvements now or hereafter erected on the Land; (iii) all fixtures attached to the Land or any buildings or improvements situated thereon; and (iv) all estates, rights, tenements, hereditaments, privileges, rents, issues, profits easements, and appurtenances of any kind benefiting the Land; all means of access to and from the Land, whether public or private; and all water and mineral rights.

TO HAVE AND TO HOLD the Property and all the estate, right, title and interest, in law and in equity, of Mortgagor's in and to the Property unto Bank, its successors and assigns, forever.

Mortgagor WARRANTS AND REPRESENTS that Mortgagor is lawfully seized of the Property, in fee simple, absolute, that Mortgagor has the legal right to convey and encumber the same, and that the Property is free and clear of all liens and encumbrances. Mortgagor further warrants and will forever defend all and singular the Property and title thereto to Bank and Bank's successors and assigns, against the lawful claims of all persons whomsoever.

PROVIDED ALWAYS that if all Obligations are timely paid and performed each and every representation, warranty, agreement, and condition of this Mortgage, the other Loan Documents and any swap agreements, are complied with and abided by, this Mortgage and the estate hereby created shall cease and be null, void, and canceled of record.

To protect the security of this Mortgage, Mortgagor further represents and agrees with Bank as follows:

**Payment of Obligations.** That the Obligations shall be timely paid and performed.

**Future Advances.** This Mortgage is given to secure not only existing Obligations, but also future advances to the same extent as if such future advances are made on the date of the execution of this Mortgage. The principal amount (including any swap agreements and future advances) that may be so secured may decrease or increase from time to time, but the total amount so secured at any one time shall not exceed the maximum principal amount of \$5,300,000.00, plus all interest, costs, reimbursements, fees and expenses due under this Mortgage and secured hereby. Mortgagor shall not execute any document that impairs or otherwise impacts the priority of any future advances secured by this Mortgage.

**Leases, Subleases and Easements.** Mortgagor shall maintain, enforce and cause to be performed all of the terms and conditions under any lease, sublease or easement which may constitute a portion of the Property. Mortgagor shall not, without the consent of Bank, enter into any new lease of all or any portion of the Property, agree to the cancellation or surrender under any lease of all or any portion of the Property, agree to prepayment of rents, issues or profits (other than rent paid at the signing of a lease or sublease), modify any such lease so as to shorten the term, decrease the rent, accelerate the payment of rent, or change the terms of any renewal option; and any such purported new lease, cancellation, surrender, prepayment or modification made without the consent of Bank shall be void as against Bank.

**Required Insurance.** Mortgagor shall maintain with respect to the Property: (i) during construction of any improvements on the Property, "all-risk" builders risk insurance (non-reporting Completed Value with Special Cause of Loss form), in an amount not less than the total value of the improvements under construction, naming Bank as mortgagee and loss payee; (ii) upon completion of construction and at all other times, insurance against loss or damage by fire and other casualties and hazards by insurance written on an "all risks" basis, including specifically windstorm and/or hail damage, in an amount not less than the replacement cost thereof, naming Bank as loss payee and mortgagee; (iii) if the Property is required to be insured pursuant to the National Flood Reform Act of 1994, and the regulations promulgated thereunder, flood insurance in an amount at least equal to the lesser of the completed replacement value of the improvements on the Property or the maximum limit of coverage available thereunder, naming Bank as mortgagee and loss payee; and (iv) liability insurance providing coverage in such amount as Bank may require but in no event less than \$1,000,000.00 combined single limit, naming Bank as an additional insured; and (v) such other insurance as Bank may require from time to time.

All casualty insurance policies shall contain an endorsement or agreement by the insurer in form satisfactory to Bank that any loss shall be payable in accordance with the terms of such policy notwithstanding any act or negligence of Mortgagor and the further agreement of the insurer waiving rights of subrogation against Bank, and rights of set-off, counterclaim or deductions against Mortgagor.

All insurance policies shall be in form, provide coverages, be issued by companies and be in amounts satisfactory to Bank. At least 30 days prior to the expiration of each such policy, Mortgagor shall furnish Bank with evidence satisfactory to Bank that such policy has been renewed or replaced or is no longer required hereunder. All such policies shall provide that the policy will not be canceled or materially amended without at least 30 days prior written notice to Bank. In the event Mortgagor fails to provide, maintain, keep in force, and furnish to Bank the policies of insurance required by this paragraph, Bank may procure such insurance or single-interest insurance in such amounts, at such premium, for such risks and by such means as Bank chooses, at Mortgagor's expense; provided however, Bank shall have no responsibility to obtain any insurance, but if Bank does obtain insurance, Bank shall have no responsibility to assure that the insurance obtained shall be adequate or provide any protection to Mortgagor.

**Insurance Proceeds.** After occurrence of any loss to any of the Property, Mortgagor shall give prompt written notice thereof to Bank.

In the event of such loss all insurance proceeds shall be payable to Bank, and Mortgagor hereby authorizes and directs any affected insurance company to make payment of such proceeds directly to Bank. Bank is hereby authorized by Mortgagor to settle, adjust or compromise any claims for loss or damage under any policy or policies of insurance and Mortgagor appoints Bank as its attorney-in-fact to receive and endorse any insurance proceeds to Bank, which appointment is coupled with an interest and shall be irrevocable as long as any Obligations remain unsatisfied.

In the event of any damage to or destruction of the Property, Bank shall have the option of applying or paying all or part of the insurance proceeds to (i) the Obligations in such order as Bank may determine, (ii) restoration of the Property, or (iii) Mortgagor. Nothing herein shall be deemed to excuse Mortgagor from restoring, repairing and maintaining the Property as required herein.

**Impositions; Escrow Deposit.** Mortgagor will pay all taxes, levies, assessments and other fees and charges imposed upon or which may become a lien upon the Property under any law or ordinance (all of the foregoing collectively "Impositions") before they become delinquent and in any event in the same calendar year in which they first become due. Upon request of Bank, Mortgagor shall add to each periodic payment required under the Note the amount estimated by Bank to be sufficient to enable Bank to pay, as they come due, all Impositions and insurance premiums which Mortgagor is required to pay hereunder. Payments requested under this provision shall be supplemented or adjusted as required by Bank from time to time. Such funds may be commingled with the general funds of Bank and shall not earn interest. Upon the occurrence of a Default, Bank may apply such funds to pay any of the Obligations.

**Use of Property.** Mortgagor shall use and operate, and require its lessees or licensees to use and operate, the Property in compliance with all applicable laws and ordinances, covenants, and restrictions, and with all applicable requirements of any lease or sublease now or hereafter affecting the Property. Mortgagor shall not permit any unlawful use of the Property or any use that may give rise to a claim of forfeiture of any of the Property. Mortgagor shall not allow changes in the stated use of Property from that disclosed to Bank at the time of execution hereof. Mortgagor shall not initiate or acquiesce to a zoning change of the Property without prior notice to, and written consent of, Bank.

**Maintenance, Repairs and Alterations.** Mortgagor shall keep and maintain the Property in good condition and repair and fully protected from the elements to the satisfaction of Bank. Mortgagor will not remove, demolish or structurally alter any of the buildings or other improvements on the Property (except such alterations as may be required by laws, ordinances or regulations) without the prior written consent of Bank. Mortgagor shall promptly notify Bank in writing of any material loss, damage or adverse condition affecting the Property.

**Eminent Domain.** Should the Property or any interest therein be taken or damaged by reason of any public use or improvement or condemnation proceeding ("Condemnation"), or should Mortgagor receive any notice or other information regarding such Condemnation, Mortgagor shall give prompt written notice thereof to Bank. Bank shall be entitled to all compensation, awards and other payments or relief granted in connection with such Condemnation and, at its option, may commence, appear in and prosecute in its own name any action or proceedings relating thereto. Bank shall be entitled to make any compromise or settlement in connection with such taking or damage. All compensation, awards, and damages awarded to Mortgagor related to any Condemnation (the "Proceeds") are hereby assigned to Bank and Mortgagor agrees to execute such further assignments of the Proceeds as Bank may require. Bank shall have the option of applying or paying the Proceeds in the same manner as insurance proceeds as provided herein. Mortgagor appoints Bank as its attorney-in-fact to receive and endorse the Proceeds to Bank, which appointment is coupled with an interest and shall be irrevocable as long as any Obligations remain unsatisfied.

**Environmental Condition of Property and Indemnity.** Mortgagor warrants and represents to Bank, except as reported by Mortgagor to Bank in writing, that: (i) Mortgagor has inspected and is familiar with the environmental condition of the Property; (ii) the Property and Mortgagor, and any occupants of the Property, are in compliance with and shall continue to be in compliance with all applicable federal, state and local laws and regulations intended to protect the environment and public health and safety as the same may be amended from time to time ("Environmental Laws"); (iii) the Property is not and has never been used to generate, handle, treat, store or dispose of, in any quantity, oil, petroleum products, hazardous or toxic substances, hazardous waste, regulated substances or hazardous air pollutants ("Hazardous Materials") in violation of any Environmental Laws; and (iv) no Hazardous Materials (including asbestos or lead paint in any form) are located on or under the Property or emanate from the Property. Further, Mortgagor represents to Bank that no portion of the Property is a protected wetland. Mortgagor agrees to notify Bank immediately upon receipt of any citations, warnings, orders, notices, consent agreements, process or claims alleging or relating to violations of any Environmental Laws or to the environmental condition of the Property.

Mortgagor shall indemnify, hold harmless, and defend Bank from and against any and all damages, penalties, fines, claims, suits, liabilities, costs, judgments and expenses, including attorneys', consultants' or experts' fees of every kind and nature incurred, suffered by or asserted against Bank as a direct or indirect result of: (i) representations made by Mortgagor in this Section being or becoming untrue in any material respect; (ii) Mortgagor's violation of or failure to meet the requirements of any Environmental Laws; or (iii) Hazardous Materials which, while the Property is subject to this Mortgage, exist on the Property. Bank shall have the right to arrange for or conduct environmental inspections of the Property from time to time (including the taking of soil, water, air or material samples). The cost of such inspections made after Default or which are required by laws or regulations applicable to Bank shall be borne by Mortgagor. Mortgagor's obligations under this Section shall continue, survive and remain in full force and effect notwithstanding foreclosure, satisfaction of this Mortgage or full satisfaction of the Obligations. However, Mortgagor's indemnity shall not apply to any negligent or intentional act of Bank which takes place after foreclosure or satisfaction of this Mortgage.

**Appraisals.** Mortgagor agrees that Bank may obtain an appraisal of the Property when required by the regulations of the Federal Reserve Board or the Office of the Comptroller of the Currency or at such other times as Bank may reasonably require. Such appraisals shall be performed by an independent third party appraiser selected by Bank. The cost of such appraisals shall be borne by Mortgagor. If requested by Bank, Mortgagor shall execute an engagement letter addressed to the appraiser selected by Bank. Mortgagor failure or refusal to sign such an engagement letter, however, shall not impair Bank's right to obtain such an appraisal. Mortgagor agrees to pay the cost of such appraisal within 10 days after receiving an invoice for such appraisal.

**Inspections.** Bank, or its representatives or agents, are authorized to enter at any reasonable time upon any part of the Property for the purpose of inspecting the Property and for the purpose of performing any of the acts it is authorized to perform under the terms of this Mortgage.

**Liens and Subrogation.** Mortgagor shall pay and promptly discharge all liens, claims and encumbrances upon the Property. Mortgagor shall have the right to contest in good faith the validity of any such lien, claim or encumbrance, provided: (i) such contest suspends the collection thereof or there is no danger of the Property being sold or forfeited while such contest is pending; (ii) Mortgagor first deposits with Bank a bond or other security satisfactory to Bank in such amounts as Bank shall reasonably require; and (iii) Mortgagor thereafter diligently proceeds to cause such lien, claim or encumbrance to be removed and discharged.

Bank shall be subrogated to any liens, claims and encumbrances against Mortgagor or the Property that are paid or discharged through payment by Bank or with loan proceeds, notwithstanding the record cancellation or satisfaction thereof.

**Waiver of Mortgagor's Rights.** Mortgagor waives any: (i) rights of homestead or other exemption with regard to any of the Property; (ii) rights or claims of equitable or statutory redemption; (iii) rights of appraisal; and (iv) rights to require marshaling of assets.

**Payments by Bank; Indemnification.** In the event of default in the timely payment or performance of any of the Obligations, Bank, at its option and without any duty on its part to determine the validity or necessity thereof, may pay the sums for which Mortgagor is obligated. Further, Bank may pay such sums as Bank deems appropriate for the protection and maintenance of the Property including, without limitation, sums to pay Impositions and other levies, assessments or liens, maintain insurance, make repairs, secure the Property, maintain utility service, intervene in any condemnation and pay attorneys' fees and other fees and costs to enforce this Mortgage or protect the lien hereof (including foreclosure) or collect the Obligations, without limitation, including those incurred in any proceeding including Bankruptcy or arbitration. Any amounts so paid shall bear interest at the default rate stated in the Note and shall be secured by this Mortgage.

In the event Bank shall become party to any suit or legal proceeding by reason of its status as holder of this Mortgage, Mortgagor shall indemnify and hold harmless Bank and reimburse Bank for any amounts paid or incurred by Bank, including all reasonable costs, charges and attorneys' fees in any such suit or proceeding.

**Assignment of Rents.** Mortgagor hereby absolutely assigns and transfers to Bank all the leases, rents, issues and profits of the Property (collectively "Rents"). Although this assignment is effective immediately, so long as no Default exists, Bank gives to and confers upon Mortgagor the privilege under a revocable license to collect as they become due, but not prior to accrual, the Rents and to demand, receive and enforce payment, give receipts, releases and satisfactions, and sue in the name of Mortgagor for all such Rents. Mortgagor represents there has been no prior assignment of leases or Rents, and agrees not to further assign such leases or Rents. Upon any occurrence of Default, the license granted to Mortgagor herein shall be automatically revoked without further notice to or demand upon Mortgagor, and Bank shall have the right, in its discretion, without notice, by agent or by a receiver appointed by a court, and without regard to the adequacy of any security for the Obligations, (i) to enter upon and take possession of the Property, (ii) notify tenants, subtenants and any property manager to pay Rents to Bank or its designee, and upon receipt of such notice such persons are authorized and directed to make payment as specified in the notice and disregard any contrary direction or instruction by Mortgagor, and (iii) in its own name, sue for or otherwise collect Rents, including those past due, and apply Rents, less costs and expenses of operation and collection, including attorneys' fees, to the Obligations in such order and manner as Bank may determine or as otherwise provided for herein. Bank's exercise of any one or more of the foregoing rights shall not cure or waive any Default or notice of Default hereunder.

**Due on Sale or Further Encumbrance.** The direct or indirect sale, assignment, or conveyance of the Property, or any interest therein, or the further encumbrance of the Property, without Bank's written consent shall, at Bank's option, constitute a Default under this Mortgage. Transfer of control of or a controlling interest in the Mortgagor shall be deemed a transfer of the Property.

**Remedies of Bank on Default.** Failure of Mortgagor or any other person liable to timely pay or perform any of the Obligations is a default ("Default") under this Mortgage. Upon the occurrence of Default the following remedies are available, without limitation, to Bank: (i) Bank may exercise any or all of Bank's remedies under this Mortgage or other Loan Documents including, without limitation, acceleration of maturity of all payments and Obligations; (ii) Bank may take immediate possession of the Property or any part thereof (which Mortgagor agrees to surrender to Bank) and manage, control or lease the same to such persons and at such rental as it may deem proper and collect and apply Rents to the payment of: (a) the Obligations, together with all costs and attorneys' fees; (b) all Impositions and any other levies, assessments or liens which may be prior in lien or payment to the Obligations, and premiums for insurance, with interest on all such items; and (c) the cost of all alterations, repairs, replacements and expenses incident to taking and retaining possession of the Property and the management and operation thereof; all in such order or priority as Bank in its sole discretion may determine. The taking of

possession shall not prevent concurrent or later proceedings for the foreclosure sale of the Property; (iii) Bank may apply to any court of competent jurisdiction for the appointment of a receiver for all purposes including, without limitation, to manage and operate the Property or any part thereof, and to apply the Rents therefrom as hereinabove provided. In the event of such application, Mortgagor consents to the appointment of a receiver, and agrees that a receiver may be appointed without notice to Mortgagor, without regard to whether Mortgagor has committed waste or permitted deterioration of the Property, without regard to the adequacy of any security for the Obligations, and without regard to the solvency of Mortgagor or any other person, firm or corporation who or which may be liable for the payment of the Obligations; (iv) Bank may exercise all the remedies of a mortgagee as provided by law and in equity including, without limitation, foreclosure upon this Mortgage and sale of the Property, or any part of the Property, at public sale conducted according to applicable law (referred to as "Sale") and conduct additional Sales as may be required until all of the Property is sold or the Obligations are satisfied; (v) With respect to any portion of the Property governed by the UCC, Bank shall have all of the rights and remedies of a secured party thereunder. Bank may elect to foreclose upon any Property that is fixtures under law applicable to foreclosure of interests in real estate or law applicable to personal property; (vi) Bank may bid at Sale and may accept, as successful bidder, credit of the bid amount against the Obligations as payment of any portion of the purchase price; and (vii) Bank shall apply the proceeds of Sale, first to any fees or attorney fees permitted Bank by law in connection with Sale, second to expenses of foreclosure, publication, and sale permitted Bank by law in connection with Sale, third to the Obligations, and any remaining proceeds as required by law.

**Miscellaneous Provisions.** Mortgagor agrees to the following: (i) All remedies available to Bank with respect to this Mortgage or available at law or in equity shall be cumulative and may be pursued concurrently or successively. No delay by Bank in exercising any remedy shall operate as a waiver of that remedy or of any Default. Any payment by Bank or acceptance by Bank of any partial payment shall not constitute a waiver by Bank of any Default; (ii) The provisions hereof shall be binding upon and inure to the benefit of Mortgagor, its heirs, personal representatives, successors and assigns including, without limitation, subsequent owners of the Property or any part thereof, and shall be binding upon and inure to the benefit of Bank, its successors and assigns and any future holder of the Note or other Obligations; (iii) Any notices, demands or requests shall be sufficiently given Mortgagor if in writing and mailed or delivered to the address of Mortgagor shown above or to another address as provided herein and to Bank if in writing and mailed or delivered to Bank's office address shown above, or such other address as Bank may specify from time to time and in the event that either party hereto changes its address at any time prior to the date the Obligations are paid in full, that party shall promptly give written notice of such change of address by registered or certified mail, return receipt requested, all charges prepaid; (iv) This Mortgage may not be changed, terminated or modified orally or in any manner other than by an instrument in writing signed by the parties hereto; (v) The captions or headings at the beginning of each paragraph hereof are for the convenience of the parties and are not a part of this Mortgage; (vi) If the lien of this Mortgage is invalid or unenforceable as to any part of the Obligations, the unsecured portion of the Obligations shall be completely paid (and all payments made shall be deemed to have first been applied to payment of the unsecured portion of the Obligations) prior to payment of the secured portion of the Obligations and if any clause, provision or obligation hereunder is determined invalid or unenforceable the remainder of this Mortgage shall be construed and enforced as if such clause, provision or obligation had not been contained herein; (vii) This Mortgage shall be governed by and construed under the laws of the jurisdiction where this Mortgage is recorded; (viii) Mortgagor by execution and Bank by acceptance of this Mortgage agree to be bound by the terms and provisions hereof.


**Waiver of Appraisal Rights.** Mortgagor understands that upon the occurrence of an Event of Default hereunder, among the other remedies set out herein or in the other Loan Documents, Mortgagee may foreclose upon the Property and proceed for a deficiency judgment pursuant to South Carolina law. The laws of South Carolina provide that in any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked may within thirty days after the sale of the mortgaged property apply to the court for an order of appraisal. The statutory appraisal value as approved by the court would be substituted for the high bid and may decrease the amount of any deficiency owing in connection with the transaction. **MORTGAGOR HEREBY EXPRESSLY WAIVES AND RELINQUISHES ANY APPRAISAL**

DK P 352PG619

RIGHTS WHICH MORTGAGOR MAY HAVE UNDER SECTION 29-3-680 THROUGH SECTION 29-3-770 OF THE SOUTH CAROLINA CODE OF LAWS (1976), AS SUCH MAY BE AMENDED, AND UNDERSTANDS AND AGREES THAT A DEFICIENCY JUDGMENT, IF PURSUED BY MORTGAGEE, SHALL BE DETERMINED BY THE HIGHEST PRICE BID AT THE JUDICIAL SALE OF THE PROPERTY REGARDLESS OF ANY APPRAISED VALUE OF THE PROPERTY.

IN WITNESS WHEREOF, Mortgagor has signed and sealed this instrument as of the day and year first above written.

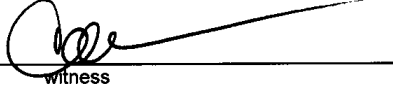
Mortgagor  
PENNY CREEK ASSOCIATES, L.L.C.

By:  (SEAL)  
Michel Lapointe, Manager

Signed, sealed and delivered in presence of:

  
witness

1208 Oakcrest Dr. Charleston SC 29412  
address

  
witness

10 NASHMOR ROAD, CHARLESTON, SC 29407  
address

2352  
Buist & Byars, LLC  
192 East Bay Street, Suite 300  
Charleston, SC 29401

State of South Carolina  
County of Charleston

**PARTNERSHIP, LIMITED PARTNERSHIP or L.L.C. PROBATE**

I, Elizabeth B. Dasburg Notary Public, do hereby certify that Michel Laplante, a Manager of PENNY CREEK ASSOCIATES, L.L.C., a limited liability company, personally appeared before me this day and acknowledged due execution of the foregoing instrument on behalf of the limited liability company.

Witness my hand and official seal, this the 7 day of August, 2000.

My commission expires:  
7-13-08

Elizabeth B. Dasburg  
Notary Public

36307

EXHIBIT ATract B-2

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "Tract 'B-2' 42.7 Acres", on a plat entitled "SUBDIVISION OF PROPERTY IN THE NAME OF F-H-P REALTY LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, S.C.", by Forrest G. Calvert, RLS, dated September 27, 1979, and recorded in the RMC Office for Charleston County, South Carolina (hereinafter the "RMC Office") in Plat Book AO at page 74, said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully be shown. (TMS Number 346-00-00-004)

And Tract 'A':

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "FHP Realty Tract 'A' 5.503 Acres" on a plat entitled "PLAT SHOWING THE ABANDONMENT OF PROPERTY LINES FOR TMS NO. 346-00-00-012 AND TMS NO. 346-00-00-011, AND THE SUBSEQUENT SUBDIVISION OF TMS NO. 346-00-00-007 INTO TRACT 'A' CONTAINING 5.503 ACRES AND TRACT 'B' CONTAINING 7.497 ACRES OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY, SOUTH CAROLINA" by Hoffman Lester Associates, Inc., dated September 24, 1997, and recorded January 20, 1998, in the aforesaid RMC Office in Plat Book EC at page 263. (TMS Number 346-00-00-066)

The aforesaid Tract B-2 and Tract A are also more particularly shown on that certain plat entitled "PLAT SHOWING PROPERTY LINE BETWEEN TMS NO. 346-00-00-004, TRACT B-2 (CONTAINING 42.49 ACRES) AND TMS NO. 346-00-00-007, RESIDUAL TRACT B (CONTAINING 5.50 ACRES) TO FORM TRACT B-2 (CONTAINING 47.99 ACRES), OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY, SOUTH CAROLINA", prepared by Hoffman Lester Associates, Inc., dated April 7, 2000, and recorded as Exhibit "\_\_\_" to that certain deed of conveyance from FHP Realty Company, A Partnership, to Penny Creek Associates, L.L.C., and also about to be recorded in the RMC Office for Charleston County, S.C.

TOGETHER WITH a twenty-foot (20') non-exclusive easement in common with Helena Igoe Blanchard, her heirs and assigns, and others entitled thereto, in favor of "Tract B" above-described, for ingress and egress over, upon and across that certain twenty-foot (20') easement extending from Maybank Highway on the south to "Tract A" on the north, as said Tract A is shown on that certain plat recorded in Plat Book AK at page 76 in the RMC Office, which easement is granted in that certain deed of conveyance from Helena Igoe Blanchard to FHP Realty Company, A Partnership, dated April 27, 1978, and recorded in Book P115, page 273, in the RMC office.

This conveyance is subject, however, to the following:

1. Easement from Helena I. Blanchard to South Carolina Electric & Gas Company, recorded in Book K66, page 587, in the RMC Office.
2. Covenants, conditions and restrictions filed for record in Book V142, page 430, in the RMC Office.

3. Covenants, conditions and restrictions filed for record in Book V142, page 434, in the RMC Office.
4. Easement from FHP Realty Company, a Partnership to Commissioners of Public Works of the City of Charleston, recorded in Book S146, page 835, in the RMC Office.
5. Easement from FHP Realty Company to South Carolina Electric & Gas Company, recorded in Book A178, page 263, in the RMC Office.
6. Easement from FHP Realty Company to South Carolina Electric & Gas Company, recorded in Book E202, page 769, in the RMC Office.
7. Easement from FHP Realty Company, a Partnership to Commissioners of Public Works of the City of Charleston, South Carolina, recorded in Book O202, page 833, in the RMC Office.
8. Agreement dated September 16, 1991, between The Valley Vista Apartments Limited Partnership; Fenwick Acres Partnership; Claude W. Blanchard, et al.; FHP Realty Company; and Fenwick Hall, Inc., recorded in Book S207, page 136, in the RMC Office.
9. Declaration of Restrictive Covenants dated January 23, 1998, and recorded on May 13, 1998, in Book S302, page 688, in the RMC Office, as amended by that Amendment to Declaration of Restrictive Covenants dated June 20, 2000, and recorded July 6, 2000, in Book V350, page 9, in the aforesaid RMC Office.
10. Twenty-foot (20') non-exclusive easement in favor of Helena Igoe Blanchard, her heirs and assigns, for ingress and egress as set forth in that certain deed of conveyance from Helena Igoe Blanchard to FHP Realty Company, A Partnership, dated April 27, 1978, and recorded in Book P115, page 273, in the RMC office.
11. Matters of survey as set forth on the above referenced boundary plat prepared by Hoffman Lester Associates as set forth below:
  - a. Existing 20' Sanitary Sewer Easement along the northern property line adjacent to Tract C-1.
  - b. Existing 20' Sanitary Sewer Easement parallel with the right-of-way of Maybank Highway and also extending from Maybank Highway through the insured property and continuing to the right-of-way of River Road.
  - c. A portion of Tract B-2 as leased to David C. Swann, D.D.S. under an unrecorded lease, of approximately 50 feet by 120 feet, "until such time public water or public sewer is available to Lot 'B-3'".
  - d. "Existing Pond", "Existing Wetlands", and "Wetland Buffer".
12. Plat entitled "PLAT SHOWING ABANDONMENT OF PROPERTY LINES FOR TMS NO. 346-00-00-012 AND TMS NO. 346-00-00-011, AND THE SUBSEQUENT SUBDIVISION OF TMS NO. 346-00-00-007 INTO TRACT 'A' CONTAINING 5.503 ACRES AND TRACT 'B' CONTAINING 7.497 ACRES OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY, SOUTH CAROLINA" by Hoffman Lester Associates, Inc., dated September 24, 1997, and recorded January 20, 1998, in the aforesaid RMC

Office in Plat Book EC at page 263, discloses a small area of pavement encroachment into Tract B-2.

13. Plat entitled "PLAT SHOWING ABANDONMENT OF PROPERTY LINES FOR TMS NO. 346-00-00-012 AND TMS NO. 346-00-00-011, AND THE SUBSEQUENT SUBDIVISION OF TMS NO. 346-00-00-007 INTO TRACT 'A' CONTAINING 5.503 ACRES AND TRACT 'B' CONTAINING 7.497 ACRES OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY, SOUTH CAROLINA" by Hoffman Lester Associates, Inc., dated September 24, 1997, and recorded January 20, 1998, in the aforesaid RMC Office in Plat Book EC at page 263, discloses a portion of Tract B-2 as leased to David C. Swann, D.D.S., of approximately 50 feet by 120 feet, "until such time public water or public sewer is available to Lot 'B-3'".
14. Easement from FHP Realty Company, a Partnership to Commissioners of Public Works of the City of Charleston, recorded in Book S146, page 855, in the RMC Office.
15. Right-of-way Easement for Ingress, Egress, and Utilities from FHP Realty Company, A Partnership, in favor of Penny Creek Associates, L.L.C. dated June 5, 2000, and recorded June 6, 2000, in Book X348, page 296, and re-recorded June 26, 2000, in Book A350, page 737 in the aforesaid RMC Office, which is to be extinguished by virtue of the within contemplated acquisition of Tract B-2 from FHP Realty Company, A Partnership, by Penny Creek Associates, L.L.C.

This is the same property conveyed to the mortgagor herein by deed of conveyance of FHP Realty Company, A Partnership, dated August 7, 2000, and recorded simultaneously herewith.

ALSO:

Parcel A, River Road:

ALL that piece, parcel or tract of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "Parcel A 44,273 sq. ft. 10.11 acres" on that certain plat by Forsberg Engineering & Surveying, Inc., dated February 18, 1998, and recorded February 20, 1998, in Plat Book EC at page 328, in the RMC Office for Charleston County, S.C., said property having such location, size, shape, metes, courses, distances, buttings and boundings as will by reference to said plat more fully appear.

This conveyance is subject, however, to the following:

1. Plat of survey recorded in Plat Book EC at page 328 in the RMC Office for Charleston County discloses the following:
  - a. "Old Hog Wire Fence Along Property Line" along the southern property line.
  - b. New 20' Sewer Easement along the property line adjacent to and parallel with the right-of-way of River Road.
  - c. "Power Pole" on property line adjacent to the right-of-way of River Road.
  - d. Building setbacks as set forth in the "Notes" on said plat.
2. Plat of survey entitled "Wetland Drawing, Santos/River Road City of Charleston, South Carolina" prepared by Hoffman Lester Associates, Inc., dated April 18, 2000, discloses the following:
  - a. "Remains of Wood Post and Wire Fence" along the southern property line.

- b. "Wetlands" through portions of the parcel.
  - c. "Existing Commissioners of Public Works 20' Sanitary Sewer Easement" along the property line adjacent to and parallel with the right-of-way of River Road.
3. Matters of survey subsequent to the aforesaid plat recorded in Plat Book EC at page 328 in the aforesaid RMC Office.
  4. Agreement in favor of Berkeley Electric Cooperative, Inc., dated March 12, 1973, and recorded in Book J102, page 77, in the aforesaid RMC Office.
  5. Right-of-way Easement in favor of the Commissioners of Public Works of the City of Charleston, South Carolina, recorded July 19, 1985, in Book S146, page 866, in the aforesaid RMC Office.
  6. Restrictive Covenants granted by Nan W. Molony and Yvonne K. Santos dated August 20, 1984, and recorded November 29, 1984, in Book R141, page 402, in the aforesaid RMC Office.
  7. Restrictive Covenants granted by Nan W. Molony and Yvonne K. Santos dated October 24, 1986, and recorded October 28, 1992, in Book T219, page 822, in the aforesaid RMC Office.
  8. Right-of-way Easement in favor of the Commissioners of Public Works of the City of Charleston, South Carolina, recorded January 29, 1998, in Book O296, page 335, in the aforesaid RMC Office.

Lender agrees with borrower to release the lien of the within mortgage from the above described "Parcel A, River Road (10.11 acres) upon the payment to lender of a sum not exceeding One Hundred Fifty Thousand and 00/100 Dollars (\$150,000.00).

This is the same property conveyed to the mortgagor herein by deed of conveyance of Yvonne K. Santos and Nan W. Molony dated August 7, 2000, and recorded simultaneously herewith.

ALSO:  
Tract C:

ALL that certain piece, parcel or lot of land, situate, lying and being in City of Charleston, County of Charleston, South Carolina, and being shown and delineated as TRACT "C", 59.280 acres of highland and 95.063 acres of marshland, on a plat by Forrest G. Calvert, dated November, 1977, entitled in part "Plat Showing Subdivision of Fenwick Hall Plantation, 237.176 Ac. Highland 148.058 Ac. Marsh Located on Johns Island, Charleston County, South Carolina. Property of Mrs. Helena Igoe Blanchard", and recorded in Plat Book AK, at page 76, in the RMC Office for Charleston County, South Carolina (the "RMC Office"), and having such location, size, shape, buttings, boundings, and dimensions as will appear by reference to said plat which is incorporated herein by reference, be all the dimensions and measurements shown thereon a little more or less.

SAVING AND EXCEPTING that certain piece, parcel or lot of land, situate, lying and being in Charleston County, South Carolina, described as 0.97 acres of land as conveyed to the South Carolina Department of Transportation in that certain deed of conveyance from Fenwick Acres dated April 16,

1998, and recorded July 28, 1998, in Book R307, page 246, in the RMC Office.

The aforesaid property and said 0.97 acre parcel are more particularly shown on that certain plat prepared by Southeastern Surveying, Inc., entitled "A Boundary Survey of Tract "C" Containing 153.153 Acres, Owned by Fenwick Acres Located in the City of Charleston, Charleston County, South Carolina", dated March 23, 1999, and recorded in the RMC Office in Plat Book ED, at page 70.

This conveyance is subject, however, to the following:

1. Covenants, conditions and restrictions dated September 8, 1986, and filed for record in Book Y166, page 522, Charleston County RMC.
2. Non-exclusive easement for ingress and egress, being twenty feet (20') in width, ten feet on either side of the center line of an existing private road extending from Maybank Highway on the south to Tract A on the north, for the benefit of the owners of Tracts A, B and C, their heirs, assigns, guests, invitees, and licensees. Tracts A, B and C are shown on the aforesaid plat recorded in Plat Book AK at page 76, in the RMC Office.
3. Easement dated December 12, 1958, from Helene I. Blanchard to South Carolina Electric & Gas Company, recorded in Book K66, page 587, Charleston County Records.
4. Easement dated August, 1974, from Helena Igoe Blanchard to South Carolina Electric & Gas Company, recorded in Book Y105, page 126, Charleston County Records.
5. Easement dated August 8, 1985, from Fenwick Acres, A Partnership to Commissioners of Public Works of the City of Charleston, recorded in Book E147, page 865, Charleston County Records.
6. Easement dated September 2, 1988, from Fenwick Acres to South Carolina Electric & Gas Company, recorded in Book P179, page 865, Charleston County Records.
7. Easement dated April 22, 1991, from Fenwick Acres to South Carolina Electric & Gas Company, recorded in Book E202, page 765, Charleston County Records.
8. Agreement dated September 16, 1991, between The Valley Vista Apartments Limited Partnership; Fenwick Acres Partnership; Claude W. Blanchard, et al.; FHP Realty Company; and Fenwick Hall, Inc., recorded in Book S207, page 136, Charleston County Records.
9. Right of Way Easement dated October 7, 1991, from Fenwick Acres Partnership, a South Carolina Partnership to Commissioners of Public Works of the City of Charleston, recorded in Book J207, page 889, Charleston County Records.
10. Amendatory Right-of-Way Easement, and Quitclaim dated May 13, 1992, between Fenwick Acres Partnership, a South Carolina partnership, and the Commissioners of Public Works of the City of Charleston, recorded in Book Y217, page 725, Charleston County Records.
11. Survey prepared by Southeastern Surveying, Inc., dated March 23, 1999 and recorded in Plat Book ED at page 70, discloses the following, to which exception is also taken:
  - (a) "Existing 20' Ingress/Egress Easement" along southern boundary

- of insured property;
- (b) "Existing 30' Sanitary Sewer Easement" running in a generally east-west direction from the property line to the west and Maybank Highway to the east, and continuing in a generally southwesterly direction parallel with the property line adjacent to the Right of Way of Maybank Highway;
  - (c) "Existing Sanitary Sewer Easement" running in a generally north-northeasterly direction along western property line;
  - (d) "Existing 120' SCE&G Transmission Easement" and "Existing 50' SCE&G Transmission Easement" running from the extreme northern tip of the insured property in a generally southeasterly direction to the eastern property line adjacent to the Right of Way of Maybank Highway;
  - (e) Tidal creek identified as "Penny Creek" running through the property in a generally east-west direction from the western property line to the far eastern boundary line near its intersection with the Right of Way of Maybank Highway.
  - (f) Concrete pad located at western edge of property adjacent to the Existing 30' Sanitary Sewer Easement referenced in (b) above; and
  - (g) Overhead power line running in a generally east-west direction, along with power poles, across the southern portion of the insured property;
  - (h) Approximate location of 12' SCE&G easement for underground line adjacent to sanitary sewer easements along western property line, running in a generally east-west direction from the western property line to the far eastern boundary line, and parallel to the right of way of Maybank Highway; and
  - (i) Transformers located within the 12' SCE&G easement noted above.
12. DHEC - OCRM critical lines as set forth on the aforesaid plat of survey prepared by Southeastern Surveying, Inc., dated March 9, 1999, and recorded in the Charleston County RMC Office in Plat Book ED at page 70.

This is the same property conveyed to the mortgagor herein by deed of conveyance of Fenwick Acres, A Partnership, dated March 25, 1999, and recorded in Book D323, page 311, in the RMC Office for Charleston County, South Carolina, and also by deed of Julius H. Weil, Jr., dated March 25, 1999, and recorded in Book D323, page 439, in the aforesaid RMC Office.

BR P 352PG627

*Handwritten initials*

**Buist & Byars, LLC**  
P.O. Box 570  
Charleston, SC 29402

**FILED**

*P352-613*

2000 AUG -8 AM 11:37

CHARLIE LYBRAND  
REGISTER  
CHARLESTON COUNTY SC

*20.00*  
*A*

**THIRD AMENDED AND RESTATED  
OPERATING AGREEMENT  
OF  
PENNY CREEK ASSOCIATES, L.L.C.**

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**THIRD AMENDED AND RESTATED  
OPERATING AGREEMENT  
OF  
PENNY CREEK ASSOCIATES, L.L.C.**

This Third Amended and Restated Operating Agreement of PENNY CREEK ASSOCIATES, L.L.C. (the "Company") dated as of October 25, 2005 amends and restates the Operating Agreement of the Company dated as of June 1, 2005 which amended and restated the Operating Agreement of the Company dated July \_\_\_\_\_, 2001 which amended and restated the Operating Agreement of the Company dated March 23, 1999, and is (a) adopted by the Managers (as defined below) and (b) executed and agreed to, for good and valuable consideration, by the Members (as defined below).

**ARTICLE I  
DEFINITIONS**

As used in this Operating Agreement, the following terms have the following meanings:

- A. "Act" means the Uniform Limited Liability Company Act of 1996 and any successor statute as amended from time to time.
- B. "Adjusted Invested Capital" means as of any time, all capital contributions of a Member, less all amounts previously distributed to that Member by the Company as a return of Adjusted Invested Capital, provided that Adjusted Invested Capital shall not be reduced below zero.
- C. "Articles" means the Articles of Organization filed with the Secretary of State of South Carolina by which PENNY CREEK ASSOCIATES, L.L.C. was organized as a South Carolina Limited Liability Company under and pursuant to the Act.
- D. "Bankrupt Member" means a Member who is the subject of an order for relief under Title 11 of the United States Code or a comparable order under a successor statute of general application or a comparable order under federal, state, or foreign law governing insolvency and has the same meaning as the term "Debtor in Bankruptcy" defined in § 33-44-101(4) of the Act.
- E. "Business Day" means any day other than a Saturday, a Sunday, or a holiday on which national banking associations in the State of South Carolina are closed.
- F. "Capital Contribution" means any contribution by a Member to the capital of the Company.
- G. "Cash Flow" means for any fiscal year, all cash receipts of the Company (other than capital contributions and proceeds from borrowing) plus excess reserves less all cash expenditures and such reasonable reserves as the Manager shall determine from time to time.

H. "Code" means the Internal Revenue Code of 1986 and any successor statute, as amended from time to time.

I. "Company" means PENNY CREEK ASSOCIATES, L.L.C., a South Carolina Limited Liability Company.

J. "Company Liability" means any enforceable debt or obligation for which the Company is liable or which is secured by any Company Property.

K. "Company Minimum Gain" means an amount determined by first computing for each Company Nonrecourse Liability any gain the Company would realize if it disposed of the Company Property subject to that liability for no consideration other than full satisfaction of the liability, and then aggregating the separately computed gains. The amount of Company Minimum Gain includes such minimum gain arising from a conversion, refinancing, or other change to a debt instrument, only to the extent a Member is allocated a share of that minimum gain. For any taxable year, the net increase or decrease in Company Minimum Gain is determined by comparing the Company Minimum Gain on the last day of the immediately preceding taxable year with the Minimum Gain on the last day of the current taxable year. Notwithstanding any provision to the contrary contained herein, Company Minimum Gain and increases and decreases in Company Minimum Gain are intended to be computed in accordance with § 704 of the Code and the Regulations issued thereunder, as the same may be issued and interpreted from time to time. A Member's share of Company Minimum Gain at the end of any taxable year equals; the sum of Nonrecourse Deductions allocated to that Member (and to that Member's predecessors in interest) up to that time and the distributions made to that Member (and to that Member's predecessors in interest) up to that time of proceeds of a nonrecourse liability allocable to an increase in Company Minimum Gain minus the sum of that Member's (and that Member's predecessors' in interest) aggregate share of the net decreases in Company Minimum Gain plus their aggregate share of decreases resulting from revaluations of Company Property subject to one or more Company Nonrecourse Liabilities.

L. "Company Nonrecourse Liability" means a Company Liability to the extent that no Member or related person bears the economic risk of loss (as defined in § 1.752-2 of the Regulations) with respect to the liability.

M. "Cumulative Preferred Return" means the cumulative non-compounded annual return equal to the product of a Member's Adjusted Invested Capital multiplied by 5% per annum.

N. "Default Interest Rate" means a rate per annum equal to the lesser of (a) five percent (5.0%) plus a varying rate per annum that is equal to the *Wall Street Journal* prime rate as quoted in the money rates section of the *Wall Street Journal* which is also the base rate on corporate loans at large United States money center commercial banks, from time to time as its prime commercial or similar reference interest rate, with adjustments in that varying rate to be made on the same date as any change in that rate, and (b) the maximum rate permitted by applicable law.

O. "Delinquent Member" means a Member who does not contribute by the time required all or any portion of a Capital Contribution that Member is required to make as provided in this Operating Agreement.

P. "Distributional Interest" means all of a Member's interest in distributions by the Company.

Q. "Dispose," "Disposing," or "Disposition" means a sale, assignment, transfer, exchange, mortgage, pledge, grant of a security interest, or other disposition or encumbrance (including, without limitation, by operation of law), or the acts thereof.

R. "General Interest Rate" means a rate per annum equal to the lesser of (a) the *Wall Street Journal* prime rate as quoted in the money rates section of the *Wall Street Journal* which is also the base rate on corporate loans at large United States Money center commercial banks, from time to time as its prime commercial or similar reference interest rate, with adjustments in that varying rate to be made on the same date as any change in that rate, and (b) the maximum rate permitted by applicable law.

S. "Lending Member" means those Members, whether one or more, who advance the portion of the Delinquent Member's Capital Contribution that is in default.

T. "Majority in Interest" means the majority vote of both these Class A Members owning a majority of the capital and those Class A Members owning a majority of the Net Profits and Net Losses of the Company.

U. "Manager or Managers" means Michel Laplante or any Person hereafter elected as a Manager of the Company as provided in this Operating Agreement, but does not include any Person who has ceased to be a Manager of the Company.

V. "Member" means any Person executing this Operating Agreement, or hereafter admitted to the Company as a Member as provided in this Operating Agreement, but does not include any Person who has ceased to be a Member in the Company. There shall be two classes of Members: Class "A" Members and Class "B" Members. Class "B" Members shall have all of the rights, powers, and duties of a Class "A" Member except that Class "B" Members shall have no right to vote on or consent (in writing or otherwise) to any matter except as provided in S.C. Code Ann. § 33-44-103(b). The provisions of this Agreement which require Member or Membership consent, written or otherwise, or a vote of the Members or Membership shall require only the consent or a vote of the Class "A" Members or Membership.

W. "Member Minimum Gain" means an amount determined by first computing for each Member Nonrecourse Liability any gain the Company would realize if it disposed of the Company property subject to that liability for no consideration other than full satisfaction of the liability, and then aggregating the separately computed gains. The amount of Member Minimum Gain includes such minimum gain arising from a conversion, refinancing, or other change to a debt instrument, only to the extent a Member is allocated a share of that minimum gain. For any taxable year, the net increase or decrease in Member Minimum Gain is determined by comparing the Member Minimum Gain on the last day of the immediately preceding taxable year with the Minimum Gain on the last day of the current taxable year. Notwithstanding any provision to the contrary contained herein, Member Minimum Gain and increases and decreases in Member Minimum Gain are intended to be computed in accordance with § 704 of the Code or the Regulations issued thereunder, as the same may be issued and interpreted from time to time.

**X. "Member Nonrecourse Liability"** means any Company Liability to the extent of liability is nonrecourse under state law, and on which a Member or related person bears the economic risk of loss under § 1.752-2 of the Regulations because, for example, the Member or related person is the creditor or a guarantor.

**Y. "Membership"** means any Member's interest in the Company, including, without limitation, rights to distributions (liquidating or otherwise), allocations, information, and in the case of Class A Members to consent or approve.

**Z. "Net Losses"** means the losses and deductions of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate, as appropriate, on the tax return of the Company filed for federal income tax purposes.

**AA. "Net Profits"** means the income and gains of the Company determined in accordance with accounting principles consistently applied from year to year employed under the method of accounting adopted by the Company and as reported separately or in the aggregate as appropriate on the tax return of the Company filed for federal income tax purposes.

**BB. "Nonrecourse Liabilities"** means Company Nonrecourse Liabilities and Member Nonrecourse Liabilities.

**CC. "Offsettable Decrease"** means any allocation that unexpectedly causes or increases a deficit in the Member's Capital Account as of the end of the taxable year to which the allocation relates attributable to depletion allowances under § 1.704-1(b)(2)(iv)(k) of the Regulations, allocations of loss and deductions under §§ 704(e)(2) or 706 of the Code or under § 1.751-1 of the Regulations, or distributions that, as of the end of the year are reasonably expected to be made to the extent they exceed the offsetting increases to such Member's Capital Account that reasonably are expected to occur during or (prior to) the taxable years in which such distributions are expected to be made (other than increases pursuant to a Minimum Gain Chargeback).

**DD. "Operating Agreement"** has the meaning given that term in the introductory paragraph.

**EE. "Person"** includes an individual, partnership, limited partnership, limited liability company, foreign limited liability company, trust, estate, corporation, custodian, trustee, executor, administrator, nominee or entity in a representative capacity.

**FF. "Proceeding"** means any threatened, pending or completed action, suit or proceeding, whether civil, criminal, administrative, arbitative or investigative.

**GG. "Property"** means the property described in Exhibit B attached hereto.

**HH. "Required Interest"** means one hundred percent (100 %) of the Class A Members.

Other terms defined herein have the meanings so given them.

**ARTICLE II  
ORGANIZATION**

**2.1 FORMATION.**

The Company has been organized as a South Carolina Limited Liability Company by the filing of Articles pursuant to the Act and the issuance of a certificate of organization for the Company by the Secretary of State of South Carolina.

**2.2 NAME.**

The name of the Company is PENNY CREEK ASSOCIATES, L.L.C. and all Company business must be conducted in that name or such other names that comply with applicable law as the Manager may select from time to time.

**2.3 DESIGNATED OFFICE.**

The registered office of the Company required by the Act to be maintained in the State of South Carolina shall be the office of the initial registered agent named in the Articles or such other office (which need not be a place of business of the Company) as the Manager, or Members if there is no Manager, may designate from time to time in the manner provided by law.

**2.4 REGISTERED AGENT.**

The registered agent of the Company in the State of South Carolina shall be the initial registered agent named in the Articles or such other Person or Persons as the Manager, or Members if there is no Manager, may designate from time to time in the manner provided by law.

**2.5 PRINCIPAL OFFICE IN THE UNITED STATES OTHER OFFICES.**

The principal office of the Company in the United States shall be at such place as the Manager, or Members if there is no Manager or the management of the Company is reserved to the Members, may designate from time to time, which need not be in the State of South Carolina. The Company may have such other offices as the Manager, or Members if there is no Manager, may designate from time to time.

**2.6 PURPOSES.**

The purposes of the Company are initially to acquire and hold the Property for a long term capital appreciation. In managing the Property as an investment the Company may hold, lease, sell, rent, develop, operate, transfer, exchange, or otherwise dispose of all or a portion of the Property, and to engage in any and all lawful business activities related or incidental thereto.

**2.7 FOREIGN QUALIFICATION.**

Prior to the Company's conducting business in any jurisdiction other than South Carolina, the Managers shall cause the Company to comply, to the extent procedures are available and those matters are reasonably within the control of the Manager or Members, with all requirements necessary to qualify the Company as a foreign limited liability company in that jurisdiction. At the request of the Manager or

Members, each Member shall execute, acknowledge, swear to, and deliver all certificates and other instruments conforming with this Operating Agreement that are necessary or appropriate to qualify, continue, and terminate the Company as a foreign limited liability company in all such jurisdictions in which the Company may conduct business.

**2.8 TERM.**

The Company commenced on the date the Articles were filed with the Secretary of State of South Carolina for the Company and shall continue in existence for the period fixed in the Articles for the duration of the Company, or such earlier time as this Operating Agreement may specify.

**2.9 MERGERS.**

The Company may merge with another business entity subject to the requirements of Sections 33-44-904 through 33-44-907 of the Act.

**2.10 NO STATE-LAW PARTNERSHIP.**

The Members intend that the Company not be a partnership (including, without limitation, a limited partnership) or joint venture, and that no Member or Manager be a partner or joint venturer of any other Member of Manager, for any purposes other than federal and state tax purposes, and this Operating Agreement may not be construed to suggest otherwise.

**ARTICLE III  
MEMBERS**

**3.1 ADMISSION OF MEMBERS.**

A. After the formation of this Company, a person becomes a new Member:

(1) in the case of a person acquiring a Membership directly from this Company, on compliance with the provisions of Section 3.2 and 3.4 of this Agreement governing admission of new Members or, if this Operating Agreement contains no relevant admission provisions, on the written consent of a Required Interest; and

(2) in the case of an assignee of a Membership on compliance with the provisions of Section 3.2 and 3.3 of this Agreement.

B. Any person may be a Member unless the person lacks capacity.

**3.2 REPRESENTATIONS AND WARRANTIES.**

Each Member hereby represents and warrants to the Company and each other Member that (a) if that Member is a corporation, it is duly organized, validly existing and in good standing under the law of the state of its incorporation and is duly qualified and in good standing as a foreign corporation in the jurisdiction of its principal place of business (if not incorporated therein); (b) if that Member is a limited liability company, it is duly organized, validly existing, and (if applicable) in good standing under the law of the state of its organization and is duly qualified and (if applicable) in good standing as a foreign

limited liability company in the jurisdiction of its principal place of business (if not organized therein); (c) if that Member is a partnership, trust, or other entity, it is duly formed, validly existing, and (if applicable) in good standing under the law of the state of its formation, and if required by law is duly qualified to do business and (if applicable) in good standing in the jurisdiction of its principal place of business (if not formed therein), and the representations and warranties in clause (a), (b), or (c), as applicable, are true and correct with respect to each partner (other than limited partners), trustee, or other Member thereof, (d) that Member has full corporate, limited liability company, partnership, trust, or other applicable power and authority to execute and agree to this Operating Agreement and to perform obligations hereunder and all necessary actions by the board of directors, shareholders, manager, members, partners, trustees, beneficiaries, or other Persons necessary for the due authorization, execution, delivery, and performance of this Operating Agreement by that Member have been duly taken; (e) that Member has duly executed and delivered this Operating Agreement; and (f) that Member's authorization, execution, delivery, and performance of this Operating Agreement do not conflict with any other agreement or arrangement to which that Member is a party or by which it is bound.

### **3.3 RESTRICTIONS ON THE DISPOSITION OF A MEMBERSHIP.**

**A.** Membership and transferability of Memberships in the Company are substantially restricted. An unauthorized transfer of a Membership could create a substantial hardship to the Company, jeopardize its capital base, and adversely affect its tax structure. These restrictions upon ownership and transfer are not intended as a penalty, but as a method to protect and preserve existing relationships based upon trust and the Company's capital and its financial ability to continue. A Disposition of a Membership in the Company may be effective only with the consent of a Required Interest.

An assignee who becomes a Member has, to the extent assigned, the rights and powers and is subject to the restrictions and liabilities of a Member under this Operating Agreement and the Act. Unless otherwise provided by this Operating Agreement, an assignee who becomes a Member also is liable for the obligations of the assignor to make contributions but is not obligated for liabilities unknown to the assignee at the time the assignee became a Member and which could not be ascertained from this Operating Agreement. Whether or not an assignee of a Membership becomes a Member, the assignor is not released from the assignor's liability to this Company.

**B.** Subject to the provisions of the following section, (i) a Person to whom a Membership in the Company is transferred has the right to be admitted to the Company as a Member with the interest in Net Profits, Net Losses, and capital so transferred to such Person, if (A) the Member making such transfer grants the transferee the right to be so admitted, and (B) such transfer is consented to in accordance with this section.

**C.** The Company may not recognize for any purpose any purported Disposition of a Membership unless and until the other applicable provisions of this section have been satisfied and the Manager has received, on behalf of the Company, a document (i) executed by both the Member effecting the Disposition (or if the transfer is on account of the death, incapacity, or liquidation of the transferor, his representative) and the Person to which the Membership is Disposed, (ii) including the notice address of any Person to be admitted to the Company as a Member and its agreement to be bound by this Operating Agreement in respect of the Membership being obtained, (iii) setting forth the Person's interest in Net Profits, Net Losses and capital after the Disposition of the Member affecting the

Disposition and the Person to which the Membership is Disposed (which together must total the Person's interest in Net Profits, Net Losses and capital of the Member affecting the Disposition before the Disposition), and (iv) containing a representation and warranty that the Disposition was made in accordance with all applicable laws and regulations (including securities laws) and, if the Person to which the Membership is Disposed is to be admitted to the Company, its representation and warranty that the representations and warranties in this Operation Agreement are true and correct with respect to that Person.

D. For the right of a Member to Dispose of a Membership or of any Person to be admitted to the Company in connection therewith to exist or be exercised, (i) either (A) the Membership subject to the Disposition or admission must be registered under the Securities Act of 1933, as amended, and any applicable state securities laws or (B) the Company must receive a favorable opinion of the Company's legal counselor or other legal counsel acceptable to the Manager to the effect that the Disposition or admission is exempt from registration under those laws and (ii) the Company must receive a favorable opinion of the Company's legal counsel or of other legal counsel acceptable to the Manager to the effect that the Disposition or admission, when added to the total of all other sales, assignments, or other Dispositions within the preceding 12 months, would not result in the Company's being considered to have terminated within the meaning of the Code. The Manager, however, may waive the requirements of this sub-part of this section.

E. The Member effecting a Disposition and any Person admitted to the Company in connection therewith shall pay, or reimburse the Company for, all costs incurred by the Company in connection with the Disposition or admission (including, without limitation, the legal fees incurred in connection with the legal opinions referred above) on or before the tenth day after the receipt by that Person of the Company's invoice for the amount due. If payment is not made by the date due, the Person owing that amount shall pay interest on the unpaid amount from the date due until paid at a rate per annum equal to the Default Interest Rate.

F. Each Member shall be entitled, without the consent of the Manager or other Members, to Dispose of all or less than all of his or its Distributional Interest to a family member or family trust of such Member, or a beneficiary of such Member, provided that, contemporaneously with the Disposition, the affiliate, family member or family trust to whom such Distributional Interest is Disposed shall execute an agreement pursuant to which such affiliate, family member or family trust agrees to be bound by the provisions of this Agreement; provided, further, that following any such Disposition, the assigning Member shall continue to be bound to perform and discharge such member's obligations and liabilities under this Agreement or any other agreement with a third party, such as loan guaranties, as long as any affiliate, family member or family trust of such assigning Member owns a Distributional Interest. For purposes of this Section 3.3, if part or all of a Membership is held by more than one affiliate, family member or family trust of such Member ("Permitted Transferee"), the Permitted Transferees shall appoint one person as sole representative with full power and authority to bind them to act on their behalf with respect to all matters in connection with the Company and this Agreement and shall send notice of such appointment to the Manager.

#### 3.4 ADDITIONAL MEMBERS.

Additional Persons may be admitted to the Company as Members and Memberships may be created and issued to those Persons and to existing Members with the consent of all of the Members. The terms of admission or issuance must specify the percentage of Net Profit, Net Loss, allocable to

such person and the Capital Contribution applicable thereto and may provide for the creation of different classes or groups of Members and having different rights, powers, and duties. The Manager shall reflect the creation of any new class or group in an amendment to this Operating Agreement indicating the different rights, powers, and duties, and such an amendment need be executed only by the Manager. Any such admission also must comply with the requirements described elsewhere in this Operating Agreement and is effective only after the new Member has executed and delivered to the Manager or a Required Interest, as appropriate, a document including the new Member's notice address, its agreement to be bound by this Operating Agreement, and its representation and warranty that the representation and warranties required of new Members are true and correct with respect to the new Member. The provisions of this section shall not apply to Dispositions of a Membership.

Notwithstanding the foregoing, the Members of the Company shall have a preemptive right to acquire additional, newly created Memberships of the Company, or securities of the Company convertible into or carrying a right to subscribe to or acquire Memberships, except to the extent limited or denied by this Operating Agreement or the Articles.

### **3.5 INTERESTS IN A MEMBER.**

A Member that is not a natural person may not cause or permit an interest, direct or indirect, in itself to be Disposed of such that after the Disposition, (a) the Company would be considered to have terminated within the meaning of section 708 of the Code or (b) without the consent of a Required Interest that Member shall cease to be controlled by substantially the same Persons who control it as of the date of its admission to the Company. On any breach of the provisions of clause (b) of the immediately preceding sentence, the Company shall have the option to buy, and on exercise of that option the breaching Member shall sell, the breaching Member's Membership. The date of payment and the fair market value of the Membership shall be determined by the Company.

### **3.6 INFORMATION.**

A. The Manager shall prepare and present to the Members, annually, a progress report which will include a financial statement for the month, and year to date, a comparison of the benchmarks established by the Manager with the actual performance to date, a cash flow analysis and a comparison of the monthly and project to date sales goals with actual sales.

B. In addition to the other rights specifically set forth in this Operating Agreement, each Member is entitled to all information to which that Member is entitled to have access pursuant to Section 33-44-408 of the Act under the circumstances and subject to the conditions therein stated.

C. The Members and Manager acknowledge that from time to time, they may receive information from or regarding the Company in the nature of trade secrets or that otherwise is confidential, the release of which may be damaging to the Company or Persons with which it does business. Each Member and Manager shall hold in strict confidence any information it receives regarding the Company that is identified as being confidential (and if that information is provided in writing, that is so marked) and may not disclose it to any Person other than another Member or the Managers, except for disclosures (i) compelled by law (but the Manager must notify the Members promptly of any request for that information, before disclosing it, if practicable), (ii) to advisers or representatives of the Member or Persons to which that Member's Membership may be Disposed as permitted by this Operating Agreement, but only if the recipients have agreed to be bound by the

provisions of this section or (iii) of information that Member also has received from a source independent of the Company that the Member reasonably believes obtained that information without breach of any obligation of confidentiality. The Members acknowledge that breach of the provisions of this section may cause irreparable injury to the Company for which monetary damages are inadequate, difficult to compute, or both. Accordingly, the Members agree that the provisions of this section may be enforced by specific performance.

### **3.7 LIABILITIES TO THIRD PARTIES.**

Except as otherwise expressly agreed in writing, no Member or Manager shall be liable for the debts, obligations or liabilities of the Company, including under a judgment decree or order of a court.

### **3.8 WITHDRAWAL.**

**A.** At any time prior to the death of a Class A Member, a Class A Member may notify the remaining Member of the first Class A Member's desire to withdraw. The notice shall contain the buyout price, terms of payment, and such other commercially reasonable terms as the first Class A Member shall desire ("First Notice"). Upon receipt of the First Notice, the remaining Class A Member shall have sixty (60) days to notify the first Class A Member ("Second Notice") either: (i) that the remaining Class A Member desires to purchase the Membership owned by the first Class A Member for the price and upon such terms established by the first Class A Member; or (ii) that the remaining Class A Member desires to sell its Membership for such price (as adjusted by the Company C.P.A. to reflect capital account differences and percentage interests in Net Profits and Net Losses) and upon such terms. The decision of the remaining Class A Member, set out in the Second Notice, shall be binding upon all Class A Members.

**B.** In the event that the remaining Class A Member does not deliver the Second Notice to the first Class A Member within said 60 days, the first Class A Member may, within 30 days thereafter, notify the remaining Class A Member ("Third Notice") either (i) that the first Class A Member desires to purchase the Membership owned by the remaining Class A Member for such adjusted price and upon such terms; or (ii) that the first Class A Member desires to sell his Class A Membership for such price and upon such terms to the remaining Class A Member. The decision of the first Class A Member set out in the Third Notice, delivered in accordance with the requirements for notice set out in this Agreement, shall be binding upon the first Class A Member and the remaining Class A Members.

**C.** If neither the first nor the remaining Class A Member has so notified the other Member(s) of an election to buy, sell, or liquidate within the periods set forth herein, the rights created by the First Notice shall lapse. This procedure can be initiated, however, by any Class A Member again at any time.

**D.** No Class B Member may withdraw from the Company prior to the date specified in the Articles of Organization for dissolution and any such attempted withdrawal shall be wrongful.

### **3.9 CLASSES AND VOTING.**

Unless otherwise provided by this Operating Agreement, there shall be two classes of Members. The Class "A" Members shall be Eugene Z. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene Z. Zurlo Living Trust dated December 11, 1997 and Michel Laplante. The Class "B" Members shall be

Kenneth E. Fowler, Trustee of the Patricia C. Laplante Trust dated September 1, 2000, Kenneth E. Fowler, Trustee of the John H. Laplante Trust dated September 1, 2000, Kenneth E. Fowler, Trustee of the Marianne E. Laplante Trust dated September 1, 2000, and Kenneth E. Fowler, Trustee of the Peter F. Laplante Trust dated September 1, 2000.

The Class A Members, at a duly authorized annual or special meeting, may elect to establish different classes or group of Members. The following provisions shall apply to each class or group:

A. The rights, powers, or duties of a class or group may be senior to those of one or more existing classes or groups of Members.

B. Prompt notice of the taking of an action under this Operating Agreement that require less than unanimous written consent of the Members and that may be taken without a meeting shall be given to the Members who have not consented in writing to the taking of the action.

C. For the purposes of this section, the taking of an action includes amending this Operating Agreement or creating, under provisions of this Operating Agreement, a class of Membership that was not previously outstanding.

### **3.10 PLACE AND MANNER OF MEETING.**

All meetings of the Members shall be held at such time and place, within or without the State of South Carolina, as shall be stated in the notice of the meeting or in a duly executed waiver of notice thereof. Members may participate in such meetings by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting as provided herein shall constitute presence in person at such meeting, except where a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

### **3.11 CONDUCT OF MEETINGS.**

All meetings of the Members shall be presided over by the chairman of the meeting, who shall be a Manager (or representative thereof). The chairman of any meeting of Members shall determine the order of business and the procedure at the meeting, including such regulation of the manner of voting and the conduct of discussion as seem to him in order.

### **3.12 ANNUAL MEETING.**

The annual meeting of the Members for the transaction of all other business which may come before the meeting shall be held on the last week in April in each year (if not a legal holiday and, if a legal holiday, then on the next business day following) at the hour specified in the notice of the meeting. If the annual meeting is not held on the date above specified, the Manager shall cause a special meeting of the Members in lieu thereof to be held as soon thereafter as convenient, and any business transacted or election held at the meeting shall be as valid as if held at the annual meeting. Failure to hold the annual meeting at the designated time shall not work a dissolution of the Company.

### **3.13 VOTING LISTS.**

The Manager, officer, or agent having charge of the records reflecting the Membership of each Member of each class, if more than one class, shall make, at least ten (10) days before each meeting of Members, a complete list of the Members, entitled to vote at such meeting or any adjournment thereof, arranged in alphabetical order with the address of and percentage of Membership of each Member of each class, if more than one class, which list, for a period of ten (10) days prior to such meeting, shall be kept on file at the registered office of the Company and shall be subject to inspection by any Member at any time during usual business hours. Such list shall also be produced and kept open at the time and place of the meeting and shall be subject to the inspection of any Member during the whole time of the meeting. The original records reflecting the Membership of each Member of each class, if more than one class, shall be prima-facie evidence as to who are the Members entitled to examine such list or records or to vote at any meeting of Members.

Failure to comply with the requirements of this Article shall not affect the validity of any action taken at such meeting.

### **3.14 SPECIAL MEETINGS.**

Special meetings of the Members may be called at any time by a Class A Member. Special meetings of Members may also be called by the Manager. Such request shall state the purpose or purposes of such meeting and the matters proposed to be acted on thereat.

### **3.15 NOTICE.**

Written or printed notice stating the place, day and hour of the meeting and, in case of a special meeting, the purpose or purposes for which the meeting is called, shall be delivered not less than ten nor more than sixty days before the date of the meeting either personally or by mail, or at the direction of the officer or person calling the meeting, to each Member entitled to vote at the meeting, provided that such notice may be waived as provided in this Operation Agreement. If mailed, such notice shall be deemed to be delivered when deposited in the United States mail addressed to the Member at his address as it appears on the records of the Company, with postage thereon prepaid. Any notice required to be given to any Member hereunder or under the Articles of Organization need not be given to the Member if (A) notice of two consecutive annual meetings of the Company and all notices of meetings held during the period between those annual meetings, if any, or (B) all (but in no event less than two) payments (if sent by first class mail) of distributions during a twelve-month period have been mailed to that person, addressed at his address as shown on the records of the Company, and have been returned undeliverable. Any action or meeting taken or held without notice to such person shall have the same force and effect as if the notice had been duly given.

### **3.16 QUORUM OF MEMBERS.**

Unless otherwise provided in the Articles, one hundred (100%) percent of the Class A Members entitled to vote, represented in person or proxy, shall constitute a quorum at a meeting of Members.

### **3.17 MAJORITY VOTE; WITHDRAWAL OF QUORUM.**

With respect to any matter when a quorum is present at any meeting, the vote of the holders of a Required Interest, present in person or represented by proxy, having voting power with respect to that matter, shall decide such matter brought before such meeting, unless the matter is one upon which, by

express provision of the Articles or this Operating Agreement, or by any express provision of the statutes which is applicable to such vote, a different vote is required, in which case the Operating Agreement shall govern and control the decision of such matter. The Members present at a duly organized meeting may continue to transact business until adjournment, notwithstanding the withdrawal of enough Memberships to leave less than a quorum.

**3.18 VOTING OF MEMBERSHIP.**

On each matter submitted to a vote of the Membership (as opposed to a vote of the Members) each outstanding Class A Membership shall be entitled to vote its percentage interest in the Company as follows:

Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of The Eugene J. Zurlo Living Trust dated December 11, 1997	50%
Michel Laplante	50%

Class A Memberships owned by another limited liability company or corporation, the majority of the Memberships or voting stock of which is owned or controlled by this Company, and Class A Memberships held by this Company in a fiduciary capacity shall not be voted, directly or indirectly, at any meeting, and shall not be counted in determining the total Class A Memberships at any given time.

A Class A Member may vote either in person or by proxy executed in writing by the Class A Member or by his duly authorized attorney in fact. No proxy shall be valid after eleven (11) months from the date of its execution unless otherwise provided in the proxy. Each proxy shall be revocable unless the proxy form conspicuously states that the proxy is irrevocable and the proxy is coupled with an interest.

**3.19 ACTION WITHOUT MEETING.**

Any action required by the Act to be taken at a meeting of the Members, or any action which may be taken at a meeting of the Members, may be taken without a meeting, without prior notice, and without a vote, if a consent or consents in writing, setting forth the action so taken, shall have been signed by the holder or holders of all the Class A Memberships, if more than one class, entitled to vote with respect to the action that is the subject matter of the consent, and such consent shall have the same force and effect as a unanimous vote of the Class A Members. Every written consent pursuant to this section shall be signed, dated and delivered in the manner required by, and shall become effective at the time and remain effective for the period specified by, the Act. A telegram, telex, cablegram, or similar transmission by a Class A Member, or a photographic, photostatic, facsimile, or similar reproduction of a writing signed by a Class A Member, shall be regarded as signed by the Class A Member for purposes of this section.

For purposes of this section, the taking of the action includes amending this Operating Agreement or creating, under provisions of this Operating Agreement, a class of Memberships that was not previously outstanding.

**3.20 ASSIGNMENT OF DISTRIBUTIONAL INTEREST.**

A. Unless otherwise provided by this Operating Agreement:

- (1) a Distributional Interest is assignable in whole or in part;
- (2) an assignment of a Distributional Interest does not entitle the assignee to become, or to exercise rights or powers of, a Member;
- (3) an assignment entitles the assignee to receive distributions, to which the assignor was entitled, to the extent those items are assigned and allocates to the assignee the assignors allocable share of Net Profit and Net Loss; and
- (4) until the assignee becomes a Member, the assignor Member continues to be a Member and to have the power to exercise any rights or powers of a Member.

### **3.21 DISTRIBUTION IN KIND.**

Except as provided by the Articles or this Operating Agreement, a Member, regardless of the nature of the Member's contribution, may not demand a distribution from this Company in any form other than cash. A Member at his option may agree to receive a distribution in kind.

### **3.22 RIGHT TO DISTRIBUTION.**

Subject to the Act, at the time that a Member becomes entitled to receive a distribution, with respect to a distribution, that Member has the status of and is entitled to all remedies available to a creditor of the Company.

### **3.23 LIMITATION ON DISTRIBUTION.**

No distribution may be made if, after giving effect to the distribution:

- A. the Company would not be able to pay its debts as they become due in the ordinary course of business; or
- B. the Company's total assets would be less than the sum of its liabilities plus, the amount that would be needed, if the Company were to be dissolved, wound up, and terminated at the time of the distribution, to satisfy the preferential rights upon dissolution, winding up and termination of Members whose preferential rights are superior to their receiving the distribution. The Company may base a determination that a distribution is not prohibited upon the provisions of Section 33-44-406(b) and (c) of the Act.

### **3.24 BUYOUT OF DISSOCIATING MEMBER.**

Except as otherwise provided in Section 3.8, if, following the death, retirement, resignation, expulsion, bankruptcy or dissolution of a Member or the occurrence of any event which terminates the continued Membership of a Member in the Company, the dissociating Member shall be entitled to receive any distribution which the dissociating Member was entitled to receive prior to the death, retirement, resignation, expulsion, bankruptcy or dissolution of a Member or the occurrence of any event which terminates the continued Membership of a Member in the Company. The Company shall have no obligation to purchase a dissociating Member's Membership until the date of the expiration of the

specified term of the Company that existed on the date of the dissociation. The date of payment and fair market value, if any, of the Dissociating Members Membership shall be determined by the Company. The death of a Member or the appointment of a guardian or general conservator shall not constitute an event of dissociation and the Member's Membership shall (i) in the case of death, pass to and may be voted by the Member's estate and subsequent beneficiary under the terms of the Member's will, or (ii) in the case of disability, be voted by such Member's guardian or general conservator.

### **3.25 PERSONAL GUARANTIES.**

Eugene J. Zurlo, on behalf of The Eugene J. Zurlo Living Trust dated December 11, 1997, shall, if required by a financial institution extending credit to the Company or by any vendor to the Company, personally guaranty up to \$2,000,000 of the Company's obligation. Michel Laplante shall have no obligation to personally guarantee any obligation of the Company.

### **3.26 OTHER BUSINESS OR ACTIVITIES.**

Nothing in this Operating Agreement shall be deemed to restrict in any way the freedom of any Member or Manager to conduct any other business or activity whatsoever, including, but not limited to, the acquisition, investment in, development, leasing, sale and exploitation of real property, without any accounting to the Company or any party hereto.

## **ARTICLE IV CAPITAL CONTRIBUTIONS**

### **4.1 INITIAL CONTRIBUTIONS.**

The Eugene J. Zurlo Living Trust dated December 11, 1997, shall make or has made the Capital Contribution described for it on Exhibit A and shall make such additional Capital Contributions as may be required from time to time. The value of the Capital Contributions shall be as set forth on Exhibit A. No interest shall accrue on any Capital Contribution and no Member shall have the right to withdraw or be repaid any Capital Contribution except as provided in this Operation Agreement.

### **4.2 SUBSEQUENT CONTRIBUTIONS.**

Without creating any rights in favor of any third party, The Eugene J. Zurlo Living Trust dated December 11, 1997, shall make subsequent cumulative contributions to the Company, in cash, up to \$700,000. Michel Laplante and all the Class B Members shall not be required to make, at any time, a capital contribution to the Company.

### **4.3 FAILURE TO CONTRIBUTE.**

A. If The Eugene J. Zurlo Living Trust dated December 11, 1997, does not contribute by the time required all or any portion of a Capital Contribution that Member is required to

make as provided in this Operating Agreement, the Company may exercise, on notice to that Member (the "Delinquent Member"), one or more of the following remedies:

(1) taking such action (including, without limitation, court proceedings) as the Manager may deem appropriate to obtain payment by the Delinquent Member of the portion of the Delinquent Member's Capital Contribution that is in default together with interest thereon at the Default Interest Rate from the date that the Capital Contribution was due until the date that it is made, all at the cost and expense of the Delinquent Member;

(2) permitting the other Members on a pro rata basis or in such other percentages as they may agree (the "Lending Member," whether one or more), to advance the portion of the Delinquent Member's Capital Contribution that is in default, with the following results:

(a) the sum advanced constitutes a loan from the Lending Member to the Delinquent Member and a Capital Contribution of that sum to the Company by the Delinquent Member pursuant to the applicable provisions of this Operating Agreement,

(b) the principal balance of the loan and all accrued unpaid interest thereon is due and payable in whole on the tenth day after written demand therefor by the Lending Member to the Delinquent Member,

(c) the amount loaned bears interest at the Default Interest Rate from the day that the advance is deemed made until the date that the loan, together with all interest accrued on it, is repaid to the Lending Member,

(d) all distributions from the Company that otherwise would be made to the Delinquent Member (whether before or after dissolution of the Company) instead shall be paid to the Lending Member until the loan and all interest accrued on it have been paid in full to the Lending Member (with payments being applied first to accrued and unpaid interest and then to principal),

(e) the payment of the loan and interest accrued on it is secured by a security interest in the Delinquent Member's Membership, as more fully set forth in this section, and

(f) the Lending Member has the right, in addition to the other rights and remedies granted to it pursuant to this Operating Agreement or available to it at law or in equity, to take any action (including without limitation, court proceedings) that the Lending Member may deem appropriate to obtain payment by the Delinquent Member of the loan and all accrued and unpaid interest on it, at the cost and expense of the Delinquent Member;

(3) exercising the rights of a secured party under the Uniform Commercial Code of the State of South Carolina, as more fully set forth in this Section; or

(4) exercising any other rights and remedies available at law or in equity.

B. Each Member grants to the Company, and to each Lending Member with respect to any loans made by the Lending Member to that Member as a Delinquent Member pursuant to this section, as security, equally and ratably, for the payment of all Capital Contributions that Member

has agreed to make and the payment of all loans and interest accrued on them made by Lending Members to that Member as a Delinquent Member pursuant to this section, a security interest in and a general lien on its Membership and the proceeds thereof, all under the Uniform Commercial Code of the State of South Carolina. On any default in the payment of a Capital Contribution or in the payment of such a loan or interest accrued on it, the Company or the Lending Member, as applicable, is entitled to all the rights and remedies of a secured party under the Uniform Commercial Code of the State of South Carolina with respect to the security interest granted in this section. Each Member shall execute and deliver to the Company and the other Members all financing statements and other instruments that the Manager or the Lending Member, as applicable, may request to effectuate and carry out the preceding provisions of this section. At the option of the Manager or a Required Interest, as appropriate, or a Lending Member, this Operating Agreement or a carbon, photographic, or other copy hereof may serve as a financing statement.

C. The trustee(s) of a trust shall be liable only to the extent of such trusts assets for any default in the payment of a Capital Contribution.

#### 4.4 RETURN OF CONTRIBUTIONS.

A Member is not entitled to the return of any part of its Capital Contributions or to be paid interest in respect of either its capital account, or its Capital Contributions. An unrepaid Capital Contribution is not a liability of the Company or of any Member. A Member is not required to contribute or to lend any cash or property to the Company to enable the Company to return any Member's Capital Contributions.

#### 4.5 ADVANCED BY MEMBERS.

If the Company does not have sufficient cash to pay its obligations, one or more Members with the consent of all other Members may advance all or part of the needed funds to or on behalf of the Company. An advance described in this section constitutes a loan from the Member to the Company, bears interest at the General Interest Rate from the date of the advance until the day of payment, and is not a Capital Contribution.

#### 4.6 MAINTENANCE OF CAPITAL ACCOUNTS.

The Company shall establish and maintain Capital Accounts for each Member. Each Member's Capital Accounts shall be increased by (1) the amount of any money actually contributed by the Member to the capital of the Company, (2) the fair market value of any property contributed, as determined by the Company and the contributing Member at arm's length at the time of contribution (net of liabilities assumed by the Company or subject to which the Company takes such property, within the meaning of § 752 of the Code), and (3) the Member's share of Net Profits and of any separately allocated items of income or gain except adjustments required by the Code. Each Member's Capital Account shall be decreased by (1) the amount of Money actually distributed by the Company to the Member, (2) the fair market value of any property distributed to the Member, as determined by the Company and the Member at arm's length at the time of distribution (net of liabilities of the Company assumed by the Member or subject to which the Member takes such property within the meaning of § 752 of the Code), and (3) the Member's share of Net Losses and of any separately allocated items of deduction or loss.

#### 4.7 DISTRIBUTION OF ASSETS.

If the Company at any time distributes any of its assets in-kind to any Member, the Capital Account of each Member shall be adjusted in accordance with Section 704(c) of the Code to account for that Member's allocable share of the Net Profits or Net Losses that would have been realized by the Company had it sold the assets that were distributed at their respective fair market value immediately prior to their distribution.

**4.8 SALE OR EXCHANGE OF INTEREST.**

In the event of a sale or exchange of some or all of the Member's Interest in the Company, the Capital Account of the transferring Member shall become the Capital Account of the assignee, to the extent it relates to the portion of the interest transferred.

**4.9 COMPLIANCE WITH SECTION 704(b) OF THE CODE.**

The provisions of this Article IV as they related to the maintenance of Capital Accounts are intended, and shall be construed, and, if necessary, modified to cause the allocations of profits, losses, income, gain and credit pursuant to Article V to have substantial economic effect under the Regulations promulgated under § 704(b) of the Code, in light of the distributions made pursuant to Articles V and XI and the Capital Contributions made pursuant to this Article IV. In cases where § 704(c) and § 1.704-3 of the Regulations apply to Company property, Members' Capital Accounts shall be adjusted in accordance with § 1.704-1(b)(2)(iv)(g) of the Regulations for allocations to them of income, gain, loss, and deduction (including depreciation), depletion, amortization, or other cost recovery) as computed for book purposes, with respect to property. Notwithstanding anything herein to the contrary, this Operation Agreement shall not be construed as creating a deficit restoration obligation.

**ARTICLE V  
ALLOCATIONS AND DISTRIBUTIONS**

**5.1 ALLOCATIONS OF NET PROFITS AND NET LOSSES.**

Except as may be required by § 704(c) of the Code, and Sections 5.2, 5.3, and 5.4 of this Article V, Net Profits, Net Losses, and other items of income, gain, loss, deduction and credit shall be allocated among the Members as follows:

Net Losses with respect to any fiscal year shall be allocated among the Members as follows:

A. First, to the Members in proportion to their respective positive capital account balances, until they have been reduced to zero.

B. The balance, if any, 50% to Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997, 25% to Michel Laplante, 10% to Kenneth E. Fowler, Trustee of the Patricia C. Laplante Trust dated September 1, 2000, 5% to Kenneth E. Fowler, Trustee of the John H. Laplante Trust, dated September 1, 2000, 5% to Kenneth E. Fowler, Trustee of the Marianne E. Laplante Trust dated September 1, 2000 and 5% to Kenneth E. Fowler, Trustee of the Peter F. Laplante Trust dated September 1, 2000.

Net Profits with respect to any fiscal year shall be allocated among the Members as follows:

A. First, to the Members until the cumulative Net Profits allocated pursuant to this Section are equal to the cumulative Net Losses allocated to the Members for all prior fiscal years.

B. Second, to Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997, an amount equal to his accrued Cumulative Preferred Return, reduced by prior allocations pursuant to this subsection B.

C. The balance, if any, 50% to Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997, and 25% to Michel Laplante, 10% to Kenneth E. Fowler, Trustee of the Patricia C. Laplante Trust dated September 1, 2000, 5% to Kenneth E. Fowler, Trustee of the John H. Laplante Trust, dated September 1, 2000, 5% to Kenneth E. Fowler, Trustee of the Marianne E. Laplante Trust dated September 1, 2000 and 5% to Kenneth E. Fowler, Trustee of the Peter F. Laplante Trust dated September 1, 2000.

The initial interest of Michel Laplante in Net Profits and Net Losses was an interest received in exchange for services to be rendered to or for the benefit of the Company (with such interest in Net Profits and Net Losses having no current predictable distributions).

## 5.2 COMPANY MINIMUM GAIN CHARGEBACK.

If there is a net decrease in Company Minimum Gain for a taxable year, each Member must be allocated items of income and gain for that taxable year equal to that Member's share of the net decrease in Company Minimum Gain. A Member's share of the net decrease in Company Minimum Gain is the amount of the total net decrease multiplied by the Member's percentage share of the Company Minimum Gain at the end of the immediately preceding taxable year. A Member's share of any decrease in Company Minimum Gain resulting from a revaluation of Company Property equals the increase in the Member's Capital Account attributable to the revaluation to the extent the reduction in minimum gain is caused by the revaluation. A Member is not subject to the Company Minimum Gain Chargeback Requirement to the extent the Member's share of the net decrease in Company Minimum Gain is caused by a guarantee, refinancing, or other change in the debt instrument causing it to become partially or wholly a Recourse Liability or a Member Nonrecourse Liability, and the Member bears the economic risk of loss (within the meaning of § 1.752-2 of the Regulations) for the newly guaranteed, refinanced, or otherwise changed liability.

## 5.3 MEMBER MINIMUM GAIN CHARGEBACK.

If during a taxable year there is a net decrease in Member Minimum Gain, any Member with a share of that Member Minimum Gain (as determined under § 1.704-2(i)(5) of the Regulations) as of the beginning of that taxable year must be allocated items of income and gain for that taxable year (and, if necessary, for succeeding taxable years) equal to that Member's share of the net decrease in the Company Minimum Gain. A Member's share of the net decrease in Member Minimum Gain is determined in a manner consistent with the provisions of § 1.704-2(g)(2) of the Regulations. A Member is not subject to this Member Minimum Gain Chargeback, however, to the extent the net decrease in Member Minimum Gain arises because the liability ceases to be Member Nonrecourse Liability due to a conversion, refinancing, or other change in the debt instrument that causes it to become partially or wholly a Company Nonrecourse Liability. The amount that would otherwise be subject to the Member

Minimum Gain Chargeback is added to the Member's share of Company Minimum Gain. In addition, rules consistent with those applicable to Company Minimum Gain shall be applied to determine the shares of Member Minimum Gain and Member Minimum Gain Chargeback to the extent provided under the Regulations issued pursuant to § 704(b) of the Code.

#### 5.4 QUALIFIED INCOME OFFSET.

In the event any Member, in such capacity, unexpectedly received an Offsettable Decrease, such Member will be allocated items of income and gain (consisting of a pro rata portion of each item of partnership income and gain for such year) in an amount and manner sufficient to offset such Offsettable Decrease as quickly as possible.

#### 5.5 INTERIM DISTRIBUTIONS.

Cash Flow shall be distributed among the Member with respect to each fiscal year of the Company as soon as practicable after the end of the year, in the following order of priority:

A. First, to Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997, to the extent of his Cumulative Preferred Return.

B. Second, to the Members in an amount, as determined by the Company's certified public accountant, sufficient to pay state and federal income taxes on Net Profits allocated to the Members pursuant to Section 5.1.

C. Third, to Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997, of the extent of his Adjusted Invested Capital.

D. The balance of any Cash Flow shall be distributed 50% to Eugene J. Zurlo and Charlotte R. Zurlo, Co-Trustees of the Eugene J. Zurlo Living Trust dated December 11, 1997, and 25% to Michel Laplante, 10% to Kenneth E. Fowler, Trustee of the Patricia C. Laplante Trust dated September 1, 2000, 5% to Kenneth E. Fowler, Trustee of the John H. Laplante Trust, dated September 1, 2000, 5% to Kenneth E. Fowler, Trustee of the Marianne E. Laplante Trust dated September 1, 2000, and 5% to Kenneth E. Fowler, Trustee of the Peter F. Laplante Trust dated September 1, 2000.

### ARTICLE VI MANAGERS

#### 6.1 MANAGEMENT BY MANAGERS.

A. Except for situations in which the approval of the Class A Members is required by this Operating Agreement or by nonwaivable provisions of applicable law or as otherwise provided in this Operating Agreement, and subject to the provisions of Section 6.2, (i) the powers of the Company shall be exercised by or under the authority of, and the business and affairs of the Company shall be managed under the direction of, the Manager; and (ii) the Manager may make all decisions and take all actions for the Company not otherwise provided for in this Operating Agreement, including without limitation, the following:

1. entering into, making, and performing contracts, agreements, leases, management contract and other undertakings binding the Company that may be necessary, appropriate, or advisable in furtherance of the purposes of the Company and making all decisions and waivers thereunder;
2. maintaining the assets of the Company in good order;
3. collecting sums due the Company;
4. to the extent that funds of the Company are available therefore, paying debts and obligations of the Company;
5. obtaining insurance for the Company.

**B.** The Manager may not make any decision or take any action for the Company without the prior written consent of the Class A Members on any of the following matters:

1. selling and marketing the Property in accordance with a business plan established by the Members;
2. Establishing a loan with a banking institution acceptable to the Members and draw upon such loan at any time and from time to time, borrowing money or otherwise committing the credit of the Company for Company activities and voluntary prepayments or extensions of debt;
3. opening and maintaining bank and investment accounts and arrangements;
4. acquiring, utilizing for Company purposes, and disposing of any asset of the Company; and
5. Selecting, removing, and changing the authority and responsibility of lawyers, accountants, and other advisers and consultants; and

## **6.2 ACTIONS BY MANAGERS; COMMITTEES; DELEGATION OF AUTHORITY AND DUTIES.**

**A.** In Managing the business and affairs of the Company and exercising its powers, the Manager shall act (i) through meetings and written consents as may be provided or limited in other provisions of this Operating Agreement; and (ii) through committees pursuant to Section 6.2 B.

**B.** The Manager may, from time to time, designate one or more Persons to be officers of the Company who is not a Manager. No officer need be a resident of the State of South Carolina or a Member. Any officers so designated shall have such authority and perform such duties as the Manager may, from time to time, delegate to them. The Manager may assign titles to particular officers. Unless the Manager decides otherwise, if the title is one commonly used for officers of a business corporation, the assignment of such title shall constitute the delegation to such officer of the authority and duties that are normally associated with that office, subject to any specific delegation of authority and duties made to such officer by the Manager. Each officer shall hold office until his

successor shall be duly designated and shall qualify or until his death or until he shall resign or shall have been removed in the manner hereinafter provided. Any number of offices may be held by the same Person. The salaries or other compensation, if any, of the officers and agents of the Company shall be fixed from time to time by the Manager with the approval of all of the Members.

C. Any officer may resign as such at any time. Such resignation shall be made in writing and shall take effect at the time specified therein, or if no time be specified, at the time of its receipt by the Manager. The acceptance of a resignation shall not be necessary to make it effective, unless expressly so provided in the resignation. Any officer may be removed as such, either with or without cause, by the Manager whenever in its judgment the best interests of the Company will be served thereby; provided, however, that such removal shall be without prejudice to the contract rights, if any, of the Person so removed. Designation of an officer shall not of itself create contract rights. Any vacancy occurring in any office of the Company may be filled by the Manager.

D. Any Person dealing with the Company, other than a Member, may rely on the authority of any one Manager or officer in taking any action in the name of the Company without inquiry into the provisions of this Operating Agreement or compliance herewith, regardless of whether that action actually is taken in accordance with the provisions of this Operating Agreement.

### 6.3 POWERS OF MANAGERS.

The Manager is an agent of this Company for the purpose of its business or affairs and the act of a Manager, including, but not limited to, the execution in the name of the Company of any instrument for apparently carrying on in the usual way the Company business or businesses of the kind carried on by the Company, binds the Company, unless the Manager so acting have, in fact, no authority to act for this Company in the particular matter, and, except as provided in Section 33-44-301(c) of the Act, the person with whom the Manager is dealing has knowledge of the fact that the Manager has no such authority.

### 6.4 NUMBER AND TERM OF OFFICE.

The Manager of the Company shall be Michel Laplante. He shall serve as Manager of the Company until removal as provided in Section 6.5 of this Agreement or upon resignation as provided in Section 6.6 of this Agreement. Unless otherwise provided in the Articles, the Manager need not be a Member or resident of the State of South Carolina.

### 6.5 REMOVAL.

Any and all Managers may be removed, either for or without cause by vote of a Required Interest

### 6.6 RESIGNATIONS.

Any Manager may resign at any time. Such resignation shall be made in writing and shall take effect at the time specified therein, or, if no time be specified then at the time of its receipt by the other Managers, if any. The acceptance of a resignation shall not be necessary to make it effective, unless expressly so provided in the resignation.

**6.7 VACANCIES.**

Any vacancy occurring in the Manager may be filled by vote of a Required Interest. A Manager named to fill a vacancy shall be elected for the unexpired term of his predecessor in office. Any Manager position to be filled by reason of an increase in the number of Managers shall be filled by vote of a Required Interest.

**6.8 PLACE AND MANNER OF MEETINGS.**

Meeting of the Manager, regular or special, may be held either within or without the State of South Carolina. Manager may participate in such meetings by means of conference telephone or similar communications equipment by means of which all persons participating in the meeting can hear each other and participation in a meeting as provided herein shall constitute presence in person at such meeting, except where a person participates in the meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

**6.9 FIRST MEETINGS.**

The first meeting of the newly elected Managers shall be held without further notice immediately following the annual meeting of Members, and at the same place, unless by unanimous consent of the Managers then elected and serving, such time or place shall be changed.

**6.10 REGULAR MEETING OF MANAGERS.**

A regular meeting of the Managers may be held at such time as shall be determined from time to time by resolution of the Managers.

**6.11 SPECIAL MEETING OF MANAGERS.**

A Manager may call a special meeting of the Managers at any time. Such special meeting shall be held at the time specified in the notice of meeting. Except as otherwise expressly provided by statute, or by the Articles, or by this Operating Agreement, neither the business to be transacted at, nor the purpose of, any special meeting need be specified in the notice or waiver of notice.

**6.12 NOTICE OF MANAGER'S MEETINGS.**

All meeting of the Managers (annual, regular or special) shall be held upon two (2) days written notice stating the date, place and hour of meeting delivered to each Manager either personally or by mail or at the direction of the President or the Secretary or the officer or person calling the meeting.

In any case where all of the Managers execute a waiver of notice of the time and place of the meeting, no notice thereof shall be required, and any such meeting (whether annual, regular or special) shall be held at the time and at the place (either within or without the state of South Carolina) specified in the waiver of notice. Attendance of Managers at any meeting shall constitute a waiver of notice of such meeting, except where the Managers attend a meeting for the express purpose of objecting to the transaction of any business on the ground that the meeting is not lawfully called or convened.

**6.13 ACTION WITHOUT MEETING.**

Any action required by statute to be taken at a meeting of the Managers, or any action which may be taken at a meeting of the Managers, may be taken without a meeting if a consent in writing, setting forth the action so taken, shall be signed by all the Managers. Such consent shall have the same force and effect as a unanimous vote at a meeting.

**6.14 QUORUM; MAJORITY VOTE.**

At all meetings of the Managers a majority of the number of Managers fixed by the Operating Agreement shall constitute a quorum for the transaction of business unless a greater number is required by law or by the Articles. The act of a majority of the Managers present at any meeting at which a quorum is present shall be the act of the Managers unless the act of a greater number is required by the statute, by the Articles or by this Operating Agreement. If a quorum shall not be present at any meeting of the Managers, the Managers present thereat may adjourn the meeting from time to time, without notice other than announcement at the meeting, until a quorum is present.

**6.15 APPROVAL OR RATIFICATION OF ACTS OR CONTRACTS BY MEMBERS.**

The Managers in their discretion may submit any act or contract for approval or ratification at any annual meeting of the Members or at any special meeting of the Members called for the purpose of considering any such act or contract, and any act or contract that shall be approved or be ratified by a Required Interest shall be as valid and as binding upon the Company and upon all the Members as if it shall have been approved or ratified by every Class A Member of the Company.

**6.16 INTERESTED MANAGERS, OFFICERS AND MEMBERS.**

**A. INTERESTED MANAGERS.** No contract or transaction between this Company and one or more of its Managers or officers, or between this Company and any other limited liability company, corporation, partnership, association, or other organization in which one or more of its Managers or officers are managers or officers or have a financial interest, shall be void or voidable solely for this reason, solely, because the Manager or officer is present at or participates in the meeting of Managers or of a committee of Managers which authorizes the contract or transaction, or solely because such Manager's or Managers' votes are counted for such purpose, if:

(1) The material facts as to the relationship or interest and as to the contract or transaction are disclosed or are known to the Managers or the committee, and the Managers or committee in good faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested Managers, even though the disinterested Managers be less than a quorum; or

(2) The material facts as to the relationship or interest and as to the contract or transaction are disclosed or are known to the Members entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the Members; or

(3) The contract or transaction is fair as to this Company as of the time it is authorized, approved, or ratified by the Managers, a committee thereof, or the Members.

B. Common or interested Managers may be counted in determining the presence of a quorum at a meeting of the Managers or of a committee which authorizes the contract or transaction.

C. This provision shall not be construed to invalidate any contract or transaction which would be valid in the absence of this provision.

#### 6.17 COMPENSATION.

The Managers with the express written consent of all Members may be paid their expenses and may be paid a fixed sum for attendance at each meeting of the Managers or a stated salary as Manager. No such payment shall preclude any Manager from serving the Company in any other capacity and receiving compensation therefor.

### ARTICLE VII INDEMNIFICATION

#### 7.1 INDEMNIFICATION.

The Company shall indemnify the Members, Managers, and agents for all costs, losses, liabilities, and damages paid or accrued by such Members, Managers or agents in connection with the business of the Company, to the fullest extent provided or allowed by the laws of the state; provided, however, the Company shall not indemnify a Member or Manager for any costs, losses, liabilities or damages paid or accrued by such Member or Manager as a result of any Member or Manager's violation of his duty of care or loyalty to the Company or another Member or willful dishonesty towards, fraud upon, or deliberate injury or attempted injury to the Company and/or a Member.

### ARTICLE VIII TAXES

#### 8.1 "TAX MATTERS PARTNER".

Michel Laplante is designated as the "tax matters partner" of the Company pursuant to § 6231(a)(7) of the Code.

### ARTICLE IX NOTICE

#### 9.1 NOTICE.

Any notice or communication required or permitted to be given by any provision of this Operating Agreement shall be in writing and shall be deemed to have been given and received by the Person to whom directed (a) when delivered personally to such Person or to a Member or Manager of the Company to which directed, or (b) when posted in the United States mails if sent by registered or

certified mail, postage and charges prepaid, addressed to the Person to which directed at the address of which such Person has notified the Company and all of the Members or Managers.

**ARTICLE X  
DISSOLUTION, LIQUIDATION, AND TERMINATION**

**10.1 DISSOLUTION.**

The Company shall dissolve and its affairs shall be wound up only upon the first to occur of the following:

- A. the written consent of 100% of the Class A Memberships;
- B. the expiration of the period fixed for the duration of the Company set forth in the Articles;
- C. upon an event that makes it unlawful for all or substantially all of the business of the Company to be continued, but any cure of illegality within ninety (90) days after notice to the Company of the event is effective retroactively to the date of the event;
- D. upon entry of a judicial decree that:
  - (1) the economic purpose of the Company is likely to be unreasonably frustrated;
  - (2) another Member has engaged in conduct relating to the Company's business that makes it not reasonably practicable to carry on the Company's business with that Member;
  - (3) it is not otherwise reasonably practicable to carry on the Company's business in conformity with the Articles of Organization and the Operating Agreement;
  - (4) the Company failed to purchase the Member's Distributional interest as required by § 33-44-701 of the Act; or
  - (5) the Manager or Members in control of the Company have acted, are acting, or will act in a manner that is illegal, oppressive, fraudulent, or unfairly prejudicial to a Member; and
- E. entry of a decree of judicial dissolution of the Company under Section 33-44-801 (b) of the Act or administrative dissolution as provided in Section 33-44-809 of the Act.

**10.2 WINDING UP AND TERMINATION.**

On dissolution of the Company as a result of an event described in Section 10.1 A. or the Manager shall act as liquidator. In all other cases, the Manager shall act as liquidators or may appoint one or more Members as liquidators. If there is no Manager, then a Required Interest of the Members will appoint one or more Members as Liquidator. The liquidator shall proceed diligently to wind up the

affairs of the Company and make final distributions as provided herein. The costs of liquidation shall be borne as a Company expense. Until final distribution, the liquidator shall continue to operate the Company properties with all of the power and authority of the Managers. The steps to be accomplished by the liquidator are as follows:

A. as promptly as possible after dissolution and again after final liquidation, the liquidator shall cause a proper accounting to be made by a recognized firm of certified public accountants of the Company's assets, liabilities, and operations through the last day of the calendar month in which the dissolution occurs or the final liquidation is completed as applicable.

B. the liquidator shall cause the notice described in Section 33-44-807 of the Act to be mailed to each known creditor of and claimant against the Company in the manner described in such Section 33-44-808 of the Act;

C. the liquidator shall pay, satisfy or discharge from Company funds all of the debts, liabilities and obligations of the Company (including, without limitation, all expenses incurred in liquidation and any advances described in Section 4.5) or otherwise make adequate provision for payment and discharge thereof (including, without limitation, the establishment of a cash escrow fund for contingent liabilities in such amount and for such term as the liquidator may reasonably determine); and

D. all remaining assets of the Company shall be distributed to Members as follows:

(1) the liquidator may sell any or all Company property, including to Members, and any resulting gain or loss from each sale shall be computed and allocated to the capital accounts of the Members;

(2) with respect to all Company property that has not been sold, the fair market value of that property shall be determined and the capital accounts of the Members shall be adjusted to reflect the manner in which the unrealized income, gain, loss, and deduction inherent in property that has not been reflected in the capital accounts previously would be allocated among the Members if there were a taxable disposition of that property for the fair market value of that property on the date of distribution; and

(3) Company property shall be distributed among the Members in accordance with the positive capital account balances of the Members, as determined after taking into account all capital account adjustments for the taxable year of the Company during which the liquidation of the Company occurs (other than those made by reason of this clause (3)); and those distributions shall be made, if possible, by the end of the taxable year of the Company during which the liquidation of the Company occurs.

All distributions in kind to the Members shall be made subject to the Liability of each distributee for costs, expenses, and liabilities theretofore incurred or for which the Company has committed and those costs, expenses, and liabilities shall be allocated to the distributee pursuant to this Section 10.2. To the extent that a Member returns funds to the Company, it has no claim against any other Member for those funds.

**10.3 DEFICIT CAPITAL ACCOUNTS.**

Notwithstanding anything to the contrary contained in this Operating Agreement, and notwithstanding any custom or rule of law to the contrary, to the extent that the deficit, if any, in the capital account of any Member results from or is attributable to deductions and losses of the Company (including non-cash items such as depreciation) or distributions of money pursuant to this Operating Agreement to all Members in proportion to their respective interests in the Company, upon dissolution of the Company such deficit shall not be an asset of the Company and such Members shall not be obligated to contribute such amount to the Company to bring the balance of such Member's capital account to zero.

**10.4 ARTICLES OF DISSOLUTION.**

After the dissolution of the limited liability company pursuant to Section 33-44-801 of the Act, the Manager or the authorized Member shall file Articles of Dissolution with the Secretary of State of South Carolina and take such other actions as may be necessary to terminate the Company. An "Authorized Member" will be a Member or Members appointed by the Manager.

**ARTICLE XI  
GENERAL PROVISIONS**

**11.1 BOOKS AND RECORDS.**

A. The Company shall maintain those books and records as it may deem necessary or desirable. All books and records shall be open to inspection of the Members from time to time. The Manager may examine all such books and records at all reasonable times. The Company shall keep and maintain such records as the Manager deems appropriate.

B. The Company shall maintain its records, if any, in written form or in another form capable of conversion into written form within a reasonable time.

C. The Company shall keep in its registered office in South Carolina and make available to Members on reasonable request the street address of its principal United States Office in which the records, if any, are maintained or will be available.

D. The Company shall keep its books on the cash method of accounting.

**11.2 AMENDMENT OR MODIFICATION.**

The Operating Agreement may be amended and modified from time to time only by a written instrument adopted and executed by all of the Class A Members. No Member or Manager shall have any vested rights in the Operating Agreement.

**11.3 CHECKS, NOTES, DRAFTS, ETC.**

The Company's checkbook shall be maintained by Eugene J. Zurlo. All checks, drafts, or other orders for payment of money, notes, or other evidences of indebtedness issued in the name of or payable

to the Company shall be signed or endorsed by Eugene J. Zurlo or by another designated person which may be appointed from time to time by the Members. The Company promptly makes available such funds as are required during the Project for payments to architects, engineers, attorneys, contractors, consultants, and others providing goods and services to the Project. The designated person may be the Manager, Member, or other person(s) as may from time to time be designed.

#### **11.4 HEADINGS.**

The headings used in this Operating Agreement have been inserted for convenience only and do not constitute matter to be construed in interpretation.

#### **11.5 CONSTRUCTION.**

Whenever the context so requires, the gender of all words used in this Operating Agreement includes the masculine, feminine, and neuter, and the singular shall include the plural, and conversely. All references to Articles and Sections refer to articles and sections of this Operating Agreement, and all references to Exhibits, if any, are to Exhibits attached hereto, if any, each of which is made a part hereof for all purposes. If any portion of this Operating Agreement shall be invalid or inoperative, then, so far as is reasonable and possible:

A. The remainder of this Operating Agreement shall be considered valid and operative; and

B. Effect shall be given to the intent manifested by the portion held invalid or inoperative.

#### **11.6 ENTIRE AGREEMENT; SUPERSEDURE.**

This Operating Agreement constitutes the entire agreement of the Members and their Affiliates relating to the Company and supersedes all prior contracts or agreements with respect to the Company, whether oral or written.

#### **11.7 EFFECT OF WAIVER OR CONSENT.**

A waiver or consent, express or implied, to or of any breach or default by any Person in the performance by that Person of its obligations with respect to the Company is not a consent or waiver to or of any other breach or default in the performance by that Person of the same or any other obligations of that Person with respect to the Company. Failure on the part of a Person to complain of any act of any Person or to declare any Person in default with respect to the Company, irrespective of how long that failure continues, does not constitute a waiver by that Person of its rights with respect to that default until the applicable statute-of-limitations period has run.

#### **11.8 BINDING EFFECT.**

Subject to the restrictions on Dispositions set forth in this Operating Agreement, this Operating Agreement is binding on and inures to the benefit of the Members and their respective heirs, legal representatives, successors, and assigns.

**11.9 GOVERNING LAW; SEVERABILITY.**

THIS OPERATING AGREEMENT IS GOVERNED BY AND SHALL BE CONSTRUED IN ACCORDANCE WITH THE LAW OF THE STATE OF SOUTH CAROLINA EXCLUDING ANY CONFLICT-OF-LAWS RULE OR PRINCIPLE THAT MIGHT REFER THE GOVERNANCE OR THE CONSTRUCTION OF THIS OPERATING AGREEMENT TO THE LAW OF ANOTHER JURISDICTION. In the event of a direct conflict between the provisions of this Operating Agreement and (a) a mandatory provision of the Articles, or (b) any mandatory provision of the Act, the applicable provision of the Operating Agreement shall control. If any provision of this Operating Agreement or the application thereof to any Person or circumstance is held invalid or unenforceable to any extent, the remainder of this Operating Agreement and the application of that provision to other Persons or circumstances is not affected thereby and that provision shall be enforced to the greatest extent permitted by law.

**11.10 FURTHER ASSURANCES.**

In connection with this Operating Agreement and the transactions contemplated hereby, each Member shall execute and deliver any additional documents and instruments and perform any additional acts that may be necessary or appropriate to effectuate and perform the provisions of this Operating Agreement and those transactions.

**11.11 NOTICE TO MEMBERS OF PROVISIONS OF THIS AGREEMENT.**

By executing this Operating Agreement, each Member acknowledges that it has actual notice of (a) all of the provisions of this Operating Agreement, including, without limitation, the restrictions on the transfer of Membership set forth in Article III, and (b) all of the provisions of the Articles. Each Member hereby agrees that this Operating Agreement constitute adequate notice of all such provisions, and each Member hereby waives any requirement that any further notice thereunder be given.

**11.12 COUNTERPARTS.**

This Operating Agreement may be executed in any number of counterparts with the same effect as if all signing parties had signed the same document. All counterparts shall be construed together and constitute the same instrument.

**11.13 CONFLICTING PROVISIONS.**

To the extent that one or more provisions of this Operating Agreement appear to be in conflict with one another, then the Manager shall have the right to choose which of the conflicting provisions are to be enforced. Wide latitude is given to the Manager, in interpreting the provision of this Operating Agreement to accomplish the purposes and objectives of the Company, and the Managers or a Required Interest, if there is no Manager, in interpreting the provisions of this Operating Agreement to accomplish the purposes and objectives of the Company and consistent with the interpretation given by the Manager.

The undersigned, being all the Members and Managers, hereby certify that the foregoing Third Amended and Restated Operating Agreement was unanimously adopted by the Manager, and the Members, effective as of the 15 day of October, 2005, TO WITNESS WHICH we have hereunto affixed our signatures.

WITNESS:

CLASS A MEMBERS

EUGENE J. ZURLO AND CHARLOTTE R. ZURLO,  
TRUSTEES OF THE EUGENE J. ZURLO LIVING  
TRUST DATED DECEMBER 11, 1997

By: Eugene J. Zurlo  
Eugene J. Zurlo  
Its: Co-Trustee

By: Charlotte R. Zurlo  
Charlotte R. Zurlo  
Its: Co-Trustee

Michel Laplante (SEAL)  
Michel Laplante (Member)

Justin Feit  
Justin Feit  
Justin Feit

CLASS B MEMBERS

Kenneth E. Fowler, Trustee of  
The Patricia C. Laplante Trust  
Dated September 1, 2000

By: Kenneth E. Fowler  
Kenneth E. Fowler  
Its: Trustee

Justin Feit

Kenneth E. Fowler, Trustee of  
The John H. Laplante Trust  
Dated September 1, 2000

By: Kenneth E. Fowler  
Kenneth E. Fowler  
Its: Trustee

Justin Feit

Kenneth E. Fowler, Trustee of  
The Marianne E. Laplante Trust  
Dated September 1, 2000

By: Kenneth E. Fowler  
Kenneth E. Fowler  
Its: Trustee

Justin Feit

Justin Pitt

Kenneth E. Fowler, Trustee of  
The Peter F. Laplante Trust  
Dated September 1, 2000

By: Kenneth Fowler  
Kenneth E. Fowler  
Its: Trustee

Justin Pitt

MANAGER  
Michel Laplante (SEAL)  
Michel Laplante

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**EXHIBIT "A"**

<b><u>MEMBER</u></b>	<b><u>INITIAL CONTRIBUTION</u></b>	<b><u>FAIR MARKET VALUE</u></b>
Eugene J. Zurlo and Charlotte R. Zurlo Co-Trustees The Eugene J. Zurlo Living Trust dated December 11, 1997	Cash	\$400,000
Michel Laplante	None	- \$ 0 -

**EXHIBIT "B"****[PROPERTY DESCRIPTION]**Tract B-2

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "Tract 'B-2' 42.7 Acres", on a plat entitled "SUBDIVISION OF PROPERTY IN THE NAME OF F-H-P REALTY LOCATED ON JOHNS ISLAND, CHARLESTON COUNTY, S.C.", by Forrest G. Calvert, RLS, dated September 27, 1979, and recorded in the RMC Office for Charleston County, South Carolina (hereinafter the "RMC Office") in Plat Book AO at page 74, said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully be shown. (TMS Number 346-00-00-004)

And Tract 'A':

ALL that piece, parcel or tract of land, together with the improvements thereon, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "FHP Realty Tract 'A' 5.503 Acres" on a plat entitled "PLAT SHOWING THE ABANDONMENT OF PROPERTY LINES FOR TMS NO. 346-00-00-012 AND TMS NO. 346-00-00-011, AND THE SUBSEQUENT SUBDIVISION OF TMS NO. 346-00-00-007 INTO TRACT 'A' CONTAINING 5.503 ACRES AND TRACT 'B' CONTAINING 7.497 ACRES OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA" by Hoffman Lester Associates, Inc., dated September 24, 1997, and recorded January 20, 1998, in the aforesaid RMC Office in Plat Book EC at page 263. (TMS Number 346-00-00-066)

The aforesaid Tract B-2 and Tract A are also more particularly shown on that certain plat entitled "PLAT SHOWING PROPERTY LINE BETWEEN TMS NO. 346-00-00-004, TRACT B-2 (CONTAINING 42.49 ACRES) AND TMS NO. 346-00-00-007, RESIDUAL TRACT B (CONTAINING 5.50 ACRES) TO FORM TRACT B-2 (CONTAINING 47.99 ACRES), OWNED BY FHP REALTY LOCATED IN THE CITY OF CHARLESTON, CHARLESTON COUNTY, SOUTH CAROLINA", prepared by Hoffman Lester Associates, Inc., dated April 7, 2000, and recorded as Exhibit "\_\_\_" to that certain deed of conveyance from FHP Realty Company, A Partnership, to Penny Creek Associates, L.L.C., and also about to be recorded in the RMC Office for Charleston County, S.C.

TOGETHER WITH a twenty-foot (20') non-exclusive easement in common with Helena Igoe Blanchard, her heirs and assigns, and others entitled thereto, in favor of "Tract B" above-described, for ingress and egress over, upon and across that certain twenty-foot (20') easement extending from Maybank Highway on the south to "Tract A" on the north, as said Tract A is shown on that certain plat recorded in Plat Book AK at page 76 in the RMC Office, which easement is granted in that certain deed of conveyance from Helena Igoe Blanchard to FHP Realty Company, A Partnership, dated April 27, 1978, and recorded in Book P115, page 273, in the RMC office.

ALSO:

Parcel A, River Road:

ALL that piece, parcel or tract of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as "Parcel A 44,273 sq. ft. 10.11 acres" on that certain plat by Forsberg Engineering & Surveying, Inc., dated February 18, 1998, and recorded February 20, 1998, in Plat Book EC at page 328, in the RMC Office for Charleston County, S.C., said property having such location, size, shape, metes, courses, distances, buttings and boundings as will by reference to said plat more fully appear.

ALSO:

Tract C:

ALL that certain piece, parcel or lot of land, situate, lying and being in City of Charleston, County of Charleston, South Carolina, and being shown and delineated as TRACT "C", 59.280 acres of highland and 95.063 acres of marshland, on a plat by Forrest G. Calvert, dated November, 1977, entitled in part "Plat Showing Subdivision of Fenwick Hall Plantation, 237.176 Ac. Highland 148.058 Ac. Marsh Located on Johns Island, Charleston County, South Carolina. Property of Mrs. Helena Igoe Blanchard", and recorded in Plat Book AK, at page 76, in the RMC Office for Charleston County, South Carolina (the "RMC Office"), and having such location, size, shape, buttings, boundings, and dimensions as will appear by reference to said plat which is incorporated herein by reference, be all the dimensions and measurements shown thereon a little more or less.

SAVING AND EXCEPTING that certain piece, parcel or lot of land, situate, lying and being in Charleston County, South Carolina, described as 0.97 acres of land as conveyed to the South Carolina Department of Transportation in that certain deed of conveyance from Fenwick Acres dated April 16, 1998, and recorded July 28, 1998, in Book R307, page 246, in the RMC Office.

The aforesaid property and said 0.97 acre parcel are more particularly shown on that certain plat prepared by Southeastern Surveying, Inc., entitled "A Boundary Survey of Tract "C" Containing 153.153 Acres, Owned by Fenwick Acres Located in the City of Charleston, Charleston County, South Carolina", dated March 23, 1999, and recorded in the RMC Office in Plat Book ED, at page 70.

BKG 579PG249

PREPARED BY: Helen Dickinson  
RETURN TO: Collateral Maintenance NC 6038  
Wachovia Bank, National Association  
P.O. Box 2705  
Winston Salem, NC 27101-2705

## MORTGAGE AND ASSIGNMENT OF RENTS

This MORTGAGE AND ASSIGNMENT OF RENTS (hereafter referred to as "Mortgage") made April 5, 2006, by and between, Penny Creek Associates, L.L.C., whose address is c/o Mitch Laplante, 151 Treeduck Court, Kiawah Island, South Carolina 29455 ("Mortgagor") and Wachovia Bank, National Association, a national banking association, whose address is Greenville, South Carolina 29601 ("Bank").

### WITNESSETH:

To secure payment and performance of obligations under a Promissory Note (the "Note") dated April 5, 2006, in the amount of \$2,200,000.00, made by Mortgagor payable to Bank, this Mortgage, any present or future Letters of Credit issued by Bank for the account of Mortgagor, other loan documents as defined in the Note (the "Loan Documents"), and swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) between Bank or any of its affiliates and Mortgagor, all other indebtedness of Mortgagor to Bank whenever borrowed or incurred, whether or not reasonably contemplated by the parties hereto as of the date hereof, and any renewals, extensions, novations, or modifications of the foregoing (collectively the "Obligations"), and in consideration of these premises and for other consideration, Mortgagor does mortgage, grant and convey unto Bank (for itself and its affiliates), its successors and assigns, all of Mortgagor's right, title and interest now owned or hereafter acquired in and to each of the following (collectively, the "Property"): (i) all those certain tracts of land in the Town of John's Island, County of Charleston, State of South Carolina described in EXHIBIT A attached hereto and made part hereof (the "Land"); (ii) all buildings and improvements now or hereafter erected on the Land; (iii) all fixtures attached to the Land or any buildings or improvements situated thereon; and (iv) all estates, rights, tenements, hereditaments, privileges, rents, issues, profits easements, and appurtenances of any kind benefiting the Land; all means of access to and from the Land, whether public or private; and all water and mineral rights.

In the event that Mortgagor is the owner of a leasehold estate with respect to any portion of the Property and Mortgagor obtains a fee estate in such portions of the Property, then, such fee estate shall automatically, and without further action of any kind on the part of the Mortgagor, be and become subject to the security title and lien of this Agreement.

TO HAVE AND TO HOLD the Property and all the estate, right, title and interest, in law and in equity, of Mortgagor's in and to the Property unto Bank, its successors and assigns, forever.

Mortgagor WARRANTS AND REPRESENTS that Mortgagor is lawfully seized of the Property, in fee simple, absolute, that Mortgagor has the legal right to convey and encumber the same, and that the Property is free and clear of all liens and encumbrances. Mortgagor further warrants and will forever defend all and singular the Property and title thereto to Bank and Bank's successors and assigns, against the lawful claims of all persons whomsoever.

PROVIDED ALWAYS that if (i) all the Obligations (including without limitation, all termination payments and any other amounts due under or in connection with any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) secured hereunder) are paid in full, (ii) each and every representation, warranty, agreement, covenant and condition of this Mortgage, and the other Loan Documents, are complied with and abided by, and (iii) any and all swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) secured hereunder have matured or been terminated, then this Mortgage and the estate hereby created shall cease and be null, void, and canceled of record.

To protect the security of this Mortgage, Mortgagor further represents and agrees with Bank as follows:

**Payment of Obligations.** That the Obligations shall be timely paid and performed.

**Future Advances.** This Mortgage is given to secure not only existing Obligations, but also future advances, including obligations under swap agreements to the same extent as if such future advances and obligations under swap agreements are made on the date of the execution of this Mortgage. The principal amount (including any swap agreements and future advances) that may be so secured may decrease or increase from time to time, but the total amount so secured at any one time shall not exceed \$4,400,000.00, plus all interest, costs, reimbursements, fees and expenses due under this Mortgage and secured hereby. Mortgagor shall not execute any document that impairs or otherwise impacts the priority of any existing or future Obligations secured by this Mortgage.

**Grant of Security Interest in Personal Property.** This Mortgage constitutes a security agreement under the UCC and shall be deemed to constitute a fixture financing statement. Mortgagor hereby grants a security interest in any personal property included in the Property. On request of Bank, Mortgagor will execute one or more Financing Statements in form satisfactory to Bank and will pay all costs and expenses of filing the same in all public filing offices, where filing is deemed desirable by Bank. Bank is authorized to file Financing Statements relating to the Property without Mortgagor's signature where permitted by law. Mortgagor appoints Bank as its attorney-in-fact to execute such documents necessary to perfect Bank's security interest on Mortgagor's behalf. The appointment is coupled with an interest and shall be irrevocable as long as any Obligations remain outstanding.

Nothing herein obligates Bank to provide credit in excess of the Obligations.

**Leases, Subleases and Easements.** Mortgagor shall maintain, enforce and cause to be performed all of the terms and conditions under any lease, sublease or easement which may constitute a portion of the Property. Mortgagor shall not, without the consent of Bank (which consent shall not be unreasonably withheld or delayed), enter into any new lease of all or any portion of the Property, agree to the cancellation or surrender under any lease of all or any portion of the Property, agree to prepayment of rents, issues or profits (other than rent paid at the signing of a lease or sublease), modify any such lease so as to shorten the term, decrease the rent, accelerate the payment of rent, or change the terms of any renewal option; and any such purported new lease, cancellation, surrender, prepayment or modification made without the consent of Bank shall be void as against Bank.

**Required Insurance.** Mortgagor shall maintain with respect to the Property: (i) during construction of any improvements on the Property, "all-risk" builders risk insurance which must include windstorm, hail damage, fire and vandalism (non-reporting Completed Value with Special Cause of Loss form), in an amount not less than the completed replacement value of the improvements under construction, naming Bank as mortgagee and loss payee; (ii) upon completion of construction, upon occupancy of any improvements, and at all other times, insurance against loss or damage by fire and other casualties and hazards by insurance written on an "all risks" basis, including malicious mischief coverage, in an amount not less than the replacement cost thereof, including coverage for loss of rents or business interruption if applicable, naming Bank as loss payee and mortgagee; (iii) if the Property is required to be insured pursuant to the National Flood Reform Act of 1994, and the regulations promulgated thereunder, flood insurance is required in the amount equal to the lesser of the loan amount or maximum available under the National Flood Insurance Program, but in no event should the amount of

coverage be less than the value of the improved structure, naming Bank as mortgagee and loss payee. If, after closing, the Property (or any part thereof) is remapped and if the vertical improvements are determined to be located in a special flood hazard area, Mortgagor must obtain and maintain a flood insurance policy. If, within forty-five (45) days of receipt of notification from Bank that the Property has been reclassified by FEMA as being located in a special flood hazard area, Mortgagor has not provided sufficient evidence of flood insurance, Bank is mandated under federal law to purchase flood insurance on behalf of Mortgagor, and Bank will add the associated costs to the principal balance of the Note. If the land or any portion thereof is located in a special flood hazard area, this Agreement may be terminated by Bank at its sole option; (iv) as applicable, insurance which complies with the workers' compensation and employers' liability laws of all states in which Mortgagor shall be required to maintain such insurance; and (v) liability insurance providing coverage in such amount as Bank may require but in no event less than \$1,000,000.00 combined single limit, naming Bank as an additional insured; and (vi) such other insurance as Bank may require from time to time.

All property insurance policies shall contain an endorsement or agreement by the insurer in form satisfactory to Bank that any loss shall be payable in accordance with the terms of such policy notwithstanding any act or negligence of Mortgagor and the further agreement (within both the property and liability policies) of the insurer waiving rights of subrogation against Bank, and rights of set-off, counterclaim or deductions against Mortgagor.

All insurance policies shall be in form, provide coverages, be issued by companies and be in amounts satisfactory to Bank. At least 30 days prior to the expiration of each such policy, Mortgagor shall furnish Bank with evidence satisfactory to Bank that such policy has been renewed or replaced or is no longer required hereunder. All such policies shall provide that the policy will not be canceled or materially amended without at least 30 days prior written notice to Bank. In the event Mortgagor fails to provide, maintain, keep in force, and furnish to Bank the policies of insurance required by this paragraph, Bank may procure such insurance or single-interest insurance in such amounts, at such premium, for such risks and by such means as Bank chooses, at Mortgagor's expense; provided however, Bank shall have no responsibility to obtain any insurance, but if Bank does obtain insurance, Bank shall have no responsibility to assure that the insurance obtained shall be adequate or provide any protection to Mortgagor.

**Insurance Proceeds.** After occurrence of any loss to any of the Property, Mortgagor shall give prompt written notice thereof to Bank.

In the event of such loss all insurance proceeds, including unearned premiums, shall be payable to Bank, and Mortgagor hereby authorizes and directs any affected insurance company to make payment of such proceeds directly to Bank and not to Bank and Mortgagor jointly. Bank is hereby authorized by Mortgagor to make proof of loss if not promptly made by Mortgagor, settle, adjust or compromise any claims for loss or damage under any policy or policies of insurance and Mortgagor appoints Bank as its attorney-in-fact to receive and endorse any insurance proceeds to Bank, which appointment is coupled with an interest and shall be irrevocable as long as any Obligations remain unsatisfied. Mortgagor shall pay the costs of collection, including attorneys' fees, of insurance proceeds payable on account of such damage or destruction. Mortgagor shall have no claim against the insurance proceeds, or be entitled to any portion thereof, and all rights to the insurance proceeds are hereby assigned to Bank as security for payment of the Obligations.

In the event of any damage to or destruction of the Property, Bank shall have the option of applying or paying all or part of the insurance proceeds to (i) the Obligations in such order as Bank may determine, (ii) restoration, replacement or repair of the Property in accordance with Bank's standard construction loan disbursement conditions and requirements, or (iii) Mortgagor. Nothing herein shall be deemed to excuse Mortgagor from restoring, repairing and maintaining the Property as required herein.

**Minimum Standards.** In addition to the requirements set forth in the Loan Documents, all surveys, insurance, title policies, construction documents, environmental reports, payment and performance bonds, and any other due diligence or additional documents required in connection with this

Loan, shall comply with Bank's minimum standards in place from time to time for such documents, which shall be provided in writing by Bank to Borrower upon request.

**Impositions; Escrow Deposit.** Mortgagor will pay all taxes, levies, assessments and other fees and charges imposed upon or which may become a lien upon the Property under any law or ordinance (all of the foregoing collectively "Impositions") before they become delinquent and in any event in the same calendar year in which they first become due. Upon request of Bank, Mortgagor shall add to each periodic payment required under the Note the amount estimated by Bank to be sufficient to enable Bank to pay, as they come due, all Impositions and insurance premiums which Mortgagor is required to pay hereunder. Payments requested under this provision shall be supplemented or adjusted as required by Bank from time to time. Such funds may be commingled with the general funds of Bank and shall not earn interest. Upon the occurrence of a Default, Bank may apply such funds to pay any of the Obligations.

**Use of Property.** Mortgagor shall use and operate, and require its lessees or licensees to use and operate, the Property in compliance with all applicable laws (including, for example, the Americans with Disabilities Act and the Fair Housing Act) and ordinances, covenants, and restrictions, and with all applicable requirements of any lease or sublease now or hereafter affecting the Property. Mortgagor shall not permit any unlawful use of the Property or any use that may give rise to a claim of forfeiture of any of the Property. Mortgagor shall not allow changes in the stated use of Property from that disclosed to Bank at the time of execution hereof. Mortgagor shall not initiate or acquiesce to a zoning change of the Property without prior notice to, and written consent of, Bank.

**Maintenance, Repairs and Alterations.** Mortgagor shall keep and maintain the Property in good condition and repair and fully protected from the elements to the satisfaction of Bank. Mortgagor will not remove, demolish or structurally alter any of the buildings or other improvements on the Property (except such alterations as may be required by laws, ordinances or regulations) without the prior written consent of Bank. Mortgagor shall promptly notify Bank in writing of any material loss, damage or adverse condition affecting the Property.

**Eminent Domain.** Should the Property or any interest therein be taken or damaged by reason of any public use or improvement or condemnation proceeding ("Condemnation"), or should Mortgagor receive any notice or other information regarding such Condemnation, Mortgagor shall give prompt written notice thereof to Bank. Bank shall be entitled to all compensation, awards and other payments or relief granted in connection with such Condemnation and, at its option, may commence, appear in and prosecute in its own name any action or proceedings relating thereto. Bank shall be entitled to make any compromise or settlement in connection with such taking or damage. All compensation, awards, and damages awarded to Mortgagor related to any Condemnation (the "Proceeds") are hereby assigned to Bank and Mortgagor agrees to execute such further assignments of the Proceeds as Bank may require. Bank shall have the option of applying or paying the Proceeds in the same manner as insurance proceeds as provided herein. Mortgagor appoints Bank as its attorney-in-fact to receive and endorse the Proceeds to Bank, which appointment is coupled with an interest and shall be irrevocable as long as any Obligations remain unsatisfied.

**Environmental Condition of Property and Indemnity.** Mortgagor warrants and represents to Bank, except as reported by Mortgagor to Bank in writing, that: (i) Mortgagor has inspected and is familiar with the environmental condition of the Property; (ii) the Property and Mortgagor, and any occupants of the Property, are in compliance with and shall continue to be in compliance with all applicable federal, state and local laws and regulations intended to protect the environment and public health and safety as the same may be amended from time to time ("Environmental Laws"); (iii) the Property is not and has never been used to generate, handle, treat, store or dispose of, in any quantity, oil, petroleum products, hazardous or toxic substances, hazardous waste, regulated substances or hazardous air pollutants ("Hazardous Materials") in violation of any Environmental Laws; (iv) no Hazardous Materials (including asbestos, mold or lead paint in any form) are located on or under the Property or emanate from the Property; (v) there are no unregistered underground storage tanks on the Property that are subject to any underground storage tank registration laws or regulations; (vi) no notice

has been received with regard to any Hazardous Material on the Property; (vii) no action, investigation or proceeding is pending or to Mortgagor's knowledge threatened which seeks to enforce any right or remedy against Mortgagor or the Property under any Environmental Law; and (viii) all licenses, permits and other governmental or regulatory actions necessary for the Property to comply with Environmental Laws shall be obtained and maintained and Mortgagor shall assure compliance therewith.

Further, Mortgagor represents to Bank that no portion of the Property is a protected wetland. Mortgagor agrees to notify Bank immediately upon receipt of any citations, warnings, orders, notices, consent agreements, process or claims alleging or relating to violations of any Environmental Laws or to the environmental condition of the Property and shall conduct and complete all investigations and all cleanup actions necessary to comply with the Environmental Laws and to remove, in accordance with Environmental Laws, any Hazardous Material from the Property.

Mortgagor shall indemnify, hold harmless, and defend Bank from and against any and all damages, penalties, fines, claims, suits, liabilities, costs, judgments and expenses, including attorneys', consultants' or experts' fees of every kind and nature incurred, suffered by or asserted against Bank as a direct or indirect result of: (i) representations made by Mortgagor in this Section being or becoming untrue in any material respect; (ii) Mortgagor's violation of or failure to meet the requirements of any Environmental Laws; or (iii) Hazardous Materials which, while the Property is subject to this Mortgage, exist on the Property. Bank shall have the right to arrange for or conduct environmental inspections of the Property from time to time (including the taking of soil, water, air or material samples). The cost of such inspections made after Default or which are required by laws or regulations applicable to Bank shall be borne by Mortgagor. However, Mortgagor's indemnity shall not apply to any negligent or intentional act of Bank which takes place after foreclosure or satisfaction of this Mortgage. These indemnification obligations are in addition to General Indemnification provisions set forth hereafter. Mortgagor's Obligations under this section shall continue, survive and remain in full force and effect notwithstanding the repayment of the Obligations, a foreclosure of or exercise of power of sale under this instrument, a delivery of a deed in lieu of foreclosure, a cancellation or termination of record of this instrument and the transfer of the Property.

**Appraisals.** Mortgagor agrees that Bank may obtain an appraisal of the Property when required by the regulations of the Federal Reserve Board or the Office of the Comptroller of the Currency, or any other regulatory agency or at such other times as Bank may reasonably require. Such appraisals shall be performed by an independent third party appraiser selected by Bank. The cost of such appraisals shall be borne by Mortgagor. If requested by Bank, Mortgagor shall execute an engagement letter addressed to the appraiser selected by Bank. Mortgagor's failure or refusal to sign such an engagement letter, however, shall not impair Bank's right to obtain such an appraisal. Mortgagor agrees to pay the cost of such appraisal within 10 days after receiving an invoice for such appraisal.

**Inspections.** Bank, or its representatives or agents, are authorized to enter at any reasonable time upon any part of the Property for the purpose of inspecting the Property and for the purpose of performing any of the acts it is authorized to perform under the terms of this Mortgage.

**Liens and Subrogation.** Mortgagor shall pay and promptly discharge all liens, claims and encumbrances upon the Property. Mortgagor shall have the right to contest in good faith the validity of any such lien, claim or encumbrance, provided: (i) such contest suspends the collection thereof or there is no danger of the Property being sold or forfeited while such contest is pending; (ii) Mortgagor first deposits with Bank a bond or other security satisfactory to Bank in such amounts as Bank shall reasonably require; and (iii) Mortgagor thereafter diligently proceeds to cause such lien, claim or encumbrance to be removed and discharged.

Bank shall be subrogated to any liens, claims and encumbrances against Mortgagor or the Property that are paid or discharged through payment by Bank or with loan proceeds, notwithstanding the record cancellation or satisfaction thereof.

**Waiver of Mortgagor's Rights.** To the fullest extent permitted by law, Mortgagor waives the

benefit of all laws now existing or that hereafter may be enacted providing for (i) any appraisal before sale of any portion of the Property, (ii) in any way extending the time for the enforcement of the collection of the Note or the debt evidenced thereby or any of the other Obligations, and any rights to hearing prior to the exercise by Bank of any right, power, or remedy herein provided to Bank.

To the full extent Mortgagor may do so, Mortgagor agrees that Mortgagor will not at any time insist upon, plead, claim or seek to take the benefit or advantage of any law now or hereafter in force providing for any exemption (including homestead exemption), appraisal, valuation, stay, extension or redemption, and Mortgagor for themselves and their respective heirs, devisees, representatives, successors and assigns, and for any and all persons claiming any interest in the Property, to the extent permitted by law, hereby waive and release all rights of valuation, appraisal, redemption, stay of execution, the benefit of all exemption laws, notice of election to mature or declare due the whole of the secured indebtedness and marshalling in the event of foreclosure of the liens hereby created. Mortgagor further waives any and all notices including, without limitation, notice of intention to accelerate and of acceleration of the Obligations.

**Payments by Bank.** In the event of default in the timely payment or performance of any of the Obligations, Bank, at its option and without any duty on its part to determine the validity or necessity thereof, may pay the sums for which Mortgagor is obligated. Further, Bank may pay such sums as Bank deems appropriate for the protection and maintenance of the Property including, without limitation, sums to pay Impositions and other levies, assessments or liens, maintain insurance, make repairs, secure the Property, maintain utility service, intervene in any condemnation and pay attorneys' fees and other fees and costs to enforce this Mortgage or protect the lien hereof (including foreclosure) or collect the Obligations, without limitation, including those incurred in any proceeding including Bankruptcy or arbitration. Any amounts so paid shall bear interest at the default rate stated in the Note and shall be secured by this Mortgage.

**Indemnification.** Mortgagor shall protect, indemnify and save harmless Bank from and against all losses, liabilities, obligations, claims, damages, penalties, fines, causes of action, costs and expenses (including, without limitation, reasonable attorneys' fees and expenses) (collectively, "Damages") imposed upon, incurred by or asserted or assessed against Bank on account of or in connection with (i) the Loan Documents or any failure or alleged failure of Mortgagor to comply with any of the terms of, or the inaccuracy or breach of any representation in, the Loan Documents; (ii) the Collateral or any claim of loss or damage to the Property or any injury or claim of injury to, or death of, any person or property that may be occasioned by any cause whatsoever pertaining to the Property or the use, occupancy or operation thereof, (iii) any failure or alleged failure of Mortgagor to comply with any law, rule or regulation applicable to it or to the Property or the use, occupancy or operation of the Property (including, without limitation, the failure to pay any taxes, fees or other charges), provided that such indemnity shall be effective only to the extent of any Damages that may be sustained by Bank in excess of any net proceeds received by it from any insurance of Mortgagor (other than self-insurance) with respect to such Damages, (iv) any Damages whatsoever by reason of any alleged action, obligation or undertaking of Bank relating in any way to or any matter contemplated by the Loan Documents, (v) any claim for brokerage fees or such other commissions relating to the Property or any other Obligations, or (vi) any and all liability arising from any leases related to the Property. Nothing contained herein shall require Mortgagor to indemnify Bank for any Damages resulting from Bank's gross negligence or its willful and wrongful acts. The indemnity provided for herein shall survive payment of the Obligations and shall extend to the officers, directors, employees and duly authorized agents of Bank. In the event the Bank incurs any Damages arising out of or in any way relating to the transaction contemplated by the Loan Documents (including any of the matters referred to in this section), the amounts of such Damages shall be added to the Obligations, shall bear interest, to the extent permitted by law, at the interest rate borne by the Obligations from the date incurred until paid and shall be payable on demand.

**Assignment of Rents.** Mortgagor hereby absolutely assigns and transfers to Bank all the leases, rents, issues and profits of the Property (collectively "Rents"). Although this assignment is effective immediately, so long as no Default exists, Bank gives to and confers upon Mortgagor the privilege under a revocable license to collect as they become due, but not prior to accrual, the Rents and

to demand, receive and enforce payment, give receipts, releases and satisfactions, and sue in the name of Mortgagor for all such Rents. Mortgagor represents there has been no prior assignment of leases or Rents, and agrees not to further assign such leases or Rents. Upon any occurrence of Default, the license granted to Mortgagor herein shall be automatically revoked without further notice to or demand upon Mortgagor, and Bank shall have the right, in its discretion, without notice, by agent or by a receiver appointed by a court, and without regard to the adequacy of any security for the Obligations, (i) to enter upon and take possession of the Property, (ii) notify tenants, subtenants and any property manager to pay Rents to Bank or its designee, and upon receipt of such notice such persons are authorized and directed to make payment as specified in the notice and disregard any contrary direction or instruction by Mortgagor, and (iii) in its own name, sue for or otherwise collect Rents, including those past due, and apply Rents, less costs and expenses of operation and collection, including attorneys' fees, to the Obligations in such order and manner as Bank may determine or as otherwise provided for herein. Bank's exercise of any one or more of the foregoing rights shall not cure or waive any Default or notice of Default hereunder.

**Due on Sale or Further Encumbrance or Transfer of an Interest in Mortgagor.** Without the prior written consent of Bank in each instance, Mortgagor shall not (i) sell, convey, transfer or encumber the Property, or any part thereof or interest therein, whether legal or equitable, (ii) cause or permit any transfer of the Property or any part thereof, whether voluntarily, involuntarily or by operation of law, or (iii) enter into any agreement or transaction to transfer, or accomplish in form or substance a transfer, of the Property. A "transfer" of the Property includes: (a) the direct or indirect sale, transfer or conveyance of the Property or any portion thereof or interest therein; (b) the execution of an installment sale contract or similar instrument affecting all or any portion of the Property; (c) if Mortgagor or any general partner or member of Mortgagor, is a corporation, partnership, limited liability company, trust or other business entity, the transfer (whether in one transaction or a series of transactions) of any stock, partnership, limited liability company or other ownership interests in such corporation, partnership, limited liability company or entity including, without limitation, changes in stockholders, partners, members, managers, trustees, beneficiaries, or their respective interests; (d) if Mortgagor, or any general partner or member of Mortgagor, is a corporation, the creation or issuance of new stock by which an aggregate of more than 10% of such corporation's stock shall be vested in a party or parties who are not now stockholders; and (e) an agreement by Mortgagor leasing all or a substantial part of the Property for other than actual occupancy by a space tenant thereunder or a sale, assignment or other transfer of or the grant of a security interest in and to any Leases.

Bank's consent to any conveyance or encumbrance may be conditioned upon an increase in the interest rate specified in the Note (or other Obligations), an extension or curtailment of the maturity of the Obligations, or other modification of the Note or this instrument.

**Remedies of Bank on Default.** Failure of Mortgagor or any other person liable to timely pay or perform any of the Obligations is a default ("Default") under this Mortgage. Upon the occurrence of Default the following remedies are available, without limitation, to Bank: (i) Bank may exercise any or all of Bank's remedies under this Mortgage or other Loan Documents including, without limitation, acceleration of the maturity of all payments and Obligations, other than Obligations under any swap agreements (as defined in 11 U.S.C. § 101, as in effect from time to time) with Bank or any of its affiliates, which shall be due in accordance with and governed by the provisions of said swap agreements; (ii) Bank may take immediate possession of the Property or any part thereof (which Mortgagor agrees to surrender to Bank) and manage, control or lease the same to such persons and at such rental as it may deem proper and collect and apply Rents to the payment of: (a) the Obligations, together with all costs and attorneys' fees; (b) all Impositions and any other levies, assessments or liens which may be prior in lien or payment to the Obligations, and premiums for insurance, with interest on all such items; and (c) the cost of all alterations, repairs, replacements and expenses incident to taking and retaining possession of the Property and the management and operation thereof; all in such order or priority as Bank in its sole discretion may determine. The taking of possession shall not prevent concurrent or later proceedings for the foreclosure sale of the Property; (iii) Bank may apply to any court of competent jurisdiction for the appointment of a receiver for all purposes including, without limitation, to manage and operate the Property or any part thereof, and to apply the Rents therefrom as hereinabove provided. In the event of

such application, Mortgagor consents to the appointment of a receiver, and agrees that a receiver may be appointed without notice to Mortgagor, without regard to whether Mortgagor has committed waste or permitted deterioration of the Property, without regard to the adequacy of any security for the Obligations, and without regard to the solvency of Mortgagor or any other person, firm or corporation who or which may be liable for the payment of the Obligations; (iv) Bank may exercise all the remedies of a mortgagee as provided by law and in equity including, without limitation, foreclosure upon this Mortgage and sale of the Property, or any part of the Property, at public sale conducted according to applicable law (referred to as "Sale") and conduct additional Sales as may be required until all of the Property is sold or the Obligations are satisfied; (v) With respect to any portion of the Property governed by the UCC, Bank shall have all of the rights and remedies of a secured party thereunder. Bank may elect to foreclose upon any Property that is fixtures under law applicable to foreclosure of interests in real estate or law applicable to personal property; (vi) Bank may bid at Sale and may accept, as successful bidder, credit of the bid amount against the Obligations as payment of any portion of the purchase price; and (vii) Bank shall apply the proceeds of Sale, first to any fees or attorney fees permitted Bank by law in connection with Sale, second to expenses of foreclosure, publication, and sale permitted Bank by law in connection with Sale, third to the Obligations, and any remaining proceeds as required by law.

**Miscellaneous Provisions.** Mortgagor agrees to the following: (i) All remedies available to Bank with respect to this Mortgage or available at law or in equity shall be cumulative and may be pursued concurrently or successively. No delay by Bank in exercising any remedy shall operate as a waiver of that remedy or of any Default. Any payment by Bank or acceptance by Bank of any partial payment shall not constitute a waiver by Bank of any Default; (ii) Mortgagor represents that Mortgagor (a) is (1) an adult individual and is sui juris, or (2) a corporation, general partnership, limited partnership, limited liability company or other legal entity, duly organized, validly existing and in good standing under the laws of its state of organization, and is authorized to do business in each other jurisdiction wherein its ownership of property or conduct of business legally requires such organization (b) has the power and authority to own its properties and assets and to carry on its business as now being conducted and as now contemplated; and (c) has the power and authority to execute, deliver and perform, and by all necessary action has authorized the execution, delivery and performance of, all of its obligations under this Mortgage and any other Loan Document to which it is a party. (iii) The provisions hereof shall be binding upon and inure to the benefit of Mortgagor, its heirs, personal representatives, successors and assigns including, without limitation, subsequent owners of the Property or any part thereof, and shall be binding upon and inure to the benefit of Bank, its successors and assigns and any future holder of the Note or other Obligations; (iv) Any notices, demands or requests shall be sufficiently given Mortgagor if in writing and mailed or delivered to the address of Mortgagor shown above or to another address as provided herein and to Bank if in writing and mailed or delivered to Wachovia Bank, National Association, Mail Code VA7628, P. O. Box 13327, Roanoke, VA 24040 or Wachovia Bank, National Association, Mail Code VA7628, 10 South Jefferson Street, Roanoke, VA 24011, or such other address as Bank may specify from time to time and in the event that Mortgagor changes Mortgagor's address at any time prior to the date the Obligations are paid in full, that party shall promptly give written notice of such change of address by registered or certified mail, return receipt requested, all charges prepaid. Notices to Bank must include the mail code. (v) This Mortgage may not be changed, terminated or modified orally or in any manner other than by an instrument in writing signed by the parties hereto; (vi) All references to "Bank" shall mean to "Bank (for itself and its affiliate)"; (vii) The captions or headings at the beginning of each paragraph hereof are for the convenience of the parties and are not a part of this Mortgage; (viii) If the lien of this Mortgage is invalid or unenforceable as to any part of the Obligations, the unsecured portion of the Obligations shall be completely paid (and all payments made shall be deemed to have first been applied to payment of the unsecured portion of the Obligations) prior to payment of the secured portion of the Obligations and if any clause, provision or obligation hereunder is determined invalid or unenforceable the remainder of this Mortgage shall be construed and enforced as if such clause, provision or obligation had not been contained herein; (ix) This Mortgage shall be governed by and construed under the laws of the jurisdiction where this Mortgage is recorded; (x) Mortgagor by execution and Bank by acceptance of this Mortgage agree to be bound by the terms and provisions hereof). **FINAL AGREEMENT.** This Agreement and the other Loan Documents represent the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties.

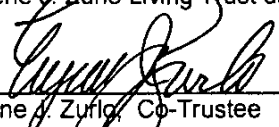
IN WITNESS WHEREOF, Mortgagor has signed and sealed this instrument as of the day and year first above written.


**Mortgagor**


Penny Creek Associates, L.L.C.

**Members:**

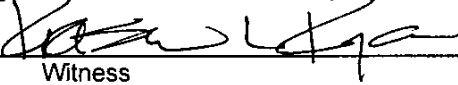
The Eugene J. Zurlo Living Trust dated December 11, 1997

By:  (SEAL)  
Eugene J. Zurlo, Co-Trustee

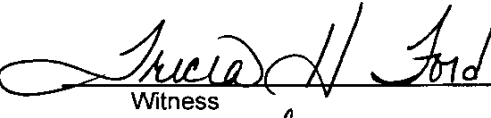
By:  (SEAL)  
Charlotte R. Zurlo, Co-Trustee

 (SEAL)  
Michel Laplante, Manager/Member

Signed, sealed and delivered in presence of:

  
Witness

John's Island, SC 29455  
Address

  
Witness

John's Island, SC 29455  
Address

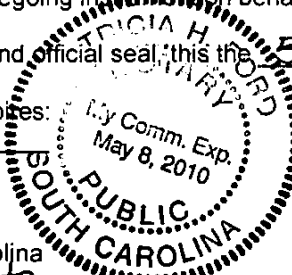
State of South Carolina  
County of Charleston

**PARTNERSHIP, LIMITED PARTNERSHIP or L.L.C. PROBATE**

I, Tricia H. Ford, Notary Public, do hereby certify that Eugene J. Zurlo, as Trustee of The Eugene J. Zurlo Living Trust dated December 11, 1997, a Member of Penny Creek Associates, L.L.C., a limited liability company, personally appeared before me this day and acknowledged due execution of the foregoing instrument on behalf of the limited liability company.

Witness my hand and official seal, this the 5 day of APRIL, 2006.

My commission expires:



Tricia H Ford  
Notary Public

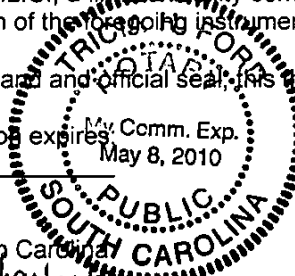
State of South Carolina  
County of Charleston

**PARTNERSHIP, LIMITED PARTNERSHIP or L.L.C. PROBATE**

I, Tricia H. Ford, Notary Public, do hereby certify that Charlotte R. Zurlo, as Trustee of The Eugene J. Zurlo Living Trust dated December 11, 1997, a Member of Penny Creek Associates, L.L.C., a limited liability company, personally appeared before me this day and acknowledged due execution of the foregoing instrument on behalf of the limited liability company.

Witness my hand and official seal, this the 5 day of APRIL, 2006.

My commission expires: My Comm. Exp. May 8, 2010



Tricia H Ford  
Notary Public

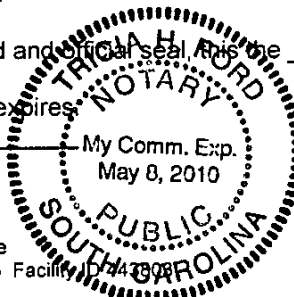
State of South Carolina  
County of Charleston

**PARTNERSHIP, LIMITED PARTNERSHIP or L.L.C. PROBATE**

I, Tricia H. Ford, Notary Public, do hereby certify that Michel Laplante, a Manager/Member of Penny Creek Associates, L.L.C., a limited liability company, personally appeared before me this day and acknowledged due execution of the foregoing instrument on behalf of the limited liability company.

Witness my hand and official seal, this the 5 day of April, 2006.

My commission expires: My Comm. Exp. May 8, 2010



Tricia H Ford  
Notary Public

Tracking #: 67529rke  
CAT - Deal # 642716 Facility ID 447808

## Exhibit "A"

## PARCEL 1 (Tract B-2-1):

All that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as Tract B-2-1, said to contain 11.645 total acres, as shown on a plat entitled "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA" prepared by HLA INC, dated December 10, 2004 and recorded in Plat Book EH at page 903, in the R.M.C. Office for Charleston County, South Carolina (hereinafter "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

Said properties are subject to all applicable covenants, conditions, restrictions, limitations, obligations and easements of record.

This being a portion of the same property conveyed to the Mortgagor herein by deed of conveyance from FHP Realty Company, a Partnership dated August 7, 2000 and recorded in Book O352, page 692, in the R.M.C. Office for Charleston County, SC.

TMS # 346-00-00-004

**ALSO**

## PARCEL 2 (Tract B-2-2):

All that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as Tract B-2-2, said to contain 22.91 acres total more or less, as shown on a plat entitled "PLAT SHOWING THE SUBDIVISION OF TRACT B-2-1 TMS NO. 346-00-00-004 CONTAINING 24.895 ACRES INTO TRACT B-2-3 (12.250 ACRES) AND RESIDUAL TRACT B-2-1 (12.645 ACRES) PROPERTY OF PENNY CREEK ASSOCIATES, LLC LOCATED IN THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA" prepared by HLA INC, dated December 10, 2004 and recorded in Plat Book EH at page 903, in the R.M.C. Office for Charleston County, South Carolina (hereinafter "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

Said properties are subject to all applicable covenants, conditions, restrictions, limitations, obligations and easements of record.

This being a portion of the same property conveyed to the Mortgagor herein by deed of conveyance from FHP Realty Company, a Partnership dated August 7, 2000 and recorded in Book O352, page 692, in the R.M.C. Office for Charleston County, SC.

TMS # 346-00-00-076

**ALSO**

## PARCEL 3 (Lot 2):

All that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as Lot 2, said to contain 16.41 total acres, more or less, as shown on a plat entitled " SHOWING THE SUBDIVISION OF TMS # 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, AND RESIDUAL THE PRESERVE AT FENWICK PLANTATION TO BE OWNED BY EPIC DEVELOPMENT, LLC THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA" prepared by GPA Professional

Land Surveyors, dated May 15, 2005 and recorded in Plat Book EJ at page 107, in the R.M.C. Office for Charleston County, South Carolina (hereinafter "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

Said properties are subject to all applicable covenants, conditions, restrictions, limitations, obligations and easements of record.

This being a portion of the same property conveyed to the Mortgagor herein by deed of conveyance from Julius H. Weil, Jr. dated March 25, 1999 and recorded in Book D323, page 439, and by deed of conveyance from Fenwick Acres, A Partnership dated March 25, 1999 and recorded in Book D323, page 312, in the R.M.C. Office for Charleston County, SC.

TMS # 346-00-00-258

**ALSO**

**PARCEL 4 (Lot 3):**

All that certain lot, piece or parcel of land, situate, lying and being in the City of Charleston, County of Charleston, State of South Carolina, shown and designated as Lot 3, said to contain 11.96 total acres, more or less, as shown on a plat entitled "SHOWING THE SUBDIVISION OF TMS # 346-00-00-002 TO CREATE NEW LOTS 1, 2, 3, AND RESIDUAL THE PRESERVE AT FENWICK PLANTATION TO BE OWNED BY EPIC DEVELOPMENT, LLC THE CITY OF CHARLESTON CHARLESTON COUNTY SOUTH CAROLINA" prepared by GPA Professional Land Surveyors, dated May 15, 2005 and recorded in Plat Book EJ at page 107, in the R.M.C. Office for Charleston County, South Carolina (hereinafter "R.M.C. Office"); said parcel having such location, size, shape, dimensions, buttings and boundings as will by reference to said plat more fully appear.

Said properties are subject to all applicable covenants, conditions, restrictions, limitations, obligations and easements of record.

This being a portion of the same property conveyed to the Mortgagor herein by deed of conveyance from Julius H. Weil, Jr. dated March 25, 1999 and recorded in Book D323, page 439, and by deed of conveyance from Fenwick Acres, A Partnership dated March 25, 1999 and recorded in Book D323, page 312, in the R.M.C. Office for Charleston County, SC.

TMS # 346-00-00-259

This is a second mortgage junior in lien to that certain mortgage from Penny Creek Associates, L.L.C. to First Union National Bank dated August 7, 2000 and recorded in Book P352, page 613, RMC Office for Charleston County, a default under which shall be deemed an event of default hereunder.

BKG 579PG261

**RECORDER'S PAGE**

**NOTE:** This page **MUST** remain with the original document



SAI

Filed By:

**Buist, Byars, Pearce & Taylor, LLC**  
130 Gardners Circle  
Suite 138  
Johns Island SC 29455

**FILED**

April 7, 2006  
4:16:23 PM

BKG 579PG249

Charlie Lybrand, Register  
Charleston County, SC

DESCRIPTION	AMOUNT
	\$ 18.00
Postage	

<b>TOTAL</b>	<b>\$ 18.00</b>
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<b>DRAWER:</b>	
	A - bmm

DO NOT STAMP BELOW THIS LINE

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee  
of the Eugene J. Zurlo Living Trust Dated December  
11, 1997; 1776, LLC; BEACH FENWICK, LLC;  
THE BEACH COMPANY; SEAMON, WHITESIDE  
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,  
LLC; JOHN DOE AND MARY ROE

Defendants,

\_\_\_\_\_ /

**PLAINTIFF’S RESPONSES TO DEFENDANT’S REQUESTS FOR ADMISSION**

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned counsel, hereby  
responses to Defendant’s, EUGENE J. ZURLO, as Co-Trustee of the Eugene J. Zurlo Living  
Trust Dated December 11, 1997, Requests for Admission dated February 20, 2020 as follows:

1. Admit.
2. Deny.
3. Admit.
4. Admit.
5. Admit that Michel Laplante was the managing member of Penny Creek Associates, LLC,  
and that he resigned and was replaced with Chris Lanning on May 3, 2016 pursuant to the  
Order of the Honorable R. Markley Dennis Jr. Deny remaining allegations.
6. Admit.
7. Admit that Exhibit E is a true and accurate copy of the RESOLUTION OF THE SOLE  
SHAREHOLDER OF PENNY CREEK ASSOCIATES, LLC dated October 4, 2013.  
Admit that Exhibit E created the easement that is the subject of Plaintiff’s lawsuit. Deny  
the easement is a “Springing Easement”. Deny remaining allegations.

- 8. Deny. Pursuant to the legal and/or equitable doctrines of actual and/or apparent authority, agency, equitable estoppel and waiver, and any other applicable doctrines or principles, when Eugene J. Zurlo signed Exhibit E, the Co-Trustees also became bound to Exhibit E.
- 9. Deny.
- 10. Deny.
- 11. Admit that Exhibit E was not recorded in the RMC office for Charleston County. Without knowledge as to whether Exhibit E was recorded in the “RDC” office for Charleston County, therefore deny.
- 12. Admit.
- 13. Admit that there is no recorded deed specifically from Penny Creek Associates, LLC, as grantor or transferor, to Maybank 2754, LLC, as grantee or transferee, for the real property that is the subject of this case. Deny remaining allegations.
- 14. Admit.
- 15. Admit
- 16. Admit.
- 17. Admit that paragraph 3b of the ORDERED, ADJUDGED AND DECREED portion of the Order states, “The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record.” Deny that Michael Laplante was a defendant in the foreclosure action.
- 18. Deny all allegations.

TAROKH LAW, PLLC  
PO BOX 10827  
TAMPA, FL 33629  
813-922-5510  
jason@tarokhlaw.com

s/ Jason M. Tarokh  
JASON M. TAROKH  
S. CAROLINA BAR # 72837

March 10, 2020

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee  
of the Eugene J. Zurlo Living Trust Dated December  
11, 1997; 1776, LLC; BEACH FENWICK, LLC;  
THE BEACH COMPANY; SEAMON, WHITESIDE  
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,  
LLC; JOHN DOE AND MARY ROE

Defendants,

**PLAINTIFF’S FIRST SET OF REQUESTS FOR ADMISSIONS TO THE DEFENDANT,  
SEAMON, WHITESIDE & ASSOCIATES, INC.**

**TO: KENT T. STAIR, ESQ., J. PATRICK NORRIS, ESQ.; AND JORDAN N. TEICH,  
ESQ., ATTORNEYS FOR THE DEFENDANT, SEAMON, WHITESIDE &  
ASSOCIATES, INC.**

Plaintiff, MAYBANK 2754, LLC, by and through the undersigned attorney, requests that  
the Defendant, SEAMON, WHITESIDE & ASSOCIATES, INC., (herein “Defendant”) admit  
the truth of the matters set forth below in writing within thirty (30) days after service of these  
Requests, pursuant to Rule 36 of the South Carolina Rules of Civil Procedure.

**REQUESTS FOR ADMISSIONS**

1. Admit that the document attached hereto as Exhibit A is a true and accurate copy of a proposal for planning, civil engineering and landscape architectural services dated October 10, 2016.
2. Admit that Defendant sent the Plaintiff the document attached hereto as Exhibit A on or about October 10, 2016.

3. Admit that the Defendant met with the Plaintiff on or before October 10, 2016 and discussed developing the property identified as “TMS 345-00-00-008” in the document attached hereto as Exhibit A.
4. Admit that the Plaintiff’s adjacent lot as described in paragraph 12 of the Complaint is the same property described as “TMS 345-00-00-008” in the document attached hereto as Exhibit A.
5. Admit that the first page of the document attached hereto as Exhibit A references “an off-site easement within the Fenwick Village PUD”.
6. Admit that the off-site easement within the Fenwick Village PUD referenced on the first page of the document attached hereto as Exhibit A is the easement that is the subject of this case.
7. Admit that the document attached as Exhibit A is signed by Stuart D. Whiteside.
8. Admit that Defendant knew about the easement that is the subject of this case on or before December 12, 2019.
9. Admit that on or before December 12, 2019, the Defendant discussed the easement that is the subject of this case with Beach Fenwick, LLC.
10. Admit that on or before December 12, 2019, the Defendant discussed the easement that is the subject of this case with The Beach Company (The Beach Co.).
11. Admit that the Defendant did not inform the City of Charleston about the easement that is the subject of this case prior to November 27, 2019, the effective date of the Development Agreement between the City of Charleston and 1776, LLC, which was recorded in the office of the Register of Deeds for Charleston County, South Carolina in Book 0843, Page 506.

TAROKH LAW, PLLC  
PO BOX 10827  
TAMPA, FL 33679  
813-922-5510  
jason@tarokhlaw.com

s/ Jason M. Tarokh  
JASON M. TAROKH  
S. CAROLINA BAR # 72837

April 24, 2020



*ATM*

October 10, 2016

Mr. John LaPlante  
2754 Maybank, LLC  
2754 Maybank Hwy  
Suite 500  
Johns Island, SC

**2754 MAYBANK COMMERCIAL  
CHARLESTON, SOUTH CAROLINA**

We understand that you intend to demolish the existing office building and redevelop TMS 345-00-00-008 as a retail and office multi-story building with associated parking and storm water detention. It is also our understanding that the property is currently in the Fenwick Village PUD, will potentially increase in size toward the rear, and will have the ability to locate some of the development program within an off-site easement within the Fenwick Village PUD. Per your request, we have prepared the following proposal for Planning, Civil Engineering and Landscape Architectural services we can provide to assist you on this project.

**Scope of Services**

Seamon, Whiteside & Associates, Inc. (SW+) will provide the following professional services:

**Division One: Preliminary Master Planning**

1. Coordinate with Client on project requirements (one meeting -complete).
2. Research zoning requirements. Prepare a site constraints base map that illustrates buffers, setbacks, and pertinent zoning requirements. Provide map to Client.
3. Discuss site development approach with Client based on constraints map and zoning requirements (one meeting).
4. Review and comment on architectural site study to be provided by Client.
5. Estimate detention requirements based on architectural site study.
6. Meet with City to discuss the zoning consistency of the architectural site study and receive comments.

**Division Two: Conceptual Design**

**Exhibit A**

Mr. John LaPlante  
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October 10, 2016

1. Review City comments with Client and decide on final site design direction.
2. Obtain proposal for remaining required surveying services (topographic, trees, wetlands) from SW+ Engineering who shall contract directly with Client.
3. Client shall provide a wetlands survey verified by The US Army Corps of Engineers or evidence that no wetlands exist on the property.
4. Investigate potential impacts to wetlands (if any) and coordinate with environmental consultant to provide recommendations regarding permitting issues. This proposal does not include efforts to support the preparation and submittal of a permit application to impact wetlands. Should the Client desire these services, they can be provided at an additional fee. Environmental consultant shall contract directly with the Client.
5. Coordinate with all necessary agencies on project requirements including but not limited to:
  - a. City of Charleston (zoning, site plan, drainage, access)
  - b. Charleston Water Systems (water and sewer)
  - c. SCDHEC-OCRM (Coastal Zone Consistency)
  - d. SCDOT (as required for highway encroachments)
  - e. SCE&G (gas & power)
6. Coordinate with Client and Architect on building footprints and site plan. Client or Client's Architect to provide building footprints in CAD format.
7. Prepare a Conceptual Site Plan based on the Client's architectural site plan, site conditions, public agency input, and applicable regulations.
8. Review the Plan with the Client and revise based on Client's input (one revision).
9. Prepare one submittal to Technical Review Committee Pre-application Package to include:
  - a) Title Sheet
  - b) Existing Conditions
  - c) Site Plan
10. Attend and present at TRC Pre-application Meeting (one meeting).
11. Revise master plan to address TRC's comments (one revision).

#### **Division Three: Site Construction Documents**

1. Coordinate with Client and Architect on final site plan requirements.
2. Prepare Conceptual Design Review Board (DRB) submittal per City of Charleston requirements. Attend and provide input at DRB meeting (Architect shall also attend to present the building design). Package shall consist of all required site documents including:
  - a. Completed application form and fee (to be prepared by the Client or Architect).
  - b. A conceptual site plan (color rendered)
  - c. A conceptual landscape plan
  - d. Architectural drawings (provided by Architect)
  - e. Site photographs
  - f. Streetscape elevation drawing (provided by Architect)

Mr. John LaPlante  
 Page 3 of 16  
 October 10, 2016

3. Coordinate and revise site plan to incorporate comments received at the Conceptual DRB meeting. Prepare Preliminary DRB submittal per City of Charleston requirements. Attend and provide input at DRB meeting (Architect shall also attend to present the building design). Package shall consist of the following:
  - a. Completed application form and fee (to be prepared by the Client or Architect).
  - b. A preliminary site plan (color rendered)
  - c. A preliminary landscape plan
  - d. Architectural floor plans (provided by Architect)
  - e. Architectural elevations (provided by Architect)
  - f. Building and wall sections (provided by Architect)
  - g. Material selections (provided by Architect)
  - h. Color rendering (provided by Architect, if required)
4. Coordinate and revise site plan to incorporate comments received at the Preliminary DRB meeting. Prepare Final DRB submittal per City of Charleston requirements and attend/provide input at DRB review meeting (Architect shall also attend to present the building design). Package shall consist of the same requirements as Preliminary DRB plus any specifically requested items.
5. Additional Final DRB submittals, should they be required for reasons that are beyond SW+'s control, shall be billed as additional services on an hourly rate basis.
6. SW+ will coordinate with the traffic engineer should TRC require a traffic study. Traffic engineer shall contract directly with the Client.
7. Prepare a TRC submittal reflecting site plan requirements and comments received at the Pre-Application Review to include the following:
  - a. Title Sheet
  - b. Existing Conditions Plan
  - c. Clearing and Demolition Plan
  - d. SWPPP Plan (const. drawings only-see note below)
  - e. Layout Plan
  - f. Grading and Drainage Plan
  - g. Water Plan (Design of any required offsite improvements is not included. Currently an existing 24" water main exists directly in front of the site. For this proposal we have assumed that we will be tapping this main in front of our site )
  - h. Sewer Plan (Design of offsite sewer main is included. Currently an existing 18" sewer main exists on the other side of the Maybank Highway. For this proposal we have assumed that we will need to jack and bore underneath Maybank Highway to obtain sewer for the site)
  - i. Planting Plans
  - j. Plant Schedule and Planting Details
  - k. Fire Protection Plan
  - l. ADA accessibility Plan
  - m. Architectural Elevations (by Architect)
  - n. Drainage Report
  - o. C-SWPPP Notebook
  - p. Traffic Impact Study (by others)
8. Submit to City and make presentation at TRC meeting. (Submittal #1)

Mr. John LaPlante  
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9. Revise plans to address TRC comments. Resubmit (Submittal #2) to the City and attend TRC review meeting (2 TRC submittals and 2 meetings are included as part of this scope of services. Should additional TRC submittals be required, they will be billed at an hourly rate basis)
10. Coordinate with Client's geotechnical engineer on site and building grading requirements.
11. Coordinate with Client's or Architect's lighting consultant on site lighting. Light pole locations will be shown on the site and landscape plans.
12. Based on comments received from the TRC meetings, the following additional sitework construction drawings will need to be prepared:
  - a. Drainage Culvert Profiles
  - b. Sewer Profiles
  - c. Site Infrastructure Details
  - d. Traffic Control Plan (excluding construction period traffic control—construction period traffic control and jobsite safety are the sole responsibility of the Contractor)
  - e. Water System Calculations
  - f. Technical Specifications
13. Provide additional landscape construction documents to include the following:
  - a. Irrigation Plan (through an irrigation supply house)
  - b. Specialty Landscape Details for specialty pavements
  - c. Technical Specifications
14. Submit construction drawings to the agencies having jurisdiction for review and permitting, including the following as applicable:
  - a. City of Charleston Engineering Dept. (roads and drainage)
  - b. Charleston Water Systems (water and sewer)
  - c. SCDHEC (water and sewer via delegated review)
  - d. SCDHEC-OCRM (Coastal Zone Consistency)
  - e. SCDOT (encroachment permit, required for driveway improvements, water main tap and sewer jack and bore)
  - f. Local power, telephone and cable television companies

**Notes:**

1. *It is assumed that the entire project will be designed and permitted in one phase.*
2. *Geotechnical studies, environment audits, structural design of retaining walls greater than 3' in height, design of site lighting, traffic studies, and other supporting services not defined in the scope of this proposal, should they be required, will provided by the Client through separate contract with outside consultant(s).*
3. *LEED Certification efforts are not included. If desired, these services can be provided as an additional service on an hourly rate or negotiated fee basis.*
4. *Client shall be responsible for the payment of application and permit fees, impact and tap fees, inspection fees, maintenance fees, bonds, and other agency charges associated with the permitting and construction of the Project.*

Mr. John LaPlante  
Page 5 of 16  
October 10, 2016

5. *It is our understanding that the current property zoning supports the intended use. This proposal does not include any efforts required for rezoning of the property or efforts for variances or special use exceptions for the project. Should our assistance in these efforts be requested it will be provided as additional services on an hourly rate basis.*
6. *Design of specialty details for structural landscape elements that are primarily of a decorative nature, such as fountains, statues, monuments, decorative fences, pergolas, decorative courtyards or plazas, decorative stairways, retaining walls and other similar elements that are not specifically identified above, are not included in this proposal. Should they be requested, they will be charged as additional services on an hourly rate basis.*
7. *Coverage under the SC NPDES General Permit for Construction Activities (NPDES) is required prior to initiation of land disturbing activities. A prerequisite to coverage is the submittal to, and approval of, a SWPPP by the local agency having jurisdiction under the SCDHEC MS4 program. In addition to initial erosion and sediment control measures, the SWPPP also includes various other provisions outside of the scope of the construction drawings. The SWPPP is intended to be a framework outlining measures that are intended to be implemented and maintained throughout the construction period. As a result, additional efforts related to the implementation, maintenance, and updating of the SWPPP are required during construction. Some of these must be performed by SW+ and others can be performed by SW+ or other parties. See below for additional information.*
8. *Opinions of probable costs that are prepared by SW+ shall be based on its experience and qualifications and represent its judgment as a Consultant familiar with the construction industry but shall not be a guarantee that construction costs will not vary from its opinions of probable cost.*
9. *SW+ recognizes that design refinement and problem solving are iterative processes. However, it must also be recognized that excessive and continuous design changes are impossible to accurately quantify and are, therefore, outside of the scope of this proposal. We understand that a design will evolve during the submittal and review processes and we do intend for these types of adjustments to be included. However, extensive and continuous design changes that are beyond the scope of those typical for a project of similar size and complexity will be charged as additional services on an hourly rate basis.*
10. *Early in the design process, the Client shall coordinate with SW+ to establish a site work and landscaping construction budget. Once the budget is established, project design will proceed in accordance with the scope and quality criteria defined as the basis for preparing the budget. After final design and preparation of CD's is underway, any Client requested changes that are inconsistent with the originally established scope and quality criteria will be charged as additional services on an hourly rate basis.*

#### **Division Four: Required Construction Phase Services**

The Client is advised that SW+ must perform, at a minimum, the construction phase services listed below. These services are necessary in order to: a) provide observations and supporting documentation that is required as a condition of the construction permits; and b) in order to provide to the Client and ourselves, a reasonable level of assurance that the Work is in general compliance with the requirements of the Construction Contract Documents (CCD's).

1. Provide drawings and specifications to Client/Architect for inclusion in Bid Documents and respond to bid related questions from the Client/Architect.

Mr. John LaPlante  
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October 10, 2016

2. During construction, interpret plans, and answer Contractor questions when requested. (including all RFI's).
3. Review Contractor's site work related shop drawing and product data submittals to confirm general conformance with the requirements of the Contract Documents.
4. Provide construction observation as follows:
  - a. Schedule, attend, and document two preconstruction meetings prior to initiation of work on key Project systems. Such meetings shall be intended to facilitate communication and to minimize potential mistakes by the installing personnel due to a misunderstanding of the Work requirements.
  - b. SW+ shall visit the site 4 times during construction, in order to observe the progress and quality of the work completed by the Contractor. Such visits and observations are not intended to be an exhaustive check or a detailed inspection of the Contractor's work but rather allow SW+, as an experienced professional, to become generally familiar with the work in progress and to determine, in general, if the work is proceeding in accordance with the CCD's.
  - c. Based on this general observation, SW+ shall keep the Client informed about the progress of the work and shall endeavor to guard the Client against deficiencies in the work.
  - d. SW+ shall not supervise, direct, or have control over the Contractor's work nor have any responsibility for the construction means, methods, techniques, sequences, or procedures selected by the Contractor nor for the Contractor's safety precautions or programs in connection with the work. These rights and responsibilities are solely those of the Contractor in accordance with the CCD's.
  - e. SW+ shall not be responsible for any acts or omissions of the Contractor, subcontractor, any entity performing any portions of the work, or any agents or employees of any of them. SW+ does not guarantee the performance of the Contractor and shall not be responsible for the Contractor's failure to perform its work in accordance with the CCD's or any applicable laws, codes, rules, or regulations.
5. Provide the necessary services in order to comply with standard conditions of the water and sewer construction permits and to support commissioning efforts required to occupy the project at completion, including but not limited to:
  - a. Witness tests of the water and sewer lines.
  - b. Provide preliminary review of water and sewer systems.
  - c. Receive and review as-built surveys and water system valve cards and any required plats provided by Client's surveyor. Drafting efforts by SW+ to compile, revise, or otherwise provide as-built or record drawings will be billed as additional services on an hourly rate basis.
  - d. After the above items are satisfactorily completed and passing water system bacteriological test have been performed, schedule and attend final inspections of the water and sewer systems with the applicable agencies.
  - e. Schedule and attend roadway and drainage system inspections as required by the local agencies having jurisdiction.
  - f. Coordinate with the agency having jurisdiction with regard to their inspection requirements of the stormwater management facilities. If required periodic SWPPP inspections are to be performed by others, attend periodic meetings or otherwise confirm that inspections and other required SWPPP

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administrative actions are being performed in general conformance with NPDES requirements. For the purpose of this proposal, we assume six (6) meetings onsite to discuss compliance with the SWPPP.

- g. Prepare Letters of Certification for the systems, as well as other engineer prepared commissioning paperwork required by local utilities for Permits to Operate. Coordinate additional commissioning paperwork prepared separately by the Client, Client's attorney, Client's surveyor, and Contractor. Compile and submit commissioning packages to local utilities for Permits to Operate.

**Division Five: Additional NPDES (SWPPP) Construction Phase Services (Optional)**

NPDES compliance requires inspection and administrative efforts by the Client, Contractor, SW+, or a third party provider throughout the construction period. At the Client's request, SW+ can provide the following additional NPDES related construction phase services. Item 1 will be provided for a lump sum fee and Item 2 will be provided on a per weekly visit basis until all land disturbing activities are completed. Due to certification requirements, SW+ cannot provide Item #1 without the inclusion of Item #2.

1. Pre-construction and administrative services (lump sum):
  - a. Prepare a SWPPP Notebook to be maintained on the project site for reference by authorized personnel. This notebook shall contain relevant Project construction drawings, inspection logs, and other documentation required by regulatory agencies.
  - b. Install and maintain a weatherproof document enclosure to house the SWPPP at the project site. The enclosure will be secured with a combination lock and marked with a telephone number to call for authorization and access.
  - c. Conduct a pre-construction conference and prepare and distribute meetings minutes.
  - d. Revise the relevant construction drawings as required in response to changing project conditions. It is estimated that a total of one revision will be required for the Project. Should more numerous revisions be required due to conditions that are beyond SW+'s control, they will be provided on an hourly rate or basis.
2. Inspections, documentation and reporting (per weekly visit):
  - a. Coordinate with Contractor, throughout the project, on issues related to implementation and maintenance of the SWPPP.
  - b. Provide weekly site inspections of stormwater improvements and SWPPP measures and prepare and distribute reports documenting the observations and any deficiencies requiring correction. EPA regulations require that inspections be performed weekly for the entire period that land disturbing operations are underway. Once operations are complete, a Notice of Termination is filed and the inspections can then stop.
  - c. File reports with the agency having jurisdiction at required intervals.

**Fees:**

We will provide the indicated services for the following fees:

Division One: Preliminary Master Planning ..... (Hourly Rate Basis up to a maximum of) \$6,900.00

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Division Two: Conceptual Design.....	(Hourly Rate Basis up to a maximum of)	\$10,200.00
Division Three: Site Construction Documents .....		\$37,485.00
Division Four: Construction Phase Services .....	Estimated Fee Range -	\$9,000.00 - \$11,000.00
Division Five-1: Pre-Construction NPDES Services (Optional).....		\$2,000.00
Division Five-2: NPDES Inspections & Reporting (Optional) .....	\$250.00 per weekly site visit	

When an estimated fee range is indicated, this estimate was made based on current understanding of project scope and/or construction duration. If it becomes apparent that this estimate will be exceeded, we will notify Client in advance of reaching the upper limit of the indicated range.

SW+ current hourly rates are as follows:

Principal in Charge.....	\$200.00
Managing Principal.....	\$180.00
Director.....	\$160.00
Senior Landscape Architect .....	\$145.00
Senior Civil Engineer.....	\$145.00
Senior Project Manager .....	\$140.00
Construction Administration Project Manager.....	\$140.00
Landscape Architect.....	\$135.00
Civil Engineering Project Manager.....	\$135.00
Land Planner III.....	\$125.00
Civil Engineering Project Coordinator .....	\$125.00
Construction Administration Project Coordinator .....	\$125.00
Entitlements Manager .....	\$120.00
Land Planner II.....	\$115.00
Engineer-in-Training.....	\$115.00
Construction Administration Field Representative .....	\$115.00
Land Planner I.....	\$100.00
Assistant Permitting Coordinator.....	\$100.00
CAD Technician .....	\$90.00
Professional Support (Information Technology, Marketing, etc.) .....	\$75.00
Administrative Support.....	\$50.00

Office reimbursable expenses will be billed at the rates listed in the table below plus a 10% handling fee:

Mileage outside of the local area .....	\$0.54 per mile
<i>(Local area is defined as the metropolitan area of the originating office of the proposal)</i>	
Printing of construction and project drawings (\$0.40 per sq ft)	
24 x 36 .....	\$2.40 each

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30 x 42 .....	\$3.50 each
36 x 48 .....	\$4.80 each
<b>Color inkjet plotting (\$8.00 per sq ft)</b>	
24 x 36 .....	\$48.00 each
30 x 42 .....	\$70.00 each
36 x 48 .....	\$96.00 each
<b>Black and white inkjet plotting (\$2.00 per sq ft)</b>	
24 x 36 .....	\$12.00 each
30 x 42 .....	\$17.50 each
36 x 48 .....	\$24.00 each
<b>Black and white Xerox copies</b>	
8½ x 11 .....	\$0.20 each
8½ x 14 .....	\$0.25 each
11 x 17 .....	\$0.35 each
<b>Color Xerox copies</b>	
8½ x 11 .....	\$1.00 each
8½ x 14 .....	\$2.75 each
11 x 17 .....	\$3.50 each

Other project related reimbursable expenses, such as but not restricted to, outside consultants, postage, long distance telephone calls, travel expenses, courier fees, and agency permitting fees will be billed at actual cost plus a 10% handling fee. Fees and reimbursable expenses will be invoiced every 4 weeks.

Should you find this Contract and attached General Terms of Agreement acceptable, please confirm by signing in the space provided below and return one executed original to our office. We look forward to working with you on this project.

Should you have any questions or need additional information, please call our office.

SEAMON, WHITESIDE & ASSOCIATES, INC.



Stuart D. Whiteside, PE  
 Principal

SDW/wro

Accepted By:

\_\_\_\_\_

Signature and Title Date

**SEAMON, WHITESIDE & ASSOCIATES, INC. (SW+/CONSULTANT)**  
**GENERAL TERMS OF AGREEMENT**

1. **The Agreement.** This document/agreement will serve as a contract for the proposed professional services. This Agreement is to be governed by the law of the State of South Carolina. This Agreement contains the entire and fully integrated agreement between the parties and supersedes all prior and contemporaneous negotiations, representations, agreements or understandings, whether written or oral. This Agreement can be supplemented or amended only by a written document executed by both parties. Provided, however, that any conflicting or additional terms on any purchase order issued by the Client shall be void and are hereby expressly rejected by the Consultant. Any provision in this Agreement that is unenforceable shall be ineffective to the extent of such unenforceability without invalidating the remaining provisions. The non-enforcement of any provision by either party shall not constitute a waiver of that provision nor shall it affect the enforceability of that provision or of the remainder of this Agreement.
2. **Consultant's Scope of Services and Additional Services.** The Consultant's undertaking to perform professional services extends only the services specifically described in this Agreement. However, if requested by the Client and agreed by the Consultant, the Consultant will perform Additional Services, which shall be governed by these provisions. Unless otherwise agreed to in writing, the Client shall pay the Consultant for any Additional Services an amount based upon the Consultant's then-current hourly rates plus an amount to cover certain direct expenses including in-house duplicating, local mileage, telephone calls, postage, and word processing.
3. **Period of Services.** Unless otherwise stated herein, the Consultant will begin work timely after receipt of a properly executed copy of this Agreement. This Agreement is made in anticipation of conditions permitting continuous and orderly progress through completion of services. Times for performance shall be extended as necessary for delays or suspensions due to circumstances that the Consultant does not control. If such delay or suspension extends for more than six months (cumulatively), Consultant's compensation shall be renegotiated. Furthermore, if the services covered by this Agreement have not been completed within 12 months of the date hereof, through no fault of SW+, the amounts of the compensation, rates and multiples set forth herein are subject to equitable adjustment.
4. **Assignment.** Neither party to this Agreement shall transfer, sublet or assign any rights or duties under or interest in this Agreement, including but not limited to monies that are due or monies that may be due, without the prior written consent of the other party. Client may assign Agreement with prior written consent of the Consultant. Subcontracting to subconsultants, normally contemplated by the Consultant as a generally accepted business practice, shall not be considered an assignment for purposes of this Agreement.
5. **Execution Authority.** The individual executing this Contract, if acting on behalf of a partnership, corporation, or funding agency, represents that he has the authority to do so.
6. **Changed Conditions.** The Client shall rely on the Consultant's judgment as to the continued adequacy of this agreement in light of occurrences or discoveries that were not originally contemplated by or known to the Consultant. Should the Consultant call for the contract renegotiation, the Consultant shall identify the changed conditions necessitating renegotiation and the Consultant and the Client shall promptly and in good faith enter into renegotiation of this Agreement. If terms cannot be agreed to, the parties agree that either party has the absolute right to terminate this Agreement.
  - 6.1. The Consultant shall put forth reasonable professional efforts to comply with codes, regulations, ordinances, and laws in effect as of the date of the Agreement. Modifications to said ordinances, regulations, etc. that occur after the Agreement date and that would impact the project through an expansion of services would constitute additional services.
7. **Termination.** The Client may terminate this agreement at any time with or without cause upon giving the other party fifteen (15) calendar days prior written notice. The Client shall within seven (7) calendar days of termination pay the Consultant for all services rendered and all costs incurred up to the date of termination, in accordance with the compensation provisions of this contract. The consultant may terminate this agreement due to non-payment beyond 90 days.

8. **Standard of Care.** In providing services under this agreement and complying with applicable laws, ordinances, and regulations, including the Americans with Disabilities Act, the Consultant will endeavor to perform in a manner consistent with that degree of care and skill ordinarily exercised by members of the same profession currently practicing under similar circumstances at the same time and in the same or similar locality.
- 8.1. The Americans with Disabilities Act (ADA) provides that it is a violation of the ADA to design and construct a facility for first occupancy later than January 26, 1993, that does not meet for accessibility and usability requirements of the ADA except where an entity can demonstrate that it is structurally impractical to meet such requirements. The Client acknowledges that the requirements of the ADA will be subject to various and possibly contradictory interpretations. The Consultant, therefore, will use his or her reasonable professional efforts to interpret applicable ADA requirements and other federal, state and local laws, rules, codes, ordinances and regulations as they apply to the project. The Consultant, however, cannot and does not warrant or guarantee that the Client's project will comply with interpretations of ADA requirements and/or requirements of other federal, state and local laws, rules, codes, ordinances and regulations as they apply to the project.
9. **Client's Responsibilities.** In addition to other responsibilities described herein or imposed by law, the Client shall:
- 9.1. Designate in writing a person to act as its representative with respect to this Agreement, such person having complete authority to transmit instructions, receive information, and make or interpret the Client's decisions.
- 9.2. Provide all information and criteria as to the Client's requirements, objectives, and expectations for the project including all numerical criteria that are to be met and all standards of development, design, or construction.
- 9.3. Furnish, at the Client's expense, all information, requirements, geotechnical reports, data, surveys and instructions required by this Agreement. The Consultant may use such information, requirements, geotechnical reports, data, surveys and instructions in performing its services and is entitled to rely upon the accuracy and completeness thereof.
- 9.4. Arrange for access to the site and other private or public property as required for the Consultant to provide its services.
- 9.5. Review all documents or oral reports presented by the Consultant and render in writing decisions pertaining thereto within a reasonable time so as not to delay the services of the Consultant.
- 9.6. Give prompt written notice to the Consultant whenever the Client becomes aware of any development that affects the scope, timing, or payment of the consultant's services or any defect or noncompliance in any aspect of the project.
- 9.7. Bear all costs for the payment of fees associated with the project. Such fees would include but not be limited to permit review and application fees, impact fees, and capacity fees. The Consultant will notify the client regarding the amount of fees and timing of payment.
10. **Method of Payment.** The Client agrees to pay the Consultant's invoices in a timely manner:
- 10.1. The Client agrees to pay the Consultant for work performed in accordance with the terms of this Contract, without regard to the success of the project.
- 10.2. For any payment, not reasonably in dispute, that is not received within 45 days, the Client shall pay a service charge on the past due amount, including interest at the rate of 1½% per month.
- 10.3. If payment is not received within 90 days, the Consultant may at their option and with five days written notice, suspend services or terminate this Agreement on the grounds of substantial nonperformance by the Client. Should SW+'s right of suspension or termination be exercised, they shall not be liable to the Client for delays or damages caused by the suspension or termination.
- 10.4. Payments on invoices submitted by SW+ for services performed shall not be delayed, postponed or otherwise withheld pending completion or success of construction, or receipt of funding from lending institutions, government grants, or other sources.
- 10.5. No deductions shall be made from the Consultant's compensation on account of liquidated damages or on account of cost in changes in the Work, other than those for which the Consultant has been finally determined to be liable. Invoices for payment shall not be offset by any claims for withholding or deductions by the Client unless the Consultant agrees or has been finally determined liable for such amounts.

- 10.6. The Consultant shall be entitled to reimbursement by the Client for reasonable fees and expenses when collection through an attorney or collection agency is necessary.
11. **Fees Not Dischargeable.** The Client agrees that any debt owed to the Consultant for professional services provided is non-dischargeable in bankruptcy meaning that any fees owed would survive in the event that the Client should ever declare bankruptcy.
12. **Fee Resolution.** The parties hereto consent that the exclusive forum for resolving any fee dispute/claim arising under this agreement shall be the Court of Common Pleas (Non-Jury) in the county of the originating office of this proposal: Charleston County or Greenville County, South Carolina.
13. **Dispute Resolution.** In an effort to resolve any conflicts that arise during the design or construction of the project or following the completion of the project, the Consultant and Client agree that all disputes between them arising out of or relating to this Agreement shall be submitted first to mediation in accordance with the Construction Industry Mediation Procedures of the American Arbitration Association as a precedent to litigation.
14. **Attorney Fees.** In the event legal action is necessary to enforce the payment terms of this Agreement, the Consultant shall be entitled to collect from the Client any judgment or settlement sums due, plus reasonable attorneys' fees, court costs and other expenses incurred by the Consultant for such collection action and, in addition, the reasonable value of the Consultant's prevailing fee schedule and expense policies.
15. **Statutes of Limitations.** Causes of action between the parties to this Agreement pertaining to acts or failures to act shall be deemed to have accrued and the applicable statutes of limitations shall commence to run not later than either the date of Substantial Completion for Acts or failures to act occurring prior to Substantial Completion or the date of issuance of the final Certificate for payment for acts or failures to act occurring after Substantial Completion. In no event shall such statutes of limitations commence to run any later than the date when the Consultant's services are substantially completed.
16. **Limitation of Liability.** The Consultant agrees, to the fullest extent permitted by law, to indemnify and hold the Client harmless from any damage, liability or cost (including reasonable attorneys' fees and costs of defense) to the extent caused by the Consultant's negligent acts, errors or omissions in the performance of professional services under this Agreement and those of his or her subconsultants or anyone for whom the consultant is legally liable. The Client agrees, to the fullest extent permitted by law, to indemnify and hold the Consultant harmless from any damage, liability or cost (including reasonable attorneys' fee and cost of defense) to the extent caused by the Client's negligent acts, errors or omissions and those of his or her contractors, subcontractors or Consultants or anyone for whom the Client is legally liable and arising from the project that is the subject of this Agreement. The Consultant is not obligated to indemnify the Client in any manner whatsoever for the Client's own negligence.
- 16.1. The Client agrees to limit the Consultant's liability to the Client and to all construction contractors and subcontractors on the project, due to the Consultant's negligent acts, errors or omissions, such that the total aggregate liability of the Consultant to all those named shall not exceed \$50,000.
17. **Certificate of Merit.** The Client shall make no claim for professional negligence, either directly or in a third party claim, against the Consultant unless the Client has first provided the Consultant with a written certification executed by an independent Consultant currently practicing in the same discipline as the Consultant and licensed in the State of South Carolina. This certification shall: a) contain the name and license number of the certifier; b) specify each and every act or omission that the certifier contends is a violation of the standard of care expected of a Consultant performing professional services under similar circumstances; and c) state in complete detail the basis for the certifier's opinion that each such act or omission constitutes such a violation. This certificate shall be provided to the Consultant not less than thirty (30) calendar days prior to the presentation of any claim or the institution of any arbitration or judicial proceeding.
18. **Insurance.** The Client is advised to seek the advice of a qualified insurance professional with regarding any and all insurance requirements for the project. The Consultant carries Workers' Compensation insurance, professional liability insurance and general liability, and automobile insurance. If the Client directs the Consultant to obtain increased insurance coverage, the Consultant will take out such additional insurance, if obtainable, at the Client's expense.

19. **Betterment.** If, due to the Consultant's error, any required item or component of the project is omitted from the Consultant's construction documents, the Consultant shall not be responsible for paying the cost to add such item or component to the extent that such item or component would have been otherwise necessary to the project or otherwise adds value or betterment to the project. In no event will the Consultant be responsible for any cost or expense that provides betterment, upgrade or enhancement of the project.
20. **Use of Documents.** SW+ and its subconsultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings, Specifications, Reports, Field Data, Notes and other documents whether handwritten or in electronic form, and shall retain all common law, statutory and other reserved rights, including copyrights thereto.
- 20.1. The Client acknowledges the Consultant's construction documents, including electronic files, as the work papers of the Consultant and the Consultant's instruments of professional service. Nevertheless, the final construction documents prepared under this Agreement shall become the property of the Client upon completion of the services and payment in full of all monies due to the Consultant. Should the property be transferred to a third party, construction documents will transfer along with the property with the Consultant's written consent. The Client shall not reuse or make any modification to the construction documents without the prior written authorization of the Consultant. The Client agrees, to the fullest extent permitted by law, to defend, indemnify and hold harmless the Consultant, its officers, directors, employees and subconsultants (collectively, Consultant) against any damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising from or allegedly arising from or in any way connected with the unauthorized reuse or modification of the construction documents by the Client or any person or entity that acquires or obtains the construction documents from or through the Client without the written authorization of the Consultant.
- 20.2. Under no circumstances shall the transfer of ownership of the Consultant's drawings, specification, electronic files or other instruments of service be deemed a sale by the Consultant, and the Consultant makes no warranties, either express or implied, of merchantability and fitness for any particular purpose, nor shall such transfer be construed or regarded as any waiver or other relinquishment for the Consultant's copyrights in any of the foregoing, full ownership of which shall remain with the Consultant, absent the Consultant's express prior written consent.
21. **Electronic Documents.** The Consultant may furnish to the Client and other parties as required during the execution of the Work, documents in electronic form. The Client shall agree to the following terms with regard to distribution and use of documents in electronic form:
- 21.1. In accepting and utilizing any drawings, reports and data on any form of electronic media generated and furnished by the Consultant, the Client agrees that all such electronic files are instruments of service of the Consultant, who shall be deemed the author, and shall retain all common law, statutory law and other rights, without limitation, including copyrights.
- 21.2. The Client agrees not to reuse these electronic files, in whole or in part, for any purpose other than for the Project. The Client agrees not to transfer these electronic files to others without the prior written consent of the Consultant (files transfer with property if sold to a third party, with Consultant's written consent. The Client further agrees to waive all claims against the Consultant resulting in any way from any unauthorized changes to or reuse of the electronic files for any other project by anyone other than the Consultant.
- 21.3. The Client and the Consultant agree that any electronic files furnished by either party shall conform to the project specifications. Any changes to the electronic specifications by either the Client or the Consultant are subject to review and acceptance by the other party. If the Consultant is required to expend additional effort to incorporate changes to the electronic file specifications made by the Client, these efforts shall be compensated for as Additional Services.
- 21.4. Electronic files furnished by either party shall be subject to an acceptance period of fourteen (14) days during which the receiving party agrees to perform appropriate acceptance tests. The party furnishing the electronic files shall correct any discrepancies or errors detected and reported within the acceptance period. After the acceptance period, the electronic files shall be deemed to be accepted and neither party shall have any obligation to correct errors or maintain electronic files.

- 21.5. The Client is aware that differences may exist between the electronic files delivered and the printed hard-copy construction documents. In the event of a conflict between the signed construction documents prepared by the Consultant and electronic files, the signed or sealed hard-copy constructions shall govern.
- 21.6. In addition, the Client agrees, to the fullest extent permitted by law, indemnify and hold harmless the Consultant, its officers, directors, employees and subconsultants (collectively, Consultant) against all damages, liabilities or costs, including reasonable attorneys' fees and defense costs, arising from any changes made by anyone other than the Consultant from any reuse of the electronic files without the prior written consent of the Consultant.
- 21.7. Under no circumstances shall delivery of electronic file for use by the Client be deemed a sale by the Consultant, and the Consultant makes no warranties, either express or implied, of merchantability and fitness for any particular purpose. In no event shall the Consultant be liable for indirect or consequential damages as a result of the Client's use or reuse of the electronic files.
- 22. Construction Phase Services.**
- 22.1. If the Consultant's services include the preparation of documents to be used for construction and SW+ is not retained to make appropriate site observation visits, the Client assumes all responsibility for interpretation of the documents and for construction observation. It is further agreed that the Client will defend, indemnify and hold harmless Consultant from any claim or suit whatsoever, including but not limited to all payments, expenses or costs involved, arising from the contractor's performance or the failure of the contractor's work to conform to the design intent and the contract documents.
- 22.2. If the Consultant provides construction phase services, the Consultant shall have no responsibility for any contractor's means, methods, techniques, equipment choice and usage, sequence, schedule, safety programs, or safety practices, nor shall SW+ have any authority or responsibility to stop or direct the work of any contractor. The Consultant's observation visits will be for the purpose of endeavoring to provide the Client a greater degree of confidence that the completed work of its contractors will generally conform to the construction documents prepared by the Consultant. The Consultant neither guarantees the performance of contractors, nor assumes responsibility for any contractor's failure to perform its work in accordance with the contract documents.
- 22.3. The Client agrees that it would be unfair to hold Consultant liable for problems that might occur should Consultant's plans, specifications or design intents not be followed, or for problems resulting from others' failure to obtain and/or follow Consultant's guidance with respect to any errors, omissions, inconsistencies, ambiguities or conflicts which are detected or alleged to exist in or as a consequence of implementing Consultant's plans, specifications or other instruments of service. Accordingly, the Client waives any claim against Consultant, and agrees to defend, indemnify and hold Consultant harmless from any claim for injury or losses that results from failure to follow Consultant's plans, specifications or design intent, or for failure to obtain and/or follow Consultant's guidance with respect to any alleged errors, omissions, inconsistencies, ambiguities or conflicts contained within or arising as a result of implementing Consultant's plans, specifications or other instruments of services. The Client also agrees to compensate Consultant for any time spent and expenses incurred by Consultant's prevailing fee schedule and expense reimbursement policy.
- 22.4. The Consultant is not responsible for any duties assigned to the Consultant in the construction contract that are not expressly provided for in this Agreement. The Client agrees that neither the professional activities of Consultant, nor the presence of Consultant's employees and sub-consultant at a construction site, shall relieve the general contractor and any other entity of their obligations, duties and responsibilities including, but not limited to, construction means, methods, sequence, techniques or procedures necessary for performing, superintending or coordinating all portions of the work of construction in accordance with the contract documents and any health or safety precautions required by any regulatory agencies. Consultant and its personnel have no authority to exercise any control over any construction contractor or other entity or their employees in connection with their work or any health or safety precautions. The Client agrees that the General Contractor is solely responsible for job safety, and warrants that this intent shall be made evident in the Client's Agreement with the general contractor. The Client also agrees that the Client, Consultant

and Consultant's subconsultants shall be indemnified and shall be made additional insureds under the general contractor's general liability insurance policy.

23. **Certifications.** The Consultant shall not be required to execute certifications or third-party reliance letters that are inaccurate, that relate to facts of which the Consultant does not have actual knowledge, or warrant the existence of conditions whose existence and accuracy the Consultant cannot ascertain, or that would cause the Consultant to violate applicable rules of professional responsibility. The Client also agrees not to make resolution of any dispute with the Consultant or payment of any amount due to the Consultant in any way contingent upon the Consultant's signing any such certification.
- 23.1. The Client shall indemnify and hold the Engineer harmless from and against any and all judgments, losses, damages, and expenses (including attorney fees and defense costs) arising from or related to claims by third parties to challenge the issuance of permits or certificates for the Project by agencies with jurisdiction in the premises. Defense costs shall include the time and expenses of the Engineer's personnel to assist in the defense of the issuance of the permit or certificate.
24. **SWPPP Services.** Where the Consultant provides SWPPP related services, the information contained in the SWPPP represents a planning tool to assist the Client, and his co-permittees, in complying with environmental regulations during the Project construction. The decisions on how to operate the construction site rest solely with the Client/co-permittees and not with the Consultant. The Client agrees to indemnify the Consultant from damages and fines resulting from the operational decisions of the Client/co-permittees, or the failure of the Client/co-permittees to follow the recommendations as outlined in the SWPPP.
25. **NPDES Permit.** In instances where an NPDES Permit remains in effect beyond the termination of other services described in this proposal, the Consultant's responsibilities for SWPPP related services shall cease at a time concurrent with the termination of other services. If the Client wishes for SWPPP related services to continue beyond that time, they shall be agreed to under a separate Contract.
26. **Shop Drawing Review.** The Consultant shall review and approve Contractor submittals, such as shop drawings, product data, samples and other data, as required by the Consultant, but only for the limited purpose of checking for conformance with the design concept and the information expressed in the contract documents. The review shall not include review of the accuracy or completeness of details, such as quantities, dimensions, weights or gauges, fabrication processes, construction means or methods, coordination of the work with other trades or construction safety precautions, all of which are sole responsibility of the Contractor. The Consultant's review shall be conducted with reasonable promptness while allowing sufficient time in the Consultant's judgment to permit adequate review. Review of specific item shall not indicate that the Consultant has reviewed the entire assembly of which the item is a component. The Consultant shall not be responsible for any deviations from the contract documents not brought to the attention of the Consultant in writing by the Contractor. The Consultant shall not be required to review partial submissions or those for which submissions of correlated items have not been received.
27. **Definition of "Hazardous Materials".** As used in this Agreement, the term hazardous materials shall mean any substances, including without limitation asbestos, toxic or hazardous waste, OCBs, combustible gases and materials, petroleum or radioactive materials (as each of these is defined in applicable federal statutes) or any other substances under any conditions and in such quantities as would pose a substantial danger to persons or property exposed to such substances at or near the Project site.
- 27.1. **Hazardous Materials - Suspension of Services.** Both parties acknowledge that the Consultant's scope of services does not include any services related to the presence of any hazardous or toxic materials. In the event the Consultant or any other person or entity involved in the project encounters any hazardous or toxic materials, or should it become known to the Consultant that such materials may be present on or about the jobsite or any adjacent areas that may affect the performance of the Consultant's services, the Consultant may, at its sole option and without liability for consequential or any other damages, suspend performance of its services under this Agreement until the Client retains appropriate qualified consultants and/or contractors to identify and abate or remove the hazardous or toxic materials and warrants that the jobsite is in full compliance with all applicable laws and regulations

- 27.2. Hazardous Substances and Conditions.** This contract does not specifically address environmental pollution audits at any level, testing or visual inspection for environmental risks of pollution or hazardous materials wither on or relating to the site. Because of the Client waives any claim against the Consultant and agrees to defend, indemnify, and hold the Consultant harmless for any alleged environmental risks or hazardous materials. We further recommend that environmental audits, reports or cleanup be performed by the client in a timely manner and under separate contract.
- 28. Corporate Protection.** It is intended by the parties to this Agreement that the Consultant's services in connection with the Project shall not subject the Consultant's individual employees, officers or directors to any personal legal exposure for the risks associated with this Project. Therefore, and notwithstanding anything to the contrary contained herein, the Client agrees that as the Client's sole and exclusive remedy, any claim, demand or suit shall be directed and/or asserted only against the Consultant, a South Carolina corporation, and not against any of the Consultant's individual employees, officers or directors.

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee  
of the Eugene J. Zurlo Living Trust Dated December  
11, 1997; 1776, LLC; BEACH FENWICK, LLC;  
THE BEACH COMPANY; SEAMON, WHITESIDE  
& ASSOCIATES, INC.; PENNY CREEK ASSOCIATES,  
LLC; JOHN DOE AND MARY ROE

Defendants,

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**PLAINTIFF'S RESPONSES TO DEFENDANTS' SECOND REQUEST FOR ADMISSIONS**

Plaintiff, MAYBANK 2754, LLC, by and through its undersigned counsel, hereby responds to Defendants', The Beach Company (Beach Co.) and Beach Fenwick, LLC (herein "Defendants"), Second Request for Admissions dated May 18, 2020 as follows:

1. Deny. Defendants attached three exhibits, two of which were separately identified as Exhibit A, and one of those apparently being partially redacted on page 19, and the other one being a copy of a purported e-mail. The sequence of the attached exhibits was: Exhibit A, Exhibit B, and Exhibit A.

2. Deny. Defendants attached as Exhibit B the Answer of Eugene J. Zurlo; Charlotte Zurlo; etc., and their Cross Claim against Michel F. Laplante, etc., purportedly filed on October 16, 2014 in Charleston County Court of Common Pleas Case # 2014-CP-10-4946.

TAROKH LAW, PLLC  
PO BOX 10827  
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813-922-5510  
jason@tarokhlaw.com

s/ Jason M. Tarokh  
JASON M. TAROKH  
S. CAROLINA BAR # 72837

June 12, 2020

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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Appeal from Charleston County  
Court of Common Pleas, Ninth Judicial Circuit  
Hon. Bentley D. Price, Circuit Court Judge

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2020-CP-10-00209

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Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe;.....Respondents,

v.

Maybank 2754, LLC,.....Appellant.

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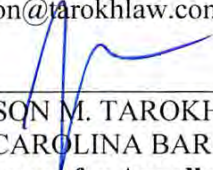
**NOTICE OF APPEAL**

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Maybank 2754, LLC, appeals the Form 4 Order, signed by the Honorable Bentley D. Price on June 29, 2020 and filed on June 30, 2020, in the above titled matter. The Appellant received written notice of the entry of the Form 4 Order in this matter on June 30, 2020. A copy of the Form 4 Order is attached hereto as required by Rule 203(d)(1)(B)(ii), SCACR. Maybank 2754, LLC, also appeals the Order, signed by the Honorable Bentley D. Price on July 13, 2020 and filed on July 13, 2020, in the above titled matter. The Appellant received written notice of the entry of the Order in this matter on July 13, 2020. A copy of the Order is attached hereto as required by Rule 203(d)(1)(B)(ii), SCACR. Both of the attached orders, which refer the entire case to the master, are immediately appealable because they affect the mode of trial, a substantial right. *See, Creed v. Stokes*, 285 S.C. 542, 331 S.E.2d 351 (1985).

Respectfully submitted,  
  
TAROKH LAW, PLLC  
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\_\_\_\_\_  
JASON M. TAROKH  
S. CAROLINA BAR # 72837  
**Attorney for Appellant, Maybank 2754, LLC**

July 15, 2020

Tampa, Florida

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP1000209

Maybank 2754 Llc  
PLAINTIFF(S)

Eugene J Zurlo et al  
DEFENDANT(S)

RECEIVED  
JUL 20 2020  
SC Court of Appeals

ELECTRONICALLY FILED - 2020 Jun 30 3:09 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209

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), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRPC;  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:

Plaintiff Maybank 2754 LIC's Motion/Temporary Injunction is Denied. Defendant Beech Company's Motion to Dismiss and Refer to the Master, Along with all outstanding motions to the refer to the master, are granted.

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 06/29/2020 .

Mary Roe  
John Doe

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.

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Charleston Common Pleas

**Case Caption:** Maybank 2754 Llc VS Eugene J Zurlo , defendant, et al  
**Case Number:** 2020CP1000209  
**Type:** Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-06-29 10:03:37 page 3 of 3

ELECTRONICALLY FILED - 2020 Jul 15 2:40 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209  
ELECTRONICALLY FILED - 2020 Jun 30 3:09 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS

MAYBANK 2754, LLC,  
Plaintiff,

Case No. 2020-CP-10-00209

vs.

[PROPOSED] ORDER

EUGENE J. ZURLO, Individually and as  
Co-Trustee of the Eugene J. Zurlo Living  
Trust Dated December 11, 1997; 1776,  
LLC; BEACH FENWICK, LLC; THE BEACH  
COMPANY; SEAMON, WHITESIDE &  
ASSOCIATES, INC.; PENNY CREEK  
ASSOCIATES, LLC; JOHN DOE AND  
MARY ROE,

Defendant.

**BRIEF PROCEDURAL HISTORY**

This matter came before the Court on June 16 and June 25, 2020 pursuant to certain motions filed by Defendants and a Motion filed on behalf of Plaintiff in this action, including:

- 1) February 17, 2020 – Defendants Beach Fenwick, LLC and The Beach Co.'s ("Beach Entities") Motion to Dismiss;
- 2) February 17, 2020 – Beach Entities' Motion to Refer to the Master-In-Equity;
- 3) February 20, 2020 – Defendant Seamon Whiteside Associates, Inc.'s ("Seamon Whiteside") Motion to Dismiss Civil Conspiracy;
- 4) February 21, 2020 – Defendant 1776, LLC's ("1776") Motion to Dismiss;
- 5) February 21, 2020 – 1776's Motion to Refer to the Master-In-Equity;

- 6) March 10, 2020 – Defendants Eugene J. Zurlo, individually and as co-trustee of Eugene J. Zurlo Living Trust’s (“Zurlo Parties”) Motion to Refer to the Master-In-Equity;
- 7) March 11, 2020 – Plaintiff Maybank 2754’s (“Maybank”) Motion for Temporary Injunction.

Counsel for all parties appeared, via video conference application “Zoom,” and the Court heard oral argument on behalf of all parties.

On June 30, 2020, this Court issued its Form 4 Order, with the following Statement of Judgment:

Plaintiff Maybank 2754 LLC’s Motion/Temporary Injunction is denied. Defendant Beech Company’s Motion to Dismiss and Refer to the Master, along with all outstanding motions to refer to the master, are granted.

The Plaintiff filed a Rule 59 Motion to Reconsider on July 1. That Motion is denied for the reasons set forth below.

#### **PLAINTIFF’S MOTION FOR TEMPORARY INJUNCTION**

Plaintiff’s Motion for Temporary Injunction, filed March 11, 2020, seeks to enjoin Beach Fenwick from developing the Subject Property until after a trial on the merits and a judgment is rendered in this matter. In consideration of Plaintiff’s Motion, the Court considered the Beach Entities’ Memorandum of Law in Opposition to Plaintiff’s Motion for Temporary Injunction, filed on June 15, 2020, Plaintiff’s Notice of Filing Order Exhibits in Support of Its Motion for Temporary Injunction, filed June 23, 2020, the testimony of Michel F. Laplante, on behalf of Plaintiff, and the oral argument of Plaintiff’s counsel, and applicable South Carolina authority, based upon which this Court makes the following findings, and denies Plaintiff’s Motion for Temporary Injunction.

A court may issue a temporary injunction “only if necessary to preserve the status quo ante, and only upon a showing by the moving party that without such relief it will suffer irreparable harm, that it has a likelihood of success on the merits, and that there is no adequate remedy at law.” *Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 586–87, 694 S.E.2d 15, 17 (2010). “An injunction is a drastic remedy issued by the court in its discretion to prevent irreparable harm suffered by the plaintiff.” *Scratch Golf Co. v. Dunes W. Residential Golf Props., Inc.*, 361 S.C. 117, 121, 603 S.E.2d 905, 907 (2004). Generally, for a preliminary injunction to be granted, the plaintiff must establish that: (1) he would suffer irreparable harm if the injunction is not granted; (2) he will likely succeed on the merits of the litigation; and (3) there is an inadequate remedy at law. *Id.*

In consideration of the briefing filed with this Court on behalf of Plaintiff and on behalf of the Beach Entities relative to Plaintiff’s Motion for Temporary Injunction, oral argument of counsel, testimony presented on behalf of Plaintiff, as well as the law of the State of South Carolina, this Court finds and so rules that Plaintiff has failed to demonstrate that it will suffer irreparable harm in the absence of the injunction sought. Plaintiff has failed to establish it will suffer irreparable harm if the injunction is not granted. Further, Plaintiff has failed to establish it will likely succeed on the merits of this litigation and likewise failed to establish it has no adequate remedy at law. Additionally, Plaintiff seeks damages in a Conspiracy Cause of Action in its Complaint, so Plaintiff has a remedy at law.

**DEFENDANTS’ MOTIONS FOR ORDER OF REFERENCE  
TO THE MASTER-IN-EQUITY**

All Defendants, except Seamon, Whiteside & Associates, Inc., filed motions for an order of reference of this litigation to the Master-In-Equity, as set forth above. Plaintiff filed its Objection and Response in Opposition to the Defendants' Motions for Order of Reference to the Master-In-Equity on April 6, 2020, following which Plaintiff filed its Amended Objection and Response in Opposition to the Defendants' Motions for Order of Reference to the Master-In-Equity on April 9, 2020. Subsequently, the Zurlo Parties filed their Reply to Plaintiff's Amended Objection and Response in Opposition to Motion for Order of Reference to the Master-In-Equity on April 22, 2020, following which Plaintiff filed its Second Amended Objection and Response in Opposition to the Defendants' Motions for Order of Reference to the Master-In-Equity on May 15, 2020. The Zurlo Parties filed their Brief in Support of Motion to Refer to Master on June 11, 2020. The Beach Entities filed their Memorandum of Law in Support of Their Motion for Order of Reference to Master-In-Equity on June 19, 2020.

The Court heard oral argument on Defendants' Motions to Refer to the Master-In-Equity on June 16, with additional argument on June 25, 2020. Based upon the parties' submissions to this Court, as well as oral argument of counsel and the testimony of Mitch Laplante, on behalf of Plaintiff, this Court finds as follows:

The Master-In-Equity may hear any matter referred to him or her by the Circuit Court. See S.C. Code Ann. § 14-11-10 et seq. and Rule 53 of the South Carolina Rules of Civil Procedure. "Pursuant to Rule 53, SCRCP, a master has no power or authority except that which is given to him by the order of reference." *Bunkum v. Manor Props.*, 321 S.C. 95, 98, 467 S.E.2d 758, 760 (Ct. App. 1996). "When a case is referred to a master, Rule 53(c) gives the master the power to conduct hearings in the same manner

as the circuit court, unless the order of reference specifies or limits his powers.” *Smith Cos. of Greenville, Inc. v. Hayes*, 311 S.C. 358, 360, 428 S.E.2d 900, 902 (Ct. App. 1993). “To rewrite the terms of sale after the sale would be patently inequitable.” *Ex parte Johnson*, 371 S.C. 614, 618, 640 S.E.2d 887, 889 (Ct. App. 2006). “[I]t is the long established policy in South Carolina that ‘[t]he courts should be particularly jealous of the integrity of judicial sales.’” *Id.* (citing *In re Wilson*, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927)).

### **THE BEACH ENTITIES’ MOTIONS TO DISMISS**

The portion of the Court’s Order of June 30, 2020, indicating the Beach Entities’ Motion to Dismiss is granted is a scrivener’s error; that Motion was not argued, it was reserved for referral to the Master-in-Equity and not considered by this Court, so that Motion will be transferred to the Master-In-Equity.

### **CONCLUSION AND ORDER**

The Plaintiff’s Motion for a Temporary Restraining Order is Denied, the Plaintiff’s Motion to Reconsider is denied, and the entire case and all the pending Motions are referred to the Master-in-Equity, pursuant to and consistent with South Carolina Rules of Civil Procedure, Rule 53. All pre-trial matters, including the parties’ motions, shall be and are hereby referred to the Master-In-Equity, with finality, with appeal directly to the South Carolina Court of Appeals or the South Carolina Supreme Court.

**AND IT IS SO ORDERED.**

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Bentley Price  
Presiding Judge-Ninth Judicial Circuit

Charleston, S.C.

July \_\_\_\_\_, 2020



Charleston Common Pleas

**Case Caption:** Maybank 2754 Llc VS Eugene J Zurlo , defendant, et al  
**Case Number:** 2020CP1000209  
**Type:** Order/Other

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-07-13 11:52:27 page 6 of 6

ELECTRONICALLY FILED - 2020 Jul 15 2:40 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209  
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STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT

CASE #: 2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as Co-Trustee  
of the Eugene J. Zurlo Living Trust Dated December  
11, 1997; ET. AL.;

Defendants,

\_\_\_\_\_ /

**AFFIDAVIT OF MICHEL F. LAPLANTE**

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

PERSONALLY APPEARED before me, Michel F. Laplante, who being duly sworn, deposes and says as follows:

1. I am over eighteen (18) years of age and have personal knowledge of all facts stated herein based upon my own knowledge.

2. Maybank 2754, LLC (herein "Maybank"), was first organized as a South Carolina limited liability company in 2006. Maybank was solely held by Penny Creek Associates, LLC (herein "PCA") until sometime in October 2013. I am, and have been, a member of Maybank 2754, LLC (herein "Maybank"), the Plaintiff, since its inception in 2013, meaning from the time when certain family members and I began owning it together by virtue of being transferred one hundred percent (100%) of the membership rights in Maybank from PCA.

3. In 2013, my son, John H. Laplante (herein "John"), served as the Plaintiff's initial manager until he died on October 15, 2019. I am currently the manager of Maybank and became

manager after John's death.

4. My daughter, Marianne Laplante Scarlata (herein "Marianne") and son, Peter F. Laplante (herein "Peter"), have been members of Maybank, since its inception in 2013.

5. Eugene J. Zurlo (herein "Zurlo"), by and through the Eugene J. Zurlo Living Trust Dated December 11, 1997, and I are members together in PCA and have been from when it was first organized as a South Carolina limited liability company in 1999.

6. I was the manager of PCA from the time it was organized in 1999 to approximately May 2016.

7. I am a licensed architect and have been an architect for over thirty (30) years. I am also a real estate developer and have been for over (25) years.

8. I have known Zurlo for approximately over twenty-five (25) years. He and I were business partners and involved with multiple real estate development projects in Kiawah Island, Johns Island and in Massachusetts worth tens of millions of dollars.

9. I have been involved in multi-million commercial property development projects in multiple states as an architect, real estate developer and/or consultant for over approximately twenty-five (25) years.

10. Zurlo and I created PCA for the purpose of acquiring and developing real estate.

11. Prior to 2013, PCA purchased the real property that is the subject of this case, which is described as "Residual Tract B-2-2" in that certain Resolution of the Sole Shareholder of Penny Creek Associates, L.L.C. (herein "Resolution"), that certain Contract for Assignment of Interest and Assignment (herein "Contract for Assignment") and that certain Assignment of Membership Interest and Written Consent in Lieu of a Special Meeting of the Sole Member of Maybank 2754, LLC (herein "Assignment"), and which is also assigned TMS # 346-00-00-076 (herein "Property"), as a real estate development project. A true and correct copy of the Resolution is

attached hereto and incorporated herein as “Exhibit A”. A true and correct copy of the Contract for Assignment is attached hereto and incorporated herein as “Exhibit B”. A true and correct copy of the Assignment is attached hereto and incorporated herein as “Exhibit C”.

12. My signatures appear on the Resolution, Contract for Assignment (on behalf of PCA and Maybank), and Assignment. I also recognize and am familiar with the signatures of my children, John H. Laplante, Peter F. Laplante and Marianne Laplante-Scarlata, which appear on the Contract for Assignment and Assignment. The Resolution also bears the signature of Zurlo, which I recognize and with which I am familiar.

13. Zurlo, on behalf of PCA, has previously executed a certain Certificate of Resolution to Borrow Money dated November 30, 2009 as “Eugene J. Zurlo, Member”, without describing his capacity as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997, which caused me to rely upon the sufficiency of his signing documents in that manner to bind PCA. A true and correct copy of the Certificate of Resolution to Borrow Money is attached hereto and incorporated herein as “Exhibit D”.

14. In addition, on February 21, 2017, I received an e-mail from Zurlo wherein he stated that PCA’s counsel “have been very careful to get Written Consents signed by all PCA Class A Members when any property (asset) sells so that sales are properly authorized and the purchasers get good title....” A true and correct copy of the e-mail is attached hereto and incorporated herein as “Exhibit E”.

15. Until sometime in October 2013, PCA was the sole member of Maybank.

16. Maybank was created by PCA to purchase and hold the real property described as Lot “B-3” in that certain deed recorded in Book F583, Page 757 in the Office of the Charleston County Register of Deeds, and which is assigned TMS # 346-00-00-008 (herein “adjacent lot”).

17. The adjacent lot is next to the Property. Maybank purchased the adjacent lot in 2006.

At the time of its acquisition by Maybank, the adjacent lot had, and still has, a building located on it with leased office space. Maybank still owns the adjacent lot.

18. Maybank's purchase of the adjacent lot was the result of development planning sessions with Zurlo, where he and I agreed that the only reason for Maybank to purchase the adjacent lot was to increase its commercial utility and development potential, and thereby its value, by creating a second means of ingress and egress across the Property, which PCA owned at the time.

19. In 2013, the Resolution was prepared by Custis Byars, Esq., and his law firm, Buist, Byars & Taylor, LLC, as part of a real estate-related transaction (herein "Maybank membership interest transfer") wherein PCA's interest in Maybank, would be transferred to some of my family members and me, on the very specific condition that PCA grant a thirty (30) foot private right of way access easement for pedestrian and vehicular ingress, egress and access to, from and over the Property, the location and condition of which to be was to be mutually agreed upon at the completion of that certain roadway known as "Pitch Fork Road" (herein sometimes "Pitchfork Road" or "Pitch Fork Road") as stated in the Resolution and also the Contract for Assignment and Assignment.

20. As part of the Maybank membership interest transfer, the Contract for Assignment, which is referenced in the Resolution, was prepared by Custis Byars, Esq., and his law firm, Buist, Byars & Taylor, LLC. The Contract for Assignment references the easement.

21. Attached to the Contract for Assignment is the Assignment, which was also prepared by Custis Byars, Esq., and his law firm, Buist, Byars & Taylor, LLC. The Assignment references the easement.

22. Although at the time of the Maybank membership interest transfer, the actual construction of Pitchfork Road was not complete, and remains incomplete, Zurlo and I both

knew that a portion of the roadway known as "Pitch Fork Road" was planned to be located on the Property, although its precise routing was not yet confirmed, which is why it is specifically referenced in the Resolution, Contract for Assignment of Interest and Assignment. At the time of the Maybank membership interest transfer, a fifty (50) foot easement for ingress and egress across about half of the Property to River Road was already in existence and so was Fenwick Hall Allee', a publicly dedicated street from Maybank Highway that extended into a portion of the Property. Both the fifty (50) foot easement and Fenwick Hall Allee' are reflected on that certain plat recorded on May 4, 2005 in Plat Book EH, Page 903 in the office of the Charleston County Register of Deeds. It was understood by Zurlo and me before and at the time of the Maybank membership interest transfer and before, that the alignment of a portion of Pitchfork Road would likely follow a portion of the approximate route of the fifty (50) foot easement and connect with a portion of Fenwick Hall Alle'. A true and correct copy of the plat is attached hereto and incorporated herein as "Exhibit F".

23. I live on and work from Kiawah Island, South Carolina, and have for over thirty (30) years. I am personally familiar with the growth on Johns Island and the traffic congestion at the Maybank Highway and River Road intersection and have been stuck in traffic on them countless times throughout the years.

24. Before the time of the Maybank membership transfer and when I was manager of PCA, I intended to have Pitchfork Road run through the Property and attended many planning meetings about it. I also had many discussions with Zurlo about having Pitchfork Road run through the Property. Zurlo and I agreed to have Pitchfork Road run through the Property given the locations of above-referenced fifty (50) easement for ingress and egress and Fenwick Hall Allee'.

25. At the time of the Maybank membership interest transfer, my intention as manager of

PCA, was to locate the easement from the adjacent lot across the Property to connect with Pitchfork Road once it was completed.

26. At the time of the Maybank membership interest transfer, I knew that a portion of Pitchfork Road would be located on the Property, although the precise routing was not yet confirmed. The reason why the easement was not specifically located at that time was because of my duties and obligations to PCA. As manager of PCA, I did not want to permanently locate the easement in a premature and arbitrary fashion during this time to avoid unnecessarily restricting the Property because it was being marketed for sale in dividable parcels. Therefore, having the location and condition of the easement conditioned upon the completion of Pitchfork Road, which would require the determination the precise routing of Pitchfork Road, and by mutual agreement, provided the necessary flexibility to connect with Pitchfork Road, once it was physically constructed, in a reasonable and beneficial manner without being detrimental to the marketing of the Property for sale in divisible parcels.

27. In or about 2007, while I was manager of PCA, I met with Professor Alex Kieger of the Harvard University Graduate School of Design and members of his class of graduate students over a two-day period. Zurlo's son, Paul Zurlo, also attended this meeting. Later I assisted in arranging a meeting with Professor Keiger and the Mayor of the City of Charleston to present the concept of a public roadway running across the Property as a solution to provide much needed traffic relief to accommodate growth on Johns Island, and in particular the Maybank Highway and River Road intersection, which is in the vicinity of the Property and adjacent lot.

28. The roadway known and described as "Pitch Fork Road" in the Resolution, Contract for Assignment and Assignment, evolved, in part, from a study by the Harvard University students working with the City of Charleston and PCA to create a public roadway to provide much needed traffic relief for Johns Island, including the vicinity of Maybank Highway and River

Road. PCA and/or Zurlo even provided funding for the Harvard University study.

29. Before the Maybank membership interest transfer, I knew that a portion of Pitchfork Road would be located on the Property by my meeting with Professor Kieger and members of his class of Harvard University graduate students, assisting in arranging a meeting between them and City of Charleston officials, and attendance at approximately at least twenty (20) planning meetings about the creation of Pitchfork Road to accommodate the rapid growth on Johns Island and its attendant traffic problems, which is why Pitchfork Road is specifically referenced as “that certain roadway known as Pitch Fork Road” in the Resolution, Contract for Assignment and Assignment.

30. The easement is necessary for the enjoyment of the adjacent lot because it is presently limited to only one means of ingress and egress, which severely limits its development potential and its use for commercial purposes, and especially in light of the traffic congestion on Johns Island and in the vicinity of Maybank Highway and River Road, which are the reasons why the Maybank membership interest transfer was specifically conditioned on the grant of the easement.

31. I relied upon the grant of the easement reflected in the Resolution, Contract for Assignment and Assignment in proceeding with the Maybank membership interest transfer.

32. Based upon my experience as an architect and real estate developer, limiting commercial real estate to one means of ingress and egress will almost always limit its development potential and value, and which is especially true in an area of high traffic density.

33. The easement was always intended to benefit the commercial utility and value of the adjacent lot, which is commercial real estate.

34. Without the easement, the adjacent lot will be limited in its commercial utility and development potential.

35. Maybank was assigned rights to the easement.

36. On December 1, 2019, I saw a sign in my son's neighborhood for a Design Review Board meeting for the next day, December 2, 2019, regarding the development of the Property. Before December 1, 2019, I was not aware of the December 2, 2019 Design Review Board meeting.

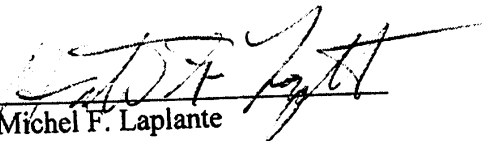
37. On December 2, 2019, I attended the Design Review Board meeting relative to the Property and discussed the easement being omitted from the development plans at the meeting.

38. Present at the December 2, 2019 meeting were Alan McMahon, a development manager employed by The Beach Company (The Beach Co.), and Russ Seamon, a director employed by Seamon, Whiteside & Associates, Inc.

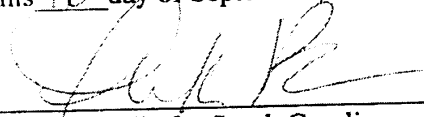
39. I discussed the easement with Alan McMahon and Russ Seamon immediately after the December 2, 2019 meeting.

40. The foreclosure case referenced by the Defendants, *Wells Fargo Bank, N.A., etc., v. Penny Creek Associates, LLC; et. al.*, Charleston Court of Common Pleas Case # 2014-CP-10-04946, does not name the Plaintiff, John, Marianne, or Peter, as defendants. Although I was personally named as a defendant in the foreclosure case, I was severed from the foreclosure claim, and the foreclosure judgment entered on June 23, 2017, in that case references that fact. A true and correct copy the foreclosure judgment entered on June 23, 2017 is attached hereto and incorporated herein as "Exhibit G" without the exhibits attached thereto due to the volume of pages. Additionally, the subject easement was neither the subject of, nor specifically referenced in. the foreclosure case.

**FURTHER AFFIANT SAYETH NOT!**

By:   
Michel F. Laplante

SWORN to and subscribed before me  
this 10 day of September, 2020.



Notary Public for South Carolina  
My Commission Expires: December 3, 2029

**FRANKIE BRATKOVICS**  
Notary Public - State of South Carolina  
My Commission Expires December 3, 2029

**RESOLUTION OF THE SOLE SHAREHOLDER  
OF PENNY CREEK ASSOCIATES, L.L.C.**

At a meeting of the Members of Penny Creek Associates, L.L.C. (the "Company") held at the Company's offices in Charleston, South Carolina, the Members of the Company hereby adopt the following resolutions:

WHEREAS, the Company is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the "Maybank 2754, LLC"); and

WHEREAS, pursuant to the terms and conditions of that certain Contract for Assignment of Interest, dated October 1, 2013, by and between the Company, Inc. (as Seller thereunder) and John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata, or their assigns (as Purchasers thereunder) (the "Agreement"), the Seller desire to sell, assign, transfer and convey certain Membership Interest in the Company to those certain Purchasers mentioned above and according to the provisions of the Agreement; and

WHEREAS, pursuant to the Agreement, the Company hereby certifies that the Company has complied with all provisions of the Company operating documents, with respect to the aforementioned sale, assignment and/or transfer of the Company Membership Interest in the Maybank 2754, LLC to the Purchaser, in consideration of Four Hundred Thousand and no/100 Dollars (\$400,000.00) and that the Members of the Company consent to the same; and

WHEREAS, as a condition of closing, the Company has agreed to grant, transfer, sell and convey to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

NOW THEREFORE IT IS RESOLVED, that the Company approves the Agreement; the sale, assignment, transfer and conveyance of Membership Interest in the Company thereunder; and any and all other documents necessary to facilitate the Company's execution of the Agreement and its compliance with the transactions contemplated thereunder.

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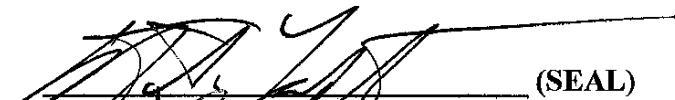
"Exhibit A"

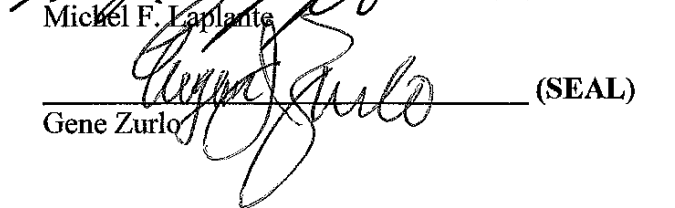
BE IT FURTHER RESOLVED, that upon the completion of Pitch Fork Road, the Company shall grant to Purchasers, their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of the Company known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at a future date.

BE IT FURTHER RESOLVED, that Michel F. Laplante in his capacity as Manager of the Company is hereby authorized to execute and deliver on behalf of the Company any and all agreements, assignments, satisfactions, releases, discharges, papers, documents, lending and collateral documents, offers, applications, leases, affidavits, certificates, certifications, verifications, non-disturbance agreements, guaranties, bonds, notes, subordination agreements, security agreements, resolutions, settlement statements, and any and all other contracts, papers or documents required in the course of the execution of the Agreement and the assignment and transfer of Membership Interest in the Company.

The undersigned Members of the Company do hereby certify that as of this 4<sup>TH</sup> day of October, 2013 the above to be a true and correct transcript of the Resolutions passed by the Company at the time and place above stated.

MEMBERS:

  
\_\_\_\_\_  
Michel F. Laplante (SEAL)

  
\_\_\_\_\_  
Gene Zurlo (SEAL)

## CONTRACT FOR ASSIGNMENT OF INTEREST

THIS CONTRACT FOR ASSIGNMENT OF INTEREST (this "Agreement") is made and entered into this   1   day of October, 2013, by and between John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarлата, or their assigns, (each a "Purchaser" and collectively the "Purchasers") and Penny Creek Associates, L.L.C., a South Carolina limited liability company (the "Seller").

### WITNESSETH:

WHEREAS, the Seller is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the "Company"); and

WHEREAS, the Company is not governed by a written operating agreement;

WHEREAS, on the terms and subject to the conditions of this Agreement, Purchasers desire to purchase One Hundred and No/100 (100%) Percent of Seller's membership interest in the Company, and Seller desires to sell and assign such One Hundred and No/100 (100%) Percent of its membership interest in the Company to Purchasers (the "Assignment"); and

WHEREAS, Purchasers and Seller now desire to memorialize the terms and conditions and respective rights, duties and obligations of the Purchasers and Seller regarding the Assignment by the provisions hereof and executing this Agreement; and

WHEREAS, the Company is joining in this Agreement for the limited purpose of acknowledging its agreement to the Assignment.

NOW, THEREFORE, in consideration of the forgoing and the mutual promises and agreements contained herein and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged by Purchasers and Seller, the undersigned, intending to be legally bound, hereby agree as follows:

### ARTICLE I Assignment of Interest

**Section 1.1. Assignment of Interest.** On the terms and subject to the conditions set forth in this Agreement, Seller hereby agrees to sell, assign, transfer and deliver to Purchasers on the "Closing Date" ( hereinafter defined), and Purchasers agree to purchase from Seller on the Closing Date, One Hundred and No/100 (100%) Percent of Seller's membership interest in the Company, including any and all associated financial and voting rights in the Company (such assets being hereinafter collectively referred to as the "Interest"). Said Interest being the entire outstanding membership interest of the Company.

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"Exhibit B"

**Section 1.2. Assumption of Liabilities.** It is hereby expressly understood and agreed that Purchasers do not assume or agree hereunder to pay, perform or discharge any debt, obligation or liability of Seller of any kind or nature whatsoever nor shall the Interest be subject to any such debt, obligation or liability.

**Section 1.3. Purchase Price.** On the terms and subject to the conditions set forth in this Agreement, Purchasers shall pay to Seller the purchase price of Four Hundred ~~Twenty-Five~~ Thousand and No/100 (~~\$425,000.00~~) Dollars ("Purchase Price").

400,000.00

## ARTICLE II Closing

**Section 2.1. Closing.** The closing (the "Closing") of the sale, transfer, assignment and delivery of the Interest, the delivery of the Conveyance Documents pursuant to Section 2.2 of this Agreement, the payment of the Purchase Price, and the delivery of any and all other instruments and certificates required hereunder shall take place on or before 4:00 PM ET, October 4, 2013, at the offices of Buist, Byars & Taylor, LLC, or at such other date or at such other time or place as the parties hereto shall agree to in writing (the date and time of the closing hereunder being referred to herein as the "Closing Date").

**Section 2.2. Transfer of Interest.** On the Closing Date, Seller shall execute and deliver to Purchasers all such instruments and documents (the "Conveyance Documents") (including, but not limited to the "Assignment of Interest" attached hereto as Exhibit "A,") as shall be requested by Purchasers to effectuate the sale, assignment, transfer and delivery of the Interest from Seller to Purchasers.

## ARTICLE III Representations and Warranties

Seller and Purchasers hereby represent and warrant to each other as follows:

**Section 3.1. Authorization, Etc.** The execution and delivery of this Agreement, the Assignment of Interest and any Conveyance Documents by Seller and Purchasers and the due consummation of the transactions contemplated herein have been duly authorized by all necessary action on the part of Seller and Purchasers. This Agreement has been duly executed and delivered by Seller and Purchasers and constitutes the legal, valid and binding obligations of Seller and Purchasers, enforceable against Seller and Purchasers in accordance with its terms. When executed and delivered pursuant to this Agreement, the Conveyance Documents will be the legal, valid and binding obligations of Seller and Purchasers, enforceable against Seller and Purchasers in accordance with their terms.

**Section 3.2. No Violation.** Neither the execution and delivery of this Agreement nor the consummation by Seller or Purchasers of the transactions contemplated hereby will constitute a violation of: (a) any agreement(s) or commitment(s) to which they are a party or by which they are bound; (b) any judgment, decree, order, regulation or rule of any court or governmental authority; or (c) any statute or law.

**Section 3.3. Consent to Transfer of Membership Interest.** The Company has joined in this Agreement for the limited purpose of acknowledging its consent to the Assignment of Interest from Seller to Purchasers, and its agreement to accept the Purchasers as Members of the Company.

**Section 3.4. No Other Consents.** Except as set forth in Section 3.3 hereto, no consent, approval or authorization of any third party or any federal, state or local or other governmental regulatory agency or authority is required in connection with the execution, delivery and performance of Seller and Purchasers under this Agreement.

**Section 3.5. Title to Assets; Encumbrances.** Seller has good, valid and marketable title to the Interest, subject to no lien, security interest, encumbrance or other restriction and Seller hereby represents and warrants that the Company has good, valid and marketable title to the Property, subject only to the permitted exceptions” set forth in Exhibit “2” (the “Permitted Exceptions”).

#### ARTICLE IV Conditions to Purchasers’ Obligations

Each and every obligation of Purchasers under this Agreement to be performed at or before the Closing Date shall be subject to the fulfillment, at or before the Closing Date, of each of the following conditions:

**Section 4.1. Representations and Warranties True; Obligations Performed.** (i) The representations and warranties of Seller and Purchasers contained in this Agreement shall be true and correct in all material respects as of the Closing Date with the same force and effect as if made on and as of the Closing Date; (ii) Seller and Purchasers shall have performed and complied in all material respects with all agreements and covenants required by this Agreement to be performed by it prior to the Closing Date; and (iii) Seller shall have delivered the Interest to Purchasers at the Closing.

**Section 4.2. No Material Adverse Change.** There shall not have occurred any material adverse change since the date of this Agreement in the business, properties, results of operations or business or financial condition of the Company, or the Interest being conveyed by Seller.

**Section 4.3. Litigation.** No suit, investigation, action or other proceeding shall be threatened or pending against Seller or Company before any court or governmental agency that, in the opinion of counsel for Purchasers, could result in the restraint, prohibition or obtainment of damages or other relief against either Seller or Company in connection with this Agreement or the consummation of the transactions contemplated hereby.

**Section 4.4. Conveyance Documents.** Seller shall have executed and delivered the Conveyance Documents in form and substance customary and usual for their intended purpose and reasonably satisfactory to Purchasers and its counsel.

**Section 4.5. 30' Access Easement.** Seller shall grant, transfer, sell and convey to Purchaser, its successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895 ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES)," having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 ("30' Private R/W"), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W.

## ARTICLE V Indemnification

**Section 5.1. Indemnification.** Seller and Purchasers each hereby indemnify and hold the other harmless and shall defend the other from any and all claims, demands, actions, causes of action, judgments, costs and expenses, including attorneys' fees and court costs arising out of the ownership of the Interest and the operation of the Company; prior to the Closing in the case of Seller's indemnification of Purchasers, and from and after the Closing in the case of the Purchasers' indemnification of Seller.

## ARTICLE VI Miscellaneous

**Section 6.1. Expenses.** The Purchasers and Seller shall pay all expenses incurred in connection with the preparation and execution of the Agreement and in connection with the transactions contemplated hereby as purchasers and sellers customarily pay in Charleston County in similar transactions.

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**Section 6.2. Survival of Representations, Warranties and Covenants.** Each of the representations, warranties, obligations, covenants and agreements of the undersigned included or provided for herein or in any schedule, certificate, or other document delivered pursuant to this Agreement shall survive the consummation of the transactions contemplated by this Agreement, notwithstanding any investigation heretofore or hereafter made by any of them or on behalf of any of them.

**Section 6.3. Schedules and Exhibits.** Any exhibits and schedules referred to herein and attached hereto are made a part of this Agreement.

**Section 6.4. Assignment.** This Agreement and all of the provisions hereof shall be binding upon, and inure to the benefit of Seller, Purchasers, and their respective successors, personal representatives, executors, heirs, beneficiaries, and permitted assigns. Purchasers, with the prior written consent of the Company, shall be permitted to assign his rights or delegate their duties pursuant to this Agreement, or any other right, obligation or duty contemplated by this Agreement, in whole or in part.

**Section 6.6. Entire Agreement.** This Agreement, including the other documents referred to herein which form a part hereof, constitutes the entire agreement and understanding of the parties hereto with respect to the subject matter hereof and supersedes all prior agreements and understandings between the parties with respect to such subject matter.

**Section 6.7. Waiver; Amendment.** No waiver in any instance by any party of any provision of this Agreement shall be deemed a waiver by such party of such provision in any other instance or a waiver of any other provision hereunder in any instance. This Agreement cannot be modified except in writing signed by the party to be charged.

**Section 6.8. Counterparts** This Agreement may be executed in more than one counterpart, each such counterpart shall be deemed an original, and all such counterparts shall constitute one and the same agreement. This Agreement shall be effective when executed by all parties, but all parties need not execute the original or the same counterpart.

*[Signatures on following page]*


IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date(s) written below.

**WITNESS**

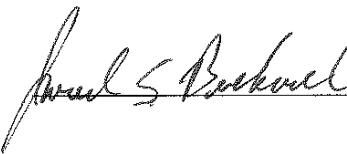
  
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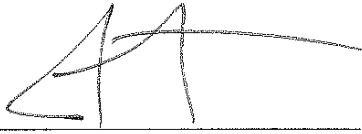
**SELLER:**

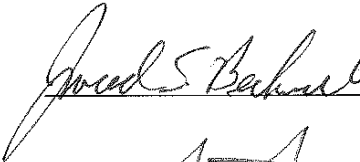
Penny Creek Associates, L.L.C.

  
By: Michel F. Laplante  
Its: Manager  
Date: 10/7, 2013

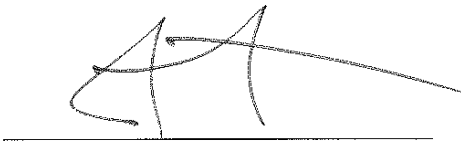
**PURCHASERS:**

  
\_\_\_\_\_

  
John H. Laplante  
Date: 10/7, 2013

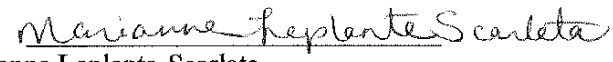
  
\_\_\_\_\_

\_\_\_\_\_  
Michel F. Laplante  
Date: 10/7, 2013

  
\_\_\_\_\_

  
Peter F. LaPlante  
Date: 10/4, 2013

  
\_\_\_\_\_

  
Marianne Laplante-Scarlata  
Date: 10/7, 2013

[Balance of page intentionally left blank. Signatures to follow.]



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**COMPANY:**  
Maybank 2754, LLC



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By: Penny Creek Associates, LLC  
Its: Sole Member  
By: Michel F. Laplante  
Its: Manager  
Date: 10/7, 2013

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**EXHIBIT "A"**

(Assignment of Membership Interest and Written Consent in Lieu of a Special Meeting of the  
Sole Member of Maybank 2754, LLC)

**ASSIGNMENT OF MEMBERSHIP INTEREST AND  
WRITTEN CONSENT IN LIEU OF A SPECIAL MEETING  
OF THE SOLE MEMBER OF MAYBANK 2754, LLC**

DATE: October 4, 2013

PARTIES: Penny Creek Associates, L.L.C., a South Carolina limited liability company (the “Transferring Member”) and, John H. Laplante, Michel F. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata, or their assigns or its assigns, (each a “Transferee” or collectively the “Transferees”).

**RECITALS:**

A. The Transferring Member is the sole member of Maybank 2754, LLC, a South Carolina limited liability company (the “Company”).

B. The Transferring Member has a 100.0% ownership interest in the Company, and is entitled to that percentage of the profits and interim distributions of the Company, and must bear that percentage of the Company’s losses.

**AGREEMENTS:**

1. ASSIGNMENT. By signing this assignment, the Transferring Member assigns and transfers all of its 100.0% interest in the Company to the Transferees, in equal shares. This assignment and transfer includes all of the right, title and interest of the Transferring Member in the profits, losses, and interim distribution of the Company.

2. ACCEPTANCE. By signing this assignment, the Transferees accept the assignment and transfer of the interest as a Member of the Company being transferred under this assignment.

3. CONSIDERATION. In consideration of the mutual promises and agreements contained in that certain Contract for Assignment of Interest, dated October 4, 2013, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged (“Consideration”), said Consideration to be paid in full and into escrow upon the execution of a certain Contract for Assignment of Interest, by and between the Transferring Member and Transferees, dated October 4, 2013.

4. TRANSFERRING MEMBER’S REPRESENTATIONS AND WARRANTIES. The Transferring Member represents and warrants to the Transferees that:

4.1. Ownership of Interest and Right to Transfer. The Transferring Member is the sole owner of the interest in the Company being transferred under this assignment, free and clear of any and all liens or encumbrances, and will defend the same against all claims and demands of all persons. The Transferring Member has a good right to transfer the interest as a member of the Company to each Transferee.

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“Exhibit C”

4.2. Status of Company. The Company is a limited liability company duly organized, validly existing, and in good standing under the laws of the State of South Carolina and has all powers required to own its assets and property and to carry on its business as now owned and conducted. The Company is not licensed or qualified as a foreign limited liability company in any other state, and the nature of its business does not make such license or qualification necessary.

4.3. Financial Statements. The financial records of the Company, to the extent available, have been furnished to the Transferees (collectively the “Financial Statements”) and are in accordance with the books and records of the Company, are based upon regularly accepted accounting principles that have been consistently applied, are complete and correct, and fairly present the financial position and results of operation of the Company as of the dates and for the periods indicated.

4.4. Adverse Changes. There has been no material adverse change in the financial condition of the Company or in the condition of its assets from that reflected in the Financial Statements.

4.5. Liabilities. the Company does not have any material liabilities or obligations of any kind whether accrued, absolute, contingent, or otherwise, and whether or not such liabilities or obligations would have been required to be disclosed on a balance sheet prepared in accordance with generally accepted accounting principles.

4.6. Tax Returns. The Company has filed all tax returns and reports that it is required to file with the appropriate federal, state, and local government agencies. Such returns and reports are accurate and complete, and the Company has paid in full or has made adequate provision for payment of all taxes, interest, penalties, assessments, or deficiencies shown to be due on such returns or reports, claimed to be due by any taxing authority, or otherwise due and owing. The Company has made all withholdings of tax required to be made under all applicable federal, state, and local tax regulations. To the best of the knowledge of the Transferring Member, the provisions for applicable property taxes and/or any applicable payroll taxes payable reflected in the Financial Statements are adequate.

4.7. Assets. The Company has good and marketable title to all of its assets, including but not limited to that certain real property known as “Lot B-3” located in City of Johns Island, Charleston County, South Carolina and as more particularly described in Exhibit “1,” attached hereto and incorporated herein by reference (the “Property”), free and clear of all claims and encumbrances, except any liens for taxes not yet due and payable or as disclosed in the financial statements.

4.8. Compliance with Law. To the best of the knowledge and belief of the Transferring Member, the Company is not in violation of any applicable law, ordinance, regulation, order, or requirement relating to its operations.

4.9. Actions and Suits. There are no actions, suits, or proceedings pending or threatened against or affecting the Company at law or in equity or before or by any federal, state, municipal, or other governmental or nongovernmental department, commission, board, bureau, agency, or instrumentality that can reasonably be expected to result in any adverse change in the business, properties, operations, prospects, or assets of the Company or in its condition, financial or otherwise.

4.10. Obligations and Contracts. The Company is not in default in the payment of any of its obligations and is not in breach of the performance of any contract to which it is a party.

4.11. Complete Disclosures. To the best of the knowledge and belief of the Transferring Member, neither this assignment nor any document that has been furnished by the Transferring Member to the Transferees in connection with this assignment contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements in this assignment or in such documents not misleading. There is no fact that materially adversely affects, or, to the best of the knowledge and belief of the Transferring Member, in the future may materially adversely affect, the business, operations, or condition (financial or otherwise) of the Company that has not been set forth in this assignment or in the Financial Statements.

5. TRANSFEREES' REPRESENTATIONS AND WARRANTIES. The Transferees represent and warrant to the Transferring Member, and to the Company, that:

5.1. Investment Intent. The Transferees are acquiring the interest as a member of the Company being transferred under this assignment for investment and not with a view to distribution.

5.2. Securities Law Registration. The Transferees understand that the interest as a member of the Company being transferred under this assignment has not been registered under the Securities and Exchange Act of 1933 or under applicable state securities statutes in reliance upon exemptions from registration. The Transferees also understand that the interest must be held indefinitely, unless it is later registered under the Securities and Exchange Act of 1933 and applicable state securities statutes unless exemptions from registration are otherwise available, and that the Company has no obligation to register the interest. The Transferees agree that the interest will not be offered, sold, transferred, pledged, or otherwise disposed of without registration under the Securities and Exchange Act of 1933 and applicable state securities laws or an opinion of counsel acceptable to the Company that such registration is not required.

6. **30' ACCESS EASEMENT.** As a condition of closing, Transferor agrees to grant, transfer, sell and convey to Transferee, its successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Transferor known as "Residual Tract B-2-2" as shown on that plat by Richard D. Lacy, entitled "PLAT SHOWING THE SUBDIVISION OF TRACT C-1 TMS NO. 346-00-00-077), TRACT B-2-1 (TMS NO. 346-00-00-004), AND TRACT B-2-2 (TMS NO. 346-00-00-076) TO CREATE EXTENSION OF FENWICK HALL ALLEÉ (CONTAINING 0.272 ACRES) AND CREATING RESIDUAL TRACT C-1 (TMS NO. 346-00-00-077) CONTAINING 15.454 ACRES, RESIDUAL TRACT B-2-1 (TMS NO. 346-00-00-004) CONTAINING 24.895

ACRES, AND RESIDUAL TRACT B-2-2 (TMS NO. 346-00-00-076) CONTAINING 22.856 ACRES),” having been recorded in Plat Book EH, page 817 in the Charleston County RMC Office on March 25, 2005 (“30’ Private R/W”), the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road (“Pitch Fork Road”). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30’ Private R/W.

7. **SURVIVAL OF REPRESENTATIONS AND WARRANTIES.** All warranties and representations made in this assignment will survive the closing of the transfer of the interest as a member of the Company being transferred under this assignment.

8. **CONSENT.** By signing this assignment, the Transferring Member consents to the assignment and transfer to the Transferees of the interest as a member of the Company being transferred under this assignment and agrees to accept the Transferees as a members of the Company with respect to the transferred interest of the Transferring Member, with full rights and obligations of a member, and by signing this written Consent, waives notice of the time, place and purpose of a joint meeting of the Members, and agrees to the transaction of the business of this joint meeting by unanimous consent of the Members.

9. **OWNERSHIP INTEREST.** The Members of the Company, their initial capital contributions shall be deemed to have been made, and their voting percentage within the Company shall be as follows:

MEMBERS	VOTING PERCENTAGE
John H. Laplante	50.0%
Michel F. Laplante	25.0%
Peter F. Laplate	12.5%
Marianne Laplante-Scarlata	12.5%
TOTAL	100.0%

10. **MISCELLANEOUS PROVISIONS.**

10.1. **Binding Effect.** The provisions of this assignment are binding upon and will inure to the benefit of the heirs, personal representatives, successors, and assigns of the parties.

10.2. **Notice.** Any notice or other communication required or permitted to be given under this assignment must be in writing and must be mailed by certified mail, return receipt requested, postage prepaid, addressed to the parties at the addresses set forth herein. All notices and other communications will be deemed to be given at the expiration of three days after the

12

{00378833.DOCX 3}

date of mailing. The address of a party to which notices or other communications must be mailed may be changed from time to time by giving notice to the other parties.

10.3. Litigation Expense. If any legal proceeding is commenced for the purpose of interpreting or enforcing any provision of this assignment, including any proceeding in the United States Bankruptcy Court, the prevailing party in such proceeding will be entitled to recover reasonable attorney's fees in such proceeding, or any appeal thereof, to be set by the court without the necessity of hearing testimony or receiving evidence, in addition to the costs and disbursements allowed by law.

10.4. Governing Law. This assignment will be governed by the law of the State of South Carolina.

10.5. Entire Agreement. This assignment constitutes the entire agreement between the parties pertaining to its subject matter, and it supersedes all prior and contemporaneous agreements, representations, and understandings of the parties. No supplement, modification, or amendment of this assignment will be binding unless executed in writing by all parties.


[Signatures on following page]

IT IS SO RESOLVED, APPROVED, AND AGREED THIS 4<sup>th</sup> DAY OF OCTOBER, 2013.

**TRANSFERRING MEMBER:**


Penny Creek Associates, L.L.C.

Paul S. Beckwith

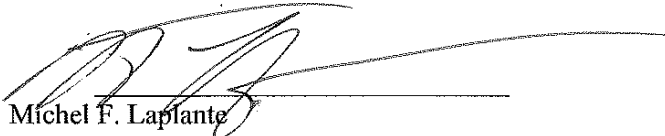
  
By: Michel F. Laplante  
Its: Manager

**TRANSFERREE:**

Paul S. Beckwith

  
John H. Laplante

Paul S. Beckwith

  
Michel F. Laplante



Peter Laplante  
Peter F. Laplante

Paul S. Beckwith

Marianne Laplante-Scarlate  
Marianne Laplante-Scarlate

### CERTIFICATE OF RESOLUTION TO BORROW

The undersigned hereby certifies to Wachovia Bank, National Association ("Bank") that the undersigned is (are) a (the) Managing Member(s), Member(s) or Manager(s) in whom management of MAYBANK 2754, LLC ("LLC"), a Limited Liability Company duly organized and existing under the laws of the State of South Carolina, is vested by the Organizational Documents (as defined below) of the LLC; that the following is a true copy of the Resolution duly adopted by each required Managing Member, Member or Manager; that such Resolution is in full force and effect and has not been amended or rescinded; and that there is no provision in the Certificate or Articles of Formation or Organization, Operating Agreement or other organizational documents (the "Organizational Documents") of the LLC, or the laws of South Carolina, limiting the power of such Managing Member, Member or Manager to pass the following Resolution, which is in full conformity with the provisions of the Organizational Documents of the LLC and the laws of South Carolina.

**RESOLVED**, that EACH of the present holder(s) of the following office(s) and/or position(s) of LLC and his (her) successor(s) in office or position:

Sole Member

is (are) hereby authorized, on behalf of, in the name of and for the account of LLC to:

- a. borrow money and/or obtain or continue credit (with or without security) from Bank, upon such terms and conditions and in such amounts as such officer(s) or position-holder(s) may deem desirable;
- b. execute and/or endorse all documents necessary or required by Bank to evidence or consummate any loan to LLC;
- c. guarantee the obligations of others to Bank;
- d. engage in business transactions of any nature and kind and/or enter into any manner of contractual relationships with Bank;
- e. grant a security interest of any kind in, assign, mortgage, or otherwise encumber property, whether real, personal, tangible, intangible and/or mixed (including securities of all types and in whatever form), of LLC as collateral securing payment or performance relative to any loan to LLC or guaranteed by LLC;
- f. sell, purchase and/or lease real, personal, tangible, intangible, and/or mixed property to/from Bank;
- g. enter into, execute and deliver, and perform LLC's obligations under any swap agreement (as defined in 11 USC §101, as in effect from time to time) with Bank, derivative agreement or foreign exchange agreement, and execute any and all documents relative thereto as may be necessary or required by Bank;

**RESOLVED FURTHER**, that the foregoing authority shall not be limited to the above-identified officer(s) or position-holder(s) of LLC but shall extend to such additional or different individuals as are named as being so authorized in any letter, form or other written or oral notice by any such above-identified officer or position-holder of LLC;

**RESOLVED FURTHER**, that the Member(s) of LLC shall furnish Bank a certified copy of this Resolution, and Bank is hereby authorized to deal with the present holder(s) of said office(s) or

position(s) under the authority of this Resolution unless and until it shall be expressly notified in writing to the contrary by LLC;


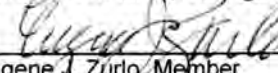
**RESOLVED FURTHER**, that the Member(s) of LLC, shall, from time to time hereafter, as changes in the personnel of the said office(s) or position(s) of LLC, are made, immediately certify such changes to Bank, and that Bank shall be fully protected in relying upon such certifications of the Member(s) of LLC, and shall be indemnified and saved harmless from any claims, demands, expenses, losses and/or damages resulting from, or growing out of, honoring the signature of any officer(s) or position-holder(s), representative(s), agent(s), or employee(s) so certified, or refusing to honor any signature not so certified which is not described or stated in this Resolution;

**RESOLVED FURTHER**, that the Member(s) of LLC is (are) authorized and directed to certify to Bank that this Resolution was duly adopted, and that the provisions thereof are in full conformity with the Organizational Documents;

**RESOLVED FURTHER**, that all transactions by any officer(s), member(s), position-holder(s), representative(s), agent(s), or employee(s) of LLC, on its behalf and in its name, with Bank prior to delivery of a certified copy of this Resolution are, in all respects, hereby ratified, confirmed and adopted;

**RESOLVED FURTHER**, that any person(s) authorized to act on behalf of LLC pursuant to the terms of this Resolution is (are) fully authorized to take any action or exercise any powers as set out or granted by those terms in relation to any subsidiary, parent or affiliate of LLC.

I, finally, certify that the following is (are) the person(s) who now hold(s) the office(s) and/or position(s) referred to above in this Resolution and that his (her) bona fide signature(s) is (are) set forth below:

Name	Title	Signature
Penny Creek Associates, L.L.C.	Sole Member	By:  Michel F. LaPlante, Manager
		By:  Eugene J. Zurlo, Member

**IN WITNESS WHEREOF**, I have hereunto duly subscribed my name(s) and affixed the seal, if any, of LLC on November 20, 2009.

By:  Member

Work Request / Tracking #: 1554798  
CAT - Deal # 1229899 Facility #: 991623  
Obligor #: [REDACTED] Obligation #: [REDACTED]

**From:** Genezurlo <genezurlo@aol.com>  
**Date:** February 21, 2017 at 11:30:56 PM EST  
**To:** Chris Lanning <chris@lanninglawfirm.com>  
**Cc:** Custis Byars <custis.byars@buisbyars.com>, Joe Keenan <joe.keenan@pcpsc.com>, Stephen Carroll <landcrafterssc@gmail.com>, "J. Rutledge Young, Jr." <jry@duffyandyoung.com>, Jay Seibels <jseibels@seibelsfirm.com>, Mitch LaPlante <scmitch@bellsouth.net>, john.laplante@gmail.com  
**Subject:** PCA Partners' Meeting: 3 ultra vires contracts

Dear Chris

At the PCA partners' meeting on February 14, 2017, we discussed two contracts for the sale of Preserve lots entered into by Mitch Laplante and John Laplante dba Fenwick Allee LLC on February 16, 2016 and a third contract for the sale of about 4 acres of PCA's residual land to Haibel Development LLC on March 20, 2016.

All three of these contracts were signed by Mitch Laplante on one side and his son John on the other, and are not valid contracts for the reasons set forth below.

I am writing to you, the Court Appointed Manager of Penny Creek Associates LLC, in my capacity as co-Trustee of the Eugene J. Zurlo Living Trust, dated December 11, 1997. The Zurlo Trust is a 50% member of Penny Creek Associates LLC.

The Third Restated and Amended Operating Agreement of Penny Creek Associates LLC, Article VI

"Exhibit E"

MANAGERS, Section 6.1 MANAGEMENT BY MANAGERS B. 4 prohibits (...., disposing of an asset without the prior written consent of the Class A Members) and B.5 (....changing the responsibilities of lawyers... without the prior written consent of the Class A Members).

The firm of Buist Byars & Taylor is PCA's real estate counsel, and Custis Byars and his firm have been very careful to get Written Consents signed by all PCA Class A Members when any property (asset) sells so that sales are properly authorized and the purchasers get good title, which has not been done here. I note that these contracts were prepared by some law firm other than BB&T, which again is a violation of the PCA Third Amended and Restated Operating Agreement.

My comments on the three "contracts" are:

1. Re' the February 16, 2016 contract for the sale of 9 lots (#5,6,7,8,9,10,11,12, and 17) by PCA to Fenwick Allee LLC (owned by JOMAPET Trust, a Laplante Family Trust) for \$1,755,576; it was signed without my knowledge and consent in violation of the PCA Operating Agreement and shortly before Laplante was removed as Manager.
2. Re' the February 16, 2016 contract for the sale of PCA Lots 2,3, and 4 to Fenwick Allee LLC, it was signed without my knowledge and consent in violation of the PCA Operating Agreement and shortly before Laplante was removed as Manager.
3. The "contract" for the "Residual Property" was entered into between M. Laplante and his son J. Laplante dba Haibel Development LLC on March 20, 2016. This contract was signed by M. Laplante after the Court removed him as Manager of PCA and without the Zurlo Trust's knowledge, approval, or consent.

I believe that some portion of the properties included in the "Residual Property" must be transferred to the POA as represented in various promotional materials and documentation provided to early lot buyers. Custis Byars has knowledge of what property goes where, but if further information is needed to define what goes to the POA and what can be sold, such knowledge can be provided by Kevin Flynn (Epic Development), early homeowners, and from promotional materials made to buyers and prospective buyers.

As to the contract for sale of approximately four acres of "Residual Property" to Haibel Development, owned by John Laplante, son of M. Laplante, you probably know that Haibel collected a fee of 5% of the sales price every time a PCA lot was sold (J. Laplante deposition-pages 62-66). These fees were paid directly by PCA to Haibel so as not to appear on the HUD-1 (J. Laplante deposition-pages 65-70).

This practice has been stopped but that begs the question about the legality of this contract, which again was signed without my knowledge and consent, was signed after the February 29, 2016 Settlement in which M. Laplante was removed as Manager, and violated the terms of the PCA Operating Agreement which requires my written consent. Furthermore, I question that the sales price reflects Fair Market Value since I understand that J. Laplante intends to flip the property to a developer for a restaurant and health club.

None of this should be a surprise to you or the Laplantes or Palmetto Commercial Properties who were advised of the Zurlo Trust's objections to these three contracts by the Zurlo Trust's lawyer Rutledge Young Sr. In June 2016.

As Second Mortgage Holder, I do not consent to the proposed transactions for the reasons stated herein. This is another attempt by the Laplantes to utilize the assets of PCA for their own benefit and in violation of the PCA Operating Agreement and a Court order.

By copy, I am notifying Palmetto Commercial Real Estate which brokered the two lot sales "contracts" and Stephen Carrol of Landcrafters so he will know that 12 lots in addition to the 22 he knows about are available for sale.

If any recipients of this letter have any questions, please contact Rutledge Young who represents

me.

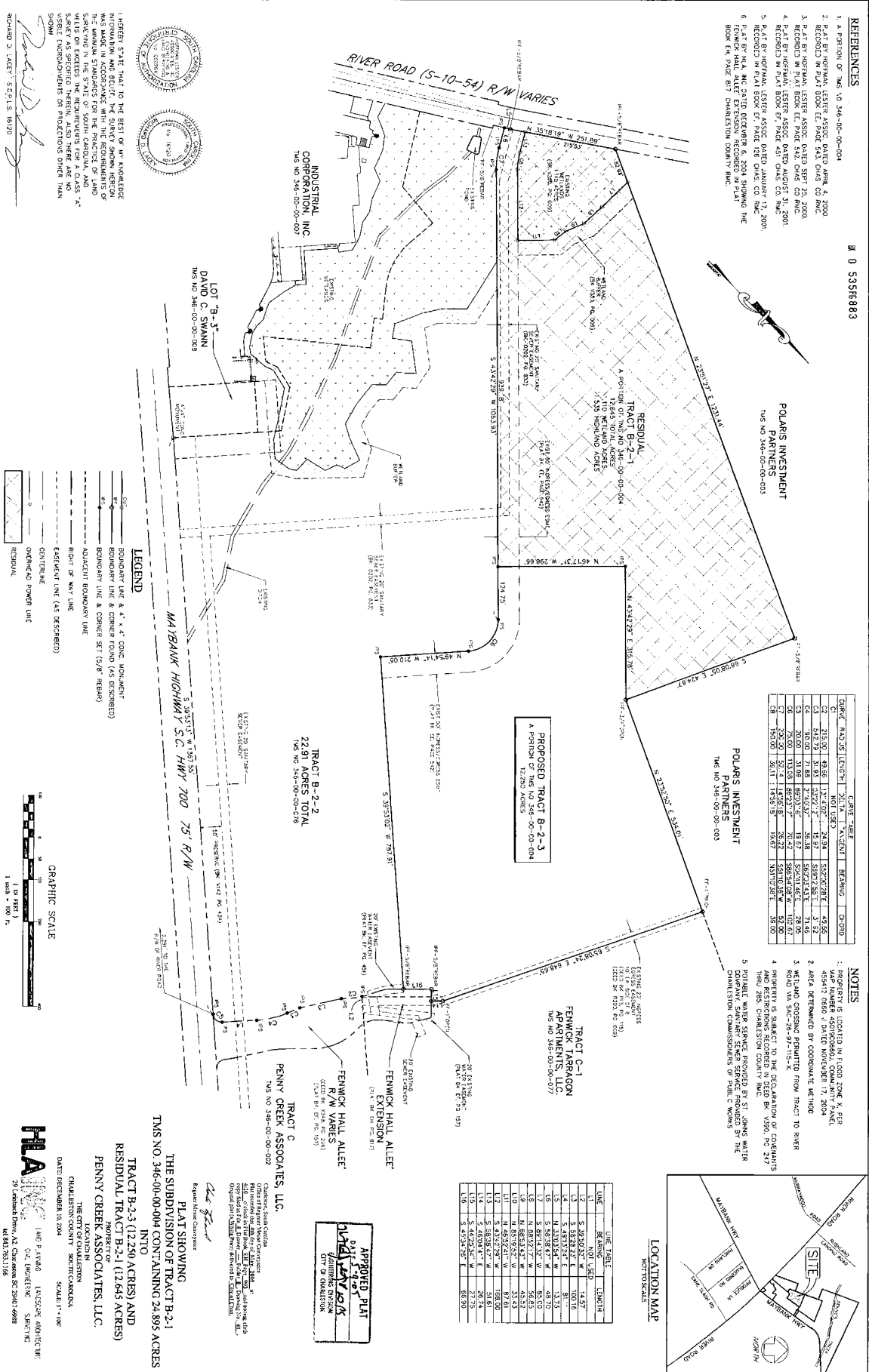
Yours truly,

s/Eugene J. Zurlo

REFERENCES

1. A PORTION OF TMS 10 346-00-00-004
2. PLAT BY HORNBA, LESTER ASSOC DATED APRIL 4, 2000 RECORDED IN PLAT BOOK 1E, PAGE 543, CHS CO REC.
3. RECORDED IN PLAT BOOK 1E, PAGE 543, CHS CO REC.
4. PLAT BY HORNBA, LESTER ASSOC DATED AUGUST 21, 2001 RECORDED IN PLAT BOOK 1E, PAGE 451 CHS CO REC.
5. PLAT BY HORNBA, LESTER ASSOC DATED JANUARY 17, 2001 RECORDED IN PLAT BOOK 1E, PAGE 108 CHS CO REC.
6. PLAT BY HORNBA, LESTER ASSOC DATED JANUARY 17, 2001 RECORDED IN PLAT BOOK 1E, PAGE 108 CHS CO REC.
7. PLAT BY HORNBA, LESTER ASSOC DATED JANUARY 17, 2001 RECORDED IN PLAT BOOK 1E, PAGE 108 CHS CO REC.
8. PLAT BY HORNBA, LESTER ASSOC DATED JANUARY 17, 2001 RECORDED IN PLAT BOOK 1E, PAGE 108 CHS CO REC.

PL 0 535H9893



**POLARS INVESTMENT PARTNERS**  
TMS NO 346-00-00-003

**POLARS INVESTMENT PARTNERS**  
TMS NO 346-00-00-003

**PROPOSED TRACT B-2-3**  
A PORTION OF TMS NO 346-00-00-004  
12.200 ACRES

**TRACT B-2-2**  
22.91 ACRES TOTAL  
TMS NO 346-00-00-006

**TRACT C-1**  
**FENWICK TARRACON APARTMENTS, LLC.**  
TMS NO 346-00-00-007

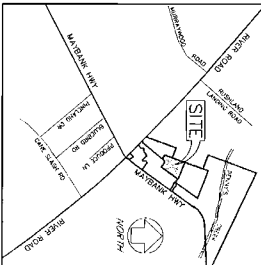
**TRACT C**  
**PENNY CREEK ASSOCIATES, LLC.**  
TMS NO 346-00-00-002

**PLAT SHOWING**  
THE SUBDIVISION OF TRACT B-2-1  
INTO  
**TRACT B-2-3 (12.200 ACRES)**  
**RESIDUAL TRACT B-2-1 (12.645 ACRES)**  
PROPERTY OF  
**PENNY CREEK ASSOCIATES, LLC.**

**HIA**  
Hornba, Lester & Associates, Inc.  
39 Lehigh Drive, 4C Charleston, SC 29403-6688  
DATE: DECEMBER 10, 2004  
SCALE: 1" = 100'

CHANCE	REASON	REASON	REASON	REASON	REASON	REASON	REASON	REASON	REASON
1	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000
2	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000
3	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000
4	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000
5	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000
6	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000
7	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000
8	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000
9	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000
10	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000	1.0000

- NOTES**
1. PROPERTY IS LOCATED IN ZONING DISTRICT R-100.
  2. ALL RIGHTS RESERVED BY THE PROPERTY OWNER.
  3. ALL RIGHTS RESERVED BY THE PROPERTY OWNER.
  4. PROPERTY IS SUBJECT TO THE DECLARATION OF COVENANTS AND RESTRICTIONS RECORDED IN DEED BK 1950, PG 247.
  5. PROPERTY IS SUBJECT TO THE DECLARATION OF COVENANTS AND RESTRICTIONS RECORDED IN DEED BK 1950, PG 247.
  6. PROPERTY IS SUBJECT TO THE DECLARATION OF COVENANTS AND RESTRICTIONS RECORDED IN DEED BK 1950, PG 247.
  7. PROPERTY IS SUBJECT TO THE DECLARATION OF COVENANTS AND RESTRICTIONS RECORDED IN DEED BK 1950, PG 247.
  8. PROPERTY IS SUBJECT TO THE DECLARATION OF COVENANTS AND RESTRICTIONS RECORDED IN DEED BK 1950, PG 247.
  9. PROPERTY IS SUBJECT TO THE DECLARATION OF COVENANTS AND RESTRICTIONS RECORDED IN DEED BK 1950, PG 247.
  10. PROPERTY IS SUBJECT TO THE DECLARATION OF COVENANTS AND RESTRICTIONS RECORDED IN DEED BK 1950, PG 247.



**LINE TABLE**

LINE	BEARING	LENGTH	AREA
1	S 89°50'57" W	14.57	100.16
2	S 88°28'22" E	100.16	13.71
3	N 81°03'54" W	13.71	48.70
4	S 89°50'57" W	14.57	56.63
5	N 88°53'15" W	48.70	158.00
6	N 89°53'29" W	51.61	54.61
7	S 88°28'22" E	100.16	27.72
8	S 89°50'57" W	14.57	65.90

**APPROVED PLAT**  
DATE: 12/10/04  
BY: [Signature]  
FOR: PENNY CREEK ASSOCIATES, LLC.

I HEREBY STATE THAT TO THE BEST OF MY KNOWLEDGE AND BELIEF, THE SURVEY SHOWN HEREON WAS MADE IN ACCORDANCE WITH THE REQUIREMENTS OF THE CONSTITUTION AND LAWS OF THE STATE OF SOUTH CAROLINA, AND I AM NOT PROVIDING ANY GUARANTEE OF ACCURACY OR LIABILITY IN CONNECTION WITH THIS SURVEY.

[Signature]  
[Name]  
[Title]



**STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON**

**IN THE CIRCUIT COURT**

Wells Fargo Bank, N.A., as Successor by Merger to Wachovia Bank, National Association, as Successor by Merger to First Union National Bank,

**Case No. 2014-CP-10-04946**

Plaintiff,

**MASTER-IN-EQUITY'S ORDER AND  
JUDGMENT OF FORECLOSURE AND  
SALE**

vs.

**(Deficiency Not Waived;  
not HAMP eligible)**

Penny Creek Associates, L.L.C. a/k/a Penny Creek Associates, LLC; Michel F. LaPlante a/k/a Michel Laplante a/k/a Mitch Laplante; Charlotte R. Zurlo; Eugene J. Zurlo; Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No. 1 pursuant to trust agreement dated August 10, 1998; Fenwick Hall Plantation Property Owners Assn., Inc. a/k/a Fenwick Hall Plantation Property Owners' Association, Inc.; Preserve at Fenwick Hall Property Owners Association, Inc. a/k/a The Preserve at Fenwick Hall Property Owners' Association, Inc.; and The Grove At Fenwick Plantation Condominium Association, Inc.,

Defendants.

Michel Laplante,

Third-Party Plaintiff,

vs.

The Eugene J. Zurlo Living Trust, Dated December 11, 1997,

Third-Party Defendant.

**FILED**  
2017 JUN 23 PM 2:52  
JULIE J. ARMSTRONG  
CLERK OF COURT

Pursuant to Rules 53 and 71, SCRPC, the above-entitled matter was referred to the undersigned to make appropriate findings of fact and conclusions of law with authority to enter a final judgment in the cause.

Pursuant to the said reference, a hearing was held on June 19, 2017, and attended by the following persons:

- Robert C. Byrd – Attorney for the Plaintiff
- Thomas B. Pritchard – Attorney for Defendant Penny Creek Associates, LLC
- J. Rutledge Young, Jr. – Attorney for Defendants Charlotte R. Zurlo and Eugene J. Zurlo, individually and as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No 1 pursuant to trust agreement dated August 10, 1998 (severed from the foreclosure claim)
- Defendant Michel F. Laplante (severed from the foreclosure claim)
- Brian Hellman – Attorney for Intervenor 1776, LLC
- J. Christopher Lanning – Manager of Penny Creek Associates, LLC

Based on the evidence presented at the hearing, I hereby find, conclude and order as follows:

**FINDINGS OF FACT**

1. The Lis Pendens, Summons, Complaint and Notice of Intent to Refer were filed August 14, 2014.
2. Service was made upon the defendants in this action, as is shown by the proofs of service filed herein.
3. Defendant Michel F. LaPlante a/k/a Michel Laplante a/k/a Mitch Laplante (“LaPlante”) filed a Motion for Injunction on August 29, 2014.
4. Defendant LaPlante filed a Motion for Temporary Restraining Order on September 9, 2014, and the Order denying said motion was entered on September 19, 2014.



5. Defendants Fenwick Hall Plantation Property Owners Assn., Inc. a/k/a Fenwick Hall Plantation Property Owners' Association, Inc.; Preserve at Fenwick Hall Property Owners Association, Inc. a/k/a The Preserve at Fenwick Hall Property Owners' Association, Inc.; and The Grove At Fenwick Plantation Condominium Association, Inc. (collectively, the "POA Defendants") filed an Answer and Counterclaim on September 29, 2014.

6. Defendants Charlotte R. Zurlo and Eugene J. Zurlo filed a Memorandum in Opposition to defendant LaPlante's Motion for Injunction on September 29, 2014.

7. Defendants Charlotte R. Zurlo, Eugene J. Zurlo, and Charlotte R. Zurlo and Eugene J. Zurlo, as Co-Trustees of The Nicklaus Lane Realty Trust No. 1 under Declaration of Trust dated May 22, 1998, and The Zurlo Investment Trust No. 1 pursuant to trust agreement dated August 10, 1998 (collectively, the "Zurlo Defendants"), filed an Answer and Cross Claim on October 16, 2014.

8. Defendant LaPlante filed an Answer, Cross Claims, and Third-Party Claims on October 27, 2014.

9. Defendant Penny Creek Associates, L.L.C. a/k/a Penny Creek Associates, LLC ("Penny Creek") and The Grove at Fenwick Plantation, LLC filed an Answer on November 6, 2014.

10. Defendant LaPlante filed a Reply to the Zurlo Defendants' Cross-Claims on November 10, 2014.

11. Third-party defendant Paul Zurlo filed a Motion to Dismiss defendant LaPlante's Third-Party Complaint on November 25, 2014.

12. Third-party defendant Eugene J. Zurlo Living Trust filed an Answer to defendant LaPlante's Third-Party Complaint on November 26, 2014.

13. The Plaintiff's Reply to the POA Defendants' Answer and Counterclaim was filed on December 4, 2014.

14. Defendant LaPlante filed Memoranda on January 15, 2015, in opposition to the Plaintiff's Motion to Strike Jury Demand and to Refer and in opposition to third-party defendant Paul Zurlo's Motion to Dismiss.

15. The Plaintiff filed a Memorandum of Law in support of its Motion to Refer on January 16, 2015.

16. Third-party defendant Paul Zurlo filed an Answer to Third-Party Complaint on January 30, 2015.

17. The Order granting Plaintiff's Motion to Refer was entered on March 5, 2015.

18. Defendant LaPlante filed a Motion on March 23, 2015, seeking to alter or amend the Order granting the Plaintiff's Motion to Refer.

19. The Zurlo Defendants filed an Amended Answer and Cross Claim on April 15, 2015.

20. Defendant LaPlante filed a Reply to the Cross-Claims of the Zurlo Defendants on April 27, 2015.

21. The Order denying defendant LaPlante's Motion to Alter or Amend the Order granting Plaintiff's Motion to Refer was entered on June 3, 2015.

22. Defendant LaPlante filed a Notice of Appeal on July 6, 2015, appealing the Order granting Plaintiff's Motion to Refer.

23. The Stipulation dismissing the third-party complaint against Paul Zurlo with prejudice was filed on July 17, 2015.



24. The Plaintiff filed a Motion to Dismiss defendant LaPlante's appeal in the Court of Appeals on August 4, 2015.

25. The Order granting the Plaintiff's Motion to Dismiss Appeal was entered by the Court of Appeals on October 20, 2015.

26. The Plaintiff's Motion for Partial Summary Judgment and Supporting Affidavit were filed on February 2, 2016.

27. The Stipulation was filed on May 26, 2016, dismissing the claims relating to The Grove at Fenwick Plantation loan and dismissing defendant The Grove at Fenwick Plantation, LLC as a party defendant.

28. The case originally asserted four (4) causes of action, two of which related to a loan by the Plaintiff to The Grove at Fenwick Plantation, LLC (the "Fenwick Loan"). During the course of the action, the Fenwick Loan was paid off and the parties stipulated to the dismissal of the two claims relating to that loan. Only the claims relating to loan to defendant Penny Creek remain.

29. The Consent Order Striking Case from Trial Docket Pursuant to Rule 40(j), SCRPC was filed on September 30, 2016.

30. The Notice to Restore Case to Active Trial Docket was filed on April 12, 2017.

31. The Order Restoring Case to Active Trial Docket was entered on April 12, 2017.

32. The Stipulation to Entry of Order and Judgment of Foreclosure and Sale was filed on April 13, 2017; and

33. The Plaintiff's Motion to Sever and for Entry of Stipulated Final Order and Judgment of Foreclosure and Sale was filed on May 25, 2017, which this Court granted on June 19, 2017.



34. The Motion to Intervene was filed by 1776, LLC on June 19, 2017.
35. This Court granted the Plaintiff's Motion to Sever on June 19, 2007.
36. The Court also grants 1776, LLC's Motion to Intervene, as set forth more fully hereinafter.
37. All parties were notified of the date, time and place of the hearing in this matter.

**The \$5,300,000.00 Loan**

38. Defendant Penny Creek, for consideration, made, executed and delivered that certain Promissory Note dated August 7, 2000 ("Original Note 1"), payable to the order of First Union National Bank ("First Union"), in the original principal sum of \$5,300,000.00, together with interest as provided therein.

39. To secure payment of the indebtedness evidenced by Original Note 1, in accordance with the terms and conditions thereof, defendant Penny Creek, for consideration, made, executed and delivered to First Union a certain Mortgage and Absolute Assignment of Leases dated August 7, 2000 ("Mortgage 1"), covering certain real property located in Charleston County, South Carolina and described more fully therein. Mortgage 1 was recorded in the RMC Office for Charleston County on August 8, 2000, in Book P-352 at Page 613. Other terms and conditions are stated in the said Mortgage 1, which is of record herein.

40. Wells Fargo Bank, N.A. is the successor by merger to Wachovia Bank, National Association who is the successor by merger to First Union and is the sole owner and holder of Original Note 1, Mortgage 1, and all other related loan documents.

41. Certain terms of the Original Note 1 were amended, modified and/or renewed by, among other things, that certain renewal Promissory Note dated April 28, 2008, in the original



principal sum of \$3,142,781.92 ("Renewal Note 1"). (Original Note 1 and Renewal Note 1 are hereinafter referred to, collectively, as "Note 1.")

**The \$2,200,000.00 Loan**

42. Defendant Penny Creek, for consideration, made, executed and delivered that certain Promissory Note dated April 5, 2006 ("Original Note 2"), payable to the order of the Plaintiff, then known as Wachovia Bank, National Association, in the original principal sum of \$2,200,000.00, together with interest as provided therein. Other terms and conditions are stated in the said Original Note 2, which is of record herein.

43. To secure payment of the indebtedness evidenced by Original Note 2, in accordance with the terms and conditions thereof, defendant Penny Creek, for consideration, made, executed and delivered to the Plaintiff a certain Mortgage and Assignment of Rents dated April 5, 2006 ("Mortgage 2"), covering certain real property located in Charleston County, South Carolina and described more fully therein. Mortgage 2 was recorded in the RMC Office for Charleston County on April 7, 2006, in Book G-579 at Page 249. Other terms and conditions are stated in the said Mortgage 2, which is of record herein. (Mortgage 1 and Mortgage 2 are hereinafter referred to, collectively, as the "Mortgages.")

44. Certain terms of Original Note 2 were thereafter amended, modified and/or renewed by: (i) that certain renewal Promissory Note dated July 5, 2007, in the original principal sum of \$4,450,000.00; and (ii) that certain Modification Number One to Promissory Note dated April 28, 2008 (collectively, "Renewal Note 2"). Other terms and conditions are stated in the said Renewal Note 2, which is of record herein. (Original Note 2 and Renewal Note 2 are hereinafter referred to, collectively, as "Note 2.")



45. Thereafter, Mortgage 2 was amended and/or modified by that certain Modification of Mortgage and Notice of Future Advance dated July 5, 2007, and recorded in the RMC Office for Charleston County on July 27, 2007, in Book V-633 at Page 342. Other terms and conditions are stated in the said Modification of Mortgage and Notice of Future Advance, which is of record herein.

**2009 Modification and Consolidation**

46. Thereafter, certain terms of Note 1 and Note 2 were amended, modified and/or renewed by, among other things, that certain renewal Promissory Note dated July 28, 2009, in the original principal sum of \$7,592,781.92, which, among other things, consolidated Note 1 and Note 2 (collectively, the "Note"). Other terms and conditions are stated in the said Note, which is of record herein.

47. In order to induce the Plaintiff to modify or extend the aforesaid loan as evidenced by the Note, and to further secure the same, defendants LaPlante and the Zurlo Defendants, for consideration, executed separate, written Unconditional Guaranties dated July 28, 2009 (collectively, the "Guaranties"), whereby the said defendants absolutely, unconditionally and irrevocably guaranteed to the Plaintiff the full and prompt payment of the obligations of defendant Penny Creek to the Plaintiff under the Note, as consolidated. Other terms and conditions are stated in the said Guaranties, which are of record herein.

**2012 and 2013 Modifications**

48. Thereafter, certain terms of the Note were amended, modified and/or renewed by: (i) that certain First Modification to Promissory Note dated August 14, 2012; and (ii) that certain Second Modification to Promissory Note dated May 23, 2013 (collectively, the "Note



Modifications”). Other terms and conditions are stated in the said Note Modifications, which are of record herein.

49. In connection with the aforesaid modifications, Mortgage 1 and Mortgage 2 were amended and/or modified by that certain Modification of Mortgages dated October 1, 2012 (the “Mortgage Modification”), and recorded in the RMC Office for Charleston County on October 15, 2012, in Book 0284 at Page 614. Other terms and conditions are stated in the said Mortgage Modification, which is of record herein.

50. Under the express terms of the aforesaid Mortgage Modification, Mortgage 1 and Mortgage 2 (collectively, the “Mortgages”) secure the Note in its entirety.

51. Certain portions of the subject mortgaged properties were thereafter released from the lien of the Mortgages, as amended and/or modified, which remains in full force and effect as to the remaining property described in the said Mortgages (the “Property”).

**Loan Defaults, Forbearance Agreement and Stipulation to Entry of Order and Judgment of Foreclosure and Sale**

52. The obligations under the terms and conditions of the Note are in default for, among other reasons, failing to repay the indebtedness in accordance with the terms thereof, including without limitation failing to repay the loan in full at maturity on April 18, 2014. The defendants have been duly notified, in writing, of the outstanding defaults.

53. In May 2016, the Plaintiff and defendants Penny Creek, LaPlante and the Zurlo Defendants entered into that certain Forbearance Agreement dated as of May 4, 2016 (the “Forbearance Agreement”), wherein the said defendants agreed and acknowledged, among other things, that the subject loan is in default and further agreed to execute the Stipulation to Entry of Order and Judgment of Foreclosure and Sale attached as Exhibit A to the Forbearance Agreement. Other terms and condition are stated in the said Forbearance Agreement, which is of record herein.

54. Pursuant to and in reliance upon the Forbearance Agreement and Stipulation, the case was removed from the active calendar pursuant to Rule 40(j), with leave to restore, by Consent Order entered on September 30, 2016.

55. The forbearance period set forth in the Forbearance Agreement expired on March 31, 2017, and the case was restored to active calendar on April 12, 2017.

56. The Plaintiff is entitled to proceed with foreclosure of its Mortgages, as amended and/or modified.

57. The Plaintiff's Mortgages constitute valid first priority liens on the Property.

58. Subsequent to the commencement of this action, the Eugene J. Zurlo Living Trust Dated December 11, 1997 (the "1997 Zurlo Trust") recorded a Second Mortgage on the subject Property in the Office of the RMC for Charleston County on May 25, 2016, in Book 0556 at Page 242 (the "Second Mortgage").

59. The Second Mortgage arose out of that certain Settlement Agreement between the 1997 Zurlo Trust and defendant Penny Creek Associates, LLC, the terms of which Settlement Agreement were entered on the record before The Honorable Markley Dennis, Jr. on February 29, 2016, in Case No. 2013-CP-10-07280. A copy of the transcript from the February 29, 2016 hearing before Judge Dennis in Case No. 2013-CP-10-07280, together with a copy of the Second Mortgage and the promissory note it secures, were presented to this Court and have been made a part of the record herein.

60. In accordance with the terms of the Settlement Agreement, the 1997 Zurlo Trust and its successor and assigns are only entitled to recover the principal sum of \$3,250,000.00, without any interest.

61. The Second Mortgage was assigned from the 1997 Zurlo Trust to 1776, LLC



pursuant to that certain Assignment of Note and Mortgage recorded in the Office of the RMC for Charleston County on April 7, 2017, in Book 629 at Page 45, a copy of which was presented to this Court and has been made a part of the record herein.

62. The parties to the foreclosure hereby consent to the joinder of 1776, LLC as a party defendant on the following express terms and conditions, which are hereby adopted and ordered by this Court:

a. That 1776, LLC expressly acknowledges and stipulates that the lien of its Second Mortgage is junior and subordinate to the lien of the Plaintiff's Mortgages;

b. That 1776, LLC further acknowledges and stipulates that it is bound by the terms of the Stipulation to Entry of Order and Judgment of Foreclosure and Sale filed on April 13, 2017; and

c. That all parties to the foreclosure, including 1776, LLC, consent to the immediate disposition of the foreclosure proceeding, expressly waiving the time limitations contained in Rule 40(b), SCRPC.

63. In the Plaintiff's loan documents, defendant Penny Creek agreed to pay all reasonable costs and expenses of collection including, but not limited to, reasonable attorneys' fees. I find and conclude that the sum of Thirty-Two Thousand Three Hundred Five and No/100 Dollars (\$32,305.00) is a reasonable amount to award as Plaintiff's unreimbursed attorneys' fees for services performed and anticipated to be performed until final adjudication of the within action, and that the sum of Two Thousand Six Hundred Sixty-Eight and 50/100 Dollars (\$2,668.50) is a reasonable amount to award as legal costs. In reaching this conclusion, I have carefully considered the nature, extent and difficulty of the legal services provided by Plaintiff's counsel in this commercial foreclosure action, the time and labor necessarily devoted by Plaintiff's

counsel to the case, the professional standing of Plaintiff's counsel and his firm, the fees customarily charged in Charleston County for similar legal services, and the beneficial results obtained by Plaintiff's counsel in this matter.

64. The amount due and owing on the loan evidenced by the Note, as of June 19, 2017, including attorneys' fees and costs of collection, is as follows:

(1)	Principal due	\$5,775,289.35
(2)	Interest on principal only 02/28/17 – 03/29/17 @ 5.75% (30 days @ \$922.44205 per day)	\$ 27,673.26*
(3)	Interest on principal only 03/30/17 – 03/31/17 @ 6.00% (2 days @ \$962.54823 per day)	\$ 1,925.09*
(4)	Interest on principal only 04/01/17 – 04/29/17 @ 8.00% (29 days @ \$1,283.39763 per day)	\$ 37,218.53**
(5)	Interest on principal only 04/30/17 – 05/29/17 @ 8.00% (30 days @ \$1,283.39763 per day)	\$ 38,501.93**
(6)	Interest on principal only 05/30/17 – 06/19/17 @ 8.00% (21 days @ \$1,283.39763 per day)	\$ 26,951.35**
(7)	Legal Fees	\$ 32,305.00
(8)	Legal Costs	<u>\$ 2,668.50</u>
	<b>Total Debt Secured by Mortgages:</b>	<b>\$5,942,533.01</b>

\* Interest accruing at forbearance period rate of Prime plus 2.00%. It is a variable rate that has been and is subject to change.

\*\* Interest accruing at default rate of Prime + 1% + 3.00%. It is a variable rate that has been and is subject to change.

Interest for the period from June 19, 2017, through the date of this judgment at the rate of 8.00% per annum shall be added to the above stated Total Debt Secured by Mortgages to comprise the amount of the judgment debt entered herein, and interest after the date of judgment at the same rate shall be added to such judgment debt to comprise the amount of the debt through the date to which such interest is computed.

65. Inasmuch as the Plaintiff has not waived deficiency, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

**CONCLUSIONS OF LAW**

1. The Plaintiff should have judgment of foreclosure of its Mortgages, as amended and/or modified.

2. The subject Property should be ordered sold at public auction after due advertisement.

3. The Plaintiff has not waived its right to seek a personal judgment for any deficiency remaining after the sale, but expressly reserves the right to waive deficiency, in writing, prior to the sale.

**IT IS THEREFORE ORDERED, ADJUDGED AND DECREED:**

1. That there is due to the Plaintiff on the loan secured by the Mortgages, as amended and/or modified, set forth in the Complaint the sum of **Five Million Nine Hundred Forty-Two Thousand Five Hundred Thirty-Three and 01/100 Dollars (\$5,942,533.01)** representing the "Total Debt Secured By Mortgages" due the Plaintiff as set out in paragraph 64 hereinabove, together with interest after the aforesaid date at the rate of 8.00% per annum and thereafter, in the event of a deficiency judgment, at the legal rate of interest for judgments.

2. That the party or parties liable for the aforesaid debt, shall, on or before the date of sale of the Property hereinafter described, pay to the Plaintiff or its attorneys the amount of the debt owed as aforesaid, together with the costs and disbursements of this action.

3. That on default of payment at or before the time herein indicated, the Property be sold by the undersigned Master-in-Equity or his designee, at public auction, at the Charleston County Courthouse, in the City of Charleston, County and State aforesaid; on some convenient Sales Day hereafter as set by the Court, on the following terms, that is to say:



a. FOR CASH: The Master-in-Equity will require a deposit of five (5%) percent on the amount of the bid, in cash or its equivalence, same to be applied on the purchase price only upon compliance with the bid, but in case of non-compliance within thirty (30) days same to be forfeited and applied to the costs and Plaintiff's debt.

b. The sale shall be subject to taxes, assessments, existing easements, and easements and restrictions of record.

c. Purchaser to pay for deed stamps and cost of recording the deed.

d. That if the Plaintiff is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses and the indebtedness of the Plaintiff in full, the Plaintiff may pay to the Master-in-Equity only the amount of the costs and expenses, crediting the balance of the bid on its indebtedness.

e. That if defendant 1776, LLC is the successful bidder at said sale for a sum not exceeding the amount of costs, expenses, the indebtedness of the Plaintiff in full, and the indebtedness owed on the Second Mortgage, the Plaintiff may pay to the Master-in-Equity only the amount of the costs, expenses, and the full amount of the Plaintiff's indebtedness, crediting the balance of the bid against its own indebtedness.

4. Inasmuch as the Plaintiff has not waived deficiency, the bidding will remain open for thirty (30) days after the sale, unless waived by the Plaintiff, in writing, prior to the sale.

5. That the Master-in-Equity will, by advertisement according to law, give notice of the time and place of such sale, and the terms thereof; and will execute to the purchaser or purchasers a deed to the Property sold. The Plaintiff or any other party to this action may become a purchaser at such sale, and if, upon such sale being made, the purchaser or purchasers should fail to comply with the terms thereof within thirty (30) days after date of sale, then the Master-in-

Equity may advertise the said Property for sale on the next or some other subsequent Sales Day, as set by the Court, at the risk of the former highest bidder, and so from time to time thereafter until a full compliance shall be secured.

6. That the Master-in-Equity shall apply the proceeds of the sale of the Property as follows:

FIRST: To payment of the amount of costs and expenses of this action;

NEXT: To the payment to Plaintiff or its attorney of the amount of debt owed to Plaintiff and interest, so much thereof as the purchase money will pay on the same; and

NEXT: Any surplus should be held pending further Order of this Court.

7. That the defendants named herein and all persons whosoever claiming under the defendants be forever barred and foreclosed of all right, title, interest and equity of redemption in the subject Property, or any part thereof.

8. That the deed(s) of conveyance made pursuant to said sale shall contain the names of only the Plaintiff, the defendant who was the titleholder of the Property at the time of the filing of the Lis Pendens, and the grantee; and the RMC is authorized to omit from the indices pertaining to such conveyance the names of all parties not contained in said deeds.

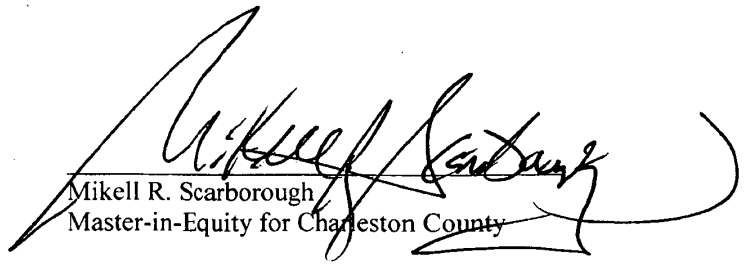
9. A description of the Property encumbered by the Mortgages and herein ordered to be sold is attached hereto as Exhibit "A" and Exhibit "A-1".

10. That the undersigned Master-in-Equity will retain jurisdiction to do all necessary acts incident to this foreclosure and to hear any post-judgment matters, including, but not limited to, the issuance of a Writ of Assistance.



AND IT IS SO ORDERED.

June 21, 2017  
Charleston, South Carolina



Mikell R. Scarborough  
Master-in-Equity for Charleston County

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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Appeal from Charleston County  
Court of Common Pleas, Ninth Judicial Circuit  
Hon. Bentley D. Price, Circuit Court Judge

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2020-CP-10-00209

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Eugene J. Zurlo, Individually and as Co-Trustee of the Eugene J. Zurlo Living Trust Dated December 11, 1997; 1776, LLC; Beach Fenwick, LLC; The Beach Company; Seamon, Whiteside & Associates, Inc.; Penny Creek Associates, LLC; John Doe and Mary Roe;.....Respondents,

v.

Maybank 2754, LLC,.....Appellant.

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**NOTICE OF APPEAL**

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Maybank 2754, LLC, appeals the Form 4 Order, signed by the Honorable Bentley D. Price on October 5, 2020 and filed on October 7, 2020, in the above titled matter. The Appellant received written notice of the entry of this Form 4 Order in this matter on October 7, 2020. A copy of this Form 4 Order is attached hereto as required by Rule 203(d)(1)(B)(ii), SCACR.

Maybank 2754, LLC, also appeals the Form 4 Order, signed by the Honorable Bentley D. Price on October 8, 2020 and filed on October 8, 2020, in the above titled matter. The Appellant received written notice of the entry of this Form 4 Order in this matter on October 8, 2020. A copy of this Form 4 Order is attached hereto as required by Rule 203(d)(1)(B)(ii), SCACR.

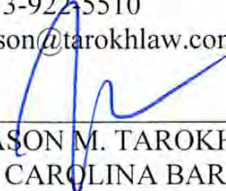
Maybank 2754, LLC, also appeals the Order Granting All Defendants Summary Judgment, signed by the Honorable Bentley D. Price on October 9, 2020 and filed on October 12, 2020, in the above titled matter. The Appellant received written notice of the entry of the Order Granting All Defendants Summary Judgment in this matter on October 12, 2020. A copy of the Order Granting All Defendants' Summary Judgment is attached hereto as required by Rule 203(d)(1)(B)(ii), SCACR.

Maybank 2754, LLC, also appeals the Form 4 Order, signed by the Honorable Bentley D.

Price on November 5, 2020 and filed on November 6, 2020, in the above titled matter. The Appellant received written notice of the entry of this Form 4 Order in this matter on November 6, 2020. A copy of this Form 4 Order is attached hereto as required by Rule 203(d)(1)(B)(ii), SCACR.

Respectfully submitted,

TAROKH LAW, PLLC  
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jason@tarokhlaw.com

  
\_\_\_\_\_  
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S. CAROLINA BAR # 72837  
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November 9, 2020

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**Attorney for Penny Creek Associates, LLC**

FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP1000209

Maybank 2754 Llc  
PLAINTIFF(S)

Eugene J Zurlo et al  
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), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  Rule 43(k), SCRPC (Settled);  
 Other
- ACTION STRICKEN** (*CHECK REASON*):  Rule 40(j), SCRPC;  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 Eugene Zurlo's Motion for Summary Judgment is GRANTED. Defendant The Beach Company's Motion for Summary Judgment is GRANTED. Plaintiff's Motion to Amend Complaint is DENIED. Defendant Seamon Whiteside and Associates Inc.'s Motion to Supplement/Motion to Dismiss is GRANTED.

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 10/05/2020 .

Mary Roe  
John Doe

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.

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ELECTRONICALLY FILED - 2020 Nov 09 12:17 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209  
ELECTRONICALLY FILED - 2020 Oct 07 11:40 AM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209



Charleston Common Pleas

**Case Caption:** Maybank 2754 Llc VS Eugene J Zurlo , defendant, et al  
**Case Number:** 2020CP1000209  
**Type:** Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-10-05 10:05:35 page 3 of 3

ELECTRONICALLY FILED - 2020 Nov 09 12:17 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209  
ELECTRONICALLY FILED - 2020 Oct 07 11:40 AM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209



**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.

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ELECTRONICALLY FILED - 2020 Nov 09 12:17 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209  
ELECTRONICALLY FILED - 2020 Oct 08 12:22 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209



Charleston Common Pleas

**Case Caption:** Maybank 2754 Llc VS Eugene J Zurlo , defendant, et al  
**Case Number:** 2020CP1000209  
**Type:** Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-10-08 11:50:57 page 3 of 3

ELECTRONICALLY FILED - 2020 Nov 09 12:17 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209  
ELECTRONICALLY FILED - 2020 Oct 08 12:22 PM - CHARLESTON - COMMON PLEAS - CASE#2020CP1000209

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
NINTH JUDICIAL CIRCUIT  
2020-CP-10-00209

MAYBANK 2754, LLC,

Plaintiff,

v.

EUGENE J. ZURLO, Individually and as  
Co-Trustee of the Eugene J. Zurlo Living  
Trust Dated December 11, 1997; 1776, LLC;  
BEACH FENWICK, LLC; THE BEACH  
COMPANY; SEAMON, WHITESIDE &  
ASSOCIATES, INC.; PENNY CREEK  
ASSOCIATES, LLC; JOHN DOE AND  
MARY ROE,

Defendants.

ORDER GRANTING ALL DEFENDANTS  
SUMMARY JUDGMENT

This case was filed by the Plaintiff on January 13, 2020. The five Defendants all filed Responsive Pleadings in a timely fashion to include Motions to Dismiss, Answers and Motions for Summary Judgment

On June 30, 2020, I referred the entire case to the Master in Equity, who by Order Dated 17, 2020, referred the entire case back to me.

These pending dispositive Motions were heard by me at a Hearing on September 24, 2020.

- Beach Motion to Dismiss filed on February 17, 2020;
- Seamon Whiteside Motion to Dismiss filed on February 20, 2020;
- Zurlo Parties Motion for Summary Judgment filed on August 14, 2020;
- Beach Motion for Summary Judgment filed on August 19, 2020;
- Seamon Whiteside Supplemental Motion to Dismiss/Motion for Summary Judgment filed on August 26, 2020; and

- 1776 Motion for Summary Judgment filed on September 3, 2020.

Plaintiff filed a Motion to Amend its Original Complaint, which was filed after all the pending Motions, except for 1776’s Motion for Summary Judgment, which merely incorporated by reference the legal arguments made by all the other Defendants in their filings. Seamon Whiteside also filed its Motion for Summary Judgment after Plaintiff filed its Motion to Amend its Complaint.

The Zurlo Parties requested that the Court hear the Motions to Dismiss and for Summary Judgment based on the original Complaint filed on January 13, 2020. That makes perfect sense to hear the Motions in the order they were filed, and if the Court decides these should be denied, the Court may allow the Amendment to the original Complaint and refile of Motions to Dismiss and Motions for Summary Judgment.

The Zurlo Parties also requested that the Court rule on the pending Motions in order of filing before the Motion to Amend, which ruling will not affect the currently pending appeal.

The Court takes judicial notice of the fact that the most significant addition to the proposed Amended Complaint is the addition of the City of Charleston as a named Defendant, but no relief is sought from the City. The Plaintiff just wants the City to be bound by whatever final judgment is rendered in this case.

**1. FINDINGS OF FACT:**

The factual history involving the Plaintiff’s claim to a future easement is not in dispute. In summary, based on the Plaintiff’s Complaint, the Responsive Pleadings of all Defendants, and the Exhibits attached to the various Motions, in 1999 Mitch Laplante (“Laplante”) and the Eugene J. Zurlo Living Trust Dated December 11, 1997 (“Zurlo Trust”), created Penny Creek Associates, LLC (“PCA”) to purchase and develop approximately 60 acres of property along Maybank

Highway on Johns Island, South Carolina. Laplante was a 50% voting member, he and his family were 50% members of PCA, and the Zurlo Trust was the other 50% member.

In December of 2013, Zurlo initiated an action, individually and derivatively, on behalf of PCA against Laplante and others seeking several remedies to include an accounting, appointment of a new manager, and judicial dissolution of PCA. That matter ultimately was resolved, with the terms of the settlement placed on the record before Judge Markley Dennis on February 29, 2016. PCA was to wind up its business, sell its real estate, and ultimately terminate its LLC status.

In 2014, Wells Fargo commenced a foreclosure action against PCA and its members based on two mortgages that it had placed on the property in 2000 and 2006. (See, Case No.: 2014-CP-10-04946, filed with the Charleston County Clerk of Court and Order of Foreclosure and Judgment filed in that case on June 23,2017.) Based upon various allegations and matters set forth in that action, which was referred to the Master-in-Equity for disposition, the Master-in-Equity issued its Order of Judgment of Foreclosure and Sale which was filed June 23,2017. The question of the 30-foot future easement never was raised in the PCA litigation nor the Foreclosure litigation.

The alleged future springing easement never was recorded, nor was it ever subordinated to the two Wells Fargo mortgages, which were recorded well before the date of the Resolution Plaintiff relies on to establish its easement in October 2013.

The Foreclosure Order notes that “all persons whosoever claiming under the defendants be forever barred and foreclosed of all right, title, interest, and equity of redemption in the Subject Property” and specifically retained jurisdiction “to do all necessary acts incident to this foreclosure and to hear any post-judgment matters.”

Pursuant to this Order, certain properties of PCA were sold in August 2017 to 1776, LLC. In December of 2019, Beach Fenwick, LLC purchased a certain 22-acre tract of the referenced

property from 1776, LLC. Laplante, individually was a named party to the foreclosure action, and at the relevant time, was the managing partner of PCA. Laplante's knowledge and conduct is, therefore, imputed to Maybank. See *In re Infinity Bus. Grp., Inc.*, 497 B.R. 794, 813 (Bankr. D.S.C. 2013); S.C. Code § 33-44-120.

Maybank 2754 is a limited liability company organized pursuant to the laws of the State of South Carolina. Laplante is its managing member. Maybank relies upon a document entitled Resolution of the Sole Shareholder of Penny Creek Associates, LLC, dated October 7, 2013, for its claim of a future easement across the former PCA property purchased by Beach Fenwick, LLC from 1776, LLC ("Subject Property"). The referenced resolution provides, inter alia:

...the Company [PCA] has agreed to grant transfer, sell and convey to Purchasers [Laplante, John H. Laplante, Peter F. Laplante, Marianne Laplante-Scarlata], their successors and assigns, an access easement for pedestrian and vehicular ingress, egress and access to, from and over that portion of the lands of Seller [PCA] known as "Residual Tract B-2-2"...the location and condition of which shall be mutually agreed upon at the completion of that certain roadway known as Pitch Fork Road ("Pitch Fork Road"). Upon the completion of Pitch Fork Road, the Parties hereto shall execute and record an Easement Agreement to memorialize the 30' Private R/W. ("Future Easement")

Plaintiff avers in its Complaint that Pitch Fork Road has not been completed and admits the "Future Easement" never was recorded.

It is the claim of that future easement, and matters attendant thereto, that give rise to this action.

## **2. SUMMARY JUDGMENT STANDARD**

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 summary judgment as

a matter of law.”<sup>1</sup> With respect to an issue upon which the non-moving party bears the burden of proof, the moving party may discharge his initial responsibility by pointing out to the Court the absence of evidence to support the non-moving party’s case.<sup>2</sup> After the moving party has met his initial burden, Rule 56(e) requires the opposing party to “do more than simply show that there is some metaphysical doubt as to the material facts.”<sup>3</sup> In response to a properly supported motion for summary judgment, the opposing party “must come forward with specific facts showing there is a genuine issue of material fact.”<sup>4</sup> In 2015, a unanimous South Carolina Supreme Court explained (in an opinion reversing the appellate court’s reversal of summary judgment and reinstating the trial court’s summary judgment ruling):

“In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party.” *Quail Hill, L.L.C. v. Cnty. of Richland*, 387 S.C. 223, 235, 692 S.E.2d 499, 505 (2010) (emphasis added) (quoting *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006)). Even though courts are required to view the facts in the light most favorable to the nonmoving party, to survive a motion for summary judgment, “it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine.” *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) (citing *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct.App.2006)).<sup>5</sup>

Courts are reluctant to dismiss cases at the Summary Judgment stage, even if there is no legal or factual basis for the case to proceed. However, reviewing just the Plaintiff’s Complaint and Responses to the Zurlo Parties’ Request to Admit in this case, there is no genuine issue as to the very material fact that the Wells Fargo foreclosure action voided any recorded or unrecorded

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<sup>1</sup> Rule 56, *SCRCP*.

<sup>2</sup> *Baughman v. American Tel & Tel. Co.*, 306 S.C. 101, 115,410 S.E.2d 537, 545 (1991).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*; see also Rule 56(e), *SCRCP*.

<sup>5</sup> *Grimsley v. S.C. Law Enft Div.*, 415 S.C. 33, 40, 780 S.E.2d 897, 900 (2015).

easement not subordinated to the Wells Fargo mortgages, and Plaintiff admits there is no written, recorded easement so all the parties are entitled to summary judgment as a matter of law.

With no facts to support a claim, and no law on Plaintiff's side, then the court should dismiss the case to avoid prolonged futile time and expenses to all the parties. See *D.R. Horton, Inc. v. Builders FirstSource-Se. Grp., LLC*, 422 S.C. 144, 150, 810 S.E.2d 41, 45 (Ct. App. 2018), *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013) (citing *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct.App.2006)).

“Although summary judgment is a drastic remedy which should be cautiously invoked, where a verdict is not reasonably possible under the facts presented, summary judgment is proper.” *Evans v. Stewart*, 370 S.C. 522, 526, 636 S.E.2d 632, 635 (Ct. App. 2006)

**3. THE COURT HAS THE JURISDICTION AND DISCRETION TO HEAR THE DISPOSITIVE MOTIONS NOW**

The Court has the discretion, jurisdiction and ability to address all dispositive Motions filed to date before addressing the Plaintiff's Motion to Amend its Complaint for the following reasons:

- A. The Appeal does not stay matters not affected by the appeal and the lower Court retains jurisdiction over matters not affected by the appeal. SCACR 225 and SCACR 241 (a).

See also Judge Scarborough's bench rulings: Transcript of 8/10 Hearing, Pages13-14. "Filing an Appeal does not stay the Court's jurisdiction to hear Motions to Dismiss and Motions for Summary Judgment." TRANSCRIPT attached as Exhibit A to Zurlo parties supplemental Memorandum of Law

- B. All parties except PCA have filed Motions to Dismiss or Motions for Summary Judgment. The issue of the existence of an easement or not is legal -also possibly a jury- matter. The court agrees with Judge Scarborough who says the threshold

issue of whether there is legally enough evidence for an easement to exist is a matter of law threshold question. See: Transcript of 8/10 Hearing, Page 14.

- C. The court also takes judicial notice that the Plaintiff alleges that his former lawyer and law firm failed to legally perfect the easement by putting it in written form and failing to record the easement in the ROD office for Charleston County so as to provide actual and or constructive notice to the public and these Defendants of the alleged 30 foot private right of way easement. See Complaint: Maybank 2754, LLC v Buist, Byars & Taylor, LLC; Custis M. Byars (2020-CP-10-02180) and Affidavit of Lisa Brown averring the agreement to create an easement should have been recorded in October 2013 "...to put all future buyers and lenders on notice that Tract -B-2-2 is subject to an easement." See: Complaint and Affidavit attached as EXHIBIT B to the Zurlo parties Supplemental Memo.
- D. The threshold legal issue is whether there is a legally enforceable easement. This legal issue will have to be heard by the Court before trial - so waiting for the Court of Appeals to decide to send the case back to Circuit Court for a jury trial only will prolong this question.

#### 4. CONCLUSIONS OF LAW

The Court finds as a matter of law there is no legal right to an easement based on the pleadings, the Motions for Summary Judgment, the affidavits submitted and the able arguments of counsel at the September 24, 2020 hearing, for the following reason:

- A. Assuming for the sake of argument the October 2013 Resolution created some form of an easement, it never was subordinated to the Wells Fargo Mortgage and was therefore foreclosed upon in 2017, rendering the easement void and of no effect.

See S.C. Code Ann. § 30-7-20 (“The recordation of any contract in the nature of a subordination, waiver or extension of any lien on real property, created by law or by agreement of the parties, shall be upon the record of the recorded mortgage or other written instrument...”). Even if there was an easement, it did not survive the recent foreclosure of first-in-time, prior-recorded, bank-owned mortgages arising in 2000 and 2006 that never were subordinated by the bank to the later-in-time, unrecorded purported easement, alleged by the Plaintiff to have arisen in 2013 by way of a Resolution referencing the grant of a future easement. See S.C. Code Ann. § 30-7-20 (“The recordation of any contract in the nature of a subordination, waiver or extension of any lien on real property, created by law or by agreement of the parties, shall be upon the record of the recorded mortgage or other written instrument...”) (emphasis added).

These facts are all matters of record over which there can be no factual or legal dispute. See Complaint at ¶14; Wells Fargo v. Penny Creek Associates, et al., Civil Action No. 2014-CP-10-4946 (Charleston County, Filed May 26, 2014); Mortgage recorded in the Register of Deeds in Charleston County on August 8, 2000, in Book P-532, at Page 613; Mortgage recorded in the Register of Deeds in Charleston County on April 7, 2006, in Book G-579, at Page 249.

Further, the Plaintiff already had judicially admitted that its alleged easement was extinguished in the bank’s foreclosure action.

While A above is reason enough to grant Summary Judgment to all Defendants, ending the case, the Court notes but does not rely on the following Additional Sustaining Grounds for granting Summary Judgment to all defendants.

- B. The October 7, 2013, Resolution on which Plaintiff relies (The Resolution) never was recorded, nor was there any recording of the intention to place a future easement on the property PCA owned which is now owned by Beach Fenwick, LLC. This prevented actual or constructive Notice of the future easement's alleged existence.

If the instrument under which rights are claimed is not recorded within a specific time, a subsequent creditor, or purchaser for value without actual notice, will not be affected. *Epps v. McCallum Realty Co.* 139 S.C. 481, 138 S.E. 297, 302 (1927);

- C. The Resolution fails to meet the essential elements required in order to create a property right.

The description of the alleged future springing easement lacks any identifiable location or condition, the duration of the easement or its scope. "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist. of Fountain Inn*, 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001) (citing 28A C.J.S. Easements §57, at 235 (1996));

- D. Assuming for the sake of argument the Resolution created an easement, the easement is one in gross and therefore is not transferrable to the Plaintiff.

An easement is either appurtenant or in gross. *Sandy Island Corp. v. Ragsdale*, 246 S.C. 414, 143 S.E.2d 803 (1965). An appurtenant easement inheres in the land,

concerns the premises, has one terminus on the land of the party claiming it, *and* is essentially necessary to the enjoyment thereof. *Tupper v. Dorchester County*, 326 S.C. 318, 487 S.E.2d 187 (1997); *Windham v. Riddle*, 381 S.C. 192, 672 S.E.2d 578, (2009) (citations omitted) (emphasis added). It also passes with the dominant estate upon conveyance. *Id.* (citing *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975)). Unless an easement has all the elements necessary to establish an appurtenant easement, it will be characterized as an easement in gross. *Id.* (citing 12 S.C. Juris. *Easements* § 3(c)). “An easement in gross is a mere personal privilege to use the land of another; the privilege is incapable of transfer.” *Id.* 381 S.C. at 201-02, 672 S.E.2d at 583. Where language in a plat reflecting an easement is capable of more than one construction, that construction which least restricts the property will be adopted. *Hamilton v. CCM, Inc.*, 274 S.C. 152, 263 S.E.2d 378 (1980);

- E. At best, the Resolution creates “an agreement to agree”, which does not amount to a contract in South Carolina.

An “agreement to agree” does not amount to a contract under South Carolina law. *BCD LLC v. BMW Mfg. Co., LLC*, 360 F. App'x 428, 435 (4th Cir. 2010) (citing *Trident Constr. Co., Inc. v. Austin Co.*, 272 F.Supp.2d 566, 575 (D.S.C.2003)). “The parties merely agreed to enter into negotiations to reach an agreement, but subsequently failed to reach an actual agreement on essential terms pertaining to land allocations, divisions of parcels, and restrictive covenants for the property.” *Id.* This is precisely what happened here, and Plaintiff admits as much. See June 25, 2020 Tr., 47:20 – 48:1 (Exhibit 1). The unrecorded Resolution, or more

precisely, the unrecorded contract referenced therein but not provided until after the filing of this action, purportedly is a contractual right for the Seller (PCA) and Buyer (Laplante Family) to agree in the future to create an easement. In South Carolina, this agreement to agree does not amount to a contract and cannot detrimentally impact future purchases of the property because the parties “subsequently failed to reach an actual agreement on essential terms pertaining to land allocations ... and restrictive covenants for the property.” *BCD LLC*, at 435; *see also Burbach Broadcasting Co. of Delaware v. Elkins Radio Corp.*, 278 F.3d 401, 407 (4th Cir.2002) ;

F. The Court takes judicial Notice that in a separate legal malpractice action that the Plaintiff filed against its own former attorney, the Plaintiff alleged:

21. BBT and Byars were careless and negligent failing to record the Resolution, or failing to prepare and record a document, in the office of the Register of Deeds (formerly, Register of Mesne Conveyance) of Charleston County, South Carolina so as to provide constructive knowledge to the public of the existence of the thirty (30) foot private right of way easement.

22. As a direct and proximate result of the Defendants’ breach of the above-described duty owed to Maybank, Maybank has suffered, and continues to suffer, damage.

23. Additionally, Maybank has suffered special damages in that its adjacent lot has lost the value of a (30) foot private right of way easement across the Property.

Maybank 2754, LLC v. Buist, Byars & Taylor, LLC et al., Civil Action No. 2020-CP 1001811 (Charleston County, Filed April 13, 2020).

The affidavit that the Plaintiff filed in support of its legal malpractice claim stated: “...the agreement should have been recorded at the time of closing to put all future buyers and lenders on notice that [the property] is subject to an easement.” Id. (Affidavit of Lisa Brown, Filed May 14, 2020).

The Plaintiff cannot take a contrary position in this litigation, rendering its lengthy affidavit and numerous exhibits irrelevant. See *Elrod v. All*, 243 S.C. 425, 134 S.E.2d 410, 416 (1964) (“[A]llegations, statements or admissions contained in a pleading are conclusive as against the pleader.”); *Quinn v. Sharon Corp.*, 540 S.E.2d 474, 480, 343 S.C. 411, 423 (Ct. App. 2000) (“[T]he fact a litigant is using the court as a forum for his inconsistent statements injures the judicial system; therefore, such abuse must be avoided under all circumstances.”); see also *Schott Motorcycle Supply, Inc. v. Am. Honda Motor Co., Inc.*, 976 F.2d 58, 61 (1st Cir. 1992) (“plaintiff should not be allowed to contradict its express factual assertion in an attempt to avoid summary judgment”).

To conclude, it is well established that “courts should be particularly jealous of the integrity of judicial sales” and should not “rewrite the terms of sale after the sale.” *Ex Parte Johnson*, 640 S.E.2d 887 (Ct. App. 2006) (quoting *In re Wilson*, 141 S.C. 60, 63, 139 S.E. 171, 172 (1927));

- G. Mitch Laplante, as the manager of PCA and controlling member, now manager, of Maybank 2754, is estopped from having Maybank 2754 raise the issue of an

easement because he failed to ever raise its existence in neither the PCA Judicial Dissolution lawsuit of the Wells Fargo foreclosure action.

Wells Fargo commenced a foreclosure action in 2014 against PCA and its members, pursuant to which it foreclosed its lien upon the Original Tract. (*See*, Case No.: 2014-CP-10-04946, filed with the Charleston County Clerk of Court). The Master-in-Equity’s Foreclosure Order dated June 23, 2017, foreclosed and barred all future claims related to the property or any interest in the property in question.

Laplante was a named defendant in the foreclosure action; was Manager of PCA; was the controlling member of Maybank; was represented by counsel; filed cross claims in the foreclosure action; and was present at the June 19, 2017, hearing when testimony and exhibits concerning the foreclosure were presented to the Court. The June 23, 2017, Foreclosure Order made no exception or mention for an easement and there was no easement noted on any plat. Indeed, the Master-In-Equity further entered a Consent Order amending the property description of the Original Tract because the parties identified a mistake in the legal description. (Exhibit 2). Laplante, as the manager of PCA and controlling member of Maybank and a self-touted real estate developer, failed to mention the existence of the “easement” and now, years later, attempts to relitigate the issue. “Collateral estoppel will bar the relitigation of an issue which was actually litigated and necessary to the outcome of a prior lawsuit.” *McNaughton–McKay Elec. Co. of N.C. v. Andrich*, 324 S.C. 275, 279, 482 S.E.2d 564, 566 (Ct. App. 1997).<sup>6</sup> Maybank’s “absence from the

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<sup>6</sup> “Laches is an equitable doctrine defined as ‘neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.’” *Strickland v. Strickland*, 375 S.C. 76, 83, 650 S.E.2d 465, 469

previous ... lawsuit does not insulate it from issue preclusion.” *Carolina Renewal, Inc. v. S.C. Dep’t of Transp.*, 385 S.C. 550, 555, 684 S.E.2d 779, 782 (Ct. App. 2009).

Here, Laplante’s knowledge is imputed to Plaintiff. S.C. Code Ann. § 33-44-102. Maybank, through its manager, Laplante, had a “full and fair opportunity to previously litigate the issue” in the foreclosure action. *See Carolina Renewal, Inc.*, at 555, 684 S.E.2d at 782. Maybank was not a party to the foreclosure action because it did not possess a real property interest in the Original Tract, including the Subject Property. The record of the foreclosure action reveals that Laplante actively participated in that proceeding, making no mention in any of his pleadings or at the foreclosure hearing of any alleged property interest of Maybank.

This issue of a description of property rights and existing easements on the Original Tract, including the Subject Property, was actually litigated in the foreclosure; the Master-In-Equity fully determined the property rights to be sold, leaving no question what the buyer was acquiring. The breadth of the property rights was further solidified upon the revision of the original Order to amend the property description. Lastly, estopping Plaintiff is necessary to support the prior judgment/foreclosure order because the sale of the subject property could be revisited if the rights acquired/sold through the foreclosure subsequently changed. Moreover, “it is a well-established principle in South Carolina that estoppel by silence arises when one party observes another dealing with his property in a

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(2007) (citation omitted). Plaintiff’s unreasonable delay in asserting its rights has resulted and continues to result in prejudice to the Beach Entities and other defendants.

manner inconsistent with his rights and makes no objection while the other party changes his position based on the party's silence.” *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 358, 628 S.E.2d 902, 911 (Ct. App. 2006) (citing *Seabrook Island Property Owners Association v. Pelzer*, 292 S.C. 343, 356 S.E.2d 411 (Ct.App.1987)). Maybank’s silence, through its controlling member and current manager, Laplante, constitutes estoppel by silence. Laplante maintained silence through the Dissolution Action as to any purported right of Maybank to an easement, and likewise maintained silence through the Foreclosure Action, thus constituting estoppel by silence, preventing Maybank from making claims at this point, in this action, as to an easement.

The June 23, 2017, Foreclosure Order is now the law of the case because it involves the same parties and the same property. By bringing this action, Maybank seeks to have a circuit court judge collaterally attack the Master’s Foreclosure Order. It is a cardinal rule in South Carolina that one Circuit Court should not overrule another, especially when the other circuit court judge has retained jurisdiction. *See Bakala v. Bakala*, 352 S.C. 612, 576 S.E.2d 156 (2003) (holding that a family court judge could not overrule the prior unappealed order of another family court judge because it had become law of the case); *In re Morrison*, 321 S.C. 370 n. 2, 468 S.E.2d 651 n. 2 (1996) (noting that an unappealed ruling becomes the law of the case and precludes further consideration of the issue on appeal); *Cooper Tire & Rubber Co. v. Perry et al.*, 261 S.C. 538, 201 S.E.2d 245 (1973) (holding that where a ruling on a demurrer to complaint is not appealed from, it becomes the law of the case); *Watkins v. Hodge*, 232 S.C. 245, 247–48, 101 S.E.2d 657, 658 (1958) (refusing to

consider jurisdictional matter of underlying case where issue had been ruled upon and not challenged on appeal). *Judy v. Martin*, 381 S.C. 455, 458–59, 674 S.E.2d 151, 153 (2009).

**ORDER**

No genuine issue of material fact exists to prolong this litigation; therefore, it is Ordered that the Defendants’ Motions for Summary Judgment are hereby granted, and this matter is dismissed in its entirety.

**AND IT IS SO ORDERED.**

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Bentley Price  
Presiding Judge-Ninth Judicial Circuit

Charleston, S.C.

October \_\_\_\_\_, 2020



Charleston Common Pleas

**Case Caption:** Maybank 2754 Llc VS Eugene J Zurlo , defendant, et al  
**Case Number:** 2020CP1000209  
**Type:** Order/Summary Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

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FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2020CP1000209

Maybank 2754 Llc  
PLAINTIFF(S)

Eugene J Zurlo et al  
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), SCRCPP;  Rule 41(a), SCRCPP (Vol. Nonsuit);  Rule 43(k), SCRCPP (Settled);  
 Other
- ACTION STRICKEN** (*CHECK REASON*):  Rule 40(j), SCRCPP;  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:

Plaintiff's Motion to Alter or Amend Order entered October 7, 2020 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 11/05/2020 .

Mary Roe  
John Doe

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.

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Charleston Common Pleas

**Case Caption:** Maybank 2754 Llc VS Eugene J Zurlo , defendant, et al  
**Case Number:** 2020CP1000209  
**Type:** Order/Electronic Form 4

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

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**Nov 08 2021**

**SC Court of Appeals**

Certificate of Counsel

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

July 22, 2021

s/Scarlet B. Moore

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