STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

Ronald Jarmuth,)
)
Plaintiff,)
)
vs.)
)
The International Club Homeowners)
Association, Inc.,)
Rosemary Toth,)
And K.A. Diehl & Associates,)
)
Defendants.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CIVIL ACTION NO.: 2009-CP-26-05196

ORDER GRANTING DEFENDANT'S MOTION TO CONSOLIDATE CASES

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

Ronald Jarmuth,)
)
Plaintiff,)
)
vs.)
)
The International Club Homeowners)
Association, Inc.)
)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 2010-CP-26-11320

This matter came before the Court on August 11, 2011 upon the motion of the Defendant, The International Club Homeowners Association, Inc. (hereinafter "Defendant"), in Civil Action No. 2010-CP-26-11320 to consolidate the above captioned matters pursuant to Rule 42(a) of the South Carolina Rules of Civil Procedure. Present at the hearing were the Plaintiff, Ronald Jarmuth ("Plaintiff"), and the attorney for the Defendant, Alicia E. Thompson.

The Plaintiff is a property owner in Pebble Creek, a residential subdivision located within the International Club community. As a property owner, Plaintiff is a member of the Defendant.

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The aforementioned cases arise out of disputes between the Plaintiff and the Defendant regarding the validity of the Declaration of the Covenants and Restrictions for the International Club ("Declaration") and the amendments to the Declaration, as well as the validity of assessments levied by the Defendant against the International Club homeowners. Plaintiff asserts other causes of action against the Defendant in Civil Action No. 2010-CP-26-11320 and against the Defendant, Rosemary Toth, and K.A. Diehl & Associates in Civil Action No. 2009-CP-26-3596.

"[C]onsolidation may be ordered whenever actions involving a common question of law or fact are pending before the court." *Ellis v. Oliver*, 415 S.E.2d 400, 401 (1992); *see also Creighton v. Coligny Plaza Ltd.*, 512 S.E.2d 510, 522 (Ct. App. 1998), *reh'g denied*, (1999), *Keels v. Pierce*, 433 S.E. 2d 902 (Ct. App. 1993). Rule 42 (a) of the South Carolina Rules of Civil Procedure addresses consolidation and specifically states: "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the action; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." The above actions involve common questions of law and fact. The claims in both actions are dependent upon the legal issue of whether the Declaration is valid. Accordingly, under South Carolina law, these two cases should be consolidated for the sake of judicial economy.

THEREFORE, IT IS ORDERED that Civil Action Number 2010-CP-26-11320 is consolidated under Civil Action No. 2009-CP-26-3596 pursuant to Rule 42(a) of the South Carolina Rules of Civil Procedure, meaning that Civil Action Number 2010-CP-26-11320 shall be tried at the same time and in the same proceedings as Civil Action No. 2009-CP-26-3596.

IT IS SO ORDERED.

The Honorable Larry B. Hyman, Jr.
Chief Administrative Judge

Dated: 8-24-2011
Conway, South Carolina

STATE OF SOUTH CAROLINA)) COUNTY OF HORRY)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT CIVIL ACTION NO.: 2009-CP-26-3596
Ronald Jarmuth,)) Plaintiff,)) vs.)) The International Club Homeowners) Association, Inc.,) Rosemary Toth,) and K.A. Diehl & Associates, Inc.)) Defendants.)	**FINAL ORDER DISMISSING PLAINTIFF'S CLAIMS AND AWARDING JUDGMENT AGAINST THE PLAINTIFF IN THE AMOUNT OF $7,326.00 AND GRANTING INJUNCTIVE RELIEF**
Ronald Jarmuth,)) Plaintiff,)) vs.)) The International Club Homeowners) Association, Inc.)) Defendant.)	CIVIL ACTION NO.: 2010-CP-26-11320

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

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

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

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

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

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

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

2. The Bylaws are Valid and Binding.

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

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

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

The Declaration Recitals, as amended, state:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Street and Amenity Center Parking.

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

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

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

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

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

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

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

b. Declaration Section 7.25 was not Deleted.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. The Architectural Guidelines are valid.

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

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

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

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

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

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

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

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

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

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

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

Section 7.4 of the Declaration specifically regulates fences:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

a. Separate Accounting for Capital Contributions.

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

b. Equitable Ownership of Capital Contributions.

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

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

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

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

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

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

d. Assessments from Single Family Owners and Multi-Family Owners.

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

e. Collection and Use of Capital Contributions.

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

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

f. Validity of the Third Amendment.

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

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

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

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

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

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

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

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

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

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

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

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

g. Validity of the Fourth Amendment.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

b. The Defendants' statements are privileged.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25. Plaintiff must remove the brick foundation.

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

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

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

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

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

IT IS SO ORDERED.

The Honorable Ralph P. Stroman
Horry County Special Referee

Conway, South Carolina
Dated: Sept 10 2012

2009-CP-26-3596

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
ronaldjarmuth@hotmail.com
August 21, 2012

Honorable Ralph P. Stroman
c/o Horry County Master-in-Equity's Office 1301 Second Avenue
Conway, SC 29526

Re: *Ronald Jarmuth v. The International Club HOA* Civil Action No. 2009-CP-26-3596; and *Ronald Jarmuth v. The International Club HOA* Civil Action No.: 2010-CP-26-11320

Dear Judge Stroman:

Today I am in receipt of a copy of the Defendants' material which was submitted, as was mine (yesterday) in deference to your order from the bench on August 10, 2012 to submit a "Brief and Proposed Order". I observe that the Defendants' material lacks a Brief. This egregious non-complying omission I respectfully suggest should rule out consideration of what the Defendants did finally offer the Court in written form.

I am not arguing the contents of anything stated what in the Defendants filed as their final submission. It is my understanding that the opportunity to present evidence, cite to cases and law, and to argue a case opens and closes with the trial. There is clearly no opportunity post trial to contest any new matter raised post trial, and I am carefully not doing so.

That being said, it appears to me from reading the Defendants' material and considering mine that there are two entirely different visions of what was before the court at the trial – even as to what issues were or were not argued.

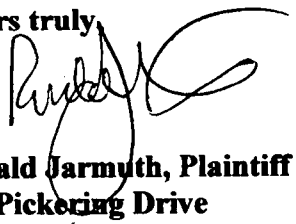
In anticipation of this I insisted (and provided the text) that the Consent Order of Reference explicitly provide that the IHOA Defendant (or more exactly, their insurance company) pay all the costs of the court reporter.

It is my suggestion that the Court utilize this opportunity to order the Transcript of the Trial from the Court Reporter at the (by consent) expense of the Defendant to resolve the question of exactly what was testified to, what issues were argued, what was included in the arguments, what cases and law were cited at trial, and what evidence was submitted either before or during the trial.

EXHIBIT C

I simply do not recognize from being present at the trial much of what is in the Defendant's proposed Order, but at this point I believe it is for the Court and not me to make this determination.

Yours truly,



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cc: Defendants through counsel Henrietta Golding
hgolding@mcnair.net

STATE OF SOUTH CAROLINA COUNTY OF HORRY	)	IN THE COURT OF COMMON PLEAS FIFTEENTH JUDICIAL CIRCUIT
Ronald Jarmuth, Plaintiff vs. The International Club Homeowners Association, Inc.. et al Defendants	)	NO. 2009-CP-26-3596 CONSOLIDATED FOR TRIAL WITH BELOW CASE
Ronald Jarmuth Plaintiff vs The International Club Homeowners Association, Inc. Defendant	)	NO. 2010-26-11320 PLAINTIFF'S CONSOLIDATED POST-TRIAL MOTION RULE 50, RULE 52, RULE 59, RULE 60

PLAINTIFF'S CONSOLIDATED POST-TRIAL MOTION:

RULE 50 FOR JUDGMENT NOT WITHSTANDING THE VERDICT / JUDGMENT AS A MATTER OF LAW
RULE 52 FOR AMENDMENT OF FINDINGS BY THE COURT
RULE 59 FOR NEW TRIAL AND TO ALTER OR AMEND JUDGMENT
RULE 60 FOR RELIEF FROM JUDGMENT

1. Plaintiff Ronald Jarmuth, pro se, moves this court for an Order or Orders relating to this Court's Order of September 10, 2012 following a prematurely terminated trial:

   a. Granting a Judgment Not Withstanding the Verdict / Judgment as a Matter of Law (JAML) per Rule 50;

   b. Amending the Findings and Making Additional Findings of Fact and Conclusions of Law per Rule 52;

   c. Granting a New Trial or Amending Judgment per Rule 59;

   d. Granting Relief from Judgment per Rule 60.

Major Grounds

2. The most significant justifications for this are:

   a. Ignored Declaratory Judgment Demand – Trial is incomplete. The Court chose to refuse to make findings of fact and conclusions of law on almost every question before it for Declaratory Judgment, including refusing to interpret certain specific statutes put before it.

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b. Unconstitutional preventing Plaintiff from putting on full case. The Court arbitrarily limited Plaintiff's trial presentation to two – and – one half days, of which half a day was then given to the Defense to call two of it's witnesses out of sequence in violation of the "ground rules" [1] set by Hon Chief Judge Steven John at a hearing on January 17, 2012, The Special Referee arbitrarily ordered at trial that, despite the fact that Plaintiff was not presenting inadmissible, or superfluous material or wasting the court's time in any way, he must complete his case by noon the third day. Arrangements had been made with the Clerk of Court for the court room to be available on Saturday and Sunday, with court officers present, and the Special Referee had agreed to hold court Saturday and Sunday if necessary. The Special Referee's explanation was that he had made arrangement for personal activities which he intended to keep. The judicial officer put his personal agenda ahead of his judicial duties. The Court's June 13, 2012 Order of Reference stated that the trial "shall continue until concluded" and did not limit the length of trial. As a result Plaintiff was unable to call Defendant Rosemary Toth, who was in the courtroom and who had been subpoenaed to testify at trial, and Plaintiff's subpoenaed witness Charles Ferrera. It also meant that Plaintiff had to exclude from his presentation entire counts of this Complaints. Plaintiff was thus limited to two days of trial instead of the five days he consistently told the court were needed.

c. Depending on fraudulent material presented by Defense Counsel outside the record of proceedings. The Court allowed Defense Counsel to put before it post - trial arguments, citations to law, references to evidence not in the record, hearsay purported statements, and entirely new topics never placed before the Court in a complaint and more importantly, not in trial testimony. This included allowing Defense counsel to provide it, outside the record and post – trial, arguments against the case presented by Plaintiff in the courtroom at trial. These post – trial , off the record supplementations by Defense Counsel were adopted by the Court in it's order "word for word" from the first word of the 49 page document to the last, and this deprived Plaintiff of his constitutional right to due process, to confront and counter purported "evidence", witnesses, and case law, and to impeach anything presented by Defense Counsel. When Plaintiff learned that this was going on he went "on the record" and filed (with the Clerk of Court) and served the special referee a

[1] All parties agreed to Hon. Judge John's direction that no party would be allowed any variance of accommodation if a witness was not available for testimony at trial in the

letter (on August 21, 2912) which alerted the Special Referee that much of the material submitted by Defense Counsel was blatantly fraudulent and grossly mis-stated the evidence, testimony, case law, and even the nature of the complaint. The Court was alerted that the Defense material was not just a restatement of that side's case presentation but an entirely new presentation, outside the proceedings, off the record of proceedings, and that this violated Plaintiff's constitutional rights.

d. Bias by the Court. The Court's final order creates an extreme impression of judicial bias, gross errors creating the impression of judicial incompetence and the impression that the Court advocated for the Defense. The order is filled with legal arguments on behalf of Defendants Defense Counsel did not make at trial, case citations favorable to Defendant Defense Counsel did not cite to at trial, allegations of fact never placed before the court by Defense counsel at trial, and outright unfavorable mis-quotes of the actual text of covenants, case citations, and testimony. In one instance, concerning roads, the Court quoted a snip of a document's text omitting the following sentences which were unfavorable to the Court's decision – which read that Horry County's Attorney was not offering any legal opinion and the IHOA should consult an attorney (the Court's Order writing that the Horry County Attorney had written that the covenants could be enforced on the roads, which could be taken as a fraudulent mis-representation of the evidence by the author of that paragraph of the order) and omitted the associated letter from Horry County (Engineering and Planning) which said that the roads ARE owned by Horry County. The order further included topics which never came before the court at trial which topics are clearly advantageous to Defendants, and was totally silent on topics placed before the court by Plaintiff for which large quantities of evidence were presented with supporting testimony sufficient to meet the burden of "more likely than not". In addition, the Order in multiple places and topics fraudulently asserted that "no evidence" was presented by Plaintiff on various topics when the list of evidence and the record of proceedings is that for each, at least several uncontested exhibits and in some, dozens of exhibits were presented. In the topic of assessment payments by the Golf Course the Court Order says that the Golf Course has always been current in assessments, ignoring the

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normal order of business.

IHOA's general ledgers which showed [2] that there has never been a year that the Golf Course paid even half it's assessments due, and ignoring the admission by IHOA current president William Freiboth that the IHOA sued the Golf Course in this very courthouse, alleging that in 2010 the Golf Course paid only one month's assessments and none at all for 2011 and 2012 -- this being a clearly fraudulent mis-representation of the uncontroverted (at trial) evidentiary record. While these frauds all originated with Defense Attorney, who wrote 100 percent of the final order, the judicial officer is 100 percent accountable for the text of any order he signs and is obligated to have done "due diligence". Plaintiff's August 21, 2012 letter alerted the judicial officer to the need for due diligence, which creates the impression that the fraudulent content of the order and its other infirmities are not errors but intentional.

e. <u>Adapting findings contrary to the Order's own internal controlling findings of fact and of law</u>. Perhaps eighty percent (80%) of the causes of action depends on the answer to "What HOA did Amendment #1 to the Covenants name as "The Association" defined in the Covenants" with rights and obligations under the covenants. Because the covenants affect title to the land and restrict the use of the land, this area of law is subject to the principle that the interpretation must arise from explicit and unambiguous text of the contract or deed. "Usage" does not overcome this requirement that contracts and deeds to land be subject to a stricter rule of construction than ordinary contracts. Whatever Association is not named as "The Association" lacks standing to context any further interpretation of the Covenants nor to seek to compel compliance with the Covenants. The case opened with one hour of testimony, argument, and presentation of evidence by Plaintiff on this question and it was brought to the Court's attention that this was first because it controls almost everything else. The alternatives were the "Murrells Inlet Golf Plantation Inc", a non-profit which exists chartered under SC Code 33-31-xx; the "International Club Association, Inc", likewise existing and so chartered, the "International Club, LLC" which is the 'for profit" golf course corporation, and the "International Club Home Owners Association, Inc" which is likewise extent and so chartered – the Defendant IHOA. All parties agreed that the interpretation of Amendment #1's change to the name controls this matter. On page 12 of it's order the

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[2] Comparing golf course assessment payments to the putative golf course agreement, which requires much less in assessments than the covenants.

Court made a controlling finding of fact and conclusion of law which reads:

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

The Court having declared that "The International Club Association Inc" (ICA) is "The Association for all purposes under the covenants then ignored this controlling decision. This controlling finding mandates revision of the rest of the order and renders a judgment against Plaintiff for alleged rule violations inconsistent because Plaintiff thus owes no duty or obligation towards the defendant and the defendant has no rights under the covenants which it may enforce. The Court also held that the Architectural Review Board is not a sub-entity of the Defendant, yet the Court's Order reads as if the ARB is a party, enforcing a non-party's purported cause of action for violation of the non-party's ARB rules, and an another inconsistency which flaws the order, awarding judgment for the damages to the HOA party defendant for a "fine" it did not impose, according to the same order.

f. Depending on an irrelevant and inapplicable statute. Plaintiff had argued that since the IHOA is chartered under 33-31-xx of the code (Non Profit Corporation Act) homeowners can not be compelled to be members no matter what any covenant or contract might provide. Plaintiff had cited 33-31-601 Admission which provides that "(b) No person may be admitted as a member without his consent.". Page 4246 of the April 12, 1994 SC House Journal states the intent of the legislature as being that it

> ***"prevents corporations from admitting people as members unless they consent to becoming members. ... Until they had manifested this consent they would not be "members" as that term is defined in section 1.40(21)."***

And subparagraph *"(a) A member may resign at any time."* which the legislative journal reported as intending that

> **"A nonprofit organization cannot force a person to belong to it ... This provision had no counterpart in former statutory law.."**

The Court's Order held that Plaintiff is required to be a member of the IHOA and to also be a member of the Amenity Center (owned by the IHOA) whether or not he uses it. In doing so the Court's Order stated that the controlling South Carolina statute is § 27-31-190 and that this is further supported by the "Restatement (Third) of Property (Servitudes) §

6.5". These arguments and citations were not raised by Defendant at trial and appear for the first time in the Court's Order. They are also clear errors of law and raise the appearance of bias or fraudulent intent by the judicial officer.

(1) Title 27 is the Horizontal Property Act and applies to apartment houses which are condominiums, specifically those where (per 27-31-30)

> **"a lessee, sole owner, or the co-owners of property expressly declare, through the recordation of a master deed or lease, which shall set forth the particulars enumerated in Section 27-31-100,"**

(2) The IHOA is incorporated under 33-31-xx of the code (an exhibit in evidence). There is no proper way that an unbiased judicial officer could cite to 27-31-190, because it reads:

> **SECTION 27-31-190. Expenses shall be shared. The co-owners *of the apartments* are bound to contribute pro rata in the percentages *computed according to Section 27-31-60* ...**

g. The award of attorneys fees is contrary to the rule of "strict construction" which awards such fees only when there is a clear, applicable, and unmistakable contractual provision, and where the fees have been expended for the purposes cited in the contract. The Court's Order itself recognizes this requirement. The Court's order said:

> **"The general rule is that attorney's fees are not recoverable unless authorized by contract or statute."** *Seabrook Island Property Owners Assoc. v. Berger,* 365 S.C. 234, 238, 616 S.E.2d 431, 434 (Ct.App. 2005). Where there is a contract, the award of attorney's fees is left to the discretion of the trial judge. *Menne v. Keowee Key Prop. Owners' Ass'n,* 368 S.C. *557,* 569, 629 S.E.2d 690, 696-97, (2006). A provision contained in restrictive covenants allowing for the recovery of attorney's fees is enforceable. *Queen's Grant II Horizontal Property Regime,* 368 S.C. at 375, 628 S.E.2d at 920.

In one of the cases, 2010-CP-26-11320, the IHOA's $2,500 was spent asking the court to dismiss that case, when it originated in Magistrate Court. There was no counter-claim at the time and the IHOA's Answer did not allege any violation of covenants or rules. The IHOA did not pay a single penny for anything that happened thereafter in that case, even when it added (two years later) a counter – claim for violation of ARB rules. In the 2009-CP-26-3596 case the exact circumstances exist, $2,500 spent defending against a suit for Declaratory Judgment with no Answer containing a counter-claim for violation of covenants or rules until three years later, and no IHOA money spent to support that contention. This was admitted in testimony at trial by IHOA President William Freiboth

who admitted this about each $ 2,500.

h. Lack of subject matter jurisdiction over the 2010-CP-26-11320 case.

When the 11320 case was filed the Defendant's $ 2,500 was filed ONLY to ask the magistrate court – where it originated – to dismiss that case as it was then captioned. It was not spent to "enforce" anything or even to prosecute the case.

In the case originating in magistrate court (11320) there was no counter – complaint for almost two years. In Magistrate Court Defense counsel's November 9, 2010 Motion to Dismiss alleged that Plaintiff's claim exceeded the magistrate's subject matter jurisdiction. Neither party asked for a transfer to the Court of Common Pleas. The magistrate did so on his own. The record is that immediately thereafter, in the docket of the 11320 case, Plaintiff filed a "precipe" on December 14, 2012 alerting the court that this was procedurally defective.. The document was titled "Plaintiff's Precipe of Objections to Order Transferring" and began with the phrase

> **"Plaintiff, Ronald Jarmuth, pro se, perpetuates his objections to certain content in the order of the Magistrate Court entered November 30, 2010, transferring this case to this Court."**

In Frierson v In-Town Suites, No. 2007-UP-549 Filed December 14, 2007 the Court of Appeals observed that the power to transfer a case to Circuit Court when the statutory limit is exceeded occurs only when there is a counter – claim whose amount, when added to the claim, exceeds the statutory limit. There was no counter – claim here so the limited authority of the magistrate court to transfer the 11320 case was not applicable. The appellate court wrote:

> **"The jurisdiction of the magistrates' court is statutorily limited by South Carolina Code section22-3-10 (2007). Although we note there are limited circumstances where the legislature has allowed magistrates to transfer a case to the circuit court, such as when a counterclaim is filed pursuant to South Carolina Code section 22-3-30 (2007), we believe the legislature intentionally limited the scope of a magistrate's power to transfer cases to the circuit court. In addition to Rainey, we find the statutory guidelines that govern magistrates' court support this view by not expressly authorizing magistrates to transfer any type of case to the circuit court."**

This conclusion of law was repeated by the Court of Appeals in the controlling case of Mosseri, Mosseri, Castro v Austin's at the Beach, Inc. and Paris, Inc., Opinion No. 4215 Filed March 12, 2007 which was an appeal from Horry County (this court) with further explanation. The Court wrote that

> **"In cases that do not fall under Section 22-3-10 (12) of the South Carolina Code [w]hen a counterclaim is filed which if successful would exceed the civil jurisdictional amount as provided in Section 22"**

A case exceeding the jurisdictional threshold must be dismissed if the case does not involve the ownership of land. In such an instance the case still will not be transferred but will be retained in the Magistrate Court.

A Circuit Court can not obtain subject matter jurisdiction by the consent of the parties; it is statutory. The 11320 case required dismissal per the insistence of Defendant as a matter of law. The magistrate court transfer was without authority. No judgment may be entered as to a case in which the Circuit Court lacks subject matter jurisdiction, thus the $2,500 award of attorneys fees is further contrary to the law.

i. Adjudicating a claim by a non-party and awarding a judgment on the non-party's claim; awarding that judgment to a party which did not allege it had a claim to the judgment. The Court's Order stated that the ARB is not a creation or entity of the IHOA, that the ARB imposed a $ 100 a month fine, that the ARB as being separate from the IHOA is not subject to the Bylaws of the IHOA which prohibit any fine or sanction until after a hearing per the provisions of Section 13.3 of the Bylaws, and that the ARB's fine will be supported. The Court then entered judgment in favor of the IHOA for the ARB's claim, to which the IHOA has no equitable claim based on anything in the record and to which the IHOA is not entitled per the language of the Court's order. The Court's Order made the following Conclusion of Law:

> **The ARB is a separate Board ... created by Article VII of the Declaration. 3 ... Article VII establishes the ARB and grants it with the authority to review and approve applications for improvements on the properties of Community homeowners. The ARB is not a committee of the Board of Directors but instead is a separate board established by the Defendant HOA's governing documents ...**

And in paragraph 24 of the Order, the Court wrote the following conclusion of law which identifies the fines as arising from non-party ARB but payable to party IHOA:

> **"As to the ARB fines, as of August 8, 2012, the Plaintiff owes $2,326.00 to the Defendant HOA. As stated hereinabove, the ARB has the authority to**

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[3] **The "Declaration" is "The Covenants". "The Articles" is the form provided by the South Carolina Secretary of State to be used when incorporating non-profit corporations. The "Covenants" are NOT "The Articles". The "Bylaws" are neither covenants nor articles. Neither the Bylaws nor the Articles mention the ARB – only the Covenants.**

assess these fines. Therefore the Defendant HOA shall have judgment against the Plaintiff in the amount of $7,326.00."

No party may sue for injury or debt associated with another party or entity and no party may have judgment for a debt arising from such a non-party. The Court's

Additional Issues Mandating New Trial or Amendment or Relief from Judgment

3. Procedural Irregularities Violating Plaintiff's Constitutional Due Process Rights.

Allowing Defense to Present It's Witnesses Prior to Plaintiff's Case.

Since this involved the questioning of witnesses, presentation of related argument, and submittal of evidence this had the effect of allowing Defense to present it's case prior to Plaintiff. Their testimony had nothing to do with Defendant's counter – claim and had the effect of introducing areas of testimony not put before the court by Plaintiff. Because the judicial officer did not allow the trial to proceed to the "natural" end of evidence, testimony, argument and the presentation of all issues, but instead well into the trial set an absolute time limit on the trial which was contrary to the order of reference, this "out of order" witness presentation further reduced the time the judicial officer allowed Plaintiff. It was also contrary to the ground rules set by the Chief Judge.

a. On January 25, 2012 Hon Chief Judge Steven John entered an Order which provided for the use of transcripts of depositions at trial in lieu of taking the testimony of such a witness at trial. As a consequence the depositions several witnesses were taken including:

(1) R Scott Pyle, President of Plantation AD and the signer of the Covenants and of Amendment #1 (no other witness was alleged to have personal knowledge of the circumstances of the creation and signing of the Covenants, of the creation of the bylaws, and of the filing of the bylaws);

(2) Rosemary Toth, defendant and former president of the IHOA.

(3) Julie Case, an employee of co-defendant KA Diehl.

(4) William ("Bill") Freiboth, current President of the IHOA.

b. Prior to the commencement of trial, Plaintiff had asserted (since as far back as December, 2011, in filings of record) that he would require five (5) trial days so that all his witnesses could be heard and evidence addressed.

Limiting the Trial to Three Days Irrespective of the Conduct of the Trial

c. The Order of reference was signed by Hon. Chief Judge Steven John on June

15, 2012. It included the provision that "The trial shall commence on Wednesday, August 8, 2012 at 9:00 A.M. at the Horry County Government and Judicial Center and shall continue until concluded." At the beginning of the trial Plaintiff again asserted his need for five (5) days and had been told that the trial would continue on Saturday August 13th and Sunday August 14th, 2012. Plaintiff, of course, has no control over how much time would be used by the Defendants to argue their case nor how much time he would need for impeachment. On Thursday August 11, 2012, based on the pace of trial, the Special Referee stated that he needed to have Saturday and Sunday for himself and asked if the parties could accommodate that. Based on the pace of trial Plaintiff observed that IF the transcripts were read by the Special Referee in their entirety as if at trial using the same standard of admissibility, Plaintiff would try to finish his case by Friday August 12th. However, later on Thursday August 11th Defense Counsel introduced Defense witnesses "out of turn" by Order of the Court and Plaintiff observed that he would need an extra day for rebuttal and impeachment, which was refused, thus Plaintiff presented an abbreviated case on Friday August 12, 2012.

Not Permitting Summation / Court Depending on Off The Record Post Trial Defense Material

d. The Court did not allow any Summation by the Parties but instead directed that "briefs" be filed within ten (10) days with proposed orders. The Court did not ask the Parties to consent to this. The trial was declared "over" at nearly Six PM (6:00 PM) on Friday based on the Judicial Officer's schedule and not based on the finishing of presenting cases. The lack of a summation is a procedural error. There would be no opportunity to rebut opposing briefs and, as is the rule for summation, no additional evidence or argument may be made. One "sums up" what is already argued and supported by the evidence. No new cases may be mentioned or relied on. No new theories or explanations presented. While this is so, the lack of a verbal Defense "summation" in the presence of the Plaintiff deprived Plaintiff of opportunities to object to material being more than just summation – new evidence, theories, explanations – which are procedural errors. Plaintiff cites this as a prejudicial error meriting a new trial. The Court specifically directed that these "briefs" reflect the order and material that was presented at trial and stated that the Court would also rely on the transcripts. Plaintiff was the only party to hold depositions and to file transcripts. Clearly the testimony adduced would be unfavorable to Defendants and thus not relied on in the Defense Counsel's "brief". No length was set. Plaintiff filed a

brief as directed and a proposed order. The Defense Counsel did not file a brief but instead filed a proposed Memorandum Order which the court adopted in it's entirety, from "word one" through "word last", including errors in the text. The spacing of the words is such that the text was not even retyped.

Ignoring that Part of the Record Favorable to Plaintiff

e. Defense Counsel did not relate to any material from the depositions and thus the Order adopted by the Court has ignored all of the testimony AND EXHIBITS from the depositions – particularly the testimony of R. Scott Pyle, THE ONLY WITNESS with actual knowledge of the circumstances of the Covenants. All testimony relating to this subject from any other witness is speculative and not evidence. The statements of Freiboth and King (an "expert witness") referred to in the final order relating to the covenants are not hearsay because they do not attempt to quote Pyle – they are simply not evidence.

Permitting Defense Evidence At Trial Never Previously Provided Plaintiff in Discovery

f. At the beginning of the Trial Defense Counsel presented a set of evidence never given Plaintiff in the form submitted to the Court as evidence. Plaintiff discovered and complained to the Court that twenty (20) out of Defendants' one hundred four (104) exhibits were never given to Plaintiff in Discovery nor were they listed on any evidence list submitted by Defense Counsel (Rule 16) prior to the day of trial. They were placed by Defense Counsel on the Plaintiff desk in court minutes before the trial began. Plaintiff protested this was "Trial By Ambush" and the Court did not address the issue, instead admitting them all into evidence because the Order did not address evidence admissibility. The same situation applies to two of the ten "Plats" Defense Counsel submitted for evidence, both of which Defense Counsel actually used at trial.

Court's Mis-Characterization of the Defense and Counter – Claim put on By Defense Counsel at Trial

g. If a person were to envision the case put on by Defense Counsel based on the Court's Order, to the extent that it purports to represent the arguments, evidence, cases, and testimony Defense Counsel put on at trial, one would envision an active defense and counter – claim, with brilliant citations to evidence and cases. In point of fact this is 100 percent fraudulent, as Defense Counsel failed to put on a counter – claim presentation at all – not one word – and in almost the entire case sat mute through Plaintiff's presentation of his case. Through the entire trial Defense Counsel made only one citation to a case. The only time Defense Counsel left the seating posture was when she jumped up waving two

documents and fraudulently stated that Plaintiff had two copies of the Pebble Creek Deed to Sunbelt Developer, one with a citation to the Covenants and one blank, when in fact the one with the citation was the Golf Course Deed – thus she defrauded the court (to which she did not show the deed in her hand). This is a critical point because the one without the citations – the only deed in evidence – was critical to the point that the Covenants did not exist until two days after Pebble Creek had been sold thus the Declarant, Plantation AD, had now equitable interest / horizontal privity in Pebble Creek such as to subject them to the Covenants. The Court's Order depends on this fraud by Defense Counsel.

Exclusion of Plaintiff's Evidence From Consideration

h. At trial Defense Counsel did NOT CONTROVERT a single document actually introduced as evidence used by Plaintiff. Before trial Defense controverted certain pieces of evidence – most of which were not used at trial – but the Court never ruled on the record as to the admissibility or use of any of the over 700 exhibits presented by Plaintiff, thus presumably all were admissible – but to read the Order Plaintiff presented no evidence in many matters, which is untrue, indicates the court ignored Plaintiff's evidence, and merits a new trial. Examples are "intentional infliction of emotional distress" which was never argued and "Federal Communications Commission" regulations, statutory law, and case decisions of which NOT ONE WORD was said nor one exhibit referred to. This is more than prejudicial, because the inclusion of and reliance on the new material to support a decision deprived Plaintiff of an opportunity for rebuttal, argument, exhibits, testimony. It is more than prejudicial, however, because it presents the appearance of bias by the judicial officer which is even worse because the case was tried by the Court without a jury.

Ignoring the Record of the Case Taken By The Court

i. At Court there was the appearance that the Court was taking close notes relating to testimony and evidence, and this is supported by the Court's direction to make the summation "briefs" follow the order of presentation and refer to the exhibits and testimony offered at trial (and in depositions). Thus the Court exercising appropriate attention to the testimony and evidence did or should have been aware of the introduction of material which was "foreign" to the proceeding, no matter how relevant, admissible, or controlling it might be in retrospect. It simply is the Court's duty to police the introduction of testimony and evidence and the burden is on the party, not the court, to advocate for a

party. In adopting argument, evidence, and cases "foreign" to the trial the Court stepped over the line – a prejudicial material error of law.

Conclusion

4. Plaintiff attaches a marked up copy of the Order of September 10, 2012 (Exhibit A); the two letters from Horry County referred to by the Order of Court, one dated April 16, 2009 and the other dated August 24, 2009, both in evidence at trial (Exhibit B). the IHOA November 17, 2010 Answer to Magistrate Court Case 2010CV-26-1072943, Jarmuth v IHOA, (Exhibit C); the IHOA's November 9, 2010 Motion to Dismiss the Magistrate Case (Exhibit D), the November 20, 2010 Transfer Order (Exhibit E), and Plaintiff's August 21, 2012 Letter to the Court filed with the Clerk (Exhibit F).

It is concluded that there are sufficient irregularities, instances of fraud by defense counsel, violations of constitutional due process, internal contradictions, appearance of bias by the court, and conclusions of law and findings of fact unsupported by any evidence, the failure of the court to address all issues before it, and personal and subject matter jurisdiction issues to merit a new trial, amendment of the order, and relief from judgment.

Ronald Jarmuth
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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	Civil Action No. 2009-CP-26-3596
Ronald Jarmuth	)	consolidated with
Plaintiff	)	Civil Action No. 2010-CP-26-11320
	)	
vs.	)	PLAINTIFF'S RULE 16
	)	STATEMENT
The International Club	)	(Revised July 16, 2012)
Homeowners Association, Inc.,	)	
et al	)	and Rule 32(b) Statement
Defendants	)	
	)	

(revised July 16, 2012)

HISTORY AND SUMMARY

In 2008 through early 2009 there were many views as to what the covenants actually were. On it's web site the HOA posted only the original covenants and Amendment #1. HOA Board members refused to acknowledge the existences of Amendments #2 through #5. There was also a difference of opinion on the authority of the HOA to enforce the contract between the Developer HOA Board and the Horry Telephone Cooperative (HTC) for cable services, the similar agreement with Waste Management, and the agreement the Developer made with the Golf Course to excuse the Golf Course from paying the assessments mandated in the Covenants. There were additional issues regarding the conduct of HOA elections and access to HOA documents.

The HOA's own Buildings and Grounds Committee took issue with spending most of the HOA's grounds maintenance budget to maintain private property – especially the Golf Course, particularly since the later was not paying either the assessments stated in the covenants nor the assessments stated in the golf course agreement.

Other differences of opinion existed over the effect of County ownership of roads – and even over who owned the roads. The HOA asserted it owned the roads even though the roads were never deeded to the HOA, and that the county had some sort of easement for the public from the HOA.

Several requests were made to the HOA for a copy of the "voter / homeowner" list so as to be able to communicate with the other homeowners. These requests were all refused, even though access is guaranteed by state law. At the membership meeting called to elect board members on September 19, 2007, when Plaintiff demanded to see the votes and tallies, Pat Walsh, Developer Horton's Director of Land Development and outgoing

E

board member, stated to Plaintiff and in the presence of another person that he had picked the new board – a statement that was consistent with contemporary HOA documents. The question then arose as to the legality of the incumbency of the new board. There was also the question of when a new board takes office, because the annual meeting specified in the bylaws takes place in March. Relatedly, after each election, at least one board member resigns and is replaced by an appointee. A dispute exists as to whether the appointee must stand for election at the next meeting of members, as is required by state law, or whether he can serve out the unexpired remainder of a board member term, the HOA practice which is contrary to state law.

The HOA Board adamantly refused to even discuss these issues. Rosemary Toth, the HOA President, made independent decisions which many, including Plaintiff, considered a breach of fiduciary duty.

It is legitimate for differences of opinion on these issues. The HOA Board's refused to discuss these matters. The HOA Board even went so far as to assert that it could prohibit or control flag poles – pre-empted by South Carolina law, or the placement of satellite dishes – pre-empted by federal law.

It became apparent that the only way to resolve these matters was to file a Complaint and Derivative Action demanding, among other things, a Declaratory Judgment. Such an action should not have been adversarial, because all people of good will should have been interested in hearing the Court's analysis of the matters, particularly of the Covenants, since only a Court Order would settle these questions. Without it, an agreement between the sides could be challenged by any homeowner in the future.

With no other course of action, many homeowners signed a petition to force a recall election of the existing board. This was a legitimate exercise in democracy. The material carefully avoided addressing the reputations of the existing board and spoke only of actions in office. Plaintiff stood for election as a replacement board member, along with four other homeowners.

Plaintiff filed such a Complaint – 2009-CP-26-3596.

The HOA Board, particularly Rosemary Toth, changed the context. Instead of directing it's attention at gathering relevant facts and case law relating to these questions, Toth and her supporters conspired to concoct a campaign of defamation against Plaintiff and further to start a "whispering campaign" to urge homeowners to dis-associate themselves with Jarmuth. This was particularly done by Bill Fletcher, a transition committee and Architectural Review Board (ARB) member and others. The objective of the campaign was to so humiliate or otherwise harm Jarmuth in reputation that he would leave the development, thus mooting his complaint.

Toth and the HOA Board met secretly and authorized the expenditure of thousands of dollars to prepare a defamation campaign against Plaintiff involving email, US Mail, and a web site. This involved the efforts of KA Diehl, the contractor, which used it's initiative

in preparing the material. The Defamations were mailed or emailed (directed at) to at least 646 homes with the expectation that they would be read by all who live there. Many recipients were not voting members of the Association. Email copies were emailed to over 200 homeowner families. Thus a total of approximately 846 homeowners – and their families – were provided the defamatory material. The Board also approved and paid for the alteration of the HOA's web site to make the defamatory material obvious to homeowners visiting the HOA web site. While it purported to provide information about the lawsuit it never actually gave a copy of the Complaint or the Defendants' Answer.

The Board hid the cost of the campaign. Printing and mailing the defamatory material cost approximately $ 3,800 just for the printing and postage plus additional charges from the management company for the web site and it's work. All invoices and other paperwork were kept out of the HOA's files. The Defendants lied about their knowledge of the contractor, since the HOA paid the mailing contractor almost $20,000 in 2009 alone – using 30 invoices, making the mailing contractor one of the largest vendors the HOA used in terms of invoices and dollar amount. Co-defendant KA Diehl used this mail contractor for the approximately 50 or so other HOA's it manages, so it is estimated that Diehl paid perhaps 1000 invoices for Carolina Mail House in 2009 and paid that contractor over $ 100,000. Yet in depositions the HOA President and most involved Diehl employee said they could not remember who the mail contractor was or how many mailings were made. In discovery, until ordered to produce documents by the court, they also hid all paperwork which related in any way to the mail contractor.

It was found through discovery that on behalf of the HOA Defendant Diehl's employee Julie Case sent 577 emails with defamatory material about Plaintiff to Plaintiff's neighbors and 624 custom mail packages to Plaintiff's neighbors and fellow homeowners with defamatory material about him.

The defamation campaign was meant to change the focus from the acts of the board to one of reputations. The immediate effect was that Jarmuth received threatening emails and phone threats – which were reported to the Horry County Police which made a record of same. One homeowner threatened to come to Jarmuth's house with a mob.

To remove the distraction Jarmuth withdrew as a candidate, which meant that the HOA should have ceased it's campaign of defamation if it was in furtherance of it's defense of it's office. It never did. ARB member Templeton, among others, was still telling homeowners to socially isolate Jarmuth, among other things he said. What Toth said is unavailable as the HOA Defendant has stonewalled on disclosing it's emails.

Defendant's employee Julie Case, in an admission against interest, admitted the campaign. The KA Diehl / HOA web site with the information about Jarmuth, supposedly about the case, doesn't have the complaints or answers or any of the pleadings – or any other information about the case despite the HOA's numerous statements to homeowners that it desired to give the homeowners information about the lawsuit.

The campaign against Plaintiff went on, and in 2010 Jarmuth filed a separate suit in

Magistrate Court regarding it's refusal to allow erection of a fence and it's levying a "fine" for a non-existent fence or wall. The HOA also selectively and capriciously and without covenant authority also refused permission to erect a children's swing set. In Jarmuth's applications, Jarmuth consistently preserved his objections to the authority of the HOA and asserted the lack of covenant authority for the HOA's actions. The HOA had the case transferred to the Court of Common Pleas from the Magistrate.

From 2009 through the end of 2011 the Court ignored Jarmuth's requests for the Court to intervene on his behalf to secure him the discovery which he holds by right. Subpoenas against Sunbelt, KA Diehl, and Horton went un-enforced. While Jarmuth produced thousands of pages of documents, the HOA did not even cooperate in discovery until October 3, 2011 when it allowed Jarmuth only 5 hours, with no assistants, to go through approximately 80,000 pages of documents, much of it trash accounting records, in random order. The KA Diehl defendant has never produced a single document and has ignored the subpoena against it. All deponents admitted the existence of a lot of documents when they objected to the subpoenas. Sunbelt admitted in October 2011 that it did not place a litigation hold on documents and destroyed all documents. Sunbelt's attorney is the HOA's attorney.

In April 2010 Defendants Toth and the HOA allowed the Central Electric Power Company to destroy landscaping at the main entrance owned by the HOA and to erect above ground power towers there. This was agreed to by the Board under threat of eminent domain. Many homeowners demanded an independent appraisal, which was not obtained by the Board. Despite bylaws and statute to the contrary, the sale was made without vote of the homeowners. Despite bylaws and statutes to the contrary, Defendants HOA and Toth distributed approximately $ 75,000 to individual homeowners. Additional funds were placed into a reserve for unexpected restoration costs. In May, 2012, it was learned that Toth personally secretly (not in the minutes of any board meeting) authorized using ten thousand dollars ($ 10,000) of the restricted funds to pay off an unrelated HOA debt which came from the settlement of yet another lawsuit by homeowners against the same Defendant HOA. This distribution violated bylaws and statutes.

In December 2011 after over two years, KA Diehl's Rule 12(b)(6) objection was called for hearing – which it abandoned at the hearing, making Diehl a defendant only days before the case was sent to trial. Likewise, an order was entered AFTER the case was sent to trial allowing a counter – claim and changed answers. Many other discovery matters are unsettled. In all, Plaintiff only had approximately 60 days for discovery on some issues against some defendants and no discovery at all against others (Diehl). Defendants have filed a Motion to Strike in each case against Plaintiff's mandatory counter – claim implicated by the Amended Answer of Defendants from December, 2011.

After filing the original complaint the case was appealed to the Court of Appeals because the trial court dismissed Henrietta Golding as a defendant. Because the Defendant refused to participate in discovery during the appeal and the Court refused to force discovery during the appeal, the case sat idle for approximately 30 months.

During that period Plaintiff desired to add a swing set for foster children and grand children and applied, reserving objections as to the requirement to do so, to the HOA's Architectural Review Board ("ARB") for a swing set which was refused even though there are scores of them around the neighborhood – including right across the street. One of the HOA's ARB members lives next door to Plaintiff and commenced to destroy Plaintiff's sprinkler system by driving stakes into the control wires and water line on Plaintiff's property near where it adjoins said ARB member. Said ARB individual also scattered hypodermic needles on Plaintiff's lawn. Police Reports were filed and the Horry County Police collected the needles as evidence. Pictures were taken. Plaintiff was advised to build a fence along the property line. A surveyor was employed and the lot line marked. The ARB refused to approve the fence despite no covenant controlling fences and the omnipresence of fences throughout the neighborhood. It commenced to "fine" Plaintiff for a non-existent "wall".

Plaintiff also sought to expand existing Palm Tree beds, including planting palm trees directly across the street from similar palm trees in neighbor yards (one of which is owned by a homeowner who is the "financial advisor" to the HOA board). It was refused, not because it violated an ARB Guideline, but because the ARB / HOA demanded Plaintiff drop his lawsuit and pay several thousand dollars to the HOA – extortion and exaction.

To avoid the effect of Res Judicata and Collateral Estoppel, Plaintiff filed another lawsuit against the HOA involving ARB issues. This was later merged with the original suit for purposes of findings of common facts and law.

On March 2, 2012 the IHOA sued the Golf Course 2012-CP-26-1740 but grossly understated the amount owed. Re-examining the ledgers to ascertain the basis for the under-claim, a close reading of the documents revealed that as far back as 2004 the Golf Course was in breach of the alleged "agreement" and the golf course debt reverted back to that computed on the basis of the covenants. This was brought to the attention of the HOA's board by a homeowner, Michael Butryn, a named plaintiff witness, but the IHOA Board declined to explain or revise their complaint against the golf course. A homeowner has intervened in that case out of concern that a repugnant "deal" is in the works between the Board and the Golf Course – since the HOA sued for approximately $ 43,000 and the golf course debt is approximately $ 383,000.

Much turns on whether the Covenants apply to the Pebble Creek area of the development where Plaintiff lives and whether the Defendant HOA is the legitimate HOA for the development. Another controlling issue is whether any of the boards were legitimate (their acts being ultra-vires) after March 2002, when per statute an election with voting by homeowners (actually used to select directors) was supposed to take place but didn't – until September, 2008. These are controlling issues.

PLEADINGS

The Court is requested to consult with the Docket as these are so numerous. There is an original and amended complaint with respective answers, and an Amended Answer as of

December 2011 with a new Counter – Complaint implicating a Plaintiff answer to the counter claim and a mandatory claim related to the counter claim. Defendants have not answered the implicated Plaintiff claim (required to avoid Res Judicata). There is also the Amended Complaint and Amended Answer in the associated case (joined for trial) 2010-CP-26-11320 with the identical (to the 2009 case) counter-claim. In both cases Defendant has asserted that Plaintiff is in violation of the covenants for having built an unauthorized wall, as it is asserted in the Counter-Claim. Plaintiff responded with a cause of action that this violates the South Carolina Frivolous Proceedings Act, because there is no wall; because the covenant provisions at issue were deleted years before; and because the (inbuilt) "walls" and actual flower bed edger are in widespread approved use through Plaintiff's own lot and elsewhere – making this selective, capricious, and malicious enforcement.

There are no open Procedural Motions before the Court:

The Court will be asked to take note of the mistreatment by Defense Counsel Henrietta Golding of Louis Astorino in particular and plaintiff's witnesses in general at the deposition held March 27, 2012.

Prior to the beginning of the March 27, 2012 deposition -- outside the deposition room – Defense Counsel Golding shoved Plaintiff's wife so hard she almost fell down, shoved into Plaintiff, and proceeded to yell at Plaintiff in the outside hallway while Plaintiff was attempting to talk with his witness Astorino about Astorino's pending deposition. This conduct could be considered assaults. This was perpetuated in the later sworn testimony of Mr. Astorino.

Instead of taking the usual seat a dozen or more feet from the witnesses, Golding positioned herself 18 inches or so from the deponents' faces and also interfered with their handling of evidence presented to them – which shared table space with her papers. Mr. Astorino, in particular, had medical issues immediately after the deposition, which Plaintiff tried to halt before Plaintiff was finished because of Astorino's medical condition. Mr. Astorino has a life – threatening situation for which he is receiving medical attention at this time and for which the Court granted him a protective order substituting his deposition testimony for trial and staying a separate proceeding against this same defendant in which he is the represented Plaintiff.

UNDISPUTED FACTS AND LAW

The only thing agreed to are the jurisdictional issues. All other matters are subject to dispute. At a hearing held on December 7, 2011 the Court held that there are no undisputed issues of law or fact.

Parking Lot: However, at the time the suit was filed Defendant Toth was asserting that the Amenity Center Parking lots belonged to the golf course – and she had the "parking only for homeowners" signs taken down. Her successor as HOA President has asserted that the parking lots are HOA property and re-erected the signs.

Roads: At a meeting between Mr. Astorino and Defendant Toth in her capacity as HOA Board President on August 11, 2010, Ms. Toth admitted that the roads belong to the county. Previously she had asserted that the public has a limited easement through the development and that the HOA owned the roads.

ISSUES

Federal, State and County Laws

Determine the rights and obligations of the HOA Board and the developers given various laws and regulations. Determine if violation of certain renders the acts of the Board "Ultra Vires".

Covenant Amendments.

What portions of the Covenants have been deleted by the impact of successive Amendments? What is the effect of these deletions on what the HOA and homeowners may and may not do? Can the HOA control conduct on property not owned by any homeowner nor by the HOA? Can the HOA force homeowners to pay assessments to maintain property outside the Planned Unit Development limits / ooutside the land subjected to the covenants / land which is not common property nor HOA owned property within the area subjected to the covenants?

Which is the HOA?

Is the HOA which has rights and obligations under the covenants the "Murrells Inlet Golf Plantation Association", as is named in the Covenants, the "International Club Association" which is the name reached by applying a phrase in Covenant Amendment 1, or the defendant "International Club Home Owners Association"? All three were organized as non-profit corporations in South Carolina.

Highway 17 Connector Association

Does the HOA have an obligation or right to collect the Highway 17 Connector Association assessments, and whether any related contracts / covenants are voidable due to changed circumstances?

Roads

Are the roads owned by Horry County, to whom they were dedicated and which maintains them, or are they owned or subject to the HOA's control, even though the HOA never actually owned the roads? Can the HOA control parking on those roads and the selection of mail boxes on said county property?

ARB

Is the ARB a committee of the HOA or an independent entity?
What are the rights and obligations of the ARB?
What is the validity of various ARB Guidelines.
Do ARB "Guidelines" actually have any regulatory effect?
What is the liability of ARB members for their actions?

Fences and Palm Trees

Are there any remaining controls on fences, walls and palm trees?
Does the extensive and permeating presence of fences and plant beds of wide variety render fence and tree controls void?
Was the ARB / HOA conduct towards Plaintiff malicious, selective, or capricious?
Did it violate the implied covenant of good faith and fair dealing?
Did the HOA commit the torts of Exaction and / or Extortion when it refused to either approve or disaprove Plaintiff's March, 2012 Palm Tree Application?
What controls, if any, does the Covenants apply to uses of property un-named in the Covenants, such as the playing of particular games on o homeowner's lot, riding bicycles on one's lot or in the streets, use of helmets by riders, the color and shape of one's doors, or walking on the streets after certain hours?

Swing Sets

What controls and limitations do the Covenants impose?
Given the variety and presence of swing sets, are further limitations void?
Was the ARB / HOA conduct towards Plaintiff malicious, selective, or capricious?
Did it violate the implied covenant of good faith and fair dealing?

Parking

Have street and driveway parking controls been deleted in the covenants

Amenity Center Parking Lots

Who owns the parking lots?
What towing can be imposed on those lots?

Grounds Watering

Does the HOA own the water in the retention ponds, despite private ownership of the pond bottoms, through the operation of a provision in the covenants?
Is it improper for the HOA to pay the Golf Course to use the retention pond water?
Is it improper for the HOA to construct decorative fountains in Golf Course owned ponds, and to maintain and operate same at HOA expense?

Retention Ponds

What is the HOA's rights and obligations regarding retention ponds which are privately owned? Can the HOA force homeowners to pay assessments for fountains and other beautification of privately owned ponds?

Planned Unit Development

Which subcommunities are within the PUD and or are subject to the covenants and or must be involuntary members of the Homeowners' Association, whichever one that it is?

Are The Enclaves and The Fairways inside the PUD and subject to the Covenants?

Did the exercise of architectural control over The Fairways and The Enclaves demonstrate their membership in the HOA and subordination to the Covenants?

What is the fiduciary responsibility of the HOA Board to collect the arrears from "The Enclaves" and "The Fairways" – two developments within the PUD?

If Amendments #2 through #5 are invalid, are the housing areas added to the HOA through those amendments members of the HOA?

Amenity Center

Interpret the covenants to determine who must involuntarily pay assessments to support the Amenity Center – if anyone must.

Interpret the covenants to determine who may use the Amenity Center.

Who was required to pay for the construction of the Amenity Center and for acquisition of the Amenity Center parking lots?

Were homeowners required to pay assessments to support the Amenity Center before builder claims to the building and pool were transferred to the HOA?

What are the boundaries of the Amenity Center and it's parking lots.

Did Rosemary Toth breach her fiduciary duty or act to the detriment of the HOA when, as President, she declared the lots owned by the golf course and ordered the removal of the parking lot warning signs. Did she willfully transfer value to the golf course and Joe Bernat Golf Academy when she transferred control of the parking lots to the golf course?

Golf Course Assessments

What is legally required to change the rate of assessments for the Golf Course from that mandated in the covenants?

Is the "Golf Course Agreement" to change the rate of assessments for the Golf Course invalid for any of various reasons?

Did the signers of the Agrement commit a breach of fiduciary duty by entering into such an agreenent? Did they in effect steal money from the HOA?

Did the HOA board in 2009 and Rosemary Toth in particular commit a breach of fiduciary duty by failing to get a legal opinion on this and by disregarding the prior legal opinion referred to in prior Board Minutes which advised against this? Who is liable for the money which the golf course was permitted to "not pay".

Did the Developer DR Horton have the authority to unilaterally, without the vote of the Board on the minutes, enter into the agreement which benefitted everyone except the HOA and which gave Horton many free or reduced price golf memberships and other compenstaion in exchange for the deal? Did Horton's employee, the "HOA President" R Doug Brown, commit a breach of fiduciary duty by obtaining a free golf course membership for himself?

Grounds Maintenance

What is the obligatoin of homeowners to THEMSELVES to maintain areas outside their deeded lots? (e,g, from their lot lines to the curb?)

Can the HOA force homeowners to pay assessments to maintain property not owned by the HOA ? (e.g., Golf Course tract, county owned property, areas deeded to homewoners, areas deeded to sub-HOA associations (The Glens), areas owned by the Developer (who did not pay assessments on his lots)?

Actions of Board of Directors Prior to September, 2007 Election of Board

As a matter of law, was the HOA required to hold an election in (March) 2002 at which the members of the HOA would elect the Board – and in each year thereafter?

As a matter of law, Given that no election was held until September, 2007, were the acts of the unelected board appointed by the Developer "Ultra – Vires" and unenforceable?

As a matter of law, When a vacancy on the unelected board occurred, was the Developer entitled to make the selection of the replacement, or was that choice only available to the remaining board in a vote by them, or by open election by homeowners?

HOA Bylaws

Are the Bylaws of the "Murrells Inlet Golf Plantation Association", "MIGPA", legally the bylaws of the International Club Homeowners Association, Inc?

As a matter of law, who can declare the bylaws of a new non-profit corporation and under what circumstances?

Are the acts of the HOA which are taken under the purported authority of the putative bylaws ultra-vires as a matter of law?

In the absence of legally effective bylaws, what controls what the HOA can and can't do beyond those acts explicitly specified in the covenants?

Cable TV Contract

Is the cable tv contract unenforceable?

Is the cable tv contract unenforceable as a matter of lack of privity?

Is the cable tv contract unenforceable as a matter of federal pre-emption?

Is the cable tv contract unenforceable because neither the IHOA nor the homeowners are parties to it?

Is the cable tv contract unenforceable because the IHOA board never authorized the

contract?

Is the cable tv contract unenforceable because the acts of the board at that time are ultra – vires?

Capital Contributions per Covenants

– "A RESTRAINT ON ALIENATION OF REAL PROPERTY"

Could DR Horton by Amendment get rid of his obligation to pay a capital contribution assessment to the HOA at original sale of a unit and replace it with a new obligation for homeowners to pay a capital contribution assessment to the HOA on every sale or resale – without the agreement of the existing homeowners?

Could Sunbelt and DR Horton divert the capital contribution assessment on original sale of any unit from payment to the HOA to payment to Horton to build the Amenity Complex used for single family home owners only?

Can the later developer Horton limit the operation of covenant on capital contributions through a private contract between developers / builders?

Is a covenant valid which imposes a new KIND OF assessment obligation on existing homeowners?

Can a developer amend the covenants years after purchase of property by homewoners years after they made their original purchase, requiring them to pay the HOA a capital contribution assessment on resale (without a consent vote by the homeowners) and which requires payment of

- an uncertain sum (payment is tied to the varying and unknowable future monthly assessment);

- an uneven sum (payment is different for condo and single family home owners);

- requirement lacks privity and is in the nature of a personal services contract between the HOA and homeowners (imposed by Amendment #3 to Covenants);

What is the liabiliity effect on board members when they ignore the advice of attorneys regarding the advisability of such an amendment (board minutes)

Central Electric – Sale of Right of Way and Use of Proceeds

Was the sale of the Right of Way to Central Electric without an approving vote of the homeowners contrary to law?

Does the HOA Board Members (at the time) owe the HOA the value of the right of way as determined by the amount paid by Central Electric for selling the right of way in violation of the law and the Bylaws?

Did the HOA Board Members at the time violate the law and bylaws by distributing part of the proceeds to some of the homeowners in violation of the Bylaws instead of retaining it in the HOA – without a vote of the members?

Does the HOA Board at the time owe the HOA the amount of money they distributed in violation of the Bylaws? And how much do they owe?

The HOA Counter – Claim (It's a WALL !) And Jarmuth's Responsive claim for Sanctions framing the HOA's action a Frivolous Proceeding

Is Jarmuth or anyone else required to seek the PRIOR permission of the HOA Architectural Review Board for anything?

If so, did Jarmuth substantially comply?

Is there an explicit and enforceable covenant controlling plant edgers or flower beds?

If so, has the widespread and varied installation resulted in changed circumstances such that there is no longer a "standard"?

Is there an explicit and enforceable covenant controlling fences and walls?

If so, has the widespread and varied installation of fences resulted in changed circumstances such that there is no longer a fence or wall "standard"?

Did Jarmuth actually build a fence or wall?

Is the power to impose a fine limited to the HOA Board or can the ARB or the contractor manager do so prior to a hearing?

Does the imposition of a fine require a hearing on notice? Did the HOA Board offer one? Did Jarmuth request same? Was the request ignored?

Was the enforcement selective and capricious?

Was the enforcement of non-existing covenants and refusal to conduct an appeal hearing malicious and an abuse of HOA process?

Was suing out non-existent covenants (ARB and fence) alleging something that wasn't even done (building a wall) a frivolous proceeding under the law and how much of a sanction is merited?

Covenant Amendments

Are Amendments #2 through #5 invalid because of failure to notify homeowners of intent to Amend PRIOR to amending and that the amendments were made AFTER amending?

Are Amendments #2 through #5 invalid as to the addition of more houses sharing the amenity facilities because of dilution of interest without the consent of the existing homeowners?

What covenant provisions have been deleted or otherwise made ineffective and unenforceable and what is the effect of those deletions?

What is the consequences of the HOA Board acting knowingly and willfully contrary to the dicta of the amendments in force at the time of a particular act?

Can a covenant that runs with the land control behavior on property which neither the HOA nor the homeowners actually still own – PRIVITY>

Is a covenant lawful which requires a homeowner to accept goods or services, which does not go directly to the actual use of the acutal land? Is a covenant lawful that requires a homeowner to join a club?

Breach of fiduciary duty

What is the obligation of a member of the Board to the HOA if said member breaches his fiduciary duty to the HOA?

Has any particular HOA Board Member so breached his fiduciary duty causing financial loss to the HOA and what is his / her consequential obligation to the HOA?

Has any particular HOA Board Member used his position to cause financial gain to himself or his employer contrary to the Non-Profit Corporation Act and to the Covenants and By-Laws and what is the consequential legal effect on the particular act or decision of the HOA Board?

What is the financial consequence on the HOA Board Member or his employer of such an act?

Did Toth and the Board breach their fiduciary duty by illegaly distributing Central Electric payments to homeowners and by using some of it to pay an unrelated debt arising from settling another lawsuit?

Did the Board(s) in July 2012 breach their fiduciary duty by failing to disclose or by not making appropriate inquiry into the either theft or misappropriation of Capital Contribution funds contributed by developers?

Did the Board breach it's fiduciary duty by paying The Glens "subassociation" over $10,000 on July 13, 2012 to accept back The Glens parking lot (dedicated to the exclusive use of The Glens residents)

- which the developer had deeded to the Defendant IHOA December 4, 2007

- which deeding the Board had never authorized accepting nor authorized (in the mintues of any Board Meeting) anyone to accept on behalf of the HOA?

- which parking lot The Glens residents were liable for the cost of repairs under the common law theory that repairs to damage to an easement road is paid by the users on the basis of proportion of use – meaning 100% The Glens expense no matter who owned the parking lot?

- which $ 10,000 was not repair of damage to pavement but an aesthetic overpaving with asphalt?

Was the payment of $ 10,000 to the Glens a breach of fiduciary duty by the Board?

Related Declaratory Question: who is responsible for the repair costs for wear and tear to private roads by easement holders?

Defamation

Have the defendants defamed Plaintiff?

How many defamations were there?

Were the defamations willful and maliciously intended?

Have they caused statutory damages to Plaintiff's reputation?

What is the extent of the damages Plaintiff is entitled to recover?

From whom and in what amount are damages payable?

Fences and Walls and Other Landscapting

By reason of lack of a consistent standard, widespread erection, deletion of

provisions in covenants, or absence of a specific restriction in covenants, are there any enforceable provisions on

- **fences or walls**
- **flower or other landscape beds**
- **edgers**
- **landscape decorations**
- **vegetable beds**
- **or other landscape items not explicitly prohibited?**

Homeowenr Association Committees and Fines

By virtue of the South Carolina Non-Profit Corporation Act, do all HOA committees have to have TWO members of the board on them for committee acts to be valid?

Can HOA committees impose fines independent of an action of the Board?

Can the HOA board impose any fine without an explicit vote by the Board on the minutes of the Board?

Can the power to impose fines be delegated to a contractor?

Contracting

Is the homeowner association entitled to any rebates, refunds, or other considerations a contracting agent gets relateable to the purchase by the agent of goods or services on behalf of the HOA? (e.g., after purchase credit card rebates, discounts, or manufacturer rebates)

The Glens

Is The Glens a "multi-family" area per the Covenants?

As a consequence, are residents of The Glens entitled to use the Amenity Center or are they restricted in the same manner as owners of Townhouses in The Cambridge area or The Villas condominiums?

Are The Glens "Townhouses" – the court may not need to reach this conclusion if the question of whether The Glens is a Multi-Family is sufficient to address eligibility to use the Amenity Center.

Roads

Do the roads for which the Horry County Council passed resolutions accepting them into the County Maintenance System belong to Horry County or to someone else?

Does the HOA own the roads and (except for the southern end of International Club Drive), did the HOA EVER own any road?

Who is responsible to maintain the roads?

Who is responsible to maintain the area from the curb of roads to the property lines of the adjacent lots? Can the HOA "fine" said homeowner for ignoing such areas outside his property?

Do South Carolina state and Horry County Ordinances pertaining to parking on streets pre-empt HOA parking rules?

Are provisions of covenants invalid which relate to activites such as parking, or mail boxes on land NOT owned by the HOA or by individual homeowners due to lack of privity?

Are there any covenants effective as to activities on "roads"

Can the HOA enact "rules" which have restrictions on roads not reflected in the Covenants?

Is it legally permissible to compel homeowners to pay for the maintenance of areas not owned by themselves or the HOA – i.e., road shoulders?

Jarmuth Children's Swing Set

Is Jarmuth entitled to set up the swing set as demanded because of –

- selective and capricious enforcement of existing rules?

- no actual prohibition on swing sets or specific requirements as to placement

- approval by HOA board of another swing set located in a side yard

Did the applicable ARB "Guidelines" at the time of disapproval have

- any explicit location requirements?

- only a requirement to "storm wind proof" the swing set?

Are the Horry County "set backs" stated in the PUD Planning Commission approval documents the only controlling limits on swing set placement?

Was the ARB denial based on a non-existent restriction?

Was the statement made by Toth to the South Carolina Human Rights Commission on November 19, 2009 that the HOA "never" approves swing sets in any location other than a backyard true?

Did the admitted approval by the HOA of at least 17 swingsets including one visible on a lot across the street from Jarmuth

- constitute "changed circumstances" or selective and capricious enforcement mandating approval of Jarmuth's swing set?

Is Jarmuth required to obtain the prior approval of the HOA's ARB to erect a swing set?

EXHIBITS

See attached Exhibit List

SC Rule 32(b) Witness List

1. **Jamison Martin**
   (843) 237-0429
   195 Kings River Rd Hagley
   Pawleys Island, SC 29585

Mr. Martin will testify about the use of irrigation systems in the PUD by the HOA, and the landscaping practices.

No deposition or other statement has been taken.

2. **Rosemary Toth**
238 Seville Dr
Murrells Inlet, SC 29576-7585
843-651-1392

Ms. Toth will testify about her decisions while a member of the board of directors; the elections which brought and kept her in office; the appointment of board members and their failure to be replaced at the first following election; her distribution of Central Electric Money; her assertions that the parking lots all belonged to the Golf Course; her failure to try to collect capital contributions from the developers; the administration of the cable contract; enforcement policies and practices regarding covenants; and contracting practices.

Email, a deposition, and other recordings have been taken and provided to the Defendant.

3. **Julie Case**
c/o KA Diehl
11822 Highway 17S Bypass
Murrells Inlet, SC 29576-9337
843-357-9888

Ms. Case will testify about the operations of the Architectural Review Board, the operations of Defendant Diehl, the circumstances surrounding issuing material relating to Plaintiff's past, elections, and other matters stated in the Rule 16 description of issues.

Email, a deposition, and a recording have been taken and provided to the Defendant.

4. **William Freiboth**
208 Wicklow Dr
Murrells Inlet, SC 29576
843-?56-4?60

Mr. Freiboth will be questioned about Policies and Procedures of the HOA, particularly it's control of the ARB; also, about the practices concerning appointment of resigned HOA Board members.

A deposition has been taken and provided to defendants.

5. **Michael Butryn**
1008 Ennis Dr
Murrells Inlet SC 29576
843-357-1276

He will testify about landscaping issues; elections; contracting; and circumstances

surrounding the distribution of material about Plaintiff by the defendants.

A deposition and statement have been taken and provided to defendants.
The defendants are known to be in possession of recordings of meetings where he spoke.

6. **Rebecca "Beckie" Abel**
c/o KA Diehl
11822 Highway 17S Bypass
Murrells Inlet, SC 29576-9337
843-357-9888

Ms. Abel will testify about the same issues as Ms. Case.
She particularly will be questioned about the record keeping practices and procedures of Diehl and the distribution of work within Diehl.

No statement has been taken.

7. **Peter Pizzi**
843-651-1158
193 Pickering Dr
Murrells Inlet SC 29576

Mr. Pizzi will testify about the buildings and grounds issues, ARB covenant / rule enforcement issues, the circumstances surround the distribution by Defendants of material about Plaintiff, and about golf course issues.

A deposition has been taken and provided to Defendants. It is believed that a recording exists of a buildings and grounds presentation – which is not in Plaintiff's possession.

8. **Jane Pizzi**
843-651-1158
193 Pickering Dr
Murrells Inlet SC 29576

Ms. Pizzi will testify about conversations she had with Diehl employees and HOA officials, particularly about one with Julie Case, and about circumstances surrounding the distribution of material about Plaintiff by the defendants.

A deposition and statement has been taken and provided to Defendants

9. **Louis Astorino**
862 Castlebridge Drive
Murrells Inlet, SC 29576-7534
843-357-9311

Mr. Astorino's depositions will be used in place of his testimony because of his medical situation. Mr. Astorino has testified about material distributed by the defendants regarding plaintiff, a statement by an official of the HOA relating to plaintiff, and enforcement procedures by the HOA / ARB relating to covenant provisions.

A recording made by Mr. Astorino which included him has been provided to defendants.

10. **Charles Ferrera**
843-314-4340
901 KNOLL SHORES CT 205
MURRELLS INLET, SC 29576

Mr. Ferrera will testify about landscaping practices of the HOA involving him, discussions between himself, Ms. Toth, and other HOA officials and county officials; HOA elections; ARB enforcement issues involving him; the distribution by the defendants of material relating to Plaintiff; billing and budgeting practices of the HOA; cable tv and waste management issues, irrigation, and HOA notification practices.

A deposition has been taken and provided to the defendants.

11. **Michael "Mike" Templeton**
826 Castlebridge Dr
Murrells Inlet, SC 29576
843-65- 6066

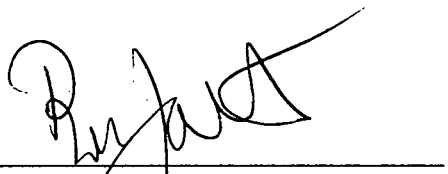
Mr. Templeton will testify about his use of his home for business purposes; about his appointment to and service on the HOA in various capacities; about elections; about HOA decision making outside of regularly scheduled meetings; and about the HOA's distribution of material relating to Plaintiff.

No statement has been taken.

12. **Ronald Jarmuth, Plaintiff**
249 Pickering Dr
Murrells Inlet, SC 29576
843-314-4355

The Plaintiff may choose to testify about all issues before the court.
Various recordings exist which include speech by Plaintiff which have been provided to Defendants. It is believed that Defendants have additional such recordings.

Submitted by Plaintiff:

By: 

Ronald Jarmuth, Plaintiff
249 Pickering Drive
Murrells Inlet, SC 29576
843-314-4355
July 16, 2012

STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	**FIFTEENTH JUDICIAL CIRCUIT**
COUNTY OF HORRY	)	
	)	**Civil Action No. 2009-CP-26-3596**
Ronald Jarmuth	)	**Civil Action No. 2010-CP-26-11320**
Plaintiff	)	
vs.	)	
The International Club	)	**PLAINTIFF'S**
Homeowners Association, Inc.,	)	**CERTIFICATE OF SERVICE**
et al	)	
Defendants	)	
	)	

I certify that, on July 17, 2012 I served a copy of Plaintiff's Rule 16 Statement with Rule 32(b) Statement together with additional exhibits not previously served --

On Defendants International Club HOA, KA Diehl, & Rosemary Toth by hand delivery of the office of their attorney, Henrietta Golding, at

McNair Law Firm, P.A.
2411 Oak Street; Suite 206
Myrtle Beach, SC 29577-3164

Ronald Jarmuth
249 Pickering Drive
Murrells Inlet, SC 29576
July 17, 2012