

#PGS:

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Record and return to:

Brian Hellman, Esq. Hellman & Yates, PA 105 Broad Street Third Floor Charleston, SC 29401

Please cross-reference to:

Declaration: Book T535 at Page 686 Declaration: Book 0846 at Page 099

FIFTH AMENDMENT TO DECLARATION OF COVENANTS AND RESTRICTIONS FOR THE PRESERVE II AT FENWICK HALL AND

PROVISIONS FOR AND BY-LAWS OF THE PRESERVE II AT FENWICK HALL PROPERTY OWNERS ASSOCIATION, INC.

THIS FIFTH AMENDMENT TO DECLARATION is made this $\frac{14}{1200}$ day of November 2023 by 1776, LLC a South Carolina limited liability company, hereinafter referred to as the "Declarant" or "1776, LLC."

WHEREAS, Declarant made a Declaration of Covenants and Restrictions for The Preserve II at Fenwick Hall and Provisions for and By-Laws of The Preserve II at Fenwick Hall Property Owners Association, Inc. (the "Declaration"), which was recorded on December 12, 2019 at Book 0846 Page 099 with the Charleston County ROD Office; and

WHEREAS, the Declaration has been previously amended pursuant to those amendments recorded at the Charleston County ROD Office; and

WHEREAS, Declarant desires to further amend the Declaration to reflect additional property that has been annexed to the Property by merger and is subject to the Declaration, as amended.

NOW THEREFORE, pursuant to the power reserved to Declarant under the Declaration. Declarant hereby amends the Declaration as follows:

- 1. The Whereas paragraphs are made a part hereof and incorporated herein.
- The defined terms in the Declaration, as amended, shall apply to the terms in this Fifth Amendment.
- 3. Section 2.02 (Additional Property) of the Declaration provides:

During the Declarant Control Period, it is contemplated that additional property may be annexed to the Property by Declarant, by merger or otherwise, without the consent of any Owners, the Association or its Members, or any mortgagee, to include, but not be limited to, the Lots or Parcels contemplated by the Preserve PUD which are not part of the Property (i.e., 31 platted and unplatted Lots), John Fenwick Lane and Zurlo Way, and the common area path located along Penny Creek owned by The Preserve at Fenwick Hall Property Owners Association, Inc.

4. 1776, LLC was the owner of those parcels on Johns Island known briefly as Lot 2 Residual (TMS No. 346-00-00-258); Lot 3 Residual (TMS No. 346-00-00-259); Lot 54 (TMS No. 346-00-00-284); and Zurlo Way (TMS No. 346-00-00-281). This property was purchased at a foreclosure sale as a result of the foreclosure of those certain mortgages from Penny Creek Associates, LLC to First Union National Bank (predecessor to Wells Fargo Bank N.A.) dated August 7, 2002 and recorded at Book P352, Page 613 and from Penny Creek Associates, L.L.C. to Wachovia Bank, National Association (predecessor to Wells Fargo Bank N.A.) dated April 5, 2006, and recorded at Book G579, Page 249. The mortgages were foreclosed in the case of Wells Fargo Bank, N.A. v. Penny Creek Associates, LLC, et. al. (Case No. 2014-CP-10-04946). The parcels were conveyed by Mikell R. Scarborough, as Master in Equity for Charleston County, to 1776, LLC by a Master's Deed recorded on August 29, 2017 in Book 0662 at Page 915.

Certain restrictive covenants for the Preserve were executed by Epic Development Group, LLC on April 29, 2005, and recorded at Book T535, Page 686 (the "Initial Preserve Covenants"). The Initial Preserve Covenants covered Lot 1 as shown on that plat at Plat Book EH, Page 884. Lot 1 was not part of the property purchased by 1776.

Pursuant to that Third Amendment dated December 27, 2013, and recorded at Book 0383, Page 849, Penny Creek Associates, LLC purported to extend the Initial Preserve Covenants to Lots 2 and 3 as shown on the plat at Plat Book EH, Page 884. Said parcels were subject to the lien of the above-described mortgages, and the holders of such mortgages did not consent to the dedication of said property to the Initial Preserve Covenants or subordinate its mortgage lien to said dedication. A substantial portion of Lots 2 and 3 was purchased by 1776 at the foreclosure sale.

Since the mortgage holder did not consent or subordinate to the dedication of the Lots 2 or 3 to the Initial Preserve Covenants, the properties purchased at the foreclosure sale were conveyed free of the Initial Preserve Covenants and are therefore not subject to said Covenants.

- 5. By a Quitclaim Deed dated February 21, 2020, and recorded on February 25, 2020 in Book 0862 at Page 242, 1776, LLC conveyed to the Preserve II at Fenwick Hall Property Owners Association, Inc. (the "Preserve II POA") certain property that it acquired in the Master's Deed referenced in paragraph 4 hereof, to be owned and used by the Preserve II POA as Common Properties, which included marshland and two (2) docks, Zurlo Way, and open space, including the recreation area and trail along the marsh.
- 6. The Initial Preserve Covenants created The Preserve at Fenwick Hall Property Owners Association, Inc (the "Preserve I POA"). On December 12, 2020, the members/owners of the Preserve I POA voted to merge into Preserve II POA (the "Merger").
- 7. On June 14, 2022, Nonprofit Corporation Articles of Merger, in which the Preserve I POA was the Acquired Corporation and the Preserve II POA was the Surviving Corporation, were filed with the Secretary of State and assigned File ID: 22615-1609211, which is attached hereto and made a part hereof.
- 8. Pursuant to Section 2.02 (Additional Property) of the Declaration and the Merger, 34 platted and unplatted Lots, being Lots 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 17, 18, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 54, 56, 57, 60, 61, 62, 63, 64, 65, and 66 as shown on the Master Plan attached to the Planned Unit Development Guidelines of The Shores at Fenwick Plantation a/k/a The Preserve at Fenwick, approved by the Charleston City Council on May 11, 2004 as Ordinance #2004-47 ("Preserve PUD"), became part of and subject to the rights and obligations set forth in the Declaration, as amended. In this Amendment, Declarant confirms that all of the Lots described in the Preserve PUD are property subject to the Declaration.
- 9. This Fifth Amendment to Declaration shall be construed and interpreted in accordance with, and governed by, the laws of the State of South Carolina. Should any provision herein conflict with such applicable law, such conflict shall be severed from this Fifth Amendment to Declaration and shall not affect the validity of any non-conflicting provision of this Fifth Amendment.
- 10. The Fifth Amendment to Declaration and shall apply to the successors and assigns of each party.

Except as set forth in this Fifth Amendment to Declaration and as previously amended, the Declaration shall remain in full force and effect.

IN WITNESS THEREOF, the Declarant has set its hands and seals hereto as follows:

DECLARANT

liability company

1776, LLC, a South Carolina limited

WITNESSES: Witness No. 1 Mana Patton	By: The Eugene Zurlo Living Trust Dated December 11, 1997 Its: Member By: Light Audo Name: Eugene J. Zurlo Its: Trustee
Witness No. 2 Witness No. 1 Witness No. 2 Witness No. 2	By: Charlotte R. Zurlo Its: Trustee
STATE OF SOUTH CAROLINA) COUNTY OF CHARLESTON)	ACKNOWLEDGMENT
The foregoing instrument was acknowledged limited liability company, by the Eugene J. Z its Sole Member, by Eugene J. Zurlo and Ch. November 2023.	Curlo Living Trust dated December 11, 1997.
(SEAL) white TA Day

Notary Public for the State of South Carolina My commission expires: 8-0-2029

Jan 13 2023

REFERENCE ID: 1201430

File ID: 220615-1609211 Filing Date: 06/14/2022

STATE OF SOUTH CAROLINA SECRETARY OF STATE

NONPROFIT CORPORATION ARTICLES OF MERGER

Pursuant to the provisions of Section 33-31-1104 of the 1976 S.C. Code of Laws, as amended, the applicant delivers to the Secretary of State these Articles of Merger:

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(b) Acq	uired Corporation	n:		····			
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*If there are	additional corpo	rations that are pa	irties to this merger, ple	ease provi	de the re	equired infor	mation
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THE PRESERVE II AT FENWICK HALL PROPERTY OWNERS ASSOCIATION, INC., a South Carolina nonprofit corporation

Name of Surviving Corporation

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	ed corporation:					
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(Office)						

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PLAN OF MERGER

THE PRESERVE AT FENWICK HALL PROPERTY OWNERS ASSOCIATION and THE PRESERVE II AT FENWICK HALL PROPERTY OWNERS ASSOCIATION

This Plan of Merger (this "Agreement") is entered into and made effective as of this 12th day of December, 2019 by and between THE PRESERVE AT FENWICK HALL PROPERTY OWNERS ASSOCIATION, INC., a South Carolina nonprofit corporation, ("The Preserve") and THE PRESERVE II AT FENWICK HALL PROPERTY OWNERS ASSOCIATION, INC., a South Carolina nonprofit corporation ("The Preserve II"), acting pursuant to S.C. Code Ann. § 33-31-1101 and with respect to the proposed merger of The Preserve into The Preserve II.

RECITALS:

WHEREAS, The Preserve and The Preserve II presently exist as separate and distinct corporations, requiring duplication of management duties and costs thereof;

WHEREAS, The Preserve was created on April 10, 2006, as a mutual benefit corporation with members for the benefit of the Preserve at Fenwick Hall community at large and in order to enforce the Declaration of Covenants and Restrictions for the Preserve at Fenwick Hall dated April 29, 2005, and recorded May 4, 2005, in Book T535 at Page 686 in the Register of Deeds for Charleston County, as amended, as well as to maintain and administer its common areas and facilities in accordance with the reasonable expectations of the residents and property owners of the Preserve at Fenwick Hall community;

WHEREAS, the Declaration of Covenants and Restrictions for the Preserve at Fenwick Hall and Provisions for and By-Laws of the Preserve at Fenwick Hall Property Owners Association, Inc. dated April 29, 2005 and recorded May 4, 2005 in Book T-535 at Page 686; were amended by that certain First Amendment recorded in Book J-583 at Page 054; that certain Assignment and Second Amendment recorded in Book 0360 at Page 784; that certain Corrective Second Amendment recorded in Book 0366 at Page 751; that certain Third Amendment recorded in Book 0383 at Page 849; that certain Fourth Amendment recorded in Book 0418 at Page 478; that certain Assignment of Declarant's Rights in Book 0602 at Page 511, and that certain Fifth Amendment recorded in Book 0794 at Page 328 in the Register of Deeds for Charleston County (collectively, the "Preserve Covenants");

WHEREAS, the property subjected to the Preserve Covenants were subject to at least one mortgage at all times prior to the filing of the Preserve Covenants and said Preserve Covenants were never consented to by the mortgagee(s), nor were the mortgage(s) subordinated to the Preserve Covenants;

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WHEREAS, on or about August 29, 2017, the residual property held by the developer of The Preserve at Fenwick Hall, the description of which is attached hereto and incorporated herein by reference as Exhibit A (the "Residual Property") was sold at a court-ordered foreclosure sale;

WHEREAS, since The Preserve Covenants were not consented or subordinated to by the foreclosing mortgagee(s), the Residual Property was not subjected to the covenants after the foreclosure sale, creating a number of issues including the right of The Preserve members to use certain real property acquired in the foreclosure sale, such as the dock, and that the purchaser at the foreclosure sale would have no obligation to pay any association dues and assessments to The Preserve;

WHEREAS, 1776, LLC a South Carolina limited liability company ("1776"), was the successful purchaser of the Residual Property at the foreclosure sale, and was desirous of resolving any issues regarding the Preserve Covenants that arose as a result of the foreclosure and, for the benefit of The Preserve II at Fenwick Hall community at large, 1776 subjected portions of the Residual Property to that certain Declaration of Covenants and Restrictions for The Preserve II at Fenwick Hall dated November ___, 2019, and recorded November ___, 2019, in Book ____ at Page ___ in the Register of Deeds for Charleston County (the "Preserve II Covenants"), and in order to enforce The Preserve II Covenants as well as to maintain and administer its common areas and facilities in accordance with the reasonable expectations of future residents and property owners of portions of the Residual Property, 1776 formed The Preserve II on November ___, 2019, as a mutual benefit corporation with members;

WHEREAS, portions of the Residual Property acquired by 1776 in the foreclosure sale included certain areas of the development that were never conveyed to The Preserve I to be used as common areas of the development, including but not limited to the dock, certain roadways, greenspace, and other buffers, which 1776 has conveyed to The Preserve II for the use and benefit of its members;

WHEREAS, after careful consideration, the Boards of Directors of each of the associations have concluded it would be in the best interests of the parties to consolidate into a single nonprofit corporation such that the members of The Preserve and The Preserve II would all be members of the same Association and have the benefit of the common areas owned by each of The Preserve and The Preserve II, and contribute towards the costs, expenses, and assessments related to the common areas of each association; and

WHEREAS, it has been preliminarily determined and approved by the Boards of Directors for The Preserve and The Preserve II that the members of The Preserve and The Preserve II be asked to approve the merger of the corporations into one corporation so that the members of The Preserve and The Preserve II would all be members of the same association.

AGREEMENT:

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are hereby acknowledged, The Preserve and The Preserve II hereby enter into the following Agreement to merge The Preserve into The Preserve II:

I. PLAN OF THE MERGER

The foregoing recitals are incorporated herein as if fully set forth below. The Preserve is proposed to be merged into The Preserve II if such merger is approved by the members of The Preserve (by two-thirds of the votes cast or a majority of the voting power, whichever is less, pursuant to S.C. Code Ann. § 33-31-1103(a)(2)). The Preserve II shall be the surviving corporation, which shall not be a new corporation, and which shall continue its corporate existence as a corporation to be governed by the laws of the State of South Carolina (also hereinafter, the "Association"). If the Merger is successful, The Preserve II will not change its name.

II. OBJECTIVES OF THE MERGED ASSOCIATION

- (a) To operate and manage the common area property included within Preserve and Preserve II at Fenwick Hall and governed by its community documents;
- (b) To enhance and preserve the value of the properties of owners subject to the Preserve Covenants and Preserve II Covenants;
- (c) To maintain the Preserve and Preserve II at Fenwick Hall as a community of the highest quality and value, and to enhance and protect its value, desirability and attractiveness;
- (d) To perform all acts and services and exercise all powers and duties in accordance with the requirements for a planned community and as set forth in the Preserve Covenants and Preserve II Covenants governing documents;
- (e) To collect dues and/or assessments as authorized in the Preserve Covenants and Preserve II Covenants;
- (f) To act for and on behalf of the members of the Association in all matters deemed necessary and proper for the protection, maintenance, and improvement of the lands and improvements owned by the members and the Association;
- (g) To provide for administration, preservation, improvement, and architectural review as contained in the applicable Preserve Covenants and Preserve II Covenants;
 - (h) To promote, foster and advance the health, safety, and welfare of the residents;
- (i) To eliminate or limit the personal liability of Directors to the Association for monetary damages for breach of fiduciary duty, as allowed by law;
- (j) To do any and all permitted acts suitable or incidental to any of the foregoing purposes and objects to the fullest extent permitted by law, and do any and all acts that, in the opinion of the Board and/or Declarant (as defined in the Preserve II Covenants), will promote the

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benefit and enjoyment of the members within the Association, and to have and to exercise any and all powers, rights, and privileges which are granted under South Carolina law, the applicable community documents, and the laws applicable to a nonprofit corporation in the State of South Carolina.

III. ARTICLES OF INCORPORATION

If this Agreement is approved by the members of The Preserve, the respective Articles of Incorporation of The Preserve and The Preserve II are to be replaced and superseded by the amended Articles of Incorporation for The Preserve II (if approved) and Articles of Merger of The Preserve and The Preserve II to be filed with the South Carolina Secretary of State.

IV. BYLAWS

If this Agreement is approved by the members of The Preserve, the respective Bylaws of The Preserve and The Preserve II are to be replaced and superseded by the Amended and Restated Bylaws of The Preserve II (if approved), as amended from time to time.

V. OFFICERS AND DIRECTORS

The officers and directors of The Preserve II on the Effective Date (as defined in Article VIII, Section (a) below) of the merger shall be the officers and directors of The Preserve II currently serving at that time, unless provided otherwise by the amended Bylaws of The Preserve II. They shall continue to constitute the officers and directors of The Preserve II for the terms elected and until their respective successors shall be elected and qualified.

VI. RESOLUTION BY DIRECTORS APPROVING AND RECOMMENDING THE MERGER PLAN AND AGREEMENT

The Board of Directors for The Preserve II and The Preserve has adopted the Joint Board Resolution Regarding Intent to Pursue Merger resolving to pursue the following actions:

- (1) Both Boards will review and adopt this Agreement pursuant to the South Carolina nonprofit Corporation Act;
- (2) The Preserve shall seek its membership approval (by two-thirds of the votes cast or a majority of the voting power, whichever is less, pursuant to S.C. Code Ann. § 33-31-1103(a)(2)) of the proposed merger by submitting a ballot to its members, where the members may vote for or against the proposed merger of the Associations; and
- (3) The Preserve II will seek to amend its Bylaws and Articles of Incorporation (through a membership vote and by the percentages required in the governing documents) to address Board transition;

The intended Merger of The Preserve and The Preserve II is contingent upon an affirmative membership vote and/or consent of relevant parties as described above, upon which The Preserve

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ssume the responsibilities of The Preserve, including but not limited to the maintenance of common facilities.

VII. RECOMMENDATION OF ADOPTION OF THIS MERGER PLAN AND AGREEMENT BY MEMBERS

The members of The Preserve will be asked to vote for and approve the merger of the Associations. The members of The Preserve II will be asked to vote for and approve the Amended Articles of Incorporation and amended Bylaws for The Preserve II and the Articles of Merger.

VIII. EFFECT OF MERGER

- (a) If the merger becomes effective, the Articles of Merger are to be filed with the South Carolina Secretary of State. The Amended and Restated Bylaws for The Preserve II will be executed and approved only the filing of the Articles of Merger.
- (b) The Preserve shall be merged into The Preserve II and the separate existence of The Preserve will have ceased and the existence of The Preserve II shall continue.
- (c) The title to all real estate and other property owned by The Preserve is vested in The Preserve II without reversion or impairment, subject to any and all conditions to which the property was subject before the merger.
 - (d) The Preserve II has all liabilities and obligations of The Preserve.
- (e) A proceeding pending against The Preserve, if any may be continued as if the merger did not occur or The Preserve II may be substituted in the proceeding for The Preserve;
- (f) The Articles of Incorporation and Bylaws of The Preserve II are amended to the extent provided in this Plan of Merger;
- (g) The memberships of The Preserve shall be converted into memberships of The Preserve II, and each Membership shall be treated equally.
- (h) The Preserve II will agree to accept all banking and other accounts of or from The Preserve.
- (i) No contracts, agreements, easements, licenses, and other obligations of The Preserve will be terminated, vacated, or otherwise eliminated.
- (j) Each member shall continue to be subject to the restrictions, architectural requirements, and enforcement provisions of their applicable protective covenants, as amended or may be amended.
- (k) The Board of Directors of The Preserve will assign its rights, powers, and duties conveyed pursuant to its governing documents to the Board of Directors of The Preserve II, including authority under any existing protective covenants.

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The percentage of common expense liabilities shall be provided for in the applicable existing protective covenants, as amended, of record.

IX. REPRESENTATIONS OF THE PARTIES

Both The Preserve and The Preserve II represent to each other that no statement, document, financial statement, schedule, exhibit or certificate furnished in connection with the Agreement or in connection with due diligence with respect hereto contains any untrue statement of a material fact, or omits to state a material fact required to make the statements therein contained not misleading. Both The Preserve and The Preserve II have disclosed to each other all information concerning its operations, financial condition, funding sources, and contractual commitments that is necessary for the board of directors of each of The Preserve and The Preserve II to make an informed decision concerning the feasibility and desirability of the Merger.

X. PROVISIONS OF GENERAL APPLICATION

- (a) For the convenience of the Associations and to facilitate the completion of this Agreement, any number of counterparts hereof may be executed; each such counterpart shall be deemed to be an original instrument, all of which together shall constitute one agreement.
- (b) This Agreement and the legal relations between the parties hereto shall be governed by and construed in accordance with the laws of the State of South Carolina.
- (c) This Agreement cannot be altered or amended except pursuant to an instrument in writing signed on behalf of the parties hereto.
- (d) At any time, or from time to time, simultaneously with or after the Effective Date of the merger, the last acting officers and directors of The Preserve shall, if and when requested by The Preserve II or its successors or assigns, execute and deliver all such deeds, assignments and other instruments and take or cause to be taken all such further action as The Preserve II or its successors and assigns may deem necessary or desirable in order to vest, perfect or confirm in The Preserve II title to and possession of all properties, rights, privileges, powers, franchises, immunities and interests of The Preserve and otherwise to carry out the purpose of this Agreement.

[Remainder of page left blank, intentionally. Signature pages to follow.]

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Mark Hammond

IN WITNESS WHEREOF, The Preserve and The Preserve II have caused this Agreement to be signed in their respective corporate names and on their behalf by their respective Presidents and certified by their respective Secretaries.

THE PRESERVE AT FENWICK HALL PROPERTY OWNERS ASSOCIATION, INC., a South Carolina nonprofit corporation, a South Carolina nonprofit corporation

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THE PRESERVE SECRETARY'S CERTIFICATION

I, <u>Nice lei Challe</u>, being the duly elected Secretary of The Preserve at Fenwick Hall Property Owners Association, Inc., a South Carolina nonprofit corporation, a South Carolina nonprofit corporation, hereby certifies that the foregoing Amendment was approved by two-thirds of the votes cast or a majority of the voting power, whichever is less.

Name: Nicala

Secretary, The Preserve

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Musk Hammond

THE PRESERVE II AT FENWICK HALL PROPERTY OWNERS ASSOCIATION, INC., a South Carolina nonprofit corporation

By: Application

Name: Frequent

Its: Frequent

THE PRESERVE II SECRETARY'S CERTIFICATION

I, <u>Dennis</u> D. <u>Curtin</u>, being the duly elected Secretary of The Preserve II at Fenwick Hall Property Owners Association, Inc., hereby certifies that the foregoing Amendment was approved by two-thirds of the votes cast or a majority of the voting power, whichever is less.

Secretary, The Preserve II

RECORDER'S PAGE

NOTE: This page MUST remain with the original document



| Date: | November 14, 2023 | | Time: | 3:29:17 PM | | Book | Page | DocType | | 1213 | 321 | Amen/Rest/Covs | | Karen Hollings, Register of Deeds | | Charleston County, SC

Filed By: HELLMAN YATES, PA

105 BROAD STREET, 3 FLOOR CHARLESTON SC 29401 (BOX)

			# of Pages:	15
MAKER:		# of Sats:	# of References:	
1776 LLC				
		Note:	Recording Fee	\$ 25.00
RECIPIENT:			Extra Reference Cost	\$ -
NA			Extra Pages	\$ -
			Postage	\$ -
Original Book:	Original Page:		_	
T535	686		ΤΩΤΔΙ Γ	\$ 25.00

DRAWER	Drawer 2
CLERK	SLW



1213 Book



321 Page



11/14/2023 Recorded Date

15 # Pgs



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