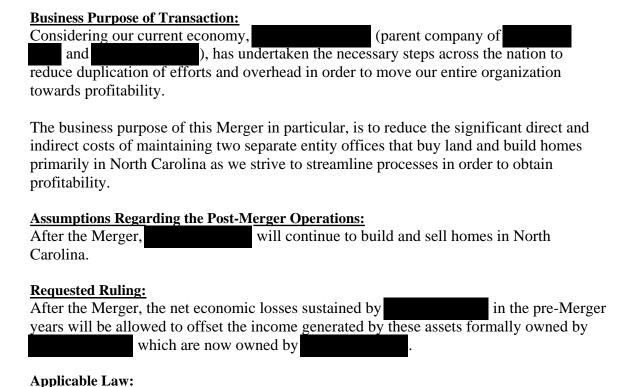


## North Carolina Department of Revenue

Beverly Eaves Perdue		David W. Hoyle
Governor		Secretary
	February 4, 2011	
Re: Net Economic	c Loss – Ruling Request	
Dear	:	
	your letters dated and and gregarding the availability of a net economic loss of war presented in your letters.	in which which consideration is
Your letters you prese	ented these facts for consideration:	
corp Carolina. Bot subsidiaries fi Sec. 105-130. and 11/30/09.	are subsidiaries of a holding company incorporated in as well is also a corporation conducting business in as well is also a corporation conducting business in the first corporation conducting business	and
"Merger". The Merger, rights and obli in North Caro	plans to merge with and into , with viving entity. The anticipated transaction is referred to e Merger is expected to occur on or before will have all the assets of igations under its existing contracts.	herein as the  . After the and assume all its will conduct business

February 4, 2011 Page 2

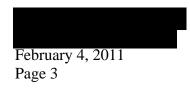


Under N.C. Gen. Stat. Sec. 105-130.8(a), economic losses may be carried over for fifteen years. North Carolina law also provides for a post-apportionment net economic loss deduction, which includes state adjustments to the federal taxable loss.

When a loss corporation and a profit corporation merger, pre-merger losses may be offset against post-merger profits only to the extent that the group of assets previously operated at a loss generates a profit after the merger (Sec. 17:0SC.IS07, N.C. Adm. Code). In order to take the post-merger losses, accounting records need to reflect the yearly income and expenses attributable to such groups of assets (Benton Woods, Inc.).

Where corporations have merged, the court will look to the substance of the merger to determine if the net economic loss may be carried forward. If the resulting merged corporation is substantially the same corporation that incurred the losses, the deduction will be allowed. If the post-merger corporation has been altered, enlarged or materially affected by the merger, the deduction will be denied (Good Will Distributors (Northern) Inc. v. Currie).

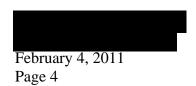
In Fieldcrest Mills, Inc. v. Coble (N. C 1976), North Carolina affirmed that the continuity of enterprise is required to take the pre-merger losses against the post-merger income. In this court case a corporation engaged in the business of textile manufacturing could not use the net economic loss carryover of a former subsidiary which was engaged in textile printing. The court held this merger results in a new enterprise, materially different from either predecessor.



In a more recent case, BellSouth Telecommunication, Inc., dba Southern Bell Telephone Telegraph v. NC Department of Revenue (1997), the North Carolina Appeals court discussed three tests, enunciated by the Court in Fieldcrest, that need to be met in order for the pre-merger loss to be allowed. The first is the "but-for" test, which allows the deduction, if but for the merger, the corporation with the loss would have been able to utilize the deduction. The "assets" test requires that the pre-merger assets that generated the loss may only deduct the loss against the income from these assets. Finally, the "substantially the same business" test allows the deduction if the business of the acquired corporation which generated the loss has not been materially altered or enlarged by the merger.

## **Argument In Support of Requested Ruling:** The Merger will satisfy the continuity of business enterprise and meet all three of the Fieldcrest tests. In particular, the Merger will satisfy the "but for" test, since would have been able to claim the net economic loss carryover if it had remained a separate entity. After the Merger the asset test will be met since 's assets that generated the losses will be tracked and will only be allowed to offset the gain associated with these loss assets. The substantially same business test will be met since both of these subsidiaries build and sell homes and will continue the same business after the Merger. In addition the business of selling homes will not be materially altered or enlarged by the Merger. **Conclusion:** Based on the support provided, we respectfully request confirmation that the Department, and to utilize, if merged, their respective prewill allow merger net economic losses to offset anticipated future post-merger taxable income. **Ruling Requested:** After the Merger, the net economic losses sustained by in the pre-Merger years will be allowed to offset the income generated by these assets formally owned by which are now owned by **Department's Response:** According to the information provided in your letters, we agree that after the merger, will retain the NEL's from that were generated prior to the merger. can utilize the NEL to offset income generated after the merger, subject Further, to the provisions and limitations of G.S. 105-130.8 and the case law you cited.

This ruling is based solely on the facts submitted to the Department of Revenue for consideration of the transactions described. If the facts and circumstances given are not accurate, or if there are other facts that were not disclosed that might cause the Department to reach a different conclusion, then the taxpayer requesting this ruling may not rely on it. A letter ruling is not equivalent to a Technical Advice Directive that generally affects a large number of taxpayers. If a taxpayer relies on this ruling and the Department discovers, upon examination, that the fact



situation of the taxpayer is different in any material aspect from the facts and circumstances given in this ruling, then the ruling will not afford the taxpayer any protection. It should be noted that this document is not to be cited as precedent and that a change in statute, a regulation, or case law could void this ruling.

Very truly yours,

