THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough,
Master in Equity

Case No. 2017-CP-10-03099

Appellate Case No. 2022-001479

Elizabeth Heatley, Neil B. McCann, Jr., David Neil Monk, Thomas V. Bessent, and Mariner's Cay Marina Council of Co-Owners, Inc.....Respondents,

vs.

Mariner's Cay Marina Condo, LLC, Mariner's Cay Fuel Dock, LLC, George A. Farmer, Jr., and South Atlantic Bank, Defendants

Of which Mariner's Cay Marina Condo, LLC, Mariner's Cay Fuel Dock, LLC and George A. Farmer, Jr., are the ..... Appellants.

INITIAL BRIEF OF RESPONDENTS

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2. Does South Carolina Code Section 27-31-60 provide "a process or procedure for amending a master deed in order to remove or add common elements"?

3. May a party be judicially estopped from asserting a position in a lawsuit, based upon a previous lawsuit in which he was neither a party nor about which he took a position?

STATEMENT OF THE CASE

This is an appeal from the Charleston County Master-in-Equity's Order filed May 16, 2022, granting declaratory relief to Respondents, holding that the 2007 Amended Master Deed of Mariners Cay Marina Horizontal Property Regime is void, to the extent that it purports to convert common elements of the Horizontal Property Regime, consisting of a Ship's Store Building and two Fuel Docks, from their former status as common elements to individual units. The individual Respondents, who are each individual unit owners, held vested title interests in the common elements that could not unilaterally be extinguished by Declarant without their consent.

A concise history of the proceedings, insofar as necessary to an understanding of the appeal, is as follows:

1. On June 16, 2017 the original individual Plaintiffs in the case filed their Summons and Complaint seeking, *inter alia*, class certification on behalf of themselves and other condominium unit / boat slip owners at Mariner's Cay Marina who are "similarly situated", and for declaratory relief that an Amended Master Deed recorded in 2007 unlawfully converted common elements to

individual condominium units; thus depriving the Plaintiffs and the class they sought to represent of their vested title rights in those common elements.

2. On July 21, 2017 the original Plaintiffs filed their Amended Complaint adding George A. Farmer (who is the sole member of the two LLC Appellants, Mariners Cay Marina Condo LLC and Mariners Cay Fuel Dock, LLC), and seeking monetary damages.

3. On September 22, 2017 Appellants (who were Defendants in the trial below) filed their Answer and Counterclaim, and asserted a third party complaint against Emerald McDonough, Road Holdings, LLC, grantor to Appellants of the subject property, seeking indemnification and damages.

4. On February 28, 2018 Respondents filed their Second Amended Complaint, pursuant to consent order, naming South Atlantic Bank, holder of a purported mortgage on the subject property as a party Defendant to the case; to which the said Bank filed its Answer on April 15, 2018.

5. On January 31, 2019 Respondents filed their third Amended Complaint, to substitute Elizabeth Heatley, as Plaintiff, for Alben Neighbors, who had sold his unit in the Horizontal Property Regime.

6. By Order filed June 12, 2019, the Circuit Court denied the motion of Plaintiffs/Respondents for class certification.

7. On July 6, 2020, and pursuant to an Order filed that same day, Respondents/Plaintiffs filed their Fourth Amended Complaint, the substance of which was to substitute the presently named individual Respondents as Plaintiffs in their own right, all of whom acquired title, and therefore vested title rights, to their boat slip units and the common elements prior to the date on which the Master Deed was amended in 2007.

8. By Consent Order filed On December 14, 2020 the case was referred to the Master-In-Equity for Charleston County, but only for his adjudication of the declaratory issues as to the validity of the 2007 Amended Master Deed, reserving to the Circuit Court and a jury all claims between the parties for money damages.

9. On March 9, 2021 and March 12, 2021 respectively, the parties filed cross motions for Summary Judgment with the Master-In-Equity on the declaratory issues.

10. On May 14, 2021, following a hearing on April 5, 2021, the Master-In-Equity granted Summary Judgement to the Appellants (Defendants below).

11. On July 8, 2021, following the filing by Respondents/Plaintiffs of their motion to reconsider on May 24, 2021, the Master-In-Equity granted the motion to reconsider, vacated its order granting Summary Judgment, and set a trial on the merits to be scheduled.

12. On May 16, 2022, following a two-day trial on March 22, and March 23, 2022, the Master-In-Equity filed his Order granting the Declaratory Relief sought by the Respondents/Plaintiffs below, concluding, *inter alia,* that the 2007 Master Deed was void to the extent that it converted common elements, to which the individual Plaintiffs held vested title interests, into individual units.

13. On September 22, 2022, the Master-In-Equity denied Appellants' Motion for Reconsideration; although the Court in its order denying reconsideration clarified that its order on the merits affected only the interests of the individual Plaintiffs/Respondents.

14. On October 18, 2022, the within appeal was filed by the Defendants/Appellants.

STANDARD OF REVIEW

A suit for declaratory judgment is neither legal or equitable, but is determined by the nature of the underlying issue. An issue essentially one at law will not be transformed into one in equity

simply because declaratory relief is sought. *Felts v Richland County 303 S.C. 354, 400 S.E.2d 781 (S.Ct. 1991)*, citing *Legette v. Smith 226 S.C 403, 85 S.E.2d 576 (1955)*.

The central issue in this case is one of statutory construction, and the relationship between Code Sections 27-31-60 and 27-31-70. More specifically, whether the 2007 Amended Master Deed is void under Code Section 27-31-70, to the extent that the Amended Master Deed purports to extinguish title interests that were vested in the Individual Respondents in the Ship's Store Building and the Fuel Docks, common elements under their deeds of conveyance under the 2006 Master Deed.

Appellants contend that Respondents' vested title interests in the Ship's Store and Fuel Docks were "lost" because of Code Section 27-31-60's "acquiescence" provision, which Appellants contend takes priority over Section 27-31-70's provision that "common elements shall remain undivided and shall not be the object of an action for partition or division of the co-ownership. Any covenant to the contrary shall be void".

Generally, the interpretation of a statute is a matter of law. *Eldridge v. City of Greenwood 331 S.C. 398, 503 S.E.2d 191 (Ct. App. 1998).* Thus, where the right to relief is entirely statutory, the action is one at law. *Harvey v. South Carolina Department of Corrections 338 S.C. 500, 527 S.E.2d 765 (Ct. App. 2000)*.

Here, the central issue being one of statutory construction, this is an action at law. *Eldridge v City of Greenwood 331 S.C.398, 503 S.E.2d 191 (Ct.App.1998)*. Therefore, the findings of fact by the trial judge will not be disturbed on appeal unless found to be without evidence to support them.

The Trial Court's alternative basis for granting relief in this case, in addition to the statutory one, is that the terms of the 2006 Master Deed, Section 16.1.(b) prohibited the Declarant from unilaterally amending the Master Deed to "adversely affect the title to any Unit unless the Owner shall consent in writing". Here, the effect of the 2007 Amended Master Deed was to extinguish

vested, undivided title interests in common elements. The alternative basis for the Trial Court's ruling may involve the "interpretation of a deed", an equitable matter. However, as found by the Trial Court, the construction of an unambiguous deed is a question of law, not fact, citing *Walters v. Summey Building Systems, Inc. 311 S.C. 507, 429 S.E.2d 854 (Ct. App. 1993).*

In the final analysis, the central, underlying issue in this case is a legal one, so that the Court of Appeals should base its review upon an "any evidence" standard. *Townes Associates v. City of Greenville 266 S.C. 81, 221 S.E.2d 773 (1976).*

STATEMENT OF FACTS

Mariner's Cay Marina was constructed on the west bank of the Folly River in Charleston County in the 1980's. It was originally privately owned, and leased boat slips to individual boat owners. In 2006, the Marina was substantially renovated, and was at the same time converted to a Horizontal Property Regime (HPR) or "Condominium" under the South Carolina Horizontal Property Act, Code Sections 27-31-10 *et seq*; in which boat slips are the equivalents of "apartments" in a residential context.

The Master Deed for Mariner's Cay Marina was recorded May 18, 2006 (Trial Exhibit "1-A"). It describes 90 boat slips, 88 of which are the equivalent of "apartments" under the Act, capable of private ownership, and two of which are designated as commercial "Fuel Docks", designated as points of service for the purchase of fuel and, critically, a point of service for the location and operation of a pump system capable of removing wastewater from boat bilges, into an onshore waste disposal system.

Common Elements: The Fuel Docks.

The 2006 Master Deed designates the Fuel Docks, including their wastewater pump-out system, as "Commercial Unit 2" (CU-2), a "common element" of the HPR to which all boat slip

owners hold undivided title interests as tenants in common. See Trial Exhibit 1-A, 2006 Master Deed at Article VII Section 7.1; and S.C. Code Section 27-31-60. As later discussed, an Amended Master Deed was unilaterally recorded by the Declarant on March 19, 2007, eliminating these common elements and converting them to individual units; which presents the central issue in this case.

Marinas are Permitted by OCRM.

Marinas are permitted activities in South Carolina by the Office of Coastal Resource Management ("OCRM"), a division of the South Carolina Department of Health and Environmental Control ("DHEC"). OCRM publishes by regulation the conditions required for the issuance and maintenance of a marina permit. See Trial Exhibit "1-A", 2006 Master Deed at Appendix II (OCRM Regulations). For a marina the size of Mariners Cay, OCRM regulations require the wastewater pump-out capability described above, as well as on-shore, separate bathroom facilities for men and women as described below. See Trial Exhibit "1-A", 2006 Master Deed at Appendix II, at Regulation "E.(6)(b)(ii); also on recorded Deed Book V583, Page 692 (OCRM Regulations). The Regulations further require that the marina provide oversight by an "experienced manager", in the case of Mariners Cay known as the "Dockmaster" (Trial Exhibit 1-A, 2006 Master Deed, Appendix II, at Regulation "E.(6)(a)(i); also shown as recorded Deed Book V583, Page 691.) The 2007 Master Deed provision is identical to the 2006 Master Deed in this respect. (See Trial Exhibit 1-B at Recorded Deed Book X618, Page 723.) OCRM Regulations also require that the marina maintain, on-site at all times, certain safety equipment to protect against fuel spills.

Common Elements: The Ship's Store Building.

The 2006 Master Deed also designates as a common element of the HPR, in addition to the Fuel Docks and the wastewater pump system, a prominent building at the water's edge known in the 2006 Master Deed as the "Ship's Store Building", a structure consisting of two elevated floors on pilings. Within the Ship's Store Building are located the onshore separate and fixed bathroom facilities required by OCRM, for men and women. As specified in the Regulations, the women's bathroom contains two toilets and a sink, and although not required by Regulation, a shower. The men's bathroom consists of a required toilet, a urinal, a sink, and a shower. The first, elevated floor level of the Ship's Store Building is designated "Commercial Unit 1-A", and the second, elevated floor is designated "Commercial Unit 1-B" (CU-1A and CU-1B). (Trial Exhibit 1-A, Article V Section 5.1; Article Section VII Section 7.1.(e).

Before the Marina's conversion to an HPR, and continuing until 2016, the Marina Dockmaster maintained his office in the Ship's Store Building, where he kept the records required by OCRM regulations and where was located a VHF radio for communications with boaters, as well as electronic controls to activate the locking and security systems on the gates controlling access to the boat docks. (Bessent 168: 21 to 169: 25). Notably, both the 2006 Master Deed and the 2007 Amended Master Deed provide that the books, records and papers of the Marina shall be maintained in the "Facility Office". (2006 Master Deed at Recorders Book V583 Page 670, and 2007 Master Deed at Recorders Book X618 at Page 709). There is no structure on the property capable of housing a "Facility Office", other than the Ship's Store Building. (Heatley, TR 151:4-10.)

In the trial testimony, the Ship's Store Building was described as the social "heart" of the Marina, where boat owners regularly congregated and where periodic social events were held, in

the form of cookouts often sponsored by the Dockmaster. (McCann 92: 3-15; Monk 70: 15-19: Heatley 134: 24-25 and 148: 9-13; Bessent 164: 5, 13-17; 162: 24; 164: 8; 150: 9 to 154: 20).

Declarant's Reservation of Right to Unilaterally Amend the Master Deed; the Proviso.

The 2006 Master Deed contains a provision whereby the original "Declarant", who created the HPR, maintained control of board of director appointments on the Council of Co-Owners; and further that Declarant could unilaterally amend the Master Deed, without notice to owners, for 18 months, or until 90% of the units had been sold. (See Trial Exhibit "1-A" Master Deed, Section 12.3.)

However, the authority of the Declarant to unilaterally amend the 2006 Master Deed was not absolute. Section 16.1.(b) contains a singular proviso that is critical to the issues in this case. Article XVI, Section 16.1.(b) provides: *"However, any such amendment shall not adversely affect the title to any Unit unless the Owner shall consent in writing*". (Trial Exhibit "1-A" at Recorder's Book V583, Page 615). (Emphasis added.)

Between the recording of the 2006 Master Deed on May 18, 2006, and March 19, 2007, when the amended Master Deed was recorded, thirty-nine boat slips were sold, including to the four individual Respondents in this case, thereby vesting in those owners undivided title interests as tenants in common to the common elements of the HPR; and more specifically to the Ship's Store Building (CU-1A and CU-1B) and the Fuel Docks (CU-2). (See Trial Exhibit "1-D(a) through 1-D(e)": Schedule of the thirty-nine boat slips sold prior to March 19, 2007; See the 2006 Master Deed at Article VII (e), Trial Exhibit "1-A".)

The four individual Respondents in this case, who were Plaintiffs in the trial below, therefore purchased their boat slips under the 2006 Master Deed, and prior to the recording of the 2007 Amended Master Deed: Elizabeth Heatley purchased Dock Unit D-8 by deed recorded

August 15, 2006 (Trial Exhibit "2-A"); Neal B. McCann, Jr., purchased Dock Unit B-8 by deed recorded March 6, 2007 (Trial Exhibit "2-B"); David Neil Monk purchased Dock Unit B-17 by deed recorded March 12, 2007 (Trial Exhibit "2-C"); and Thomas V. Bessent purchased Dock Unit D-1 by deed recorded August 18, 2006 (Trial Exhibit "2-D"). Each of the individual Respondents, therefore, were vested with undivided interests as tenants in common with all other slip owners to the common elements, including the common elements disputed in this case: The Ship's Store Building containing Commercial Units 1-A and 1-B, and the Fuel Docks, Commercial Unit 2.

Notwithstanding the vested title interests held by the owners of boat slips conveyed prior to March 19, 2007, including the four individual Respondents; and notwithstanding the clear and unambiguous proviso of the 2006 Master Deed that it could not be unilaterally amended to "adversely affect the title to any Unit unless the Owner shall consent in writing", the Declarant unilaterally, without notice to or the vote of any slip holder, recorded an amended Master Deed on March 19, 2007 that purported to convert the entire Ship's Store Building containing Commercial Units 1-A and 1-B, as well as the Fuel Docks, Commercial Unit 2, from common elements into individual units. (See Trial Exhibit "1-B" the 2007 Master Deed at Article V Section 5.1.3; Article VII Section 7.1.(e). See, also, the Second Recital to the 2007 Master Deed, confirming that it was unilaterally amended by the Declarant.) (See the testimony of the individual Respondents at: Monk 63: 20 to 65: 14; McCann 90: 4 to 10; 17; Heatley 117: 17 to 118: 19; Bessent: 166: 21-25.)

The Declarant thereafter mortgaged those former common elements and thereafter defaulted on the mortgage, which was foreclosed in 2013. Appellants are successor grantees from the buyer at foreclosure sale, of the disputed common element properties, the Ship's Store Building

and the Fuel Docks. Notably, no individual Unit Owners, including the Individual Respondents in this case, were parties to the foreclosure suit.

There Was No Change in the Use of the Ship's Store Building or the Fuel Docks From March 19, 2007 Until Plaintiffs Were Ousted in October of 2016.

However, between the original recording of the 2006 Master Deed on March 18, 2006, and October of 2016, when Respondents were ousted from the Ship's Store Building and the Fuel Docks, nothing was changed on the ground: The Ship's Store Building remained as the Dockmaster's office, under his exclusive lock and key control. (Bessent 168: 21 to 169: 20). The Ship's Store Building remained as the social heart of the marina. The onshore men's and women's restrooms in the Ship's Store Building remained open 24 hours a day, 7 days a week for all slip owners and users. (Bessent 165: 24 to 166: 2.) The Fuel Docks were available for use by all slip owners for wastewater pump out. (At some point in time, fuel sales from the Fuel Docks were discontinued. However, the Fuel Docks continued to be used as common elements by all slip owners until October of 2016.)

Individual Respondent Tom Bessent began leasing a boat slip at Mariner's Cay Marina in 2000, before it was converted to an HPR. He owns two slips, D-1 acquired August 18, 2006 and E-4 acquired in 2015 (TR 158: 2-11; 159: 21; 162: 3-5). From at least 2000 until October, 2016, the Dockmaster's office was located in the Ship's Store Building, where he also maintained a VHF radio for communication with boaters. The Dockmaster also controlled the Ship's Store Building and had the keys to the building. (TR 163: 19; 169: 16).

The Ship's Store Building was also the heart, the focal point of the marina, where boaters gathered often for cookouts put on by the Dockmaster (TR 162: 24 to 164: 8). The restrooms in

the Ship's Store Building were open for slip owners and users 7 days a week, 24 hours a day from 2000 until 2020, when COVID struck (TR 165: 5-7; 165: 24 to 165: 2).

The use of the Ship's Store Building and Fuel Docks by all slip owners was changed in October of 2016 when Mr. Farmer, owner and member of the Appellant LLC's, told the Dockmaster to vacate (TR 169: 16-20).

The Individual Respondent Parties Had No Contemporaneous Notice or Knowledge That The 2007 Amended Master Deed Purported to Extinguish Their Vested Title Interests In The Ship's Store and Fuel Docks.

To begin with, the plain language of the Amended 2007 Master Deed states, in its second Recital, that the Declarant was filing the amended Master Deed unilaterally under Article XVI of the 2006 Master Deed, "...to clarify various provisions and to eliminate various inconsistencies." The recital is more than misleading, inasmuch as the substance of the 2007 Master Deed was to eliminate the common elements which are at issue in this case.

In its Order, the Trial Court concluded that "The individual Plaintiffs in this case learned over time, and to different extents, that the 2006 Master Deed had been amended by the 2007 Master Deed. Because conditions on the ground remained unchanged from 2007 to 2016, none of them appeared to appreciate or understand that the Common Elements to which they held undivided title interests had been alienated, contrary to those title interests, until they were displaced on or about October of 2016..." (Trial Court Order at page 17).

The trial evidence supports this conclusion:

David Neil Monk, who purchased Boat Slip Unit B-17 by deed recorded March 12, 2007, testified that he first learned that the 2006 Master Deed had been amended when he was confronted by Mrs. Farmer, wife of Defendant George Farmer who is the single member of the LLC parties,

because he was using the wastewater pump-out system at the fuel dock. Mr. Monk testified that he had used the pump-out system since about 1994, before the Marina HPR was formed. This confrontation would have occurred in 2016, after the purported conveyance to Appellants.

He further testified that he was not notified in 2006 or 2007 that the master deed was to be amended; and if he had been given notice that he would have voted against it. (Monk TR 61: 11-20; 63: 20 to 65: 14; 67: 23-25; 68: 25 to 69: 5-14.)

Neal McCann, who purchased Unit B-8 by deed recorded March 6, 2007, testified that he did not learn that the 2006 Master Deed had been amended until the Dockmaster was ousted from his office in the Ship's Store Building, and gate access was cut off, in 2016. He testified further that he did not "acquiesce" to the Master Deed Amendment. (McCann TR 85: 7-20; 90: 4-17.)

Elizabeth Heatley and her husband purchased Unit D-8 by deed recorded August 15, 2006. They had leased the same space before it was available for sale in 2006. She learned in 2010 that the 2006 Master Deed had been amended, but understood the changes to all be "administrative". She did not know, in 2007, that the Declarant sought to amend it, and was not given the opportunity to vote. (Heatley TR 108: 5; 109: 18; 117: 1 to 118: 19; 124: 15-21; 124: 22 to 125: 8.)

Tom Bessent testified that he acquired Unit D-1 by deed recorded August 18, 2006. He had leased a space before the Horizontal Property Regime was formed, since 2000. He was aware by 2010 or 2011 that the 2006 Master Deed was amended, but "it was a while before I understood the implications". He testified that the use of the Ship's Store Building and Fuel Docks did not change between 2006 and 2016. The Dockmaster office was in the Ship's Store Building and the Dockmaster had the key to the building. This was the case until the Dockmaster was asked to leave by Mr. Farmer, "ousted", in October, 2016. (Bessent TR 158: 21 to 159: 11; 159: 15-21; 162: 13; 166: 21-25; 168: 21 to 169: 20; 170: 25 to 171: 2.)

This case was filed on July 16, 2017, nine months after Appellants ousted Respondents from the Ship's Store Building and the Fuel Docks.

Two Polestars guide the outcome of this case.

Two "polestars", referred to by the Trial Court in its Order as "Two unambiguous legal principles", guide the outcome in this case; one is factual, and the other is legal. The factual polestar is discussed above: the clear and unambiguous provision in the 2006 Master Deed, Article XVI Section 16.1.(b) (Trial Exhibit 1-A), that the Declarant's right to unilaterally amend the Master Deed did not include the right to make any amendment that would "adversely affect the title to any Unit unless the Owner shall consent in writing". Inasmuch as the 2006 Master Deed was duly recorded with the Charleston County Register of Deeds, the Appellants and their attorney knew, or were charged with constructive knowledge, of this caveat. *Binkley v. Rabon Creek Watershed Conservation Dist. 348 S.C. 58, 558 S.E.2d 902 (Ct. App. 2001).*

The second polestar, although legal, fits logically into a factual narrative of this case. Code Section 27-31-70 provides that in a horizontal property regime "The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition or division. Any covenant to the contrary shall be void". (Emphasis added). It cannot be disputed that Appellants and their attorneys were charged with at least constructive knowledge of the unambiguous provisions of Code Section 27-31-70.

Despite the admonition contained in the 2006 Master Deed that a unilaterally amended Master Deed could not adversely affect the title interests of a slip owner; and despite the provision of Section 27-31-70 that vested title interests in common elements could not be adversely affected by a Declarant's unilateral amendment of the Master Deed without the owner's consent, the then-

Declarant unilaterally amended the Master Deed in 2007 to remove the common elements here in dispute.

These two polestars very much set the bar that Appellants must cross and overcome in their appeal. As argued below, Appellants fall far short of crossing the bar.

ARGUMENTS

I: THE TRIAL COURT PROPERLY CONSTRUED CODE SECTION 27-31-60: RESPONDENTS DID NOT "ACQUIESCE" TO THE EXTINGUISHMENT OF THEIR UNDIVIDED TITLE INTERESTS IN THE COMMON ELEMENTS:

A. Appellants' argument that Section 27-31-60 "deals with the procedure for amending a master deed in order to remove or add common elements" cannot be sustained as a matter of law. The plain and ordinary meaning of the words used in the statute do not support Appellants' Argument.

Appellants' threshold argument in this appeal is entirely based upon their construction of Code Section 27-31-60, and its provision that a unit owner's percentage interest in the HPR may be "altered" by acquiescence. And further, that the Respondents, and the individual Respondents in particular, "acquiesced" to the elimination, cancellation and extinguishment of their vested title interests in the Ship's Store Building and the Fuel Docks.

In so many words, Appellants argue the following syllogism in support of their "acquiescence" argument: that, notwithstanding the absolute vesting language in Section 27-31-70 (later discussed more fully), and because Section 27-31-60 provides that the percentage interest of a boat slip owner in the common elements "shall not be altered without the acquiescence of the co-owners representing all the (boat slips) of the property", it must follow, therefore, that with the acquiescence of all unit owners, their vested title interests in the common elements may be, and

were in this case, eliminated, cancelled, and extinguished. Appellants cite no authority in support of their argument that vested interests in the common elements may be "extinguished" by "acquiescence", other than Section 27-31-60.

Therefore, it is worthwhile to here review the entirety of Section 27-31-60:

(a) An apartment owner shall have the exclusive ownership of his apartment and shall have a common right to a share, with the other co-owners, in the common elements of the property, equivalent to the percentage representing the value of the individual apartment, with relation to the value of the whole property. This percentage shall be computed by taking as a basis the value of the individual apartment in relation to the value of the property as a whole.

***The percentage** shall be expressed at the time the horizontal property regime is constituted, shall have a permanent character, and **shall not be altered without the acquiescence of the co-owners representing all the apartments of the property**.* (Emphasis added).

The basic value, which shall be fixed for the sole purpose of this chapter and irrespectively of the actual value, shall not prevent each co-owner from fixing a different circumstantial value to his apartment in all types of acts and contracts

(b) The owner of any apartment embraced in the master deed and building plan shall have the right to require specific performance of any proposed common elements for recreational purposes set out in the master deed which are included in the next stage of the development that applies to recreational facilities in the event the additional stages or erection do not develop.

In their Brief at page 25, Appellants argue that Section 27-31-60 "...deals with the procedure for amending a master deed in order to remove or add common elements". (Emphasis added). Section 27-31-60, therefore, is Appellants' stake in the ground; it is the threshold, linchpin premise of their case and their appeal. However, Appellants cite no authority, and offer no logical

syllogism, to support their contention that Section 27-31-60 provides for amending a master deed to "remove" or to eliminate from, much less "add" to, common elements of a horizontal property regime.

In his Order, the Trial Court succinctly addressed this point: *"I conclude that the import of Section 27-31-60 is to define the relative property interests of apartment owners with respect to each other, and with respect to the common elements of a Horizontal Property Regime, as a percentage value, and nothing more. There is no language in 27-31-60 that could reasonably be construed to support the argument that an apartment owner might forfeit the entirety of his or her property interests by 'acquiescence'. Rather, the term, 'acquiescence' modifies only the phrase 'The percentage... shall not be altered without the acquiescence of the co-owners representing all the apartments of the property'. No reasonable construction of the emphasized terms, above, could substitute the term 'forfeited' for the term 'altered'. Yet that is the conclusion urged by Defendants."* Order at page 13. (Emphasis added in original.)

The plain meaning of the statutory term "altered".

An analysis of Appellants' linchpin argument construing Section 27-31-60 must begin with a study of the operative words of the statute, and more specifically, the meaning of the verb "altered"; because "altered" is the operative verb, based upon Appellants' arguments, that must pass scrutiny whether Respondents' vested title interests were or can be "extinguished" under the statute. Even assuming that all boat slip owners had acquiesced to changes in their percentage interests of the common elements, (which is not conceded, and of which there was no evidence at trial), does the statutory verb "altered" go so far as to allow for a construction that an owner's percentage ownership interest may be "altered" to the point of extinction? After all, that is what

Appellants' argued at trial, and that is what Appellants' reargue in this Appeal: that the vested title rights of Respondents have been extinguished because of their acquiescence.

"The cardinal rule of statutory construction is that (our courts) are to ascertain and effectuate the actual intent of the legislature." *Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989).* "Words used therein must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation." *Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992).* "The language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Id.* Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning. See e.g. *Gulf Oil Corp. v. S.C. Tax Comm'n. 248 S.C. 267, 270, 149 S.E.2d 642, 643 (1966)* (citing Webster's New International Dictionary for definition of a statue's reference to "paid-in surplus"); *State v. Dickinson, 339 S.C. 194, 199, 528 S.E.2d 675, 677 (Ct. App. 2000)* (citing Black's Law Dictionary for definition of "obtaining" in statute for obtaining property in fraudulent manner); *State v. Estridge, 320 S.C. 288, 291, 465 S.E.2d 91, 93 (Ct. App. 1995)* (referencing dictionary definition in determining legislative intent).
Lee v. Thermal Engineering Corp., 352 S.C. 81, 91, 572 S.E.2d 298, 303 (S.Ct. 2002).

Here, the verb "altered" as used in Section 27-31-60 is not defined in the statute. Therefore, it is appropriate to resort to the dictionary definition of the term.

Merriam Webster defines "alter" to mean "to make different without changing into something else". (*Webster New Collegiate Dictionary*, copyright 1981; *Merriam Webster Online* 2023, same.) *Black's Law Dictionary* defines "alter" as: "to make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an

entirely new thing or destroying the identity of the thing altered". *Black's Law Dictionary*, 4th Edition, 1957.

An analysis of Section 27-31-60 thus begins with the fundamental point that the words of the section neither support any argument that its terms provide for the elimination or extinguishment by "acquiescence" of a boat slip owner's vested title interest in common elements, nor do they provide a procedure for "removing common elements", as Appellants argue. Rather, the Statute provides only that percentage interests may be "altered", that is to say "changed" or "modified", by acquiescence. But the section does not allow for the construction as here urged by Appellants that would "destroy the identity of the thing altered"; that is to say, a boat slip owner's undivided title interest in the common elements. See *Black's* definition, *supra.*

Therefore, the vested percentage interests of boat slip owners in the common elements of the Mariners Cay Horizontal Property Regime, in this case specifically referring to the vested interests in the Ship's Store Building (CU1-A and CU1-B) and the Fuel Docks (CU2), may be "altered", but they cannot be extinguished by "acquiescence", as argued by Appellants.

B. Appellants' Construction of Section 31-27-60 creates a conflict with 27-31-70 where none exists.

The rules of statutory construction are based pretty much on common sense and logic. The rule of construction previously discussed, as to the use of dictionary definitions, is a common sense example. A second rule, also invoked in this case, is that statutes dealing with the same subject matter must be reconciled, if possible, so as to render both operative. *Hodges v. Rainey 341 S.C. 79, 91 533 S.E.2d 578, 584.* Appellants urge a position upon this court that, rather than harmonizing two statutory sections, Sections 27-31-60 and 27-31-70, invokes a conflict between them, where none exists. However, the statutes must be harmonized and reconciled with each other, particularly

in order to prevent an interpretation that would lead to a result that is plainly absurd. *Charleston County Assessor v. Universal Adventures, LLC 427 S.C. 273, 285, 831 S.E.2d 412, 418 (S.Ct. 2019),* citing *Hodges v. Rainey 341 S.C. 79, 88 533 S.E.2d 578, 583. (S.Ct. 2000).*

Immediately following Section 27-31-60, which articulates the title concept that apartment owners in an HPR also share undivided title interests in the common elements of a horizontal property regime, Code Section 27-31-70 unambiguously states: "*Common elements shall not be divided. The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition or division of the co-ownership. Any covenant to the contrary shall be void.*" (Emphasis added.)

Resorting, once again, to dictionary definitions, the term "covenant" is defined as "a formal, solemn and binding agreement". *Merriam Webster, supra*; and from Black's: a "covenant" is "an agreement, convention, or promise of two or more parties, by deed in writing, signed, sealed and delivered, by which either of the parties pledges himself to the other that something is either done or shall be done, or that stipulates for the truth of certain facts". *Black's Law Dictionary, supra.*

According to Appellants' logic, and their arguments to this Court, therefore, although section 27-31-70 unambiguously provides that even though a "covenant", that is to say "a formal, solemn and binding agreement", may not extinguish a boat slip owner's vested, undivided title interests in the common elements, the same vested title interests of those boat slip owners may nevertheless be lost by their mere "acquiescence", under Section 27-31-60.

Here, another look at the dictionary is helpful: Webster's definition of "acquiesce" is telling: "to accept or comply tacitly or passively". *Webster's, supra.* And from Black's: "to give

an implied consent to a transaction, to the accrual of a right, or to enact, by one's mere silence, or without express assent or acknowledgment". *Black's Law Dictionary, supra.* (Emphasis added.)

Appellant would have this Court hold, therefore that, on the one hand, even though a "covenant", a signed and sealed "formal, solemn and written agreement", extinguishing a boat slip owner's undivided interests in common elements contrary to the Master Deed would be "void" under Section 27-31-70, on the other hand, the mere silence on the part of the same boat slip owner in circumstances where he should have spoken, would nevertheless result in extinguishment of his vested title interests under Appellants' construction of 27-31-60.

More to the point, the "covenant to the contrary" in this case that is "void" under Section 27-31-70 is the 2007 Master Deed provision that purports to extinguish the vested title interests of the individual Respondents in the common elements consisting of the Ship's Store Building and the Fuel Docks.

However, to follow Appellants' logic, even though the 2007 Master Deed provision extinguishing the common elements at issue would be a "covenant to the contrary" with respect to the vested rights created under the 2006 Master Deed and thus "void" under Section 27-31-70, because Respondents "acquiesced" under 27-31-60 those vested rights were lost and extinguished. Appellants' argument therefore would render the "void" provision of 27-31-70 meaningless. Our appellate courts have consistently held that they will not construe a statute in a way which creates an absurd result or renders it meaningless. *State v. County of Florence, 406 S.C. 169, 174, 749 S.E.2d 516 (S.Ct. 2013),* citing *Florence County Democratic Party v. Florence County Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420.*

There could be no better example of an absurd result than the one argued by Appellants, here.

The Sections may be reconciled and harmonized.

On the other hand, Sections 27-31-60 and 27-31-70 may be harmonized and reconciled by looking to the plain and ordinary meanings of the words used in them. First, as previously noted, "altered" as used in Section 27-31-60 means only the "change" to, but not the "elimination" of, the relative percentage interests of boat slip owners in the common elements. As the trial court held in its order, the term "acquiescence" in Section 27-31-60 modifies only the phrase, "The percentage...shall not be altered without the acquiescence of the co-owners representing all the (boat slips) of the property...)" (Emphasis in original). Secondly, and on the other hand, under 27-31-70, the phrase "common elements shall remain undivided" refers to the underlying quality and of a co-owner's undivided title interest in the common elements; that is to say, its existence.

"Acquiescence" and Phased or "Staged" Condominium Development.

The reference in 27-31-60 to "acquiescence" as a basis to alter the percentage interest held by a boat slip owner very likely contemplates cases in which a master deed provides for the development of a horizontal property regime in phases where, upon the introduction of a subsequent phase adding additional units, and encompassing most or all of the same common elements, a unit owner in the first phase is deemed to have "acquiesced" to the alteration of his relative percentage interests in the property and its common elements, by virtue of the Master Deed provision contemplating subsequent phases; but never to the "elimination" of that interest

In further support for the proposition that the "acquiescence" language of 27-31-60 was inserted in contemplation of additional condominium phases, Section 27-31-60(b) contemplates "phased", or "staged" condominium development by its reference to the ability of a unit holder to enforce by specific performance any recreational elements set out in the master deed "which are included in the next stage of the development" in the event the additional stages do not develop.

In this case the 2006 Master Deed provides in Article V Sections 5.1 to 5.4 for a subsequent phase of boat slips to be constructed at Mariners Cay, which upon construction would thereby invoke Section 27-31-60's "acquiescence" provisions that would alter the relative percentage ownership interests of all boat slip owners. It could not, however, extinguish or eliminate that interest. No such additional phase has been constructed to date, however.

Notably, Section 5.1 of the 2006 Master Deed describing "Marina Docks and Commercial Units", begins with the conditional term, "Initially", setting the tone for additional stages; and Section 5.2 is entitled "Subsequent Stages", providing that "Declarant proposes to develop the Regime in two stages, with the first stage being set forth in Section 5.1...". The Master Deed continues by expressing the Declarant's intent to construct an additional 20 boat slips in a subsequent stage; and, in Section 5.2(d), provides for such additional stage, "without the necessity of consent of the Council of Co-Owners", to record a Supplemental Master Deed to bring the additional Units into the Horizontal Property Regime.

Thereafter, and to confirm this writer's argument that Section 27-31-60's "acquiescence" likely refers to the addition of "phases" or "stages" of a Horizontal Property Regime, Section 5.4 provides: "Effect of Annexation on Percentage Interest", "... and if Declarant elects to subject an additional 20 units to the Master Deed, thereby increasing the total Percentage Interests, the voting power of each Co-Owner will be affected..." (Emphasis added). Section 5.4 therefore further provides that the Master Deed Exhibit "D" (recorded at Book V583 at Page 599) reports the affect on a Unit Owner's voting power if 20 Units were added to the Regime; and it further provides that, if fewer than 20 Units are added, a new Exhibit "D" will be attached to a "Supplemental Master Deed" showing the Percentage Voting interests based on the actual number of new Units added.

Therefore, it is the potential diminution in voting interests to which Unit Owners "acquiesce" under Section 27-31-60. But never to the complete elimination of either the Unit Owner's voting rights or, more importantly for the purposes of this case, their total vested title interests in the common elements; contrary to the arguments attempted by Appellants.

C. There is no evidence of the acquiescence of the "Co-Owners representing all of the apartments of the property".

Even if, as argued by Appellants, title interests may be extinguished by "acquiescence" under Code Section 27-31-60, that code section requires the "acquiescence of the co-owners representing all of the apartments of the property". (Emphasis added).

In this case, there is no evidence that the four individual Respondents "acquiesced" to the extinguishment of their vested title interests in the Ship's Store Building or Fuel Docks, much less that there was acquiescence of the co-owners representing all of the boat slips of Mariner's Cay Marina. For example, as before recited, Respondents Monk and McCann did not know about the 2007 Amended Master Deed until 2016, only several months before this lawsuit was filed in June of 2017.

By Appellants' own argument "acquiescence" requires knowledge by the party who has acquiesced. The record here is devoid of any evidence that the four individual Respondents, and much less the "co-owners representing all" of the boat slips, acquiesced to the extinguishment of their vested title interests in the Ship's Store Building and the Fuel Docks.

Without waiving or foregoing the argument that "extinguishment" of a title interest cannot occur under Section 27-31-60's "acquiescence", at all, there must be evidence that "all" acquiesced. The evidence is simply not there.

II. SECTION 27-31-70 IS THE CONTROLLING STATUTE IN THIS CASE.

The trial court properly concluded in this case that the controlling statute is Section 27-31-70 which provides that "The common elements, general and limited, shall remain undivided and shall not be the object of an action for partition or division of co-ownership. Any covenant to the contrary shall be void." Citing the case of *Reyhani v. Stone Creek Cove Condo II Horizontal Property Regime 329 S.C. 206, 494 S.E.2d 465 (Ct. App. 1997)*, the trial court held that "once common elements are set aside and vested in the co-owners, such co-owners may not be unilaterally deprived of their interests in the common elements by the actions of the developer." (Trial Court order at page 10.)

Appellants seek to distinguish this case from *Reyhani* by arguing that in that case the subject property, a common element, golf club house, was not converted to a unit by amendment to master deed, but was, rather, mortgaged by the developer and foreclosed after default. However, *Reyhani*, just like the Appellants in this case, purchased the subject property after foreclosure. This singular fact in common puts *Reyhani's* facts, and its holding, in lock step with the facts of this case.

Under the facts of this case, the common-element property was wrongfully taken away from Respondents, converted to individual units, was mortgaged, and was foreclosed after default, following which the Appellants became the putative purchasers. In *Reyhani*, the subject property was unlawfully mortgaged as a common element, foreclosed, and was thereafter sold to Reyhani, who became the putative purchaser. The properties in both cases were wrongfully alienated in violation of Section 27-31-70, sold at foreclosure sale, and the putative buyers unsuccessfully sought to prevail against the superior claims of the true titleholders, the condominium unit owners who held prior, vested title interests in the common elements.

Also, in *Reyhani* Mr. Reyhani argued without success that the homeowner's association board "was aware of the transfer of the property to him and acknowledged the same", in effect arguing "acquiescence" by the homeowners association board; but also to no avail.

The Court of Appeals held in *Reyhani* that the property owners of the horizontal property regime who held vested, undivided interests in the common elements as tenants in common had not themselves assented to the alienation of their undivided interests in the property as a common element; so that the vested, prior title interests of the unit owners prevailed over the later claims of title taken in contravention of Section 27-31-70.

Reyhani thus supports two propositions applicable to this case: (1) First, under section 27-31-70, once title interests in common elements are vested in unit owners, they may not be divested of those interests by the unilateral actions of the developer; and (2), secondly, even if the board of directors of the homeowner's association had assented, such assent cannot bind the individual unit owners.

Appellants' attempt to distinguish *Reyhani* on its facts does no more than point out non-material distinctions in fact, without a difference as to the factual and legal conclusions reached.

Reyhani's precedential strength in this case is plain, palpable, and controlling.

III. BECAUSE APPELLANTS HAD CLEAR RECORD NOTICE THAT THE 2006 MASTER DEED COULD NOT BE UNILATERALLY AMENDED TO ADVERSELY AFFECT TITLE RIGHTS, THE TRIAL COURT'S ORDER MUST BE AFFIRMED.

There can be no more basic a concept in real property title law than that of "record notice". In his Order, the trial court concluded that "a thorough title search and review would confirm that the Declarant's conveyance of the common elements into units violated the terms of the Master Deed". (Order at page 18). Citing *Binkley v. Rabon Creek Watershed Conservation Dist. supra.*

The Trial Court was there referring to the 2006 Master Deed Article XII Section 16.1 ((*cite to ROA here*), that provides that, whereas the Declarant may unilaterally amend the Master Deed for a period of 18 months or until 90% of the boat slips have been sold, the Declarant's right of unilateral amendment includes a significant and unambiguous proviso: *"However, any such amendment shall not adversely affect the title to any unit unless the unit shall consent in writing"*. It cannot be disputed that the 2006 Master Deed was recorded on May 18, 2006, and that its terms and provisions were incorporated into every one of the thirty-nine boat slip conveyances recorded before the 2007 amended Master Deed was recorded.

The 2006 Master Deed was also recorded within the chain of title to the conveyances to the Appellants in this case. It was incumbent upon Appellants, in the exercise of the reasonable diligence with which they are charged, to inquire in what manner and to what extent the 2007 Amended Master Deed had amended the 2006 Master Deed. That inquiry, if diligently performed, would have disclosed: (1) First, the Recital in the 2007 Master Deed as appears in Recorders Book X618 at Page 608, clearly provides that the 2006 Master Deed was unilaterally amended by the Declarant; 2) a reading of the 2006 and 2007 Master Deeds plainly show that the 2007 Master Deed converted the Ship's Store Building and the Fuel Docks, that Appellants intended to purchase, from common elements to individual units; (3) a reading would show that the 2006 Master Deed, in its paragraph 16.1.(b) provides that no unilateral amendment may adversely affect title interests to unit owners without their "consent in writing"; and (4) that no "consents in writing" appeared on the public record from the owners of the thirty-nine boat slip units that had been conveyed under the 2006 Master Deed.

Notice of the 2006 Master Deed, with which Appellants were charged, "is notice of its whole contents, and it is also notice of whatever matters one would have learned by any inquiry

which the recitals of the instrument made it one's duty to pursue. Property owners are charged with constructive notice of instruments recorded in their chain of title." *Binkley v. Rabon Creek, etc., supra, 348 S.C. at 71.*

A reasonable inquiry into the record by Appellants in this case would have clearly disclosed that, first, the 2006 Master Deed contained the proviso limiting the ability of the Declarant to unilaterally amend it that would "adversely affect title interests", as described above; that the 2007 Amended Master Deed was unilaterally recorded by the Declarant; that between the recording of the 2006 Master Deed and the recording of the 2007 Amended Master Deed, thirty-nine boat slip units were conveyed, including to the four individual Respondents in this case; that, therefore, the four individual Respondents, in addition to owners of the other thirty-five boat slips, had acquired vested title interests as tenants in common to the Ship's Store Building and the Fuel Docks, Commercial Units CU-1A, CU-1B and CU-2; that the 2007 amended Master Deed thereby violated, and was recorded in contravention of, the clear proviso expressed in, the 2006 Master Deed provision proscribing any amendment that would "adversely affect title interests".

In the case of *Kneale v. Bonds 317 S.C. 262, 452 S.E.2d 840 (Ct. App. 1994)* the Court of Appeals reversed the trial court and ordered a mandatory injunction to restrain the construction of a 2,200 square foot addition to a condominium, being built over a portion of the general common elements of the HPR in that case.

Similarly to this case, the *Kneale* court held "we agree with the property owners that the additions and alterations in question were approved contrary to the specific provisions of the master deed requiring approval of a majority of the homeowners." 317 S.C. at 267. And, further, "a strict construction of the Master Deed and the provisions of the horizontal property act prevent additions of the type built by the Bonds because the Bonds' structure violates provisions of the

master deed and the Horizontal Property Act", citing Code Section 27-31-170 which provides "each co-owner shall comply strictly with the by-laws and with the administrative rules and regulations adopted pursuant thereto..." 317 S.C. at 267.

The "strict compliance" that was violated in this case was by the Declarant who, contrary to the plain terms of the 2006 Master Deed, unilaterally amended the Master Deed in a manner that adversely affected the title interests of the then thirty-nine boat slip holders who held undivided interests, including the four individual Respondents in this case,

Because Appellants were on record notice of the clear and unambiguous provisions of the 2006 Master Deed above discussed, they took title to the subject property in this case with full knowledge that the conversion of common elements to individual units was plainly contrary to the expressed terms of the 2006 Master Deed and was, thereby, unlawful.

IV: THE TRIAL COURT PROPERLY RULED THAT THE CLAIMS OF RESPONDENTS ARE NOT BARRED BY THE DOCTRINE OF JUDICIAL ESTOPEL.

In ruling against Appellants' judicial estoppel argument at trial, that Respondents should be estopped from taking a position in one trial, inconsistent with, or in conflict with, a position taken in the 2013 foreclosure case, the Trial Court relied upon the case of *Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004)*, a case also cited by Appellants in their Brief. In *Cothran,* the Supreme Court adopted the elements necessary for the doctrine of judicial estoppel to apply. A party is thereby estopped if the evidence shows, and the court finds: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have

received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Here, Appellants' assert that, because the Mariners Cay Council of Co-Owners was joined as a party defendant in the mortgage foreclosure case of *Emerald Road Portfolio, LLC v. Tiger River Capital, LLC*, and because the Council of Co-Owners "made no attempt to intervene in any way or object to the sale of any units subject to lawsuit", that therefore the "Plaintiffs" are judicially estopped in this case from "asserting a position inconsistent or in direct conflict with that position it took in the foreclosure case..." (Appellants' Brief at page 30). Appellants also cite *Cothran*, as well as the case of *Federal Credit Union v. Bailey 327 S.C. 242, 489 S.E.2d 472 (1997)*.

Appellants do not suggest, must less argue, that the individual Respondents are barred by judicial estoppel; although they argue that the "Plaintiffs" are so barred, apparently throwing the Council of Co-Owners and the Individual Respondents into the same bucket.

In their very brief, page and a half written argument, Appellants do not attempt to argue why a position taken by the Council of Co-Owners in the foreclosure case should judicially estop the individual Respondents. At this point it is more than noteworthy that none of the individual Respondents in this case were parties to the foreclosure case.

In this case, the Trial Court in its final order concluded "...as a matter of law, that a homeowners association may not commit or bind the individual title rights and interests held by an individual unit owner", (Order at page 11), citing *Reyhani supra,* 329 S.C. 214.

Appellants did not appeal from the trial court's legal conclusion that the Council of Co-Owners cannot commit or bind title interests of unit owners. The proposition is, therefore, the law of this case, from which Appellants did not appeal. It is well established that an unchallenged ruling, "right or wrong," is the law of the case and requires affirmance. *Charleston Lumber Co. v.*

Miller Housing Corp. 338 S.C. 171, 525 S.E.2d 869 (S.Ct. 2000). "An issue is deemed abandoned where Appellant failed to provide arguments or support authority for his ascertain. *Transportation Insurance Co. v. S.C. Second Injury Fund 389 S.C. 422, 699 S.E.2d 687 (S.Ct. 2010).* "An unappealed ruling is the law of the case and requires affirmance. *Shirley's Iron Works Inc. v. City of Union 403 S.C. 560, 743 S.E.2d 778 (S.Ct. 2013)*, citing *Transportation Insurance Co v. Second Injury Fund supra.*

The law of this case, therefore, is that the Council of Co-Owners may not commit or bind the title interests of individual unit owners; a position that Respondents asserted at trial, and that they likewise appear to assert in this appeal.

Additionally, no relief was granted to the Council of Co-Owners by the Trial Court. Rather, the Court's order holds, first, that the 2007 Master Deed for Mariners Cay Marina is void, a nullity and of no effect to the extent that its provisions converted the former common elements to individual units, which were thereafter sold. The Order further holds that the said common elements are "hereby restored to their status as common elements"; "and that the individual plaintiffs, Elizabeth Heatley, Neil B. McCann, Jr., David Neil Monk, and Thomas V. Bessent are herewith and hereby declared to own, and they do own and hold, undivided interests in the Ship's Store Building and Commercial Units, CU-1A, CU-1B and the Fuel Docks, CU-2, as tenants in common with each other…". (Order at page 19.)

Finally, and perhaps most significantly, as correctly held by the trial court, none of the five elements of judicial estoppel are established by the evidence in this case. As noted at page 15 of the Trial Court's Order, *Cothran v. Brown* sets forth the five elements that must be proved to make out a case for judicial estoppel; as set forth in the opening paragraph of this argument.

There is not one single element of the doctrine of judicial estoppel, not one, present in this case. The most fundamental is that the individual Respondents were not parties to the first, foreclosure case, upon which Appellants rely to argue judicial estoppel. Judicial "estoppel" is invoked where a party takes a position in one case, and takes a contradictory position in a second case about the same issue. The principal factual predicate is not present, here: however, none of the Individual Respondents in this case was a party or even a witness in the first case, the foreclosure.

Appellants thereby do not even cross the threshold of proof of the doctrine. From the failure of the principal predicate, Appellants' argument goes only downhill: there was no "position" for the Individual Respondents to take in the first case; and, therefore, neither were the Individual Respondents "successful" in the first case. There is no evidence they sought to mislead the court, either then or now. There is no inconsistency of positions, period.

Rather, as properly found by the trial judge, "the 'position' taken by the individual Plaintiffs in this case is that their vested title interests were wrongfully and unlawfully divested of them by the unilateral actions of the Declarant in amending the Master Deed, thereby attempting to convert common elements to individual units in contravention of the statute, the case law, and the terms of the 2006 Master Deed." (Order at page 15).

Neither can it be said that the Council of Co-Owners took an inconsistent position in the foreclosure case. Rather, and at best, they simply failed to raise the fundamental title issue that is joined in this case; but that title issue was not a "position" asserted in the foreclosure case by them, at all. Particularly because the individual Respondent parties cannot be bound as to title issues by any position taken by the Council of Co-Owners, there can be no estoppel invoked against them here.

V: THIS APPEAL IS BARRED BY THE "TWO ISSUE" RULE, BECAUSE APPELLANTS DO NOT APPEAL FROM THE TRIAL COURT'S ALTERNATIVE GROUND THAT THE 2007 MASTER DEED WAS UNLAWFULLY AMENDED IN VIOLATION OF THE 2006 MASTER DEED PROVISION THAT NO UNILATERAL AMENDMENT MAY ADVERSELY AFFECT TITLE INTERESTS.

The Trial Court's Order in this case is based upon "two unambiguous legal principles". (Order, page 16). One legal principle, which has been previously argued, is Code Section 27-31-70. (See Argument I, above). The second, unambiguous legal principle is the provision of the 2006 Master Deed in Article XII Section 16.1 that, whereas the Declarant could unilaterally amend the Master Deed, "any such amendment shall not adversely affect the title to any Unit unless the Owner shall consent in writing". (2006 Master Deed at Art. XVI, Section16.1(b); Order at page 16).

Appellants have argued at length in their Argument I why Code Section 27-31-60's "acquiescence" provision prevails over Section 27-31-70's vested title interests in common elements. However, Appellants have not addressed, at all, the Trial Court's alternative basis for its ruling: that the plain language of the 2006 Master Deed prohibited the Declarant from unilaterally amending the Master Deed in a manner that would "adversely affect the title to any Unit unless the Owner shall consent in writing." Because Appellants do not appeal from the Trial Court's alternative ground for granting relief, that is to say the terms of the 2006 Master Deed, this appeal must fail. The Trial Court's order must be affirmed under the "two issue rule".

"Under the two issue rule, where a decision is based on more than one ground, the Appellate Court will affirm unless the Appellant appeals all grounds, because the unappealed ground will become the law of the case." *Atlantic Coast Builders and Contractors v. Lewis 398*

S.C. 323, 730 S.E.2d 282 (S.Ct. 2012), citing *Jones v. Lott 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010)*.

The *Atlantic Coast Builders* case was a contractual lease dispute between landlord Lewis and tenant Atlantic Coast Builders. The Master-In-Equity awarded money damages to Atlantic Coast Builders on all causes of action, for negligent misrepresentation, unjust enrichment, breach of the lease, and breach of the covenant of quiet enjoyment. However, Lewis appealed only the findings of liability for negligence misrepresentation and breach of contract, but not for unjust enrichment. "Accordingly, there is a ground for liability from which no appeal was taken, and our consideration of Lewis's arguments is barred by the two-issue rule". 398 S.C. at 328.

Likewise, in this case the Trial Court concluded as a matter of law that the 2007 Master Deed is void to the extent that it divests the individual Respondents (Plaintiffs below) of their vested title rights in the Ship's Store Building and Fuel Docks, Commercial Units CU-1A, CU-1B and CU-2., because Declarant did not obtain their written consent as required by the 2006 Master Deed, Article XVI, Section 16.1. (Trial Court Order at page 12; Note, the Trial Court Order contains an obvious scrivener's error, inasmuch as it refers to "Art. XII, Sec. 16.1". Section 16.1 of the Master Deed is included in Article XVI, not in Article XII.)

The Trial Court also held the 2007 Master Deed to be void pursuant to Code Section 27-31-70 because the terms of the 2007 Master Deed were a "covenant to the contrary" with the clear provisions of the 2006 Master Deed, prescribed under Section 27-31-70.

However, in their Appeal, Appellants argue only that section 27-31-60's statutory "acquiescence" clause prevails over 27-31-70's provision that common elements shall remain undivided. Appellants' do not address, at all, the Trial Court's alternative basis for granting relief, that the 2007 Master Deed was also amended in contravention of the express 2006 Master Deed

provisions. Appellants do not argue or suggest any common law, statutory, or non-statutory authority why "acquiescence" exists as a defense to a Master Deed amendment unilaterally recorded by the Declarant, without notice to, or vote of, the boat slip owners who hold vested title interests, in clear and plain contravention of the 2006 Master Deed that the 2007 Master Deed purports to amend.

The facts here are a carbon copy of those in *Atlantic Coast Builders*, where relief was granted by the Trial Court on multiple legal grounds, and the failure of appellants to appeal all legal grounds leaves the unappealed grounds as the "law of the case".

This argument, to paraphrase Justice Hearn in the *Atlantic Coast Builders* case, does not present a "…'gotcha game' aimed at embarrassing lawyers or harming litigants…". Rather, this argument is made to protect a vital interest in the appellate process. "Error preservation has been a critical part of appellate practice in this State for a long time, serving to insure, as noted by the Chief Justice, that we do not reach issues that were not ruled upon by the Trial Court. We therefore agree that we are not precluded from finding an issue unpreserved even when the parties themselves do not argue error preservation to us. In fact, a rule which would permit such an 'appeal by consent' is contrary to the very core of our preservation requirement: 'issue preservation rules are designed to give the Trial Court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queens Grant II Horizontal Property Regime v. Greenwood Development Corp., 368 S.C. 342, 373, 628 S.E.2nd 902, 919 (Ct.App. 2006)*

The *Atlantic Coast Builders'* Court continued: "Nevertheless, these rules must also be applied consistently and not selectively. If our review of the record establishes that an issue is not preserved than we should not reach it." 398 S.C. at 329.

Here, the Trial Court was not given the fair opportunity to rule on the Master Deed Section 16.1 issue. A review of Appellants' Motion to Alter or Amend Judgement, filed with the Trial Court May 20, 2022 (*cite to ROA here*), shows that Appellants did not argue to the Trial Court that its order, based upon the alternative ground that the 2006 Master Deed precluded this manner of unilateral amendment of the Master Deed, should be reconsidered or set aside. And there was certainly no evidence presented at trial that any of the owners of those thirty-nine boat slips "consented in writing" as the 2006 Master Deed plainly required.

The Trial Court's Order in this case must be affirmed under the two-issue rule.

VI: APPELLANTS IMPROPERLY ARGUE PROTECTED SETTLEMENT COMMUNICATIONS BETWEEN THE PARTIES, CONTRARY TO THE TRIAL COURT'S RULINGS AND SOUTH CAROLINA RULE OF EVIDENCE 408.

Interspersed in Appellants' brief are references to settlement discussions exchanged between Mr. Farmer, the principal of the Appellant LLCs, and members of the Board of the Council of Co-Owners. (See, for example, Appellant LLCs' Statement of the Case at page 3 and page 4; see their Statement of Facts at pages 15, 17, 20, 21.) The references made by Appellants in their Brief discuss communications between the board of directors of the Council of Co-owners and Mr. Farmer wherein "as a practical matter" the Board was seeking to resolve their differences with Mr. Farmer.

Appellants' improper references to settlement discussions culminate with their argument made in the first paragraph of page 22 of their Brief: "Why would they offer to purchase something they already own? Again this (is) more evidence of their understanding that Mr. Farmer and his entities owned what they indeed own to this date". The trial transcript reflects considerable

colloquy between the Trial Judge and counsel about the admissibility of the settlement communications. See Transcript pages 218 through 225.

Respondents objected to the admissibility of the communications: At page 212 beginning with line 5: (by Mr. Barr): "And so now counsel is trying to introduce those practical settlement discussions for the very reason that settlement discussions are confidential. And that is to show, well, you must... you must have known you didn't have a very good position or you didn't have any position at all. So I really do think it steps right on the very basis for excluding settlement discussions..."; and, at page 216 beginning with line 8: (by Mr. Barr): "But on the other hand, they're being used for the exact purpose that settlement discussions are not admissible. And that is to show that your position... to get to the underlying merits of the position. That's what it is. It's to show guilt. It's to show you don't have a case... And that's the only purpose they're being offered for, which is why they're not admissible."

The Trial Court's ruling on the objection of Respondents appears at transcript page 224 beginning with line 21: "But it would seem to this Court that the purpose of the offer to settle cannot be made against the party as evidence of the validity of the opponent's claim. So I don't think that it's going to be admissible on that basis alone. So would move *(sic)* to exclude those e-mails as offers of settlement and compromise under Rule 408. Okay?"

To which the attorney for Appellants responded at page 225 line 3: (by Mr. O'Kelley): "Understood, Your Honor. May we offer a proffer of the *(sic)* so the Court can at least look at them on -- at your leisure?" To which the Court replied "Sure. Sure. So we will proffer them in the record."

CONCLUSION.

By every measure, the Trial Court was correct in its conclusion that "two unambiguous legal principles" guide the outcome of this case.

The provisions of the 2006 Master Deed could be no clearer. The Master Deed is a matter of public record, and unambiguously provides that the Declarant could not unilaterally amend it to "adversely affect the title interests of a unit owner". Yet, that is exactly what the Declarant did in this case. Appellants do not challenge or appeal from the decision of the Trial Court grounded upon this Master Deed proscription. Accordingly, under the "two issue" rule, because Appellants do not appeal from that ground, the Trial Court's order must be affirmed.

Even if Appellants are correct that Section 27-31-60's "acquiescence" is invoked in this case, there is no evidence that the four Individual Respondents acquiesced, much less that "all" slip owners acquiesced, to the 2007 Amendment, as Code Section 27-31-60 requires.

Appellants argue for a contorted construction of Section 27-31-60 that brings it into direct conflict with Section 27-31-70's vested rights protections. And Section 27-31-70 could no more clearly state that common elements "shall remain undivided", and that they shall not be the object of partition or division of co-ownership, and that "any covenant to the contrary shall be void". Appellants' arguments only create conflict between the two code sections, where none exists.

Because the Statute and the Master Deed vested irrevocable title interests in the individual Respondents, Beth Heatley, Neil McCann, David Neil Monk, and Tom Bessent, the Declarant's improper and unlawful attempt to extinguish those title interest must be repudiated. Neither can Appellants' negligence be sanctioned. As clearly laid out in the trial record of this case, the defects in the Appellants' title claims were open and obvious matters of public record. It is no excuse that they, or their representatives, failed to read what was plainly written in the recorded documents.

Particularly because the defects in the Appellants' title claims are clear, open, and obvious as matters of public record, the Order of the Trial Court must be affirmed.

Respectfully,

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August 16, 2023