STATE OF SOUTH CAROLINA)
)
)
COUNTY OF BEAUFORT)

IN THE COURT OF COMMON PLEAS
FOURTEENTH JUDICIAL CIRCUIT

Richard K. Davenport and Mary E. Davenport,)
)
Plaintiffs,)
)
vs.) Civil Action No. 2010-CP-07-594
)
Dataw Island Owners' Association, Inc.,)
nominal Defendant, *et al.*,)
)
Defendants.)

ORDER REGARDING PLAINTIFFS' MOTION TO ALTER OR AMEND JUDGMENT AND DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AS TO REMAINING CLAIMS

I. Introduction

On April 3, 2012, this Court entered an Order Regarding Defendants' Motions to Dismiss and All Parties' Motions for Summary Judgment ("April 3 Order") granting summary judgment against Plaintiffs and/or dismissing most of their claims. Except as otherwise stated in this Order, the Court incorporates the April 3 Order by reference, including its factual discussion and defined terms. Plaintiffs have filed a Motion to Alter or Amend Judgment ("Motion to Alter"), asking the Court to reconsider the April 3 Order. The parties have briefed the issues, and the Court heard extensive oral argument. Upon consideration of all arguments and submissions, the Court hereby DENIES Plaintiffs' Motion to Alter in its entirety. It also GRANTS Defendants' motions for summary judgment as to any claims surviving the April 3 Order. The Court does not intend to change the effect of the April 3 Order, but hereby amends that April 3 Order as set forth below to clarify it and address certain issues that were not expressly addressed therein. The Court also amends its Order to clarify that because matters outside of the pleadings were submitted by all parties and considered by the Court, the Motion to Dismiss of the parties is hereby disposed of under Rule 56 of the *South Carolina Rules of Civil Procedure*.

II. Background

This action centers around two aspects of the Dataw Island Community. The first is a 2001 decision, by a vote of over 85% of property owners, to adopt the "One Island Concept." The second is the inclusion in annual DIOA budgets of a Greenspace Line Item. All of Plaintiffs' claims, including those in two companion cases pending in this Court and a prior 2007 federal lawsuit, revolve around these items.

Under the One Island Concept: 1) all future property purchasers were required to maintain at least Social Membership in the community's common-interest amenity club, Dataw Island Club, Inc. ("DIC"); 2) DIC was required to offer a Social Membership; and 3) DIC was to use future membership revenue to support significant expansion and improvement of amenities. The mandatory membership aspect of the One Island Concept was enacted through the adoption of the Third Amendment to Dataw's Declarations.

The Greenspace Line Item is a part of the annual DIOA budget, amounting to a charge of approximately $250 annually from each owner. The annual DIOA budget is passed each year by a direct vote of the property owners. The Greenspace Line Item is a small part of the overall budget and is collected and provided to DIC for golf course maintenance, recognizing the benefits well-maintained golf courses have on property values for the whole community. Every budget approved by Dataw owners since 2005—including budgets passed after Plaintiffs' allegations in this litigation became public—has been overwhelmingly (often by more than 90% favorable votes) passed with a Greenspace Line Item.

III. The Third Amendment.

The April 3 Order addresses the validity of the Third Amendment as a proper DIOA corporate action. For the reasons discussed therein, the DIOA members' overwhelming adoption of the Third Amendment was proper under the Declarations and under South Carolina law. The April 3 Order also concludes that Plaintiff's claims are barred by the statute of limitations. The Motion to Alter raises several grounds urging reconsideration of that Order, but those arguments do not alter the conclusions drawn in the April 3 Order.

The Court adheres to its conclusion that the Third Amendment was a proper corporate act. The South Carolina Nonprofit Corporations Act of 1994 defines the powers of nonprofit corporations. Of note, South Carolina Code § 33-31-302 authorizes non-profit corporations "to make and amend bylaws not inconsistent with its articles of incorporation or with the laws of this State for regulating and managing the affairs of the corporation." The Declarations broadly permit their own amendment, by three-fourths of the voting DIOA owners.

It is undisputed that the Third Amendment was duly passed by more than the requisite vote. In challenging the validity of the Third Amendment, Plaintiffs rely on two cases holding that, in order to have power over a property, there must be some proper conveyance of that power. *See Erkes v. Kasparek*, 303 S.C. 70, 72, 399 S.E.2d 6, 7 (Ct. App. 1990)(residents lack power to dictate future lot size for un-subdivided property retained by developer where no instrument executed with the same formalities as would be necessary for the disposition of the property); *Home Sales, Inc. v. City of N. Myrtle Beach*, 299 S.C. 70, 77, 382 S.E.2d 463, 467 (Ct. App. 1989) (legend on a subdivision plat did not convey any power or right incident to ownership of property). This Court has fully considered the parties' extensive arguments concerning the meaning of "amendment" in the context of the Declarations and concludes that the Third Amendment, adding to the Declarations the covenant implementing the One Island Concept, was an amendment to the Declarations, permitted by the Declarations and by South Carolina law. The existence of express authorization in the association's governing documents for such amendment distinguishes this case from *Erkes* and *Home Sales* and renders them inapposite. A property owners' association can exercise those powers, and only those powers, that were conveyed to it. Here, Dataw Island's governing documents provide for amendment of the Declarations, albeit by a dauntingly high vote percentage. In the case of the Third Amendment, these procedural requirements were satisfied and the Amendment was a valid exercise of corporate power.

The April 3 Order addresses the statute of limitations applicable to Plaintiffs' claims, including the three-year limit of S.C. Code § 15-3-530(1) and Section 33-31-830(e)'s

requirement that an action against directors be brought within the sooner of three years from the challenged conduct or two years from when the harm should have been discovered. Sound considerations of public policy support the enforcement of the statute of limitations here. DIC has borrowed millions of dollars and constructed improved amenities to benefit the community. This debt obligation and construction were undertaken in reliance on the unchallenged supermajority vote for the Third Amendment. More than six years after the vote on the Third Amendment, Plaintiffs, for the first time, challenged the decision of their fellow owners. After the lapse of so much time, it is virtually impossible to unwind these community investments. As the South Carolina Court of Appeals held in affirming the denial of a refund of even clearly unauthorized assessments in *Seabrook Island Property Owners Association v. Pelzer,* 292 S.C. 343, 356 S.E.2d 411 (S.C. App. 1987), "The Association expended the moneys for purposes authorized by the bylaws. . . . [Property owner] cannot now return the benefits or restore the Association to its former position." Cases such as this exemplify the reason why statutes of limitations exist. Moreover, while resolving the issues before the Court on the statutes of limitation before reaching such analysis, the Court would also find that waiver and laches bar Plaintiffs' pursuit of this attack on the Third Amendment.

Plaintiffs argue that their claims are subject to a 20-year statute of limitations as "an action upon a sealed instrument," under S.C. Code § 15-3-320(b). However, the Court finds that the 20-year statute of limitations does not apply.[1] The Declarations are not a "sealed instrument." Although the Declarations lack a physical seal, South Carolina law can permit an agreement to "sealed" based on the intention of the parties. *See* S.C. Code § 19-1-160; *accord* S.C. Code § 27-7-30. However, the Declarations lack the requisite multiple indicia of that intention. *Treadaway v. Smith*, 325 S.C. 367, 378, 479 S.E.2d 849, 856 (Ct. App. 1996) (separation agreement sealed where *multiple* suggestions of intention to create agreement under seal); *South Carolina Dep't of Soc. Servs. v. Winyah Nursing Homes, Inc.*, 282 S.C. 556, 320

[1] Section 15-3-320(b) would not apply to tort causes of action regardless, but at most to contract claims.

S.E.2d 464 (Ct. App. 1984); *Carolina Marine Handling, Inc. v. Lasch*, 363 S.C. 169, 609 S.E.2d 548 (2005) (single boilerplate statement insufficient to create sealed instrument); *accord Clifton, LLC v. Tadlock*, 2012 WL 909826 (D.S.C. March 16, 2012) (language "Signed, sealed and delivered" above parties' signatures insufficient for sealed document). The only expression of an intention in the Declarations is non-conspicuous, boilerplate language above Alcoa South Carolina, Inc's signature block: "Signed sealed and delivered in the presence of [witness]." As in *Clifton*, this single indicator is insufficient to create a sealed instrument in the absence of an actual seal.

Further, the discussion of whether the Declarations are a sealed instrument misses the point that the Plaintiffs are not suing "upon" the Declarations, but to avoid them. Plaintiffs have pointed to no provision in the Declarations under which they seek relief from Defendants. To the contrary, the essence of their claim is that material parts of the Declarations are not valid.

The Declarations do not waive the statute of limitations. Section 13.03 of the Declarations provides that a delay in exercising rights relating to a breach is not "an acquiescence thereto nor shall be deemed a waiver of the right to enforce such right, power, or remedy thereafter as to the same violation or breach, or as to a violation or breach occurring prior or subsequent thereto, and shall not bar or affect its enforcement." Section 13.03 is a non-waiver provision common in governing documents such as the Declarations. Its intent clearly is to prevent the DIOA's failure to enforce covenants on some occasions from acting as a waiver of its right to enforce the covenants on other occasions. Nothing in Section 13.03 evidences an intention to waive the applicable statute of limitations in a member's suit seeking to declare the Declarations invalid.

The Court finds no basis to equitably toll or to estop the Defendants from asserting the statute of limitations. Plaintiffs can point to no extraordinary circumstances preventing them from knowing that they might have a cause of action relating to the Third Amendment and bringing suit within the statute of limitations. The validity and wisdom of the Third Amendment

have been the subject of vigorous public debate on Dataw Island since before its inception. The Plaintiffs have pointed to no evidence that the Defendants lulled them into inaction.

For the foregoing reasons and those articulated in the Court's April 3 Order, the Plaintiffs' Motion to Alter as to the claims relating to the Third Amendment must be denied.

IV. Greenspace

The April 3, 2012 Order addresses the validity of the Greenspace Line Item as a proper DIOA corporate action. For the reasons stated in that Order, the owners' yearly passage of budgets that include the Greenspace Line Item were proper corporate acts. The powers of any corporation, including a property owners' association, are not unlimited. "Restrictive covenants are contractual in nature and bind the parties thereto in the same manner as any other contract. *Palmetto Dunes Resort v. Brown,* 287 S.C. 1, 336 S.E.2d 15 (Ct.App.1985). Moreover, a corporation may only exercise powers granted to it by law, its charter, articles of incorporation, or bylaws; acts beyond the scope of those enumerated powers are *ultra vires. Lovering v. Seabrook Island Prop. Owners Ass'n,* 289 S.C. 77, 344 S.E.2d 862 (Ct. App. 1986), *aff'd as modified,* 291 S.C. 201, 352 S.E.2d 707 (1987)." *Seabrook Island Prop. Owners Ass'n v. Pelzer,* 292 S.C. 343, 356 S.E.2d 411 (Ct. App. 1987). Though not unlimited, the powers of a nonprofit corporation are very broad. The inclusion of the Greenspace fee in the annual DIOA budgets is not *ultra vires.* Unlike the property owners' association in *Seabrook,* which relied upon the business judgment rule as its authority to make assessments not authorized by covenants, Defendants here rely on specific authorization in the Declarations, the Articles of Incorporation, and the broad powers conferred under the Nonprofit Corporations Act. The Declarations define the annual "Assessment" as "an Owner's share of the Common Expenses or other charges from time to time assessed against an Owner by the Association [DIOA] in the manner herein provided." (*See* Decl. ¶ 1.01(e)). The Declarations grant broad authority to fund common expenses by the annual assessments:

> for purposes including, but not limited to... for the general purposes of promoting the recreation, health, safety, welfare, common benefit, and enjoyment

> of the Owners and occupants of the Development, and maintaining the Development and improvements therein, providing those services important to the development and preservation of an attractive community appearance, and, maintaining the privacy, security and general safety of the owners and occupants of the [D]evelopment; all as more specifically authorized from time to time by the Board of Directors.

See Decl. ¶ 9.01). In this regard, the Declarations state further:

> The Common Expenses to be funded by the annual assessments may include, but shall not necessarily be limited to, the following: . . .
>
> (viii) such other expenses as may be determined from time to time by the Board of Directors of the Association [DIOA] to be Common Expenses, including, without limitation, taxes and governmental charges not separately assessed against Lots, Dwellings or Multi-Family Areas; . . .
>
> (xi) for such further items that the Board may, in its discretion, deem necessary.

(Section 9.03(viii) and (xi)). This grant of authority to assess is broad, and nothing in the Declarations prevents DIOA's members from approving a charge such as the Greenspace Item. The Nonprofit Corporations Act gives nonprofit corporations authority "to impose dues, assessments, and admission and transfer fees upon its members", section 33-31-302(15) and "to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation", section 33-31-302(18). When Greenspace was initially added to the DIOA budget, it was with the express statement and belief that properly and well-maintained golf courses enhance the value of all Dataw properties. The entire DIOA membership, not just the DIOA Board, votes on each year's budget containing the Greenspace Line Item, and the budgets have been overwhelmingly passed every year.

Further, the Greenspace fee is not a "distribution" as defined in Section 33-31-140(11), and is therefore not subject to challenge as an improper distribution to Board members. A "distribution" in this context is defined as a "direct or indirect transfer of assets or any part of the income or profit of a corporation to its members, directors, or officers." The term does not include "conferring benefits on its members in conformity with its purposes", section 33-31-140(11)(b). Plaintiffs argue that the golfing members of the DIOA Board benefit from the

Greenspace funding, but the benefit that they receive is the same that all members receive, and it is in conformity with DIOA's purposes.

Additionally, the Court adheres to its determination in the April 3 Order that Plaintiffs' claims relating to the Greenspace Line Item are time-barred. It is undeniable that Plaintiffs knew or should have known they might have a cause of action as soon as enactment of the 2005 budget containing the first Greenspace Line Item, as they believed then that the Line Item was not a proper budget item. Therefore, in February 2005, the statute of limitations began to run against all claims against all potential Defendants, expiring in February 2007, nine months prior to commencement of the federal suit. *Moore v. Benson*, 390 S.C. 153, 700 S.E.2d 273 (Ct. App. 2010) (limitations period begins to run when party knows or should know, through due diligence, that cause of action might exist). The budget has been passed every year since 2005, even while litigation challenging Greenspace has been pending, by an overwhelming majority of the members of the DIOA. This belies any argument that the Greenspace Line Item is the product of a continuing pattern of deceit by the Defendants, such as would re-start the running of the statute of limitations with each new budget.

For these reasons, as well as those stated in the April 3, 2012 Order, the Plaintiffs' Motion to Alter or Amend as to the claims relating to the Greenspace Line Item must be denied.

V. Summary Judgment as to Remaining Claims

Defendants filed motions for summary judgment as to all claims that survived the April 3 Order. Plaintiffs concede that the holdings in the April 3 Order are dispositive of the remaining claims and that Defendants are entitled to summary judgment if the Court denies the Motion to Alter. It is unnecessary to address the grounds raised by Defendants in support of their summary judgment motions. The defendants' Motions for Summary Judgment are therefore GRANTED.

VI. The Motion for a More Definite Statement is Now Moot.

The April 3 Order stated that, to the extent Plaintiffs' claims survived the Motions to Dismiss and for Summary Judgment, they were required to amend their Complaint to more

specifically allege the culpable conduct of each Defendant and more fully state their claims. Plaintiffs did not elect to amend, but the Court having ruled for Defendants on all claims, this issue is now moot.

VII. Conclusion.

As set forth in the April 3 Order and herein, the Third Amendment and Greenspace Line Item are legal acts and all of the Counts of the Complaint are dismissed or have had summary judgment granted in favor of the Defendants. To the extent not addressed or modified in this Order, the holdings in the April 3 Order are incorporated and reaffirmed herein. The Plaintiffs' Motion to Alter or Amend is hereby DENIED, and Defendants' motions for Summary Judgment as to the remaining claims are GRANTED.

IT IS SO ORDERED:

BY THE COURT

5-23-13

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2010CP0705944

Richard K Davenport	Dataw Island Owners Association, Inc Bruce "Skip" Adams Victor Brinkman Earl Dietz Dan Hopkins	Dataw Island Club, Inc George Beck Colin Collins Merwin "Mer" Grayson
PLAINTIFF(S)		DEFENDANT(S)

Submitted by:	Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order ☐ Statement of Judgment by the Court:

Order Regarding Plaintiffs' Motion to Alter or Amend Judgment &Defendants' Motion for Summary Judgment As to Remaining Claims

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

s/ C. T. Mullen	**2142**	5/23/2013
Circuit Court Judge	**Judge Code**	**Date**

For Clerk of Court Office Use Only

This judgment was entered on **May 23, 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **May 28, 2013**, to attorneys of record or to parties (when appearing pro se) as follows:

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Court Reporter