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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Jr., Circuit Court Judge

Opinion No. 6016 (S.C. Ct. App. filed Aug. 16, 2023)

Vista Del Mar Condominium Association; Dennis M. Merritt, Trustee of the Dennis M. Merritt Living Trust; John J. Hawkins; Eleanor N. Hawkins, ……..... Plaintiffs,

v.

Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; and John Doe, a Nominal Defendant Representing all Persons or Entities Unknown Who May Claim an Interest in the Property that is the subject of this action,……..Defendants,

And

Atlantic Development Company, LLC and Atlantic Coast Funding, LLC; ……Third-Party Plaintiffs,

v.

Barbara P. Swartz; Nancy S. Case; Winston-Salem Daly Development, LLC; Charles F. Webber; Mark L. Skowron, as Trustee of Mark L. Skowron Revocable Trust dated April 24, 2002 and Gail L. Skowron, as Trustee of the Gail L. Skowron Revocable Trust dated 04/24/2002; Norman W. Taylor, Trustee of the Norman W. Taylor Revocable Living Trust dated April 28, 2008; Tim Mitchell Development, LLC; Eric R. Sklut and Lori Levine Sklut; Fred C. Warehime and Patricia F. Warehime; James W. Blackburn, III and Peggy S. Blackburn; Barbara I. Bowser; KHDH, LLC; Beth G. Bauknight; Roderick D. Sanders (or his successor), as Trustee of the Amended and Restated Revocable Declaration of Trust of Anne Mallard Sanders u/a/d January 16, 2015; GGK Properties, LLC; Leon Levine and Sandra Levine; Joseph Moglia and Amy H. Moglia; Angela M. Mason, as Trustee of the Angela Mason Revocable Trust dated June 9, 2003 and amended and restated May 27, 2007; Dexter R. Barbee, Sr.; Daniel M. Talbert, Sr.; Craig W. Lawton; Craig W. Lawton; David N. Dalton; Janet W. Weed, Trustee of the Janet W. Weed Revocable

Trust underTrust Instrument dated April 17, 2013; Robert H. Messier, Jr. and Janice H. Messier; Jeffrey Schneider, Trustee for the Jeffrey Schneider Revocable Trust Dated August 1, 2017; Phillip Kleinman and Charisse D. Kleinman; Stephen Gatto and Camille Gatto; Lutz Real Estate, LP; Astorg Imports, Inc.; ABLP Properties, LLC; Sutton Children, LLC; Daniel C. Schuster and Mardell J. Schuster; Roy C. Putrino and Eileen M. Putrino; Spencer Squier and Sherri Squier; VDM 1004, LLC; Roger B. Matherly and Bonnie V. Matherly; ITAC 203, LLC; Rebecca R. Shroff and Kersi S. Shroff; Sandra P. Levine and Lori Ann Sklut, Co-Trustees of the Irrevocable Trust F/B/O Amy Beth Levine dated September 18, 1986; David E. Lukowski; Richard B. Kline and Leslie Kline; James P. Aplington and Carol D. Aplington; Michael L. Van Glish and Judith K. Van Glish; Anna A. Olsen; Anne Marie Murray; William J. Pridemore and Irina V. Pridemore; William B. Davidson and Julia Davidson; Bruce Alexander Henderson and Valerie Sokolov; Mark W. Lee; Sue David Kline; Thomas Mckiernan and Anne Mckiernan; Philip H. Strobl and Amy Mott Strobl; James M. Faircloth and Sylvia Faircloth; Cheryl Jackson and Phillip H. Jackson; Weldon Riggs and Tiffiany Riggs; Janet P. Merritt, Trustee of the Janet P. Merritt Living Trust U/A dated March 24, 2000; Melia Mooney Pavoris; William L. Mansfield and Patricia S. Mansfield; Stuart W. Gibbs and Helen R. Gibbs; Michael R. Blackburn and Pamela M. Blackburn; Jeffrey G. Edwards and Teresa T. Edwards; and Michael J. Wilk, ……Third-Party Defendants,

Of which Vista Del Mar Condominium Association; Dennis M. Merritt, Trustee of the Dennis M. Merritt Living Trust; John J. Hawkins; Eleanor N. Hawkins; Barbara P. Swartz; Nancy S. Case; Winston-Salem Daly Development, LLC; Charles F. Weber; Mark L. Skowron, as Trustee of Mark L. Skowron Revocable Trust dated April 24, 2002 and Gail L. Skowron, as Trustee of the Gail L. Skowron Revocable Trust dated 04/24/2002; Norman W. Taylor, Trustee of the Norman W. Taylor Revocable Living Trust dated April 28, 2008; Tim Mitchell Development, LLC; Eric R. Sklut and Lori Levine Sklut; Fred C. Warehime and Patricia F. Warehime; James W. Blackburn, III and Peggy S. Blackburn; Barbara I. Bowser; KHDH, LLC; Beth G. Bauknight; Roderick D. Sanders (or his successor), as Trustee of the Amended and Restated Revocable Declaration of Trust of Anne Mallard Sanders u/a/d January 16, 2015; GGK Properties, LLC; Leon Levine and Sandra Levine; Joseph Moglia and Amy H. Moglia; Angela M. Mason, as Trustee of the Angela Mason Revocable Trust dated June 9, 2003 and amended and restated May 27, 2007; Dexter R. Barbee, Sr.; Daniel M. Talbert, Sr.; Craig W. Lawton; Craig W. Lawton; David N. Dalton; Janet W. Weed, Trustee of the Janet W. Weed Revocable Trust under Trust Instrument dated April 17, 2013; Robert H. Messier, Jr. and Janice H. Messier; Jeffrey Schneider, Trustee for the Jeffrey Schneider Revocable Trust dated August 1, 2017; Phillip Kleinman and Charisse D. Kleinman; Stephen Gatto and Camille Gatto; Lutz Real Estate, LP; Astorg Imports, Inc.; ABLP Properties, LLC; Sutton Children, LLC; Daniel C. Schuster and Mardell J. Schuster; Roy C. Putrino and Eileen M. Putrino; Spencer Squier and Sherri Squier; VDM 1004, LLC; Roger B. Matherly and

Bonnie V. Matherly; ITAC 203, LLC; Rebecca R. Shroff and Kersi S. Shroff; Sandra P. Levine and Lori Ann Sklut, Co-Trustees of the Irrevocable Trust F/B/O Amy Beth Levine dated September 18, 1986; David E. Lukowski; Richard B. Kline and Leslie Kline; James P. Aplington and Carol D. Aplington; Michael L. Van Glish and Judith K. Van Glish; Anna A. Olsen; Anne Marie Murray; William J. Pridemore and Irina V. Pridemore; William B. Davidson and Julia Davidson; Bruce Alexander Henderson and Valerie Sokolov; Mark W. Lee; Sue David Kline; Thomas Mckiernan and Anne Mckiernan; Philip H. Strobl and Amy Mott Strobl; James M. Faircloth and Sylvia Faircloth; Cheryl Jackson and PhillipH. Jackson; Weldon Riggs and Tiffiany Riggs; Janet P. Merritt, Trustee of the Janet P. Merritt Living Trust U/A dated March 24, 2000; Melia Mooney Pavoris; William L. Mansfield and Patricia S. Mansfield; Stuart W. Gibbs and Helen R. Gibbs; Michael R. Blackburn and Pamela M. Blackburn; Jeffrey G. Edwards and Teresa T. Edwards; and Michael J. Wilk, are the ……Petitioners,

And

Of which Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; and John Doe, a Nominal Defendant Representing all Persons or Entities Unknown Who May Claim an Interest in the Property that is the subject of this action are the…….....Respondents.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioners certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 11, 2023.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in allowing the division and removal of common element property of a horizontal property regime when the plain language of S.C. Code Ann. § 27-31-70 explicitly bars such division, and such division permits the creation of an unfair tax and operational costs shelter?

2. Did the Court of Appeals err in ruling that under the master deed, the transition period within which the developer could remove common element property from the horizontal property regime ended in February 2015 rather than March 2008?

3. Did the Court of Appeals err in determining that an access easement had been granted that burdened the horizontal property regime's real property?

4. Did the Court of Appeals deprive a condominium association and its unit owners of their property without due process of law when it summarily determined, in disregard of S.C. Code Ann. § 27-31-70, that ownership of the property belonged solely to the developer?

STATEMENT OF THE CASE

This case involves important and novel questions concerning the respective property rights between a condominium association and the developer of the horizontal property regime. On January 17, 2017, Petitioner Vista Del Mar Condominium Association (the "Association") filed a Complaint disputing the ownership of a 2.58 Acre Tract that the developer, Respondent Vista Del Mar Condominiums, LLC ("VDMC" or the "Developer"), had partitioned, divided, and removed from the common elements of The Regime. (R. p. 291.) On April 5, 2017, an Amended Complaint

was filed to include, as plaintiffs, the owners of three condominium units. (R. pp. 80-89.) The remaining unit owners within The Regime were subsequently named as Third-Party Defendants. The Association and the unit owners asserted that VDMC's removal of the 2.58 Acre Tract from The Regime was barred by S.C. Code § 27-31-70 and the terms of the Master Deed, and that the conveyance of an Access Easement was also barred by the Master Deed. (R. pp. 80-89.)

VDMC created The Regime in December 2003 through the execution of a Master Deed that was filed with the Horry County Register of Deeds. (R. pp. 518-585.) At the same time, VDMC created the Association. (R. pp. 568-571.) The Master Deed initially subjected a total of 5.85 acres of land and improvements to declaration of The Regime. (R. p. 560.) VDMC constructed one condominium tower or building on the original 5.85 acres. A portion of this 5.85 acres became the 2.58 Acre Tract that is the subject of the present dispute. (R. pp. 498, 506.)

The Master Deed permitted VDMC to withdraw unimproved portions of property from The Regime as well as the right to add property to The Regime. (R. p. 522.) On June 27, 2006, VDMC recorded the First Amendment to the Master Deed, which added an additional 5.0 acres of land, including improvements, into Phase II of The Regime. (R. pp. 398-423.) VDMC constructed a second condominium tower in Phase II. (R. pp. 398-423, 506.)

Under the Master Deed, up to six phases and six buildings with a maximum of 250 units could be developed within The Regime. (R. pp. 513, 540.) However, only two phases and two buildings having a total of 66 units were ever completed. (R. p. 513.)

The Master Deed contains a "Transition Perion." The Court of Appeals accepted the trial court's conclusion that once the Transition Period concluded, VDMC, as developer, could not withdraw property from The Regime. (R. pp. 83, 525-526.) The Transition Period is defined as:

> [T]he time period commencing on the date of recording of the Master Deed and ending on the earlier of:

1. December 31, 2017; or

2. Three (3) months after the conveyance in the ordinary course of Developer's business of ninety-nine percent (99%) of the maximum number of Units to be contained in all phases of the Regime, rounded down to the next whole number, to persons other than the Developer; or

3. Three (3) months following the date the Developer surrenders its authority as a Class "B" Member of the Association to appoint and remove directors and officers of the Association by an express amendment to this Master Deed executed and filed of record by Developer.

(R. pp. 525-526.)

VDMC sold the last remaining unit for the two completed phases of The Regime on or about December 31, 2007. (R. pp. 83, 506.) The Association and the unit owners contend that this sale triggered Option 2 of the Master Deed, set forth above. (R. p. 83.) Consequently, the Transition Period ended three months after December 31, 2007, or March 31, 2008. (R. p. 83.)

Even so, approximately one year later, in March 2009, VDMC attempted to partition, divide, and remove the subject 2.58 Acre Tract from The Regime by recording a Fourth Amendment to the Master Deed ("Fourth Amendment"). (R. pp. 425-429.) A corrective Fourth Amendment was filed on April 6, 2009. (R. pp. 425-429.)

On or about December 19, 2013, VDMC sold and conveyed the 2.58 Acre Tract to GDMB Ocean, LLC ("GDMB Ocean"). (R. pp. 433-438.) VDMC also assigned its rights as developer under the Master Deed to GDMB Operations, LLC ("GDMB Operations"). (R. pp. 440-450.)

On December 19, 2013, with an effective date of December 20, 2013, VDMC, Grande Dunes Development Company, LLC, Villa Marbella Development Company, LLC, and Villa Venezia Development Company, LLC, and GDMB Operations entered into an Assignment of Declarant and Developer Rights in Connection with the Grande Dunes Development. (R. pp. 440-450.) After this transaction, GDMB Ocean or GDMB Operations purported to grant an access

easement over portions of the common area of The Regime, purportedly on behalf of the Association. (R. pp. 747-755.) The 2.58 Acre Tract and the access easement were sold and conveyed to Atlantic Development Company, LLC ("ADC") on January 8, 2016. (R. pp. 85, 499.) ADC executed a promissory note secured by a mortgage on the 2.58 Acre Tract in favor of Atlantic Coast Funding, LLC ("ACF"). (R. pp. 85, 499.)

On November 7, 2014, GDMB Operations surrendered its authority as a Class "B" member of the Association under the Master Deed. (R. pp. 452-453.) According to Respondents, this triggered Option 3 for the ending of the Transition Period under the Master Deed and meant that the Transition Period would end three months thereafter, on February 7, 2015. (R. pp. 452-453, 525-526.)

The Amended Complaint, filed on April 4, 2017, asserts alternative causes of action for (1) quiet title, (2) declaratory judgment, (3) equitable title, (4) equitable easement appurtenant, and (5) servitude appurtenant. (R. pp. 85-87.) On April 20, 2017, VDMC filed an Answer. (R. pp. 90-94.) ACF filed a separate Answer on September 11, 2017. (R. pp. 95-103.) On April 16, 2018, ADC filed an Answer, Counterclaims for declaratory judgment and to quiet title, Cross-Claim, and a Third-Party Complaint for declaratory judgment and to quiet title against each individual unit owner in The Regime. (R. pp. 112-141.)

On May 31, 2019, ADC and ACF moved for partial summary judgment on all matters pertaining to the 2.58 Acre Tract. (R. p. 301.) On August 13, 2019, a hearing was held on this motion. (R. pp. 194-236.)

On November 8, 2019, the trial court filed a written Order denying ADC and ACF's motion for summary judgment. (R. pp. 36-54.) ADC and ACF filed a motion for reconsideration on November 18, 2019. (R. pp. 897-916.) The trial court held two additional hearings on January

27, 2020, and February 18, 2020, concerning the motion to reconsider and both summary judgment motions. (R. pp. 264-290.)

On February 20, 2020, the trial court issued a written Order reversing its earlier Order and granting summary judgment in favor of ADC and ACF on all claims relating to the 2.58 Acre Tract and the access easement. (R. pp. 55-74.)

On March 20, 2020, the Association and unit owners filed a notice of appeal to the South Carolina Court of Appeals. (R. pp. 932-955.) Transcripts of the proceedings were timely ordered and received on May 26, 2020. (R. pp. 932-955.)

On August 16, 2023, the Court of Appeals filed Opinion No. 6016, which affirmed the trial court's order granting summary judgment in favor of ADC and ACF. The Court of Appeals held that: (1) "the circuit court did not err in finding the Transition Period had not ended and Developer still possessed the authority to remove the Property from the Regime on April 6, 2009" (Op. p. 9); (2) "Developer's removal of the Property from the Regime was valid" (Op. p. 12); and (3) the circuit court's findings regarding the access easement were affirmed under the rule that "whe[n] 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" (Op. at 12). However, the Court of Appeals noted that the trial court erred in holding that the 2.58 Acre Tract was not a statutory common element. (Op. at 12.)

The Association and unit owners filed a Petition for Rehearing on August 29, 2023. The Association and unit owners subsequently filed a motion to amend their rehearing petition. By Order filed on October 11, 2023, the Court of Appeals granted the motion to amend but denied the Petition for Rehearing.

Petitioners seek a writ of certiorari to review the decisions issued by the Court of Appeals.

ARGUMENT

I. THE COURT OF APPEALS SHOULD HAVE HELD THAT UNDER THE PLAIN LANGUAGE OF S.C. CODE ANN. § 27-31-70, THE DEVELOPER COULD NOT DIVIDE AND REMOVE THE 2.58 ACRE TRACT FROM THE REGIME

The Court of Appeals erred in allowing the Developer to divide the common elements and remove the 2.58 Acre Tract from The Regime because such division is barred by the plain language of S.C. Code Ann. § 27-31-70. This statute provides: "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**." S.C. Code Ann. § 27-31-70 (emphasis added).

To date, it does not appear that any South Carolina court has interpreted the last sentence of the referenced statute. The true meaning and scope of this statute present novel questions of law that may be taken up by this Court on certiorari. *See* Rule 242(b)(1), SCACR. Moreover, the interpretation posited by the Respondents, and accepted by the Court of Appeals, violates the public policy of the State of South Carolina and will have a significant impact on further development of tracts in South Carolina by affording developers the opportunity to create unfair operational costs and tax shelters.

Under the plain and literal language of S.C. Code Ann. § 27-31-70, the division and removal of common elements from a horizontal property regime is simply not permissible, and "[a]ny covenant to the contrary [in the master deed] shall be void." The use of the word "shall" in a statute ordinarily means that the action referred to is mandatory in nature. *See S.C. Dep't of Highways & Pub. Transp. v. Dickinson*, 288 S.C. 189, 191, 341 S.E.2d 134, 135 (1986); *Montgomery v. Keziah*, 277 S.C. 84, 85, 282 S.E.2d 853, 854 (1981). Further, "[w]here the terms of the statute are clear, the court must apply those terms according to their literal meaning." *Collins*

v. Doe, 352 S.C. 462, 466, 574 S.E.2d 739, 741 (2002).

Even so, the Court of Appeals relied on *Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 211, 494 S.E.2d 465, 468 (Ct. App. 1997), for the proposition that notwithstanding the literal language of S.C. Code Ann. § 27-31-70, a developer's right to remove common element property from a horizontal property regime is dependent on the terms of the master deed. In *Reyhani*, the Court of Appeals cited § 27-31-70 as authority for the principle 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." *Reyhani*, 329 S.C. at 211, 494 S.E.2d at 468.

This Court has not yet addressed the meaning of the quoted sentence from *Reyhani*. It is thus an open question of law as to whether the Court of Appeals correctly interpreted *Reyhani* as authorizing the court to look beyond the four corners of S.C. Code Ann. § 27-31-70 and to refer to the master deed in order to determine whether a developer had the right to divide and remove common element property from the regime. This Court should grant this Petition in order to take up this novel question of law as it is one of exceptional importance with significant public policy implications. *See* Rule 242(b)(1), SCACR.

Appellants submit that the Court of Appeals wrongly applied *Reyhani* when it determined that the case provided authority for the Developer here to divide and remove the 2.58 Acre Tract. Such an interpretation impermissibly and unfairly allows a developer to shelter its assets from taxes and operational costs. Under the Respondents theory of the case, through the use of this artifice, a developer may simply subject an entire development project to a single horizontal property regime and then carve out pieces for future sale or development at its leisure. In the interim, such property bears no tax map number, no ad valorem tax bill and the existing

condominium owners are subjected to all costs of maintenance, insurance, drainage, etc. Appellants respectfully submit that the use and deployment of this artifice is not supported by either the Sout Carolina Horizontal Property Act (S.C. Code Ann. § 27-31-10, *et seq.*) (the "Act") or the public policy of this State. Under the current facts, the 2.58-acre parcel at issue was subjected to The Regime Master Deed by virtue of the First Amendment, recorded June 27, 2006 in Deed Book 3119 at Page 469, land records of Horry County, South Carolina. (R. pp. 0398, 0682). In 2016, that same subject real property, together with other parcels, were transferred to Respondent, Atlantic Coast Development Company, LLC, for a consideration of Twenty-Five Million Six Hundred Thousand and No/100 ($25,600,000.00) Dollars, as evidenced by the deed recorded in Deed Book 3884 at Page 1242, land records of Horry County, South Carolina. Between the date of submission to the Master Deed and the date of improper removal and divestiture, the developer paid no taxes and no operational or maintenance costs, as the subject real property was legally and properly a part of the common elements of The Regime. This result was neither intended, nor authorized, by the Act. In fact, the language of *Reyhani*, notwithstanding, the plain language of S.C. Code Ann. § 27-31-70 unequivocally states that any such act, artifice or "covenant" is void.

It is axiomatic that "[t]he primary rule of statutory construction is to ascertain and give effect to the intent of the legislature." *Mid-State Auto Auction v. Altman*, 324 S.C. 65, 69, 476 S.E.2d 690, 692 (1996). "'What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.'" *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)); *see also Denson v. Nat'l Cas. Co.*, 439 S.C. 142, 146, 886 S.E.2d 228, 230 (2023).

"Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581; *see also Denson*, 439 S.C. at 146, 886 S.E.2d at 230. "If a statute's language is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning. . . . Where the terms of the statute are clear, the court must apply those terms according to their literal meaning." *Paschal v. State Election Comm'n*, 317 S.C. 434, 436-37, 454 S.E.2d 890, 892 (1995).

Under the unambiguous language of S.C. Code Ann. § 27-31-70, once the common elements are submitted into a horizontal property regime, they must exist as an undivided whole. Had the South Carolina General Assembly intended for § 27-31-70 to be conditional in nature, it would not have included the unconditional last sentence in the statute. Unlike the prior section of the Horizontal Property Act, § 21-31-70 does not distinguish between recreational and non-recreational common elements. Instead, it plainly states that **any covenant** dividing the common elements "**shall** be void." S.C. Code Ann. § 27-31-70 (emphasis added). A court is "not at liberty, under the guise of construction, to alter the plain language of [a] statute by adding words [that] the Legislature saw fit not to include." *First Citizens Bank & Tr. Co., Inc. v. Blue Ox, LLC*, 422 S.C. 461, 471, 812 S.E.2d 418, 423 (Ct. App. 2018), *cert. denied*, 2018 S.C. LEXIS 204 (Aug. 3, 2018) (alterations in original) (quoting *Shelley Constr. Co. v. Sea Garden Homes, Inc.*, 287 S.C. 24, 28, 336 S.E.2d 488, 491 (Ct. App. 1985)).

Accordingly, the statutory language can only be viewed as a conscious decision to prohibit any division and removal of the common elements of a regime. Had the Legislature intended that the language of a master deed have the power to alter this result, it would have included such language in the statute. *See Rogers v. Rogers*, 432 S.C. 168, 185, 851 S.E.2d 447, 456 (Ct. App.

2020) (recognizing that if the Legislature had intended to permit a lump sum child support award, it would have included it in the statutes pertaining to child support).

The Court of Appeals disregarded the plain meaning of S.C. Code Ann. § 27-31-70 by allowing certain language in the Master Deed to override the express and unconditional provisions of the statute. (Op. pp. 11-12.) The court's decision should not be permitted to stand. Accordingly, this Court should grant the Petition and take up the novel questions of law presented here concerning the scope and meaning of S.C. Code Ann. § 27-31-70 and *Reyhani.* *See* Rule 242(b)(1), SCACR.

II. THE COURT OF APPEALS SHOULD HAVE CONCLUDED THAT THE TRANSITION PERIOD ENDED IN MARCH 2008 RATHER THAN IN FEBRUARY 2015

The Court of Appeals accepted the trial court's determination that once the Transition Period defined in the Master Deed expired, the Developer could no longer withdraw any property from The Regime.[1] The Master Deed defines the Transition Period as concluding on the earlier of

> . . .
>
> 2. Three (3) months after the conveyance in the ordinary course of Developer's business of ninety-nine percent (99%) of the maximum number of Units to be contained in all phases of the Regime, rounded down to the next whole number, to persons other than the Developer; or
>
> 3. Three (3) months following the date the Developer surrenders its authority as a Class "B" Member of the Association to appoint and remove directors and

[1] Petitioners assert that this determination was incorrect because, as detailed in Argument Part I, above, the terms of the Master Deed could not legitimately contravene the express language of S.C. Code Ann. § 27-31-70, which provides: "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." However, even if it is presumed for purposes of this section of the Petition that the Transition Period defined in the Master Deed sets forth the time period within which the Developer could remove property from The Regime, the Court of Appeals still erred in ruling that the Developer had the right to remove the 2.58 Acre Tract from The Regime in March 2009.

> officers of the Association by an express amendment to this Master Deed executed and filed of record by Developer.

(R. pp. 525-526.)

The Court of Appeals incorrectly ruled that Option 3 applied, and that the Transition Period ended in February 2015, which was three months after GDMB Operations, VDMC's assignee, filed an amendment to the Master Deed surrendering its Class "B "authority. (Op. p. 9.) In reaching this conclusion, the court held that Option 2 was never triggered because the Developer "never completed all phases of the Regime contemplated in the Master Deed." (Op. p. 9.)

This holding hinged on the court's interpretation of the language of Option 2. According to the court, Option 2 would have been triggered "upon the sale of the maximum number of Units that *could have been constructed* if all phases had been added to the Regime[.]" (Op. p. 8.) Because all six possible phases of the Regime were never completed, the court determined that Option 2 never came into play here. (Op. p. 8.) The court also incorrectly ruled that the language of Option 2 was "not reasonably susceptible to more than one interpretation, and thus, it is not ambiguous." (Op. p. 9.)

In interpreting a deed, South Carolina courts "are guided by two settled rules of law. First, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy." *Wayburn v. Smith*, 270 S.C. 38, 41, 239 S.E.2d 890, 892 (1977); *see also K&A Acquisition Grp., LLC v. Island Pointe, LLC*, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009). Second, "the deed must be construed as a whole, and effect given to every part thereof, if such can be done consistently with law." *Wayburn*, 270 S.C. at 42, 239 S.E.2d at 892.

"The intention of the grantor must be found within the four corners of the deed." *Gardner v. Mozingo*, 293 S.C. 23, 25, 358 S.E.2d 390, 392 (1987); *see also K&A Acquisition Grp., LLC v.*

Island Pointe, LLC, 383 S.C. 563, 581, 682 S.E.2d 252, 262 (2009). If this can be accomplished, the deed is unambiguous, and the court may construe it as a matter of law. On the other hand, a contract is ambiguous "when the terms of the contract are reasonably susceptible of more than one interpretation." *S.C. Dep't of Nat. Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001); *see also Jordan v. Sec. Grp.*, 311 S.C. 227, 230, 428 S.E.2d 705, 707 (1993). Further, "[w]hen intention is not expressed accurately in the deed evidence *aliunde* may be admitted to supply or explain it." *Gardner*, 293 S.C. at 25, 358 S.E.2d at 392 (1987); *see also K&A Acquisition*, 383 S.C. at 581, 682 S.E.2d at 262. In such cases, the deed is ambiguous and, therefore, it is not susceptible to definitive interpretation by the court on a motion for summary judgment. *Gardner*, 293 S.C. at 25, 358 S.E.2d at 392.

Here, the phrase "[t]o be contained" in Option 2 may reasonably be interpreted in more than one way and, therefore, the contractual language is ambiguous. In effect, the Court of Appeals' interpretation of Option 2 is not the only reasonable interpretation. The phrase could equally apply to all six possible phases of construction (as the Court of Appeals found) or to the buildings that were actually constructed and sold on the market (as Petitioners claimed).

The maximum number of units to be contained in all completed phases of The Regime was 66. The 66th unit was finished and sold to a new unit owner on or about December 31, 2007. Once this was done, a court could reasonably find that Option 2 was triggered, and that the Transition Period ended three months thereafter, on or about March 31, 2008. *See S.C. Dep't of Nat. Res.*, 345 S.C. at 623, 550 S.E.2d at 302; *Jordan*, 311 S.C. at 230, 428 S.E.2d at 707.

At a minimum, the Court of Appeals should have found that the contractual language at issue was ambiguous. The four corners of the Master Deed do not plainly refer to all units that could possibly have been constructed if all potential phases had been added to The Regime. *See*

K&A Acquisition, 383 S.C. at 581, 682 S.E.2d at 262; *Gardner*, 293 S.C. at 25, 358 S.E.2d at 392. Instead, the language of Option 2 could equally be interpreted as referring to all units that were actually built within the Regime. *See S.C. Dep't of Nat. Res.*, 345 S.C. at 623, 550 S.E.2d at 302; *Jordan*, 311 S.C. at 230, 428 S.E.2d at 707.

Because either interpretation is reasonable, the meaning of the contractual language presents a question of fact for the factfinder to resolve at trial. The Court of Appeals erred in affirming the trial court's issuance of summary judgment, as this usurped the factfinder's role and definitively resolved the ambiguity in Respondents' favor. *See Robinson v. Estate of Harris*, 378 S.C. 140, 144, 662 S.E.2d 420, 422 (Ct. App. 2008) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law"). This Court may revisit this important issue on certiorari.

III. THE COURT OF APPEALS SHOULD NOT HAVE AFFIRMED THE TRIAL COURT'S RULING THAT AN ACCESS EASEMENT HAD BEEN GRANTED THAT BURDENED THE REGIME'S REAL PROPERTY

Pursuant to Rule 220(b), SCACR, and *Skywaves I Corp. v. Branch Banking & Tr. Co.*, 423 S.C. 432, 451, 814 S.E.2d 643, 653-54 (Ct. App. 2018), *cert. denied*, 2018 S.C. LEXIS 225 (Nov. 9, 2018), the Court of Appeals affirmed the trial court's conclusion that ADC holds a valid access easement over a portion of The Regime's real property. (Op. p. 12.) The trial court's ruling, however, was not meritorious. For the reasons described below, the trial court's conclusion that ADC had either an express access easement or an implied easement by plat cannot stand. (R. pp. 70-72.)

A. Express Easement

The trial court incorrectly found that ADC and ACF had established the existence of an express access easement in their favor. (R. pp. 70-71.) "A grant of an easement is to be construed

in accordance with the rules applied to deeds and other written instruments." *Binkley v. Rabon Creek Watershed Conservation Dist*., 348 S.C. 58, 71, 558 S.E.2d 902, 909 (Ct. App. 2001); *see also K&A Acquisition*, 383 S.C. at 581, 682 S.E.2d at 262. A deed "cannot operate to convey an interest which the grantors do not have in the land described in the deed." *Belue v. Fetner*, 251 S.C. 600, 606-07, 164 S.E.2d 753, 756 (1968).

When the access easement in question was granted in December 2014, there was no ownership interest by the parties attempting to grant the easement. This was so because, as explained above, under the terms of the Master Deed, the Transition Period ended on or about March 31, 2008. At that point, the Developer lost the ability to remove property from The Regime, and it lost all ownership interest in the 2.58 Acre Tract. (R. pp. 83, 525-526.) Lacking an ownership interest in this property, the Developer could not grant any interest in the property to a third party that would lead to the creation of a valid and enforceable access easement. *See Belue*, 251 S.C. at 606-07, 164 S.E.2d at 756.

Moreover, under South Carolina law, "[t]he character of an express easement is determined by the nature of the right and the intention of the parties creating it." *Tupper v. Dorchester Cty*., 326 S.C. 318, 325, 487 S.E.2d 187, 191 (1997). Here, the Master Deed includes specific, allowable easements, such as easements for encroachments as between common areas and units and as between units and units, and easements for air space, utilities, construction, inspection by the Developer, emergency personnel, and for a sales office and related signs. (R. pp. 546-548.) The access easement at issue is not among the easements specifically listed and authorized by the Master Deed. (R. pp. 546-548.) It follows that the Developer's attempt to grant the access easement was without authority under the Master Deed and, therefore, was invalid and void *ab initio*. *See Belue*, 251 S.C. at 606-07, 164 S.E.2d at 756.

Taking this a step further, it should be noted that the Association and unit owners in no way consented to, joined in, or ratified the access easement. In *Reyhani*, 329 S.C. at 211, 494 S.E.2d at 468, the court held that co-owners with vested interest in the common elements cannot be "unilaterally deprived of their interests in the common elements by the actions of the developer." The purported granting of the easement by the Developer and its assignee here would deprive the Association and unit owners of a property interest without their consent and, therefore, is invalid.

B. Implied Easement by Plat

The trial court determined that even if no express access easement existed, ADC had an implied easement by plat that arose when VDMC filed the Fourth Amendment to the Master Deed in March 2009 removing the 2.58 Acre Tract from The Regime. According to the trial court, this was so "because the Fourth Amendment referenced the 243/275 Plat, which showed the Access Easement." (R. p. 71.)

"Generally, when a deed references a plat that contains an easement, an implied easement arises even though the deed itself is silent." *Gooldy v. Storage Ctr.-Platt Springs, LLC*, 422 S.C. 332, 338, 811 S.E.2d 779, 782 (2018). However, the presumption that an implied easement exists may be rebutted by evidence of a "specific, contrary intention by the grantor." *Id.*

The presumption of implied easement may be rebutted, for example, where the evidence shows that the deed incorporated a plat "merely for descriptive purposes[.]" *Id.* at 341, 811 S.E.2d at 783; *see Lancaster v. Smithco, Inc.*, 246 S.C. 464, 469, 144 S.E.2d 209, 211 (1965) ("A plat, however, is not an index to encumbrances, and the mere reference in a deed, as in this case, to a plat for descriptive purposes does not incorporate a notation thereon as to an easement held by a third party"); *Bennett v. Inv'rs Title Ins. Co.*, 370 S.C. 578, 595, 635 S.E.2d 649, 658 (Ct. App.

2006) (stating that courts should "look to the intention of the parties in incorporating a plat to determine its effect").

Notably, the concept of an implied easement by plat is intended to function as an equitable estoppel against the grantor and in favor of an innocent purchaser. *Gooldy*, 422 S.C. at 338, 811 S.E.2d at 782; *see also Town of Carrboro v. Slack*, 261 N.C. App. 525, 532, 820 S.E.2d 527, 533-34 (2018). Thus, "this type of easement arises only when the purchaser whose transaction relies on the plat is conveyed the land." *Slack*, 261 N.C. App. at 532, 820 S.E.2d at 534. If the purported grantor did not actually own the land on which the purported easement lies, then no implied easement by plat can arise. *Id.* 530-33, 820 S.E.2d at 531-34.

Here, the trial court below found only that the Fourth Amendment to the Master Deed referred to the 243/275 Plat. (R. p. 71.) The trial court wrongly assumed that this reference was sufficient in itself to create an easement by implication. (R. p. 71.) In making this assumption, the trial court erroneously failed to consider rebuttal evidence by the Association and the unit owners. (R. pp. 71-72.) This rebuttal evidence showed that neither VDMC nor GDMB Ocean/Operations had an ownership interest in the 2.58 Acre Tract at the time of the assignments or the conveyance of the access easement. As a result, no implied easement by plat could arise. *See Slack*, 261 N.C. App. at 530-533, 820 S.E.2d at 531-34; *Gooldy*, 422 S.C. at 338, 811 S.E.2d at 782.

In summarily affirming the trial court's ruling, the Court of Appeals compounded the trial court's error. In effect, the Court of Appeals simply ignored the issue of whether VDMC in 2014 or GDMB Ocean/Operations in 2016 were legally capable of conveying access easements to a third party. A writ of certiorari is, therefore, necessary to address the novel questions of law overlooked by the Court of Appeals. *See* Rule 242(b)(1), SCACR.

IV. THE COURT OF APPEALS VIOLATED PETITIONERS' DUE PROCESS RIGHTS WHEN IT SUMMARILY ENTERED JUDGMENT IN RESPONDENTS' FAVOR AND THEREBY DIVESTED PETITIONERS OF THEIR OWNERSHIP RIGHTS IN THE 2.58 ACRE TRACT

"To determine whether a plaintiff was deprived of property without due process of law in violation of the Fourteenth Amendment, we must first identify the property interest involved. Next, we must determine whether the plaintiff received constitutionally adequate process in the course of the deprivation." *O'Connor v. Pierson*, 426 F.3d 187, 196 (2d Cir. 2005). Courts analyze procedural due process claims under the three-factor balancing test enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976). This test weighs (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards" and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.*

The *Eldridge* factors here weigh in favor of a finding that the Court of Appeals violated the due process rights of the Association and the unit owners. First, the private interest that was affected was an interest in common element property that was used in conjunction with the unit owners' residences. Second, the Court of Appeals flagrantly disregarded the express terms of S.C. Code Ann. § 27-31-70, which plainly precluded the Developer from separating and removing the 2.58 Acre Tract from The Regime in March 2009. Third, the Government's interest in avoiding the cost associated with the alternative (*i.e.*, correct) procedure is low to nonexistent.

In short, the Court of Appeals wrongfully divested the Association and the unit owners of their ownership interest in the 2.58 Acre Tract when it ignored the plain language of S.C. Code Ann. § 27-31-70 and summarily decided that ownership of this land belonged to solely to Respondents. "[T]he General Assembly's authority to legislate is plenary: the South Carolina

Constitution grants power to the legislature to enact any act it desires to pass, if such legislation is not expressly prohibited by the Constitution of this state, or the Constitution of the United States." *Planned Parenthood S. Atl. v. State*, 892 S.E.2d 121 (S.C. 2023) (internal citation omitted). In addition, "statutes are presumed constitutional." *Id.* "Third, when issuing constitutional rulings, a court should endeavor to ground its decision on the narrowest possible basis." *Id.*

Under the circumstances, the Court of Appeals wrongfully deprived Petitioners of their property interest in the 2.58 Acre Tract. This property interest was substantiated by the unambiguous language of S.C. Code Ann. § 27-31-70, a statute which is presumed to be constitutional. The court's violation of Petitioners' due process rights presents a substantial constitutional question that may appropriately be addressed on its merits by this Court on certiorari. *See* Rule 242(b)(4), SCACR.

CONCLUSION

For the reasons stated, Petitioners ask the Court to grant this petition for a writ of certiorari.

Respectfully submitted this 9th day of November 2023.

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