THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Larry B. Hyman, Jr., Circuit Court Judge
Fifteenth Judicial Circuit

Case No. 2017-CP-26-00424
Appellate Case No. 2020-000528

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

v.

Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; 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; 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;p 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; 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; and Eleanor N. Hawkins; 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; 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;p 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; Michael J. Wilk, are the ..... Appellants,

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.

FINAL BRIEF OF RESPONDENTS
ATLANTIC DEVELOPMENT COMPANY, LLC
AND ATLANTIC COAST FUNDING, LLC

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December 23, 2020

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II. DID THE TRIAL COURT CORRECTLY FIND THAT THE TRANSITION PERIOD DID NOT END ON THE CONVEYANCE OF THE 66TH UNIT OUT OF 250 PLANNED UNITS IN 2007 WHEN THE MASTER DEED EXPRESSLY AND UNEQUIVOCALLY PROVIDES THAT THE TRANSITION PERIOD ENDS AFTER CONVEYANCE OF 99% OF THE MAXIMUM NUMBER OF UNITS (250) TO BE CONTAINED IN ALL PHASES OF THE REGIME, AN AMENDMENT TO THE MASTER DEED SHOWS THAT THE TRANSITION PERIOD ENDED IN FEBRUARY 2015, AND THE ASSOCIATION ADMITTED THE TRANSITION PERIOD ENDED IN 2015?

III. DID THE TRIAL COURT PROPERLY REJECT APPELLANTS' CHALLENGE TO AN ACCESS EASEMENT EVEN THOUGH THE ASSOCIATION SIGNED THE EASEMENT, THE ASSOCIATION HAD THE AUTHORITY UNDER THE MASTER DEED TO GRANT THE EASEMENT, AND AN EASEMENT BY IMPLICATION WAS OTHERWISE CREATED?

STATEMENT OF THE CASE

In 2017, the governing body of a horizontal property regime in Myrtle Beach—Vista Del Mar Condominium Association ("Association")—and several unit owners filed this case disputing ownership of certain property previously submitted to the Vista Del Mar horizontal property regime pursuant to the governing master deed ("Master Deed"). (R. pp. 80–89). The Association and the unit owners asserted the developer, Vista Del Mar Condominiums, LLC ("VDMC"), had improperly removed a 2.58-acre parcel of unimproved property ("2.58 Acre Tract") from the horizontal property regime and improperly conveyed an access easement ("Access Easement"). (R. pp. 80–89). Specifically, the Association and the unit owners asserted the removal of the 2.58 Acre Tract was barred by S.C. Code § 27-31-70 as well as the terms of the Master Deed and the conveyance of the Access Easement was barred by the Master Deed. (R. pp. 80–89). The Association and several of the unit owners named as defendants the current owner and mortgage holder on the 2.58 Acre Tract, Respondent Atlantic Development Company, LLC ("ADC") and Respondent Atlantic Coast Funding, LLC ("ACF"). (R. pp. 80–89). In response, ADC and ACF filed counterclaims and a third-party complaint against all the regime unit owners who were not yet parties (collectively, the "Unit Owners") seeking a declaratory judgment and to quiet title to the 2.58 Acre Tract and Access Easement. (R. pp. 112–141).

On May 31, 2019, ADC and ACF moved for partial summary judgment on all matters related to the 2.58 Acre Tract. (R. pp. 301–494). On July 15, 2019, ADC and ACF also moved for partial summary judgment on all matters related to the Access Easement. (R. pp. 495–502). ADC and ACF provided detailed memoranda of law to the court in support of each motion for summary judgment, supported by matters of public record, deposition testimony, and other evidence. (R. pp. 301–494 (motion for partial summary judgment with exhibits); R. pp. 727–755 (memorandum in

support of the motion for partial summary judgment and exhibits); R. pp. 756–768 (Notice of Filing of additional materials)). The Association and the Unit Owners submitted a memorandum in opposition to ADC and ACF's motions for summary judgment but submitted no affidavits or deposition testimony in support of its opposition. (R. pp. 503–726).

The trial court heard the summary judgment motion for the 2.58 Acre Tract on August 13, 2019. (R. pp. 194–236). At the hearing, the trial court took the matter under advisement and requested proposed orders from both sides. (R. pp. 75–77, 234). The hearing included argument related to Appellants' theory that the Transition Period had ended pursuant to "option 2" under the Master Deed, and Appellants' proposed order stated an additional deposition was necessary on that issue. (R. p. 212; R. pp. 18–35). On September 9, 2019, the trial court asked that the parties take the additional deposition requested by Appellants within 30 days and submit the transcript to the trial court. (R. p. 769). The parties took the deposition and submitted the transcript to the trial court on October 24, 2019. (R. pp. 772–896).

On November 8, 2019, the trial court denied ADC and ACF's motion by written order. (R. pp. 36–54). On November 18, 2019, ADC and ACF timely filed a motion to reconsider. (R. pp. 897–916). The trial court then heard the motion to reconsider on January 27, 2020, and again on February 18, 2020. (R. pp. 237–263; R. pp. 264–290). On February 18, 2020, the trial court also heard the motion for summary judgment on the Access Easement. (R. pp. 264–290). At the January 27, 2020 and February 18, 2020 hearings, the trial court stated it inadvertently denied the summary judgment motion on the 2.58 Acre Tract. (R. p. 261; R. p. 289). On February 20, 2020, the trial court then entered an order reversing its denial order and entering summary judgment in favor of ADC and ACF on all claims related to both the 2.58 Acre Tract and the Access Easement. (R. pp. 55–74).

The Association and the Unit Owners did not file a motion to alter or amend or to reconsider under Rule 59(e), SCRCP, but timely filed this appeal. (R. pp. 932–55).

STATEMENT OF FACTS

The Vista Del Mar Horizontal Property Regime and The Master Deed

In December 2003, VDMC created the Vista Del Mar Horizontal Property Regime (the "Regime") by executing the Master Deed. (R. pp. 321–96). At the same time, VDMC created the Association. (R. pp. 371–75). The Master Deed gave VDMC certain rights as "Developer," and set out a plan of development for an intial Phase I to contain building one and 25 units. (R. p. 352). Section 14 of the Master Deed also addressed future development and VDMC's right to expand the Regime:

> 14. The Development Plan for The Project
>
> 14. 1 Phase I.
>
> The Regime as initially constituted (sometimes referred to herein as "Phase I") is composed of Building Number 1 which contains twenty-five (25) Units, as well as the Common Areas thereof, all as described and depicted on Exhibit "B" attached hereto.
>
> 14.2 Reservation of Right to Expand and Contract.
>
> Anything to the contrary contained in this Master Deed notwithstanding, at any time during the Transition Period, the Developer will be entitled to expand the Regime in five additional phases to a total of two hundred fifty (250) Units as provided in this Section 14 and as further described in Exhibit "C" hereto.

(R. pp. 352–54).

Additionally, the Master Deed gave VDMC rights as "Developer" to withdraw unimproved portions of property from the Regime and to add property to the Regime, a right that the Master Deed recited early and often. For example, the Master Deed provided on Page 1:

> NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that the Developer hereby submits the Land more fully described in Exhibit "A" Attached

> Hereto And All Improvements Located Thereon . . . to the provisions of Sections 27-31-10 et seq. of the South Carolina Code Of Laws (1976), And Hereby Creates Thereon A Horizontal Property Regime (Sometimes Termed "Condominium Ownership") to be known as THE VISTA DEL MAR HORIZONTAL PROPERTY REGIME, subject to the following, **INCLUDING BUT NOT LIMITED TO, THE RIGHT TO WITHDRAW UNIMPROVED PORTIONS OF THE LAND PURSUANT TO SECTION 14.2(B)**.

(R. p. 325) (emphasis in the original).

Further, the Master Deed defined "Land" as the Land described in Exhibit "A" attached to the Master Deed, "as ***said exhibit may be amended from time to time in accordance with the provisions of this Master Deed to withdraw unimproved portions thereof from the Project***." (R. p. 327) (emphasis added). The Master Deed also noted VDMC's right to withdraw property in the section discussing common area property:

> 3.4 Common Area and Limited Common Area.
>
> ****
>
> (c) No Partition. The Common Area will remain undivided and no right to partition the same or any part thereof will exist except as provided in the Condominium Act, the Bylaws **and this Master Deed**.
>
> ****
>
> (f) Reservation of Easements and Use, Expansion and Contraction Rights. **The Common Areas will be subject to all easements and use, expansion and contraction rights, if any, reserved by the Developer** hereunder, and the right of the Developer to expand the Regime by construction of additional Units pursuant to Section 14.2.

(R. p. 333) (emphasis added).

Section 14.2(b) set forth the right to withdraw common area:

> 14.2 Reservation of Right to Expand and Contract.
>
> ******
>
> (b) Contraction; Withdrawal[al] of Unimproved Common Area.

> During the Transition Period, **the Developer is entitled to subdivide portions of the Common Area from the Project** which are unimproved with structures **and to remove the subdivided portion upon the application of this Master Deed** by filing one or more Amendments to this Master Deed (including amendments to the Exhibits). **Solely, the Developer will execute an Amendment for itself and as attorney-in-fact for all Owners. An Amendment will be effective upon recording such Amendment in the ROD Office for Horry County**.

(R. p. 353) (emphasis added).

In addition to reserving VDMC's right to withdraw property throughout, Section 14 of the Master Deed specifically addressed future development and VDMC's right to expand or withdraw the property subject to the Regime:

> 14. The Development Plan for The Project
>
> 14. 1 Phase I.
>
> The Regime as initially constituted (sometimes referred to herein as "Phase I") is composed of Building Number 1 which contains twenty-five (25) Units, as well as the Common Areas thereof, all as described and depicted on Exhibit "B" attached hereto.
>
> 14.2 Reservation of Right to Expand and Contract.
>
> Anything to the contrary contained in this Master Deed notwithstanding, at any time during the Transition Period, the Developer will be entitled to expand the Regime in **five additional phases** to a total of **two hundred fifty (250) Units** as provided in this Section 14 and as further described in Exhibit "C" hereto.
>
> ******
>
> (b) Contraction; Withdrawal[al] of Unimproved Common Area.
>
> During the Transition Period, **the Developer is entitled to subdivide portions of the Common Area from the Project** which are unimproved with structures **and to remove the subdivided portion upon the application of this Master Deed** by filing one or more Amendments to this Master Deed (including amendments to the Exhibits). **Solely, the Developer will execute an Amendment for itself and as attorney-in-fact for all Owners. An Amendment will be effective upon recording such Amendment in the ROD Office for Horry County**.

(R. pp. 352–53) (emphasis added). Additionally, Section 14.7 of the Master Deed gave VDMC the absolute right to expand or withdraw the property subject to the Regime without the consent of the Unit Owners:

> 14.7 No Consent Required.
>
> Subject to the time limit set forth in Section 14.2 hereinabove, the Developer, its successors and assigns, will have the absolute right to effect **an expansion or contraction of the Regime** in accordance with this Section 14 and to file Amendments to this Master Deed without any action or consent on the part of any Owner or Mortgage holder. . . .

(R. p. 353) (emphasis added).

The Developer could exercise this unilateral right to withdraw property from the Regime during the "Transition Period," which the Master Deed 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 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 the Master Deed executed and filed of record by the Developer.

(R. p. 328).

The Development of Vista Del Mar

VDMC initially submitted 5.853 acres of land and improvements to the Regime with the Master Deed in 2003. A portion of this 5.853 acres became the 2.58 Acre Tract. (R. pp. 321–96).

In June 2006, VDMC conditionally submitted 5.00 acres of additional land and improvements—a portion of which became the 2.58 Acre Tract—to the terms of the Master Deed

by recording the First Amendment to the Master Deed ("First Amendment"). (R. pp. 398–423). The First Amendment specifically provided that the land submitted "shall be **held, transferred, sold, conveyed**, given, donated, leased and occupied subject to the Master Deed . . . ," making the submission subject to VDMC's right to withdraw property from the Regime. *See* R. pp. 398–423 (emphasis added). The First Amendment also provided for the construction of a second building with forty-one (41) additional units. (R. pp. 398–423). Indisputably, the second building and the sixty-sixth unit were completed in late 2007.

In March 2009, VDMC removed the 2.58 Acre Tract from the Regime by recording another amendment ("Fourth Amendment")[1] to the Master Deed. (R. pp. 425–29). It is undisputed that the 2.58 Acre Tract was a portion of both the 5.853 acres submitted initially and the 5.00 acres submitted with the First Amendment. (R. pp. 425–29). The Fourth Amendment referenced a plat ("243/275 Plat") describing the 2.58 Acre Tract and an Access Easement. (R. pp. 425–29).

In December 2013, VDMC conveyed the 2.58 Acre Tract to GDMB Ocean, LLC ("GDMB Ocean"), (R. pp. 433–38), and assigned its rights as "Developer" under the Master Deed to GDMB Operations, LLC ("GDMB Operations") (the "GDMB Assignment"). (R. pp. 440–50).

In December 2014, the Association and GDMB Ocean, LLC entered into an Amended and Restated Easement Agreement reiterating the easement over that area labeled "Access Easement" on the 243/275 Plat. (R. pp. 747–55).

On November 7, 2014, GDMB Operations started the process to end the Transition Period by filing an amendment to the Master Deed voluntarily surrendering its authority as a class "B" member of the Association under the Master Deed. (R. pp. 452–53). Under the Master Deed, this meant that the Transition Period would end on February 7, 2015—90 days after the voluntary

[1] The parties agree amendments two and three to the Master Deed are not relevant to this case.

surrender. (R. pp. 328, 452–53). Daniel Charles Schuster, a unit owner who served on the Association board in 2015 and who testified as the 30(b)(6) designee of the Association, testified the Transition Period ended in February 2015:

> **Q.** Okay. So in February of 2015, everybody -- the Regime, the Association -- operated under the assumption that the Transition Period ended, and the Developer was ceding control of the board to the members of the Association?
>
> **A.** Yes.

(R. p. 458). Moreover, the Association's financial statements from 2015 stated that the Transition Period ended in February 2015. (R. pp. 469–71). Although the Master Deed planned for a total of six phases and a maximum of 250 units, it is undisputed that only two buildings and 66 units were completed.

On January 8, 2016, GDMB sold the 2.58 Acre Tract and other property to ADC for a combined total of $25,000,000.00. (R. pp. 476–81). ADC then gave a mortgage in the amount of $24,000,000.00 on the entirety of the property, including the 2.58 Acre Tract, to ACF as security for a promissory note. (R. pp. 483–94).

STANDARD OF REVIEW

"Summary judgment is appropriate where it is clear there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law." *Strother v. Lexington Cty. Recreation Comm'n*, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Id.*

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THE 2.58 ACRE TRACT WAS PROPERLY REMOVED FROM THE HORIZONTAL PROPERTY REGIME.

A. S.C. Code Ann. § 27-31-70 does not prevent removing property from a horizontal property regime where the governing master deed allows removal.

Appellants assert they own the 2.58 Acre Tract because VDMC's removal was void. Specifically, Appellants assert S.C. Code Ann. § 27-31-70 completely bars removing property subject to a horizontal property regime and the Transition Period had ended when VDMC attempted to remove the 2.58 Acre Tract. However, Appellants are incorrect.

1. This Court previously recognized in *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime* that property could be removed where it has not yet vested in the unit owners.

This Court already allowed VDMC to do exactly what it did—withdraw property from a horizontal property regime—in *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 494 S.E.2d 465 (1997), which addressed a title dispute over a roughly one-acre lot previously submitted to a horizontal property regime. The *Reyhani* facts were complicated by a foreclosure on a large development where a small parcel was subject to a horizontal property regime. *Id.* at 208–09, 494 S.E.2d at 466. The master deed, as amended by a court order resolving the foreclosure, allowed development of the regime property until a certain date. *Id.* at 208–09, 494 S.E.2d at 466–67. After that date passed, the plaintiff purchased the disputed lot, which had been part of the regime property. *Id.* at 210, 494 S.E.2d at 467. The unit owners and association then asserted title to the disputed lot and alleged the disputed lot was a general common element under the terms of the master deed. *Id.* The plaintiff disagreed and asserted that he owned the property in compliance with the master deed as amended. *Id.*

Reyhani ultimately held the plaintiff did not take title in compliance with the master deed and that the disputed lot had become a general common element of the horizontal property regime.

Id. at 213–14, 494 S.E.2d at 469. Importantly, the court held, "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." *Id.* at 211, 494 S.E.2d at 468 (emphasis added). The *Reyhani* master deed, as amended, allowed the undeveloped property of the horizontal property regime to be developed until a certain date, but after that date, it declared the land would become a general common element. *Id*. That date had passed by the time the *Reyhani* plaintiff purchased the disputed lot, and the court held the plaintiff did not acquire title because his lot had become a general common element—title had vested in the unit owners in the regime. *Id.* Implicitly, *Reyhani* rejected Appellants' interpretation of § 27-31-70 and held that common element property may be removed from the regime or conveyed according to the terms of the applicable master deed. *Id*.

The facts in this case are analogous to *Reyhani*'s facts, except here VDMC's rights as developer had not expired—the 2.58 Acre Tract had **not vested** in the Unit Owners because the provisions of the Master Deed allowed the removal of unimproved property until the end of the Transition Period.[2] Therefore, the Unit Owners held the property subject to the developer's (VDMC's) right to divest it under the Master Deed's terms. While *Reyhani* did not elaborate on the application of § 27-31-70, the court was clear the terms of the master deed determined the parties' rights when the disputed property was subject to a horizontal property regime. Clearly, *Reyhani* did not apply § 27-31-70 as Appellants would here—it did not interpret § 27-31-70 as a complete bar to the *Reyhani* plaintiff's claim to the property. Accordingly, *Reyhani* implicitly

[2] Notably, the Court of Appeals has consistently recognized that a developer may unilaterally amend a master deed where the developer specifically reserves the right to do so. *See Queen's Grant II Horizontal Property Regime v. Greenwood Development Corporation*, 368 S.C. 342, n.15, 367–68, 628 S.E.2d 902, 915–16 (Ct. App. 2006) (*citing Heritage Fed. Sav. & Loan v. Eagle Lake & Golf Condominiums*, 318 S.C. 535, 541, 458 S.E.2d 561, 565 (Ct. App. 1995)). It cannot be disputed that the terms of the Master Deed allowed the Developer to unilaterally remove unimproved property.

rejected Appellants' interpretation of § 27-31-70, and following *Reyhani* in this case—where the parties do not dispute the Master Deed provided the 2.58 Acre Tract could be removed—means VDMC properly removed the 2.58 Acre Tract.

2. The plain language of § 27-31-70 is clear it does not prevent removal.

Even if *Reyhani* were not dispositive, § 27-31-70 is unambiguous and simply provides that horizontal property regime unit owners must hold title to the common elements in undivided interests and creates an exception to the general right to partition property held in common. Appellants' interpretation of "[t]he common elements . . . shall remain undivided" as a complete restraint on alienation is simply incorrect.

S.C. Code Ann. § 27-31-70 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.

The interpretation of a statute is a question of law to be decided by the court. *See Lightner v. Hampton Hall Club, Inc.*, 419 S.C. 357, 363, 798 S.E.2d 555, 558 (2017). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *State v. Ramsey*, 409 S.C. 206, 209, 762 S.E.2d 15, 17 (2014). Moreover, "words in a statute must be construed in context, and the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895–96 (2008).

Section 27-31-70 is unambiguous, declares only how apartment[3] owners must hold title to the common elements, and creates an exception to the general right to partition property held in

[3] "Apartment" is the statutory definition for the individual living area held as separate property. *See* S.C. Code Ann. § 27-31-20(a). The Master Deed uses the term "unit" to describe the individual

common. Other statutes in the Horizontal Property Act support this interpretation. The statute immediately preceding § 27-31-70 provides that "[a]n 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* . . . ." S.C. Code Ann. § 27-31-60(a) (emphasis added). Additionally, § 27-31-120 provides that "[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the *undivided*[4] *interest of the owner in the common elements*, both general and limited, appertaining to the apartment without specifically or particularly referring to same." *Id.* at § 27-31-120 (emphasis added). Reading these statutes together clarifies what was intended: an ownership interest in a unit must include an undivided interest in the whole of a regime's common area, and unit owners may not convey some or all of the common area property tied to their units. Section 27-31-70 does not prevent changes in what property makes up the total common elements.

Furthermore, the meaning of the first part of the statute is clarified by the second part's ban on partition or division of commonly held property. Ordinarily, "[a]ll joint tenants and tenants in common who hold, jointly or in common . . . shall be compellable to make severance and partition

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area held as separate property but also defines "unit" as the "apartment" defined in the statute. These terms mean the same thing.

[4] "Undivided" in the real estate context refers to proportional ownership of some whole interest in property. *See, e.g.*, *In re Sargent*, 337 B.R. 661 (N.D. Ohio Bankr. 2006) ("an undivided interest in property, denotes that each interest has a right in the whole of the property."); *Black's Law Dictionary* 1465–66 (6th Ed.) (defining "joint tenancy" as a type of "ownership of real or personal property by two or more persons in which each owns an undivided interest in the whole . . . ."). The South Carolina Supreme Court, in cases both modern and ancient, uses "undivided" in this manner. *See, e.g.*, *Matter of Estate of Kay*, 423 S.C. 476, 482, 816 S.E.2d 542, 545 (2018) (describing ownership of property as "a one-half undivided interest in 330 acres"); *Perry v. Middleton*, 2 S.C.L. 462 (S.C. Const. App. 1802) (describing "a tenant in common for the one undivided third of a tract of land"). To illustrate, if two people commonly own half interests in a five-acre tract, they own an undivided one-half interest in the whole five acres. If the two owners sold one of the five acres, the two co-owners would still own an undivided half interest in the remaining four acres. The owners' interests are both "undivided" before and after the sale.

. . . ." *See* S.C. Code Ann. § 15-61-10. However, § 27-31-70 provides that, because apartment owners hold title to the common elements as an undivided whole, those apartment owners may not invoke the statutory right to partition those common elements.

Conversely, Appellants state the removal of the 2.58 Acre Tract is a "partition or division" rather than a conveyance. However, the Master Deed is a conveyance by deed from Vista Del Mar and its amendments are conveyances by deed, especially so when those amendments add or remove property. Accordingly, "conveyance" rather than "partition or division" is the correct way of looking at the Fourth Amendment to the Master Deed in this case.

Likewise, Appellants' blanket-ban interpretation of S.C. Code Ann. § 27-31-70 would lead to an absurd result: no horizontal property regime common element could ever be conveyed, even if every unit owner agreed. *See generally Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (courts will not adopt an absurd interpretation of a statute that the General Assembly could not have intended). Taking Appellants' theory one step further, undeveloped property, once submitted to a horizontal property regime, could not be developed into units because part of the property would be changed from common area to separately owned units.

The elaborate and well-written Master Deed provided flexibility to the developer on how this development would be structured. All unit owners who purchased units in the Regime purchased subject to this express flexibility. Similarly, the Horizontal Property Act provides flexibility and is not rigid like Appellants claim it is. Appellants' interpretation of § 27-31-70 is absurd and requires matters be read into the statute that simply do not exist. This flawed interpretation would provide absolutely no flexibility to Regimes and developers. In fact, under this interpretation once Phase I and Building One were completed, the developer could not have proceeded with the development of any other phases. This Court should flatly reject this

interpretation just like Judge Hyman rejected it.

Accordingly, § 27-31-70 does not void the removal of the 2.58 Acre Tract from the Regime.

3. Alternatively, the 2.58 Acre Tract was not a statutory common element to which § 27-31-70 would apply.

Third, even if this Court were to assume § 27-31-70 applies as Appellants suggest, the 2.58 Acre Tract was not a common element under the statute.

The Horizontal Property Act clearly defines "general common elements" and omits unimproved property from the definition:

> "General common elements" means and includes:
>
> (1) The land whether leased or in fee simple and whether or not submerged on which the apartment or building stands; provided, however, that submerged land developed or used under this chapter is subject to any law enacted relating to the leasing of submerged lands by the State for the benefit of the public;
>
> (2) The foundations, main walls, roofs, halls, lobbies, stairways, moorages, walkway docks, and entrance and exit or communication ways in existence or to be constructed or installed;
>
> (3) The basements, flat roofs, yards, and gardens, in existence or to be constructed or installed, except as otherwise provided or stipulated;
>
> (4) The premises for the lodging of janitors or persons in charge of the property, in existence or to be constructed or installed, except as otherwise provided or stipulated;
>
> (5) The compartments or installations of central services such as power, light, gas, cold and hot water, refrigeration, reservoirs, water tanks and pumps, and the like, in existence or to be constructed or installed;
>
> (6) The elevators, garbage incinerators, and, in general, all devices or installations existing or to be constructed or installed for common use;
>
> (7) All other elements of the property, in existence or to be constructed or installed, rationally of common use or necessary to its existence, upkeep, and safety[.]

S.C. Code Ann. § 27-31-20(f).[5]

[5] There is no dispute that the 2.58 Acre Tract is not a limited common element.

Section 27-31-70 does not apply to the 2.58 Acre Tract because it is not a common element as defined under the statute. There is no genuine dispute that the 2.58 Acre Tract is entirely unimproved property, and the statutory definition does not include unimproved land as a common element subject to the Horizontal Property Act. The 2.58 Acre Tract is neither "[t]he land . . . on which the apartment or building stands"; "yards" or "gardens"; "necessary to [the property's] existence, upkeep, and safety"; or an element "rationally of common use." No other enumerated item under the statute comes close to describing the 2.58 Acre Tract.

To be clear, the 2.58 Acre Tract was "Common Area" as defined under the Master Deed, which is defined more broadly than the statutory "common elements." S.C. Code Ann. § 27-31-20(f) sets forth a specific list of common elements, and the Master Deed defines "Common Area" more broadly. *See* R. p. 326. Appellants conflate these terms. *See* Appellants' brief at 11, 19 (page 11, for example, states, "VDMC's own documents the Fourth Amendment and Corrective Fourth Amendment expressly stated a common area was being divided and removed."). Accordingly, VDMC did not make the 2.58 Acre tract a statutory "common element" by calling it "common area" that could be removed in accordance with the Master Deed provisions.[6]

Moreover, Appellants' assertion that parts of the two tracts initially submitted were improved does not create a question of fact whether the 2.58 Acre Tract was improved. Appellants admit the 2.58 Acre Tract was not improved in their brief. *See* Appellants' brief at 10–11, 13 (the 2.58 Acre Tract was part of a 5.0-acre tract submitted and a condominium building was constructed on part of the 5.0 acres, but not the 2.58 Acre Tract). Other than the argument that the 2.58 Acre

[6] Furthermore, Appellants never asserted to the trial court that the Master Deed-defined common area was automatically a statutory common element, and therefore this issue was not raised and ruled upon by the trial court. *See Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Tract was part of the 5.0-acre tract that was in part improved, Appellants have not identified any evidence of improvements upon the 2.58 Acre Tract. Appellants at the summary judgment stage presented no affidavits or evidence supporting their assertions.

Furthermore, S.C. Code Ann. § 27-31-110 requires that "[o]ther common elements, both general and limited, must be shown graphically in so far as possible and must be described in detail in words and figures" on plats or maps filed with a master deed. The Master Deed initially placed a building and 5.853 acres of land under the Master Deed. (R. pp. 321–96). The First Amendment submitted an additional building and 5.00 acres to the Master Deed. (R. pp. 398–423). The plats referenced in the Master Deed and the plat attached to the First Amendment do not describe the 2.58 Acre Tract as a common element at all. (R. pp. 321–96; R. pp. 398–423). In contrast, the access common areas and limited common areas for each building are specifically described as common areas in the respective survey and site plans of each building in both the Master Deed, (R. pp. 321–96), and the First Amendment, (R. pp. 398–423). Accordingly, the Master Deed and the First Amendment did not comply with § 27-31-110 in describing the unimproved land as a common element.[7]

Accordingly, the 2.58 Acre Tract was not a common element and § 27-31-70—which applies to "[t]he common elements, both general and limited"—does not apply to it.

[7] The trial court found this was an independent reason why the 2.58 Acre Tract is not a common element. However, Appellants failed to challenge this ruling on appeal. The failure to challenge this finding is an independent basis on which to affirm. *See Weeks v. McMillan*, 291 S.C. 287, 292, 353 S.E.2d 289, 292 (Ct. App. 1987) ("Where a decision is based on alternative grounds, either of which independent of the other is sufficient to support it, the decision will not be reversed even if one of the grounds is erroneous."*); I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419-421, 526 S.E.2d 716, 723-24 (2000) (holding that an appellate court may affirm based on any ground appearing in the record).

B. The Transition Period Ended in February 2015, and the Removal of the 2.58 Acre Tract Occurred within the Transition Period.

The Master Deed provided for up to 250 units and six total buildings during the Transition Period and provided three ways for the Transition Period to end. None of the triggering events occurred until GDMB Operations voluntarily ended the Transition Period in 2015—well after VDMC removed the 2.58 Acre Tract in 2009. Specifically, the Master Deed provided that the Transition Period began "on the date of recording of the Master Deed" and "end[ed] on the earlier of":

> 1. December 31, 2017;[8] or
>
> 2. Three (3) months after 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 the Master Deed executed and filed of record by the Developer.

(R. p. 328) (emphasis added).

"In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. The intention of the grantor must be found within the four corners of the deed." *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582–83 (2009) (internal citations and punctuation omitted). "The interpretation of a deed is an equitable matter." *Heritage Fed. Sav. & Loan*, 318 S.C. at 539, 458 S.E.2d at 564. Moreover, "[t]he determination of the

[8] The parties agree that the Transition Period ended before December 31, 2017.

grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court." *Hunt v. Forestry Comm'n*, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct. App. 2004).

The Master Deed is unambiguous, and the Transition Period ended in February 2015. Indisputably, the Master Deed allowed up to 250 units to be built in six phases. (R. pp. 321–96). When only two buildings and 66 units were built, VDMC removed the 2.58 Acre Tract in 2009. (R pp. 425–29). In December 2013, VDMC conveyed the 2.58 Acre Tract to GDMB Ocean and its rights as "Developer" under the Master Deed to GDMB Operations. (R. pp. 433–38; R. pp. 440–50). In November 2014, GDMB Operations executed an amendment to the Master Deed that began the three-month process to end the Transition Period using the third method provided in the definition of Transition Period—by surrendering its rights. (R. pp. 452–53). Indisputably, still only two buildings and 66 units of the allowed six buildings and 250 units had been completed. Accordingly, VDMC removed the 2.58 Acre Tract from the Regime well before the Transition Period ended.

In contrast, Appellants assert the Transition Period ended when 99% of the units actually built were sold in 2008. Specifically, Appellants assert "Ultimately, the maximum number of units to be contained in all phases of the Regime was 66." *See* Appellant's Brief at 16. However, Appellants' position completely disregards the plain language of the Master Deed, which specifically provided for terminating the Transition Period if the Developer sold 99% of "the maximum number of Units to be contained in all phases of the Regime." (R. p. 328). Indisputably, the Master Deed provided:

> Anything to the contrary contained in this Master Deed notwithstanding, at any time during the Transition Period, the Developer will be entitled to expand the Regime in five additional phases to a total of two hundred fifty (250) Units as provided in this Section 14 and as further described in Exhibit "C" hereto.

(R. pp. 352–54). Moreover, it specifically contemplated building the units in phases, stating "Five additional Buildings, or any lesser number of them, may be submitted in any order as Phases II through VI of the Regime. A Building may be composed of as little as twenty-five (25) Units . . . ." (R. p. 352). Under Appellants' interpretation, Phase II could never have been built because once Phase I was completely sold, 100% of the units actually constructed would have been sold and the end of the Transition Period would be triggered under Appellants' theory. This cannot be correct given the plain language of the Master Deed. Accordingly, Appellants' argument is without merit, and there is no genuine dispute of fact when the Transition Period ended.

Moreover, the record reflects that the Association, the Unit Owners, and GDMB Operations (as the Developer under the Master Deed) understood that the Transition Period ended in 2015. Mr. Schuster testified that the Transition Period ended in 2015, and the Association's own 2015 financial statement stated the Transition Period ended in 2015. (R. pp. 455–58; R. pp. 463–71). There is no genuine dispute the Transition Period ended in February 2015.

Accordingly, the Transition Period ended in 2015 when GDMB Operations voluntarily ended it because the plain language of the Master Deed shows the second method of triggering the Transition Period could not have occurred in 2008 when nowhere near the 250 possible units had been built.

II. THE ACCESS EASEMENT WAS PROPERLY CREATED EITHER EXPRESSLY OR BY IMPLICATION.

The parties dispute whether the access easement exists, which is a question of fact in a law action. *See, e.g., Smith v. Commissioners of Pub. Works of City of Charleston*, 312 S.C. 460, 465, 441 S.E.2d 331, 334 (Ct. App. 1994). Accordingly, this Court reviews summary judgment on the easement matter under the usual summary judgment standard of review set forth above.

A. The Association properly conveyed an express access easement.

The Access Easement is valid because the developer validly controlled the Association until the end of the Transition Period, the Master Deed allowed the easement conveyance, and the Association could grant the easement. Appellants' arguments—that the Association agreed to the easement agreement after the developer started the end of the Transition Period, the Master Deed does not allow the Access Easement, and conveying the easement is an ultra vires act by the Association—are incorrect.

As stated above, GDMB Operations, who then held the developer's rights under the Master Deed, began the end of the Transition Period voluntarily in November of 2014. (R. pp. 452–53). In December 2014, the Association conveyed GDMB Ocean the Access Easement. (R. pp. 747–55); *see also Hudson v. Leopold*, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986) ("A deed regular and valid on its face raises a presumption of validity."); *Evins v. Richland Cnty. Historic Pres. Comm'n*, 341 S.C. 15, 20, 532 S.E.2d 876, 878 (2000) ("Estoppel by deed precludes a party to a deed from asserting as against the other any right or title in derogation of the deed, or from denying the truth of any material fact asserted in it."). While the end of the Transition Period meant the Association would no longer be under developer control, nothing in the Master Deed indicates the Association would be restricted in any way during the ninety-day period.

Moreover, the Master Deed did not bar the Association from conveying the Access Easement. In fact, the Master Deed specifically provides "the Board of Directors will be entitled to grant additional permits, licenses, and *easements* over the Common Area for utilities, roads and other purposes reasonably necessary or useful for the proper maintenance and operation of the Project." (R. pp. 321–96) (emphasis added). Nor is there any indication that granting the easement is an ultra vires act—the bylaws of the Association provide "[i]n addition to any other power

contained herein or in the Master Deed, the Association may exercise the powers granted to a nonprofit mutual benefit corporation as enumerated in the Nonprofit Corporation Act." (R. pp. 377–96).

Accordingly, ADC is clearly entitled to the Access Easement under the Amended and Restated Easement Agreement.

B. Even if there were no express easement, an implied easement arose when the removal amendment referenced a plat showing the Access Easement.

Notwithstanding the express Access Easement, an implied easement arose when VDMC filed the Fourth Amendment to the Master Deed removing the 2.58 Acre Tract because the Fourth Amendment referenced the 243/275 Plat, which showed the Access Easement.

An easement arises by implication where property is conveyed and an adjoining street is referenced in a plat, even though the deed is silent. *See Gooldy v. The Storage Center-Platt Springs*, LLC, 422 S.C. 332, 811 S.E.2d 779 (2018). As between an owner who has conveyed lots according to a plat and the grantee, the dedication of a private easement is complete when the conveyance is made. *Carolina Land Co. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975); *see also Blue Ridge Realty Co. v. Williamson*, 247 S.C. 112, 145 S.E.2d 922 (1965) (holding the purchaser of lots with reference to the plat of the subdivision acquired every easement, privilege and advantage shown upon said plat, including the right to the use of all the streets, near or remote, as laid down on the plat by which the lots were purchased and as between the owner, who has conveyed lots according to a plat, and his grantee or grantees, the dedication is complete when the conveyance is made, even though the street is not accepted by the public authorities.).

An easement arose as a matter of law when the amendment removing the 2.58 Acre Tract referenced the 243/275 Plat showing the Access Easement. (R. pp. 425–29). It is immaterial whether VDMC owned the burdened parcel when it conveyed the 2.58 Acre to GDMB Ocean

because the Access Easement already existed. Accordingly, an implied easement arose as a matter of law even if the Amended and Restated Easement Agreement were somehow invalid.[9]

CONCLUSION

For these reasons, unimproved property may be withdrawn from a horizontal property regime when the master deed allows it, S.C. Code § 27-31-70 did not prevent removal of the 2.58 Acre Tract from the Regime, and the Master Deed clearly allowed the 2.58 Acre Tract to be removed. Moreover, the Master Deed limited the time for removal to a defined Transition Period, which ended in February 2015 rather than March 2008. Furthermore, the deeded Access Easement is valid, and even if it were not, an easement implied by plat arose as a matter of law. Accordingly, Respondents ask that this Court affirm the trial court's order granting summary judgment in favor of ADC and ACF.

[9] To the extent Appellants assert the Court contradicted itself on this point, *see* Appellants' brief at 19, this issue was not raised and ruled upon and Appellants did not file a Rule 59(e) motion. Accordingly, this argument is not preserved for appellate review. *See Kiawah Resort Assocs., Ltd. Partnership v. Kiawah Island Cmty. Ass'n*, 421 S.C. 538, 553, 808 S.E.2d 521, 529 (Ct. App. 2017) (declining to address on appeal an argument about a trial court's inconsistent ruling when that argument was never raised to the trial court).

Respectfully submitted,

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December 23, 2020

CERTIFICATE OF COUNSEL

I hereby certify that this Final Brief complies with Rule 211(b), SCACR.

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