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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

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

Court of Appeals Opinion No. 6016 (filed 8/16/2023)
Supreme Court Case No. 2023-001754

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; 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; 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 ..... 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.

RESPONDENTS' RETURN TO THE PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED FOR REVIEW

1. **Did the Court of Appeals correctly hold that Section 27-31-70's prohibition of partition or division of common elements concerns the unit owners' rights in the common elements and does not prohibit a developer from removing non-recreational common elements from a regime unless those common elements have vested in the unit owners pursuant to the terms of the master deed?**

2. **Did the Court of Appeals correctly hold that the Transition Period had not ended when the Developer filed the Corrected Fourth Amendment to the Master Deed, which removed the Property from the Regime?**

3. **Did the Court of Appeals correctly affirm the circuit court under the "two-issue" rule where the circuit court held the Access Easement was created either by an express easement or by implication and Petitioners only appealed whether the Access Easement was created expressly?**

INTRODUCTION

Petitioners again assert Vista Del Mar Condominiums, LLC ("Developer") improperly removed a 2.58-acre parcel of unimproved property ("Property") from a horizontal property regime and improperly conveyed an access easement ("Access Easement"). However, this Petition for a Writ of Certiorari should be denied because it does not present a novel question of law, no Court of Appeals judge dissented, the decision of the Court of Appeals does not conflict with a prior decision of this Court, no constitutional issues and federal questions are presented, and no other matter supports certiorari in this case. The Court of Appeals properly affirmed the trial court by following earlier Court of Appeals precedent, applying the plain meaning of S.C. Code Ann. § 27-31-70, and construing the unambiguous provision of a horizontal regime property master deed. Any other issue raised by Petitioners is not properly before the Court and waived because those arguments were either 1) first raised here (the due process challenge), or 2) was not otherwise properly raised to the Court of Appeals (the Access Easement and "two issue" rule). Accordingly, this Court should deny the Petition for a Writ of Certiorari by Petitioners.

COUNTERSTATEMENT OF THE CASE

The Vista Del Mar Horizontal Property Regime and the Master Deed

In December 2003, Developer created the Vista Del Mar Horizontal Property Regime ("Regime") by executing a master deed ("Master Deed"). (R. pp. 321–96). Through the Master Deed, the Developer initially submitted 5.853 acres of oceanfront land in Myrtle Beach to the Regime. A portion of this 5.853 acres became the Property. *Id*. At the same time, the Developer created Appellant Vista Del Mar Condominium Association ("Association"). (R. pp. 371–75).

The Master Deed gave the Developer certain rights as "Developer" and set out a development plan for an initial Phase I to contain building one and 25 units. (R. p. 352). Section 14 addressed future development:

> 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) (emphasis added).

The Master Deed also allowed the Developer to withdraw unimproved portions of property from the Regime and add property to the Regime, a right the Master Deed recited early and often.[1] Section 14.2(b) of the Master Deed specifically 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.

[1] For example, the Master Deed noted this right on Page 1, *see* (R. p. 325) ("NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that the Developer hereby submits the Land more fully described in Exhibit "A" . . . subject to the following, **INCLUDING BUT NOT LIMITED TO, THE RIGHT TO WITHDRAW UNIMPROVED PORTIONS OF THE LAND PURSUANT TO SECTION 14.2(B)**") (emphasis original); in the defined term "Land," *see* (R. p. 327) (defining "Land" by reference to an exhibit and "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,***" (emphasis added); and when defining the common area, *see* (R. p. 333).

> 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). Section 14.7 allowed the Developer an 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).

Additionally, the Master Deed provided a time limit for future development during a "Transition Period" in which the Developer could expand the Regime with future development or withdraw property subject to the Regime. (R. pp. 352–53) (emphasis added). The Master Deed defined "Transition Period" 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

In June 2006, the Developer conditionally submitted an additional 5.00 acres—a portion of which became the Property[2]—to the terms of the Master Deed by recording the First Amendment to the Master Deed ("First Amendment"). (R. pp. 398–423). Among other things, the First Amendment also provided for the construction of a second building with forty-one (41) additional units. *Id*. It is undisputed that the second building and the sixty-sixth unit were completed in late 2007.

In April 2009, the Developer removed the Property from the Regime by recording another amendment ("Fourth Amendment")[3] to the Master Deed. (R. pp. 425–29). The Fourth Amendment referenced a plat ("243/275 Plat") describing the Property and an Access Easement. *Id*.

In December 2013, the Developer conveyed the Property 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

[2] It is undisputed that the Property 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).

[3] Amendments two and three to the Master Deed are immaterial to this case.

Deed, this meant that the Transition Period would end on February 7, 2015—90 days after the voluntary surrender. (R. pp. 328, 452–53).[4] When the Transition Period ended in 2015, it is undisputed that only two buildings and 66 units were completed, although the Master Deed contemplated a total of six phases and a maximum of 250 units.

On January 8, 2016, GDMB sold the Property and other property to Respondent Atlantic Development Company ("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 GDMB property, including the Property, to Respondent Atlantic Coast Funding ("ACF") as security for a promissory note. (R. pp. 483–94).

Procedural Background

In 2017, the Association and several Association unit owners filed this case asserting the Developer improperly removed the Property from the Regime and improperly conveyed the Access Easement. (R. pp. 80–89). Specifically, the Association and the unit owners asserted that removal of the Property was barred by S.C. Code § 27-31-70 and by the terms of the Master Deed and that the conveyance of the Access Easement was invalid. *Id*. In addition to the Developer, the Association and unit owners named as defendants the current owner and mortgage holder on the Property, Respondent ADC and Respondent ACF, respectively. *Id*. 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 Property and Access Easement. (R. pp. 112–141).

[4] The Association knew this was happening and acknowledged this date as the end of the Transition Period. Petitioner 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 (R. p. 458), and the Association's financial statements from 2015 stated that the Transition Period ended in February 2015, (R. pp. 469–71).

On February 20, 2020, the trial court entered summary judgment in favor of ADC and ACF on all claims related to both the Property and the Access Easement, holding, among other things, that S.C. Code § 27-31-70 did not bar removal of the Property, the Master Deed allowed removal of the Property, the Transition Period had not ended at the time the Property was removed from the Regime, and the Access Easement was created expressly or by implication. (R. pp. 55–74). Petitioners 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).

On August 16, 2023, the South Carolina Court of Appeals affirmed the trial court, holding S.C. Code § 27-31-70 did not bar removal of the Property, the Master Deed allowed removal of the Property, and the Transition Period had not ended at the time the Property was removed from the Regime. Moreover, the Court of Appeals affirmed the trial court on the Access Easement issue under the "two issue" rule because Petitioners did not appeal the trial court's finding that the Access Easement would also have been created by implication.

ARGUMENT

A. The Court of Appeals correctly held that Section 27-31-70's prohibition of partition or division of common elements concerns the unit owners' rights in the common elements and does not prohibit a developer from removing non-recreational common elements from a regime unless those common elements have vested in the unit owners pursuant to the terms of the master deed.

Petitioners seek a writ of certiorari on the statutory issue. However, the Court of Appeals simply followed its own precedent and the plain language of S.C. Code Ann. § 27-31-70 in rejecting Petitioners' proposed interpretation. As the Court of Appeals stated, "[c]onsidering the Act as a whole, we hold Section 27-31-70's prohibition of partition or division of common elements concerns the unit owners' rights in the common elements and does not prohibit a developer from removing non-recreational common elements from a regime unless those common elements have vested in the unit owners pursuant to the terms of the master deed." *See*

Vista Del Mar Condo. Ass'n v. Vista Del Mar Condominiums, LLC, 441 S.C. 223, 238, 892 S.E.2d 532, 540 (Ct. App. 2023). This holding was correct, and there is no need for this Court to review it.

The Court of Appeals implicitly rejected Petitioners' interpretation of § 27-31-70 in a previous case over removing property from a horizontal property regime. *See Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 494 S.E.2d 465 (1997). *Reyhani* addressed a title dispute over a roughly one-acre lot previously submitted to a horizontal property regime. Unlike this case, *Reyhani* addressed common elements that had already vested and were not removed in compliance with the master deed. *Id.* However, *Reyhani* recognized 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." *Id.* at 211, 494 S.E.2d at 468 (emphasis added). It would be irrelevant whether common elements vested if § 27-31-70 applied as the categorical bar on removal or conveyance that Petitioners assert it is. Moreover, courts had already held that "a developer may 'reserve certain rights provided he states those rights with specificity in the master deed.'" *Heritage Fed. Sav. & Loan v. Eagle Lake & Golf Condos.*, 318 S.C. 535, 541, 458 S.E.2d 561, 565 (Ct. App. 1995) (cited by *Vista Del Mar Condo. Ass'n*, 441 S.C. at 236, 892 S.E.2d at 539).

The plain language of S.C. Code Ann. § 27-31-70 and the surrounding statutory scheme (the Horizontal Property Act, S.C. Code Ann. § 27-31-10, *et seq.*) also do not support Petitioners' interpretation. *See Vista Del Mar Condo. Ass'n*, 441 S.C. at 235, 892 S.E.2d at 539 ("[s]tatutes must be read as a whole and sections which are part of the same general statutory scheme must be construed together and each given effect, if it can be done by any reasonable construction.") (citing *Hinton v. S.C. Dep't of Prob., Parole & Pardon Servs.*, 357 S.C. 327, 333,

592 S.E.2d 335, 339 (Ct. App. 2004)). The Court of Appeals considered § 27-31-70 and relevant statutes and stated:

> The Act clearly allows for a developer to develop a regime in phases and requires a developer to set forth in the master deed and plot plan the details of proposed buildings and common elements. *See* § 27-31-100(g) (setting forth the particulars the developer must have in the master deed to develop the regime in two or more phases). The Act also contemplates that a developer may choose to forgo completing all phases of the development. Section 27-31-60(b) of the Act grants unit owners "the right to require specific performance of any proposed common elements for recreational purposes set out in the master deed which are included in the next stage of the development that applies to recreational facilities in the event the additional stages of erection do not develop." The Act does not grant unit owners similar rights to demand specific performance of the remaining common elements that are not recreational. However, this court recognized "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 v. Stone Creek Cove Condo. II Horizontal Prop. Regime*, 329 S.C. 206, 211, 494 S.E.2d 465, 468 (Ct. App. 1997).

Vista Del Mar Condo. Ass'n, 441 S.C. at 237, 892 S.E.2d at 540.

Other statutes illustrate the plain meaning. Section 27-31-70 unambiguously declares only how apartment[5] owners must hold title to the common elements and creates an exception to the general right to partition property held in common. 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). Section 27-31-120 provides that "[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the *undivided*[6] *interest of the owner in the common elements,* both general and limited, appertaining

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

[6] "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

to the apartment without specifically or particularly referring to same." *Id.* § 27-31-120 (emphasis added). These statutes depart from the usual rules for tenants in common because ordinarily "[a]ll joint tenants and tenants in common who hold, jointly or in common . . . shall be compellable to make severance and partition . . . ." *Id.* § 15-61-10. Section 27-31-70 changes the usual rule and instead provides that apartment owners may not invoke the statutory right to partition those common elements. Considered in the context of the statutory scheme, it is clear that "[s]ection 27-31-70's prohibition of partition or division of common elements concerns the unit owners' rights in the common elements and does not prohibit a developer from removing non-recreational common elements from a regime unless those common elements have vested in the unit owners pursuant to the terms of the master deed." *See Vista Del Mar Condo. Ass'n*, 441 S.C. at 238, 892 S.E.2d at 540 (citing relevant statutes, including S.C. Code Ann. § 27-31-60(a); § 27-31-80; § 27-31-100; § 27-31-100(g); § 15-61-10(A) (Supp. 2022); § 15-61-50 (2005)).

Conversely, Petitioners assert § 27-31-70 is a complete ban on any conveyance or reserved rights by a developer because of the language "[a]ny covenant to the contrary shall be void." There is no dispute that any covenant purporting to allow partition under the partition statute would be void because of § 27-31-70. Petitioners' suggested interpretation goes much further and requires the Court to disregard the other statutes within the statutory scheme that show the proper scope of § 27-31-70, which changes the normal rules of holding real estate as a co-tenant-in-common in the horizontal regime context.

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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 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").

Imagining the application of Petitioners' blanket-ban interpretation of S.C. Code Ann. § 27-31-70 illustrates how such an interpretation would be unreasonable and 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 Petitioners' theory one step further, undeveloped property could not be developed into units once submitted to a horizontal property regime because part of the property would be changed from a common area to separately owned units. This Court should not consider granting a writ when Petitioners' proposed interpretation is unreasonable.

Nor does S.C. Code Ann. § 27-31-70 present a "novel" question as Petitioners assert. Two opinions by the Court of Appeals have now interpreted § 27-31-70 under facts that did not allow removal (*Reyahni*) and facts that did allow removal (*Vista Del Mar Condominium Association*). While there is no opinion from this Court on § 27-31-70, there is no need for one when the Court of Appeals properly construed and applied the statute in multiple published opinions.

Petitioners also have failed to manufacture a real public policy concern with the proffered "tax haven" scenario. *See* Petitioners' Cert. Pet., p. 8–9. The imagined "tax haven" by Petitioners is conclusory and speculative such that this Court should not consider it. Nothing is offered to support the allegations, and no statute is cited to identify South Carolina's "public policy" on this issue, making it hard to address. However, it is worth noting South Carolina appellate courts long ago approved allowing developers flexibility when developing property. *See generally Heritage Fed. Sav. & Loan*, 318 S.C. at 541, 458 S.E.2d at 565 ("a developer may 'reserve certain rights

provided he states those rights with specificity in the master deed.'").

Apparently to create a constitutional issue, Petitioners assert for the first time that the lower courts' interpretation of § 27-31-70 deprived them of procedural due process. This position is without merit. To begin with, this issue was not raised at the trial level or in the Court of Appeals and is therefore waived. *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."); *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); *see also* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n. 2 (2011) ("It is axiomatic that an issue cannot be raised for the first time on rehearing"); *Kennedy v. S.C. Retirement Sys*., 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time."); *Kiawah Prop. Owners Group v. Pub. Serv. Comm'n of South Carolina*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (finding an issue raised for the first time in a petition for rehearing was not preserved).

Moreover, Petitioners' due process challenge is meritless under this Court's procedural due process precedents. *See generally Kurschner v. City of Camden Plan. Comm'n,* 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008) (citing *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)) ("Procedural due process imposes constraints on governmental decisions which deprive

individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution."). As this Court stated: "[t]he fundamental requirements of due process include *notice*, an *opportunity to be heard* in a meaningful way, and *judicial review*." *Kurschner*, 376 S.C. at 171, 656 S.E.2d at 350 (citing S.C. Const. art. 1, § 22*; Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control*, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991)) (emphasis added). Petitioners' sole basis for a deprivation of due process is that the trial court and Court of Appeals erred in interpreting § 27-31-70. An adverse interpretation of a statute for Petitioners after years of litigation cannot conceivably be considered to have denied them due process where they have been heard multiple times and received two layers of judicial review. Throughout the litigation, Petitioners have asserted their interpretation of § 27-31-70, which has been rejected as unreasonable and contrary to the statute's plain meaning by two courts. But they have been heard.

Finally, Petitioners do not assert what additional procedures would have protected their rights. *Cf. Kurschner*, 376 S.C. at 171, 656 S.E.2d at 350 (rejecting proposed alternative procedures for due process challenge to the appellate standard of review and evidentiary standards and procedure for a zoning hearing) (citing *Mathews*, 424 U.S. at 335, for the proposition that "in determining the process which is due, a court will consider the private interest affected by the proceeding, the risk of error created by the chosen procedure, and the countervailing governmental interest supporting challenged procedure"). Petitioners merely disagree with the rulings they have received and have not identified any procedural failure, much less one that denied them constitutional rights.

Accordingly, Petitioners have not identified any basis to grant certiorari based on the Court of Appeals' ruling on S.C. Code Ann. § 27-31-70.

B. The Court of Appeals correctly held that the Transition Period had not ended when the Developer filed the Corrected Fourth Amendment to the Master Deed, which removed the Property from the Regime.

Petitioners again assert an unreasonable interpretation of the Master Deed as a basis for this Court to grant certiorari. However, the Court of Appeals correctly construed the unambiguous terms of the Master Deed.

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. A triggering event did not occur until GDMB Operations voluntarily ended the Transition Period in 2015—well after the Developer removed the Property in 2009.

"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 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. 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;[7] or

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

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). 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, the Developer removed the 2.58 Acre Tract in 2009. (R pp. 425–29). In December 2013, the Developer 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, only two buildings and 66 units of the allowed six buildings and 250 units had been completed. Accordingly, the Developer removed the Property from the Regime well before the Transition Period ended.

Conversely, Petitioners assert the Transition Period ended when 99% of the units actually built were sold in 2008 because "to be contained" in the Transition Period provision is ambiguous. Petitioners' 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). The Master Deed expressly 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) (emphasis added). It expressly 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 Petitioners' 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 Petitioners' theory. This cannot be correct given the plain language of the Master Deed.

Accordingly, Petitioners' argument does not support granting a writ of certiorari when the Court of Appeals properly construed the terms of this unambiguous Master Deed.

C. The Court of Appeals correctly affirmed the circuit court under the "two-issue" rule where the circuit court held the Access Easement was created either by an express easement or by implication and Petitioners only appealed whether the Access Easement was created expressly.

Petitioners assert the Court of Appeals erred by summarily affirming the Access Easement issue under Rule 242(c), SCACR, under the "two-issue" rule. However, Petitioners do not identify for this Court where they properly challenged the circuit court's ruling that the Access Easement would have been created by implication if not by the express document. Accordingly, this question is not properly presented to this Court and waived under the "two-issue" rule.

Even if the question were properly presented, Petitioners are wrong on the merits. 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.

GDMB Operations, who then held the developer's rights under the Master Deed, began the end of the Transition Period voluntarily in November 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).

Additionally, an implied easement arose when Developer filed the Fourth Amendment to the Master Deed removing the Property because the Fourth Amendment referenced the 243/275 Plat, which showed the Access Easement, even if there were no express 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 with the amendment removing the Property because the amendment referenced the 243/275 Plat showing the Access Easement. (R. pp. 425–29). It would be immaterial whether the Developer owned the burdened parcel at the time it conveyed the Property to GDMB Ocean because the Access Easement would already have existed by implication. Accordingly, an implied easement arose as a matter of law, even if the express Access Easement was somehow invalid.

Petitioners did not preserve this issue on appeal, and if they had, the trial court should be affirmed on the merits. Accordingly, the arguments on the Access Easement do not support granting a writ of certiorari.

CONCLUSION

For these reasons, this Court should deny the Petition for a Writ of Certiorari.

[Signatures on Following Page]

Respectfully submitted,

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