

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

The Honorable Mikell R. Scarborough, Master-in-Equity

Appellate Case No. 2023-000773

RECEIVED

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SC Court of Appeals

Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani,
Nancy Falciani, Robert St. Louis, Lindsay Layton, Roger Woolf,
Roberta Woolf, Nancy Zaj, Meg White, Joey Winchester, Kelly
Hill, Mary Thaler, Ed Thaler, Lisa Essig, Brianna Stello, Jennifer
Sellars, Dominique Powell, Jennifer Mayo and James Hardy Respondents,

v.

Mariner's Cay Racquet & Yacht Club Homeowners' Association,
Inc. Appellant.

RECORD ON APPEAL, VOLUME I OF II

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STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON) IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Dustin Grotzke; Christine Grotzke; Leo) CASE NO.: 2019-CP-10-03390
Cornejo; Steve Falciani; Nancy Falciani;)

Robert St. Louis; Lindsay Layton; George) **MOTION AND**
Lauderback; Beth Lauderback; Jan Prentice;) **CONSENT ORDER OF**
Julie Haynie; Lynn Alexander; Lisa Scott;) **REFERENCE TO**
Ron Woolf; Rabecca Woolf; Nancy Zai;) **MASTER-IN-EQUITY**
Meg White; Ginger Adler; Gerry Murphy;)
Sam Ogden; Joey Winchester; Frank Duffy;)
Betty Duffy; Lois Stefan; Kelly Hill; Mary)
Thaler; Ed Thaler; Lisa Essig; Jenn Odom;)
Brianna Stello; and Leslie Kelly,)

Plaintiffs,)

v.)

Mariner's Cay Racquet & Yacht Club)
Homeowner's Association, Inc.,)

Defendant(s).)
_____)

IT APPEARING that, pursuant to Rule 53(b) of the South Carolina Rules of Civil Procedure, any action for equitable relief may be referred to a Master-in-Equity or special referee, by order of a circuit court judge or the clerk of court, wherein the parties consent;

IT FURTHER APPEARING that the above-entitled action is primarily an action for equitable relief in the form of injunctive relief and declaratory judgment, and it is a matter proper to refer to the Honorable Mikell R. Scarborough, Master-in-Equity for Charleston County, South Carolina, to wit:

Procedural history

Plaintiffs filed a Summons and Complaint in Court of Common Pleas for the Ninth Circuit in Charleston County on June 24, 2019 alleging breach of contract by Defendant and seeking equitable relief in the form of a temporary restraining order and/or temporary injunction as well as a declaratory

judgment. Plaintiffs did not demand a jury trial in the Complaint. This action arises out of a dispute between certain condominium unit owners ("Plaintiffs") and Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. ("Defendant") in regard to the recorded Master Deed for Mariner's Cay Racquet & Yacht Club. Service of the filed Summons and Complaint was accepted by counsel for Defendant on July 10, 2019 as reflected on the Acceptance of Service filed with the Court on July 25, 2019. Defendant timely filed an Answer and Counterclaim on September 10, 2019 and demanded a jury trial. Plaintiffs timely filed a Reply to the Counterclaim on October 14, 2019.

Explanation regarding equitable and legal claims

As to the claims for relief by Plaintiffs and Defendant in their respective pleadings, the parties have jointly agreed to set aside for the time being any and all legal claims which have demanded monetary relief, in order that the Master-in-Equity for Charleston County may first hear and rule upon the equitable claims they have asserted. Plaintiffs and Defendant have agreed that the central issue to be heard by the Master-in-Equity is whether the Board may restrict the short-terms rental of condominium units pursuant to the existing language of its Master Deed and governing documents.

Plaintiffs and Defendant do not waive, abandon or relinquish any of their claims or causes of action, including but not limited to those which seek monetary relief; nor do the parties waive, abandon or relinquish their right to have such claims tried by a jury in Common Pleas court. Instead, they have jointly agreed and consented to set aside any such non-equitable claims temporarily for the purposes and aims stated herein, and to have such non-equitable claims addressed at a later time in Common Pleas court if necessary and appropriate.

Plaintiffs and Defendant consent to proceeding non-jury before the Master-in-Equity on the herein described equitable portion of the dispute, and to have said issue heard and ruled upon by the Master-in-Equity prior to any legal claims for monetary relief being heard or ruled upon. As both

parties have consented to temporarily stay their claims for monetary relief and proceed non-jury, and further to have the equitable issue(s) heard and ruled upon first by the Master-in-Equity of Charleston County, it is therefore proper and appropriate pursuant to Rule 53(b) SCRCF for this matter to be referred in its entirety to the Master-in-Equity for Charleston County.

ORDER AND DECREE

Therefore and accordingly,

IT IS HEREBY ORDERED that the above-captioned matter is referred, pursuant to Rule 53 SCRCF, to the Master-in-Equity for Charleston County, who shall exercise all power and authority which a Circuit Judge sitting without a jury would have, including but not limited to, making findings of fact and conclusions of law; directing entry of final judgment; hearing any issues, including motions, after judgment; issuing any and all orders, supplemental orders, and writs of assistance, with any appeal from the final judgment being to the Supreme Court or the Court of Appeals as provided by the South Carolina Appellate Court Rules.

AND IT IS SO ORDERED!

Date: _____
Charleston, South Carolina

Circuit Court Judge / Clerk of Court

[ATTORNEY SIGNATURES ON FOLLOWING PAGE]

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Charleston Common Pleas

Case Caption: Dustin Grotzke , plaintiff, et al VS Mariners Cay Racquet & Yacht
Club Homeowners Association Inc
Case Number: 2019CP1003390
Type: Order/Referred to Master or Special Referee

So Ordered

s/Jennifer B. McCoy #2764

Electronically signed on 2020-01-20 16:43:00 page 5 of 5

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	

Dustin Grotzke, Christine Grotzke,	)	Civil Action No. 2019-CP-10-03390
Leo Cornejo, Steve Falciani,	)	

ORDER

Nancy Falciani, Robert St. Louis,	)
Lindsay Layton, Roger Woolf,	)
Roberta Woolf, Nancy Zaj, Meg White,	)
Joey Winchester, Kelly Hill, Mary Thaler,	)
Ed Thaler, Lisa Essig, Brianna Stello,	)
Jennifer Sellars, Dominique Powell,	)
Jennifer Mayo and James Hardy,	)

Plaintiffs,

v.

Mariner's Cay Racquet & Yacht Club	)
Homeowners' Association, Inc.,	)

Defendant.

This matter came before the Court on cross-motions for summary judgment by Plaintiffs and Defendant Mariner's Cay Racquet & Yacht Club ("Mariners Cay"), as well as a motion by Plaintiffs to amend the Complaint.

The Court heard the motions on September 19, 2022. Attorney Sean A. O'Connor appeared on behalf of Plaintiffs. Attorneys Robert H. Jordan and John W. Fletcher appeared on behalf of Defendant. The Court reviewed and considered all filings and heard and considered arguments of counsel. For the reasons set forth herein below, the Court hereby GRANTS Plaintiffs' motion to amend the Complaint, GRANTS Plaintiffs' motion for summary judgment, GRANTS the injunctive relief requested by Plaintiffs, DECLARES that the moratorium purported to be enacted by Defendant was legally impermissible and may not be enforced by Defendant, and DENIES Defendant's motion for summary judgment.

FACTUAL BACKGROUND

Plaintiffs own condominium units in Mariner's Cay Racquet & Yacht Club ("Mariners Cay"), a condominium community located within the City of Folly Beach, South Carolina. When the unit owners acquired title to their units, they became members of the Mariner's Cay Racquet and Yacht Club Homeowner's Association ("Association"). Each unit owner ("Owners") in Mariners Cay is subject to the Master Deed which was recorded on May 12, 1982 at Book J128, Page 300 in the Charleston County Register of Deeds office.

Some of the Plaintiffs have in the past rented their condominium units on a short-term basis, and to further that purpose, have marketed and advertised their units online on vacation rental websites and/or applications as being available for such short-term rentals. Other Plaintiffs purchased their units after the Association's Board of Directors implemented and caused to be recorded a series of "moratoriums" prohibiting short-term rentals; these Plaintiffs have not yet been allowed to rent their units short term, but have asserted in Plaintiffs' amended complaint that they wish to do so.

Every mandate the Owners in Mariner's Cay are required to follow, under the recorded governing documents, are (1) a Covenant in the Master Deed, (2) a By-Law, or (3) a rule or regulation that the Board is authorized to promulgate under Article III, Section 3, subsection (e) of the Master Deed.

The Master Deed addresses leasing of the units in Article III "Property Rights," Section 2 pertaining to "Units," and states in relevant part as follows:

Each Unit, together with its Percentage Interest in the General Common Area and Facilities and the Limited Common Area and Facilities, shall for all purposes constitute a separate parcel of real property which, subject to the provisions of this Master Deed, may be owned in fee simple and which may be conveyed, transferred, *leased* and encumbered in the same manner as any other real property. Each Owner, subject to the provisions of the Act

and this Master Deed, shall be entitled to the exclusive ownership and possession of his Unit.

(Emphasis added.) Also under Article III, in Subsection 3 pertaining to “Common Area and Facilities,” it states:

The Board shall have the right to promulgate rules and regulations limiting the use of the General Common Area and Facilities to Unit Owners and their guests as well as to provide for the exclusive use of a part of the General Common Area and Facilities by a Unit owner and his guests for special occasions which exclusive use may be conditioned, among other things, upon the payment of a fee.

Article IX explicitly addresses “Leasing of Units” in Section 7: “Units may be rented provided the occupancy is only by the lessee and his immediate family unless otherwise provided by the Association’s Board of Directors. No less than all of a Unit may be rented.”

Plaintiffs, in deciding to purchase their units in Mariner’s Cay, knew that the Master Deed allowed for rentals of their units, without any time limitation or minimum lease duration.

On October 5, 2018, the Board of Directors of Mariner’s Cay Racquet and Yacht Club (“Board”) sent an email to the unit owners addressing short-term rentals. In the email, the Board complained about and criticized what it called “the negative effects of short-term rentals of units.” In that email, the Board stated that “the best way to maintain the residential quality of Mariners Cay is to amend the Master Deed and to prohibit the Short-Term Rental of units.”

The language of the Master Deed setting forth the procedure for amendments states as follows: “The Master Deed may be amended at any time and from time to time after notice as hereinabove provided has been given by a vote of not less than seventy-five percent (75%) of the total vote of the Association.” Master Deed Article XI, Section 1(b).

The Board began the procedure for an amendment by sending out on October 9, 2018, a notice of a town hall meeting to discuss the options available and what the amendment would mean for the community. On October 19, 2018, the Board sent another email proposing an amendment

to the Master Deed prohibiting the rental of units for terms of less than thirty (30) days. Again the Board acknowledged, “[t]his would require a Vote to amend the Mariners Cay Master Deed.”

In preparing for the vote the Board found that, of the 135 units in Mariners Cay, approximately 42 units intended to vote against the proposed changes, which accounted for approximately 31% of the units. Recognizing that the vote would be less than the 75% requirement in the Master Deed to implement the proposed change, and so would fail, the Board did not proceed with the proposed amendment for a vote by the owners. At no time since have the Members taken an official vote in relation to the amendment of the Master Deed regarding short-term rentals.

On May 28, 2019, the Board announced a “moratorium” on short term rentals.¹ The Board claimed that it made this decision based on findings of the Mariner’s Cay Livability Committee. The moratorium document stated in part, “Investors and realtors have recently uncovered the beauty of the residential neighborhood, and over the past three and a half years 50% of all new condo purchases have been for investment rental use. Through a survey, the Board found that a majority of the current owners want ‘some’ rental restrictions.” In purporting to impose the moratorium, the Board voted unanimously in favor and then announced the moratorium, in contravention to its prior statement that prohibiting short term rentals would require an amendment of the Master Deed by vote of approval by 75% or more of the members of the Association.

The Summons and Complaint in the herein action were filed on June 24, 2019. The action was referred to the Master-in-Equity via a consent order filed January 20, 2020. Plaintiffs and Defendant filed their respective cross-motions for summary judgment on July 8, 2022. Plaintiffs filed their motion to amend the Complaint in August 8, 2022.

¹ The original version of the moratorium was recorded in the Charleston County Register of Deeds office on November 13, 2019 in Book 0839 at Page 332. Three subsequent “renewals” of the “temporary” moratorium were recorded on March 18, 2020 in Book 0867 at Page 848; on April 22, 2021 in Book 0983 at Page 949; and on April 28, 2022 in Book 1104 at Page 750.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Plaintiff's motion to amend the Complaint is GRANTED.

A. Introduction

Plaintiffs filed a Complaint on June 24, 2019 asserting breach of contract and requesting injunctive relief and a declaratory judgment against Mariner's Cay Homeowners Association ("HOA") after the HOA's Board of Directors purported to enact a moratorium prohibiting short-term rentals of owners' condominium units. Defendant answered and counterclaimed against Plaintiffs for alleged breaches of the HOA's governing documents.

On July 19, 2022, both motions for summary judgment were scheduled to be heard before the Court. Prior to the hearing Plaintiffs filed an affidavit on behalf of Jennifer Sellars, an owner of a condominium unit in Defendant's HOA who bought her unit after the purported moratorium went into effect. Sellars sought to join as a Plaintiff. The Court continued the hearing and instructed Plaintiffs to file a Motion to Amend the Complaint to add the new Plaintiff(s). On August 8, 2022 Plaintiffs filed a Motion to Amend Complaint with a proposed Amended Complaint attached. Thereafter, Defendant filed a *Memorandum in Opposition to Plaintiff's Motion to Amend* on August 22, 2022. Plaintiffs filed a Reply Brief on September 16, 2022.

For the reasons set forth hereinbelow, Plaintiffs' Motion to Amend Complaint is GRANTED.

B. Applicable standard

Under Rule 15 of the South Carolina Rules of Civil Procedure, "...a party may amend his pleading only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires and does not prejudice any other party." SCRCP 15. "Leave to amend pleadings pursuant to Rule 15 SCRCP shall be liberally and freely given when justice so

requires and does not prejudice any other party.” *Crestwood Golf Club, Inc. v. Potter*, 328 S.C. 201, 493 S.E.2d 826 (1977); *Pruitt v. Bowers*, 330 S.C. 483, 499 S.E.2d 250 (Ct. App. 1998). The prejudice Rule 15 envisions is a lack of notice that the new issue is going to be tried, and a lack of opportunity to refute it.” *Pool v. Pool*, 329 S.C. 328–9, 494 S.E.2d 822 (1998) (citing *Soil & Material Eng’rs, Inc. v. Folly Assocs.*, 293 S.C. 498, 501, 361 S.E.2d 779, 781 (Ct.App.1987)) “This rule strongly favors amendments, and the Court is encouraged to freely grant leave to amend.” *Jarrell v. Seaboard Sys. R.R.*, 294 S.C. 183, 363 S.E.2d 398 (S.C. App. 1987). “If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be “freely given.” *Id.* (citing Fed. R. Civ. P. 15(a)); accord *Forrester v. Smith & Steele Builders, Inc.*, 295 S.C. 504, 507, 369 S.E.2d 156, 158 (Ct. App. 1988).

In accordance with the Court’s instructions at the hearing on July 19, 2022, Plaintiffs filed their Motion to Amend the Complaint. The proposed Amended Complaint added Jennifer Sellars, Dominique Powell, Jennifer Mayo, and James Hardy as Plaintiffs and removed some current Plaintiffs who either no longer own units at Mariner’s Cay or who no longer wished to be involved in this litigation. Allowing Plaintiffs to add parties and remove others would not change or affect Plaintiffs’ causes of action. In fact, Defendants conceded in their memorandum that the proposed Amended Complaint makes the same challenges to the moratorium as the original Complaint. As such, Defendants had notice of Plaintiffs’ intention to amend the Complaint since at least July 19,

2022, after which the Motion to Amend was filed on August 8, 2022, and thus Defendants could not credibly claim prejudice by the proposed amendment.

C. All Plaintiffs have standing to bring this action.

The moratorium contained a “grandfathering” provision which indicated that the short-term rental prohibition was applicable only to Owners who purchased their units after the moratorium was enacted (“post-moratorium Owners”) and not applicable to Owners who owned their units before the first version of the moratorium went into effect (“pre-moratorium Owners”). Based on this aspect of the moratorium, Defendant argued that the pre-moratorium Owners lacked standing to bring this action, alleging that they had suffered no injury in fact. Defendant further argued that the post-moratorium Owners should not be able to join as Plaintiffs or that their claims should be dismissed on summary judgment on the basis that they were on record notice of the moratorium before they purchased their units.

The Court rejects these arguments, finding that all Plaintiffs stated an injury in fact for the purpose of standing analysis. The Court finds that, as a result of the purported moratorium, the pre-moratorium Owners have been deprived of their ability to freely sell their property to prospective purchasers who would be interested in continuing to rent the units on a short-term basis, which constitutes an injury in fact. One Plaintiff asserts, via a filed affidavit, that he sold one of his units subsequent to the moratorium and was forced to reduce the sales price substantially after the purchaser learned they would not be able to rent the unit on a short-term basis. The Court also finds, even assuming the post-moratorium Owners were on record notice of the moratorium prior to their purchases, they were not barred from challenging the validity and enforceability of the moratorium, which Plaintiffs assert violates the Master Deed.

The Court finds that this is a straightforward contract interpretation issue, and Plaintiffs have standing to bring a breach of contract action against Defendant as well as seek a declaratory judgment and injunctive relief. Defendant incorrectly attempts to frame Plaintiffs' claims as being required to be brought only derivatively. The Court disagrees. The Official Comment to S.C. Code § 33-31-304 states, "The focus of section 3.04 is narrow... it does not address actions that... ii) violate federal or state laws, (iii) *breach duties owed by the directors, officers, employees or agents of the corporation...* or (vi) *breach duties owed by the corporation.*" See S.C. Code § 33-31-304, Official Comment. (Emphasis added.) Based upon the plain language of S.C. Code § 33-31-304 as explained clearly by the Official Comment, Plaintiffs have standing to bring this breach of contract action without having to bring it through a derivative action.

D. Even if the post-moratorium Owners had actual or constructive knowledge of the moratorium, they nonetheless have standing to be Plaintiffs in this action, as they claim the moratorium is in direct breach of the Master Deed, which is a contract between the Association and all Owners.

Even if the post-moratorium Owners purchased their properties with actual or constructive knowledge of the Moratorium, they still have standing because Plaintiffs allege that Defendant's actions were unlawful and in breach of the Master Deed. Defendant may not credibly claim that a Plaintiff's constructive knowledge of its unlawful actions, in violation of its contract and property rights, somehow bars Plaintiff from seeking to enforce those rights. The Court is aware of no authority in South Carolina jurisprudence for this proposition.

Moreover, the Court instructed Plaintiffs on July 19, 2022 to submit a Motion to Amend the Complaint to add the new Plaintiffs. It was stated openly in this Court on July 19, 2022 by Plaintiffs' counsel and understood by Defendant and the Court that Plaintiffs specifically intended

to defeat Defendant's standing argument² by adding Plaintiffs who had purchased their units after the moratorium went into effect and were thus not grandfathered. After Plaintiffs did exactly that, Defendant asserted that the new Plaintiffs are barred from joining the action due to actual or constructive knowledge of the moratorium prior to purchasing their condo units. That argument has no support in applicable law and is thereby rejected by this Court.

E. There was no need or practical benefit for the parties to conduct discovery to address the new Plaintiffs' claims or any other fact issue prior to the Court ruling on the cross-motions for summary judgment.

At the prior hearing on July 19, 2022, this Court granted Plaintiffs' motion to stay discovery until each parties' cross-motions for summary judgment were heard and ruled upon. The issue before the Court is whether the Board can prohibit short-term rentals via a unilateral moratorium not voted on by the membership, or if an amendment to the Master Deed is needed for such a restriction to be imposed. Amending the Complaint to add new Plaintiffs does not change the question before the Court on summary judgment, and thus there is no need for fact discovery to be conducted at this time. No persuasive argument has been advanced by Defendant as to how there has been any material change in the circumstances of the Plaintiffs' arguments. Therefore, the Court finds it appropriate and the most efficient use of the Court's resources to rule on the cross-motions for summary judgment so as to narrow the issues prior to having the parties and their counsel undertake months of timely and expensive discovery.

Further, because the post-moratorium Owners had standing to sue, regardless of their constructive or actual knowledge of the moratorium, there was no need for the Defendant to

² Defendant has argued that the original Plaintiffs were not injured by the moratorium due to their being grandfathered, despite the diminution of the original Plaintiffs' property value. The Court commented informally at the July 19, 2022 hearing that even though the parties' money damages claims are stayed for now and are not before the Master-in-Equity, that does not prevent the original Plaintiffs from citing that alleged injury in fact as a basis for standing as to the original Plaintiffs.

conduct new or additional discovery as to the new Plaintiffs prior to the cross-motions for summary judgment being ruled upon.

F. Conclusion

Based on the foregoing reasons, the Court GRANTS Plaintiffs' Motion to Amend Complaint filed with this Court August 8, 2022, and DENIES Defendant's motions, made orally by Defendant's counsel in court on September 19, 2022, to continue the hearing on the cross-motions for summary judgment and for leave to conduct additional discovery before the hearing on the cross-motions for summary judgment

II. Plaintiffs' motion for summary judgment is GRANTED, Plaintiffs' claim for injunctive relief is GRANTED, the Court DECLARES that the moratorium purported to be enacted by Defendant was legally impermissible and may not be enforced by Defendant, and Defendant's motion for summary judgment is DENIED.

A. Applicable Standard

In a motion for summary judgment, the movant shall prevail when "the pleadings, depositions, answers and interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56, SCRPC. The construction and enforcement of an unambiguous written contract is a "question of law for the court, and thus can be properly disposed of at summary judgment." *Harbor Town Yacht Club Boat Slip Owners' Ass'n v. Safe Berth Management, Inc.*, 421 F.Supp. 2d 908 (D.S.C. 2006). In granting summary judgment "it must be shown that further inquiry into the facts is not needed to clarify the application of the law." *Charleston Lumber Co., Inc. v. Miller Housing Corp.*, 318 S.C. 471, 479, 458 S.E.2d 431, 436 (Ct. App. 1995). "[S]ummary judgment is completely appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner." *Gecy v. South*

Carolina Bank & Trust, 422 S.C. 509, 517, 812 S.E.2d 750, 754 (Ct. App. 2018) (quoting *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006)).

B. Restrictive Covenants are Contractual rights.

The nature of the relationship between homeowner's associations and their members is contractual. See *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) (holding real covenants are "agreements... to do, or refrain from doing certain things with respect to real property") (ellipsis in original) (quoting 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* §1 (2005)); *id.* ("Covenants, in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract.") Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. 17 S.C. Jur. *Covenants* § 2 (2005) (citing *Hoffman v. Cohen*, 262 S.C. 71, 202 S.E.2d 363 (1974) and *Manning v. City of Columbia*, 297 S.C. 451, 377 S.E.2d 335 (1989)). Thus, the issue before the Court is one of contract interpretation.

C. Article IX, Section 7 allowing the Owners' right to lease their units and the clause granting the Board power to regulate use of the common areas controls over the vague reference to the "unless otherwise provided" by the Board's authority language.

Under the well-settled canon of contract construction, "where there are two clauses in any respect conflicting, that which is specifically directed to a particular matter controls in respect thereto over one which is general in its terms." *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551, 558, 24 S. Ct. 538, 540 (1904). When, at the time of formation, "parties express themselves in reference to a particular matter, the attention is directed to that, and it must be assumed that it expresses their intent; whereas a reference to some general matter, within which the particular may be included, does not necessarily indicate that the parties had the particular matter in thought." *Id.*, 193 U.S. at 558, 24 S. Ct. at 540-41. "The purpose of all rules of contract construction is to determine the

parties' [objective] intention" at the time of contract formation, rather than a "subjective, after-the-fact meaning one party assigns to it." S.C. Jur. Contracts 30d § 33 (2019); *North American Rescue Products, Inc. v. Richardson*, 411 S.C. 371, 378 769 S.E.2d 237, 240-41 (2015); see also *Klutts Resort Realty, Inc. v. Down'Round Development Corp.*, 268 S.C. 80, 89, 232 S.E.2d 20, 25 (1977). In determining such intention, parole evidence may be admissible "to show the true meaning of an ambiguous written contract." *Klutts Resort Realty, Inc.*, 268 S.C. at 89, 232 S.E.2d at 25. When a contract is capable of being read in more way than one, it is ambiguous and thus the court may look to extrinsic evidence when determining the intent of the drafters. *Id.*

The Master Deed does not prohibit or restrict short-term rentals of units in any manner. It specifically and explicitly allows for the leasing of units. As the Master Deed references the Horizontal Property Regime Act (the "Act"), it is appropriate to consider the property rights granted to an owner under the Act. Section 27-31-60 of the South Carolina Code states "[a]n apartment owner shall have the exclusive ownership of his apartment." Consistent with that quoted language of the Act, Article III, Section 2 of the Master Deed explicitly grants an Owner a fee simple interest in his or her unit, and further provides that the unit may be "conveyed, transferred, [and] *leased*["] (Emphasis added.) There is no time limitation or lease duration placed on this right. Article IX, Section 7 of the Master Deed does create a specified restriction on the renting of units, but the only limitation is that the occupants must be the lessee and his immediate family. Both of these sections in the Master Deed are inherently directed at the leasing of units, and show not only that, at the time of formation, the parties intended to allow for the leasing of units but also, as the Master Deed does not mention such a limitation, that they did not intend to include a minimum duration restriction on the leasing of units.

Article III, Section 3 of the Master Deed directly addresses the Board's power over certain limited areas of Mariner's Cay, those areas being the Common Areas which the Unit Owners hold as tenants in common. Subsection (e) provides the Board authority to promulgate rules and regulations; however, this subsection explicitly states that the rules and regulations may limit "the use of the General Common Area and Facilities." It is therefore clear that the rules and regulations promulgated by the Board may not limit or restrict the Owners' use of their own units, but rather only over the Owners' use of the General Common Areas. The Board's moratorium flies in the face of this clear distinction.

For this reason as well as the others that follow, it is appropriate for the court to grant Plaintiffs' motion for summary judgment and deny Defendant's motion for summary judgment.

D. Owners' rental of their units on a short-term basis is a "residential use" and not a "business activity," and thus short-term rentals do not violate the Master Deed.

Defendant contends that Owners' short-term rentals of their units are a business activity in violation of certain provisions of the Master Deed. Specifically, they rely on Article XI, Section 1, which states "Buildings and all Units contemplated in the development shall be, and the same hereby are, restricted exclusively to residential use..." and Article IX, Section 4, which provides "No business activities of any kind whatever shall be conducted in any building or in any portion of the property." The City of Folly Beach, in which Mariner's Cay is located, has established an ordinance requiring "any owner wishing to operate a short-term rental must maintain a current business license, comply with rental registration requirements, and make proper payment of local, county, and state taxes." Folly Beach, SC, Ordinances ch. 117 § 2 (2010).

"A restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of free use of the property." *See Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263

S.E.2d 378, 380 (1980). The Court is to construe any ambiguity in favor of limited duration and against restricting property. *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006). While South Carolina has not yet taken up the specific question of whether short-term rentals violate restrictive covenants requiring property to be used only for residential purposes and prohibiting its use for business purposes, courts in a number of other states have considered the issue and the majority of those courts have almost uniformly held that short-term rentals do not violate restrictive covenants similar to those at issue in this case.

“A negative covenant, prohibiting business and commercial uses of the property, does not bar short-term residential vacation rentals.” *Russell v. Donaldson*, 731 S.E.2d 535, 539 (N.C. Ct. App. 2012). “Residential use, without more, has been consistently interpreted as meaning that the use of the property is for living purposes, or a dwelling, or a place of abode;” and “the transitory or temporary nature of such use does not defeat the residential status.” *Lowden v. Bosley*, 395 Md. 58, 68, 909 A.2d 262, 267 (2006). “[R]enting this dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood.” *Pinehaven Planning Bd. v. Brooks*, 70 P.3d 664, 668 (Idaho 2003). “So long as the renters continue to relax, eat, sleep, bathe, and engage in other incidental activities... they are using the cabin for residential purposes.” *Slaby v. Mountain River Ests. Residential Ass’n, Inc.*, 100 So. 3d 569, 579 (Ala. Civ. App. 2012).

In *Slaby*, a residential association asserted that the property owners’ short-term rentals of their cabin violated restrictive covenants prohibiting commercial use. 100 So.3d at 571. However, the court reviewed numerous appellate decisions from other states and agreed with “the majority of other jurisdictions” that rental of the property for eating, sleeping, and other residential purposes did not amount to commercial use. *Id.* at 580-82.

“The owner’s receipt of rental income either from short- or long-term rentals in no way detracts or changes the residential characteristics of the use by the tenant.” *Ross v. Bennett*, 203 P.3d 383, 388 (Wash. Ct. App. 2008). “[T]he nature of the property’s use is not transformed from residential to business simply because the owner earns income from the rentals.” *Santa Monica Beach Prop. Owners Ass’n v. Acord*, 219 So. 3d 111, 115 (Fla. Ct. App. 2017), citing *Lowden v. Bosley*, 909 A.2d 261, 262 (Md. 2006). “When the [owners] rent their cabin, they no doubt realize some pecuniary gain, but neither that financial benefit nor the advertisement of the property or the remittance of a lodging tax transforms the nature of the use of the property from residential to commercial.” *Slaby*, 100 So. 3d at 580. “While [the owner’s] renting of the property as a dwelling on a short-term basis may have constituted an economic endeavor on [the owner’s] part, to construe that activity as one forbidden by the language of the deed restrictions is unreasonable and strained.” *Mason Family Trust v. DeVaney*, 146 N.M. 199, 201, 207 P.3d 1176, 1178 (N.M. Ct. App. 2009).

In *Mason Family Trust v. DeVaney*, Mr. Devaney rented his property on a short-term basis when he was not occupying the property himself, and he rented the property for many more days than he dwelled there and received substantial rental fees. *Id.* at 200, 1177. Additionally, a property management company advertised and managed the rental of the cabin. *Id.* Nonetheless, the court held “a deed restriction for dwelling purposes only does not demonstrate an intent to prohibit short-term rental for dwelling purposes. Nor, in our view, does this commercial or business use restriction preclude the economic aspect of an owner’s vacation home which is also partially used as a short-term rental for dwelling purposes.” *Id.* at 202, 1179.

Adopting Silsby’s reading [prohibiting rentals] would result in an affirmative rule of law holding that every single- or multi-family residence that is rented for use by someone other than the owner is a commercial enterprise. Under such a rule of law, innumerable properties would invariably run afoul of local zoning ordinances prohibiting commercial uses. The use of this property is residential; the fact that this use may involve income in some fashion does not change a fundamentally

residential use to a commercial enterprise. *Silsby v. Belch*, 952 A.2d 218, 222-23 (Me. 2008).

Very similar to the Restrictive Covenants at issue here at Mariner's Cay, in *Mullin v. Silvercreek Condo. Owner's Ass'n, Inc.*, 195 S.W.3d 484 (Mo. Ct. App. 2006), several unit owners had rented their units on a short-term or nightly basis for a long period of time. The Overtons specifically obtained a license from the City and collected and paid sales tax on all of the units used for short-term use. *Id.* at 487. The Condominium Association asserted this violated their restrictive covenants—one limiting use to single-family residential and another stating “no business, trade, occupation, or profession or any kind shall be conducted, maintained, or permitted on any part of the property.” *Id.* at 489. The Missouri Court of Appeals affirmed the trial court and held that the short term and nightly rentals did not violate the covenants reasoning that (1) the restrictions read together plainly allowed owners to rent their condominiums from time to time and (2) given that restrictive covenants are not favorites of the law, any ambiguity should be interpreted narrowly in favor of free use of the property. *Id.* at 490-91.

In *Yogman v. Parrott*, 937 P.2d 1019 (Or. 1997), the defendants used their beach house as a vacation home, and when they were not using it themselves, they rented it for short periods of time to others who also used it as a vacation home. Plaintiffs sued for an injunction claiming defendants' rental activity violated the restrictive covenant that limited the lots to be used “exclusively for residential purposes” and stated “no commercial enterprise shall be constructed or permitted on any of said property.” *Id.* at 1020. The Oregon Supreme Court concluded that defendants' rental of the property was permissible, because that use was not “plainly within the provisions of the covenant,” and held in favor of the owners of the vacation property. *Id.* at 1023.

Similar to the decisions cited here, Plaintiffs in the case at bar have either rented their condominium units on a short-term basis or, as new Plaintiffs wish to do, have thus far been

prohibited from undertaking such rentals. Similar to *DeVaney* and *Slaby*, some of the Plaintiffs have marketed and advertised units online on vacation rental websites and/or applications as being available for short-term rentals. The renters' use of the units (sleeping, eating, bathing, etc.) are indisputably activities associated with residential use, and thus Plaintiffs' short-term rentals are not and cannot be automatically transformed into business activities simply because Plaintiffs advertise and market their units online and receive income from the short-term rentals. Similarly, as in *Mullin*, the requirement of a business license does not automatically transfer the short-term rentals at issue here into a business activity.

Therefore, this Court finds the Owners' short-term rental of their units is a "residential use" and not in violation of the Master Deed. Even if the residential use and business activities restrictions in the Master Deed could be open to more than one interpretation, courts in South Carolina have traditionally favored free use of property when a restrictive covenant is ambiguous. *See Hardy*, 369 S.C. 160, 631 S.E.2d 539.³

For these reasons as well as the others that follow, it is appropriate for the Court to grant Plaintiffs' motion for summary judgment and deny Defendant's motion for summary judgment.

E. The South Carolina Nonprofit Corporation Act does not support the moratorium.

The South Carolina legislature greatly broadened the powers of nonprofit corporations with the enactment of the South Carolina Nonprofit Corporation Act in 1994. For example, the scope of those powers includes the power "to do all things necessary or convenient, not inconsistent with the law, to further the activities and affairs of the corporation." *See* S.C. Code Ann. § 33-31-302 (18). However, the Official Comment to Section 33-31-302 states "a distinction should be drawn between the power of the corporation to do all things necessary or convenient to carry out its

³ This court has previously ruled on this issue in favor of the Owner's right to rent their unit where the restrictions did not specifically forbid the owner from doing so in *McCown v. Romain Retreat H/O Assoc.*, 2015-CP-10-03387.

activities and the question of whether corporate acts are reasonable or otherwise prohibited.” *See* S.C. Code Ann. § 33-31-302 (Official Comment). The Official Comment continues, “The fact that a nonprofit corporation has the power to operate a business does not mean that the corporation is acting properly in running the business.” *See Id.*

The purpose of Section 33-31-302 is to provide a broad grant of powers while setting forth a nonexhaustive list of specific powers—in light of history, it was feared that a court might improperly conclude that a corporation lacked some power because it was not specifically set forth in the Model Act. *See Id.* Additionally, the Nonprofit Corporation Act requires the corporations to adopt bylaws and provides that the bylaws “may contain any provision for regulating and managing the affairs of the corporation that is not inconsistent with the law or the articles of incorporation.” *See* S.C. Code Ann. § 33-31-206.

Defendant asserts a defense to Plaintiffs’ claims under the Nonprofit Corporation Act. The Act was created in order to ensure that a corporation’s powers were not limited by what was included in the Model Act. It was not created in order to generate an exception to the general rule that a corporation’s powers come from the applicable law, its charter, its bylaws, and other governing documents. Further, Defendant has failed to demonstrate how the moratorium imposed was “necessary or convenient” to further the “activities or affairs of the corporation.” The Master Deed asserts at Article III, Section 3 that Mariner’s Cay was “organized for the purpose of carrying out the powers, duties, and obligations of the Council and Co-Owners as defined in the Act.” Defendant has asserted that the moratorium was in response to the negative effects of short-term rentals to vacationers. Even assuming that allegation is true, imposing the moratorium, without a vote of the Unit owners, was a violation of the Master Deed, as it is not necessary nor convenient to further the activities of Mariner’s Cay. Thus, Defendant’s impermissible action in creating and

enforcing the moratorium is not protected by the Nonprofit Corporation Act because Defendant has failed to show how the moratorium was necessary to the Association. More importantly, the moratorium was enacted in breach of the Master Deed.

For these reasons as well as the others that follow, it is appropriate for the court to grant Plaintiffs' motion for summary judgment and deny Defendant's motion for summary judgment.

F. The business judgment rule does not support, validate or authorize the moratorium.

In South Carolina, courts apply the business judgment rule to protect corporate directors. *Fisher v. Shipyard Vill. Council of Co-Owners, Inc.*, 415 S.C. 256, 270, 781 S.E.2d 903, 910 (2016). "Under the business judgment rule, a court will not review the business judgment of a corporate governing board when it acts within its authority and it acts without corrupt motives and in good faith." *Kuznik v. Bees Ferry Assocs.*, 342 S.C. 579, 599, 538 S.E.2d 15, 25 (Ct.App.2000) (quoting *Dockside Ass'n v. Detyens*, 291 S.C. 214, 217, 352 S.E.2d 714, 716 (Ct.App.1987)). The business judgment rule applies to disputes between directors of a homeowner's association and aggrieved homeowners, and the court of appeals stated "the conduct of directors should be judged by the business judgment rule and absent a showing of bad faith, dishonesty, or incompetence, the judgment of directors will not be set aside by judicial action. *Goddard v. Fairways Dev. Gen. P'ship*, 310 S.C. 408, 414, 426 S.E.2d 828, 832 (Ct.App.1993) (citing 4 S.C. Juris. *Condominiums* § 42 (1991)).

Per the rules of contract construction, the court looks to the language of the contract to determine what powers the Board has, and does not have. *Bauman v. Long Cove Club Owners Ass'n*, 380 S.C. 131, 137-38, 668 S.E.2d 420, 424 (2008). The business judgment rule protects a corporation's exercise of its best judgment when deciding between viable options in a given

business-related situation. The business judgment rule is not a cloak that protects a corporation from a violation of its own Bylaws. *Fisher*, 415 S.C. at 270, 781 S.E.2d at 911.

Here, the Board violated the Master Deed by imposing the moratorium on short term rentals, and accordingly, it is not protected by the business judgment rule. Explicitly, the governing documents grant the Board power over the common areas, including the right to “establishment and amendment from time to time of reasonable regulations governing the use of the Common Area and Facilities and the Limited Common Area and Facilities.” See Master Deed Article III, Section 3. However, nowhere in the governing documents is the Board granted power to limit an Owner’s use and leasing of his or her unit. In fact, the Master Deed explicitly grants an Owner a fee simple interest in his or her unit, and further provides that the unit may be “conveyed, transferred, [and] *leased*[.]” (Emphasis added.) Master Deed, Article III, Section 2. By placing a restriction on the units, on its own accord and without amending the governing documents (as it initially acknowledged it was required to do), the Board has directly breached the Master Deed. Accordingly, the business judgment rule cannot and does not validate or authorize the moratorium. Rather, the Board is bound to follow the covenants included in the Master Deed as construed by the laws of contract. See *Seabrook Island Property Owners Ass’n v. Pelzer*, 292 S.C. 343 (1987).

For these reasons as well as the others that follow, it is appropriate for the Court to grant Plaintiffs’ motion for summary judgment and deny Defendant’s motion for summary judgment.

G. Defendant has failed to support its affirmative defenses.

1. Defendant’s 12(b)(6) defense is without merit.

Defendant pled a failure to state facts sufficient to constitute a cause of action as a defense to the Complaint under Rule 12(b)(6), SCRCP. Defendant has not supported its defense under Rule 12(b)(6). Further, dismissal under Rule 12 is not appropriate.

“In considering a motion to dismiss pursuant to Rule 12(b)(6), SCRCP, the [] court must base its ruling solely upon the allegations set forth in the face of the complaint.” *Charleston County Sch. Dist. V. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011) (citing *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 66-67, 651 S.E.2d 305, 307 (2007)). “[P]leadings in a case should be construed liberally and the Court must presume all well-pled facts to be true so that substantial justice is done between the parties.” *Charleston County Sch. Dist. v. Harrell*, 393 S.C. 552, 557, 713 S.E.2d 604, 607 (2011) (citing *Overcash v. S.C. Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005)) (citing *Stroud v. Riddle*, 260 S.C. 99, 102, 194 S.E.2d 235, 237 (1973)). The Complaint pleads a cause of action for Breach of Contract by Defendant. Plaintiff alleged the existence and enforceability of a recorded Master Deed and By-laws encumbering properties in the Association, which the Board is obligated to follow. The action of the Board in imposing a moratorium is in breach of the Master Deed, and consequently impaired Plaintiffs’ right to free alienability of their units. Taken as true, the allegations form a sufficient basis for a breach of contract action and so dismissal under Rule 12(b)6, SCRCP is not appropriate.

For these reasons as well as the others that follow, it is appropriate for the Court to grant Plaintiffs’ motion for summary judgment and deny Defendant’s motion for summary judgment.

2. The equitable defenses of Waiver, Estoppel, Unclean Hands, and Laches are similarly without merit.

a. Waiver and Estoppel

Waiver and equitable estoppel are similar and often used interchangeably. *Potesta v. U.S. Fidelity & Guar. Co.*, 202 W. Va. 308, 504 S.E.2d 135 (1998). Nonetheless they are separate doctrines. A waiver is a voluntary and intentional abandonment or relinquishment of a known right. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). Generally, the party claiming waiver must show that the party against whom

waiver is asserted possessed, at the time, actual or constructive knowledge of his rights or of all the material facts upon which they depended. *Id.* Equitable estoppel arises when a party, relying upon what another has said or done, changes his position to his detriment. *Gibbs v. Kimbrell*, 311 S.C. 261, 268, 428 S.E.2d 725, 729 (Ct. App. 1993). A claim of estoppel includes elements for the party asserting estoppel and the party estopped. *E.g., Provident Life and Accident Ins. Co. v. Driver*, 317 S.C. 471, 477, 451 S.E.2d 924, 928 (Ct. App. 1994) (listing the elements of equitable estoppel: as to the estopped party, a misrepresentation, intent to induce the other party to act, an actual or constructive knowledge of the true facts; and as to the party claiming estoppel, lack of knowledge, or means of acquiring knowledge of the true facts, reasonable reliance, and prejudicial change of position). Estoppel cannot exist if the knowledge of both parties is equal and nothing is done by one to mislead the other. *Helsel v. City of North Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (1992).

Plaintiffs' right to use their units for short term rentals are not barred by waiver or equitable estoppel. The mere fact that Plaintiffs are using their condominiums for short-term rentals demonstrates that they did not waive the right to such use. Furthermore, each of the elements concerning equitable estoppel cannot be proven here. Plaintiffs' short-term rentals of their units is not a misrepresentation, as they have been forthcoming about their rentals. Similarly, Defendant cannot prove a lack of knowledge, reasonable reliance or prejudicial change of position. The doctrines of waiver and equitable estoppel are not applicable here and do not bar Plaintiffs' breach of contract action.

b. Unclean Hands

The doctrine of unclean hands precludes a plaintiff from recovering in equity if he acted unfairly in a matter that is the subject of the litigation to the prejudice of the defendant. *Arnold v.*

City of Spartanburg, 201 S.C. 524, 23 S.E.2d 735 (1943). The expression “clean hands” means a clean record with respect to the transaction itself. *Id* at 738. The rule must be understood to refer to some misconduct in regard to the matter in litigation of which the opposite party can, in good conscience, complain in a court of equity. *Am. Ass’n v. Innis*, 60 S.W. 388 (Ky. 1901).

There exists no bad faith on the part of Plaintiffs in this action. Likewise, Defendant has not been prejudiced. Defendant asserted problems related to short term rentals such as parking issues, cleanliness issues in common areas, and vandalism but that has nothing to do with Plaintiffs’ right to use their own units for short-term rental purposes. *See* Ex. B to Complaint. Moreover, under the Master Deed, in order to resolve some of the issues outlined, Defendant has full authority to make changes to rules regarding use and access to the common areas. *See* Ex. A to Complaint, Article III, Section 3. The incidental issues that are supposedly related are not a product of bad faith or unclean hands nor any violation of the Master Deed. As outlined above in this memorandum, Plaintiffs’ rentals of their units do not violate the Master Deed or Bylaws. Therefore, Defendant’s claim that Plaintiffs have unclean hands must necessarily fail and does not bar Plaintiffs’ claims.

c. Laches

Laches arises upon the failure to assert a known right under circumstances indicating that the lached party has abandoned or surrendered the right. *Brown v. Butler*, 347 S.C. 259, 554 S.E.2d 431, 434 (2001). Laches is defined as “neglect for an unreasonable and unexplained length of time, under circumstances affording opportunity for diligence, to do what in law should have been done.” *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 296, 519 S.E.2d 583, 598 (Ct.App.1999). Delay alone is not enough to constitute laches; it must be unreasonable, and the party asserting laches must show prejudice. *Id*. If a claim is filed within the applicable limitations period, laches cannot

be found unless a heightened burden is satisfied. *PCS Nitrogen, Inc. v. Ross Dev. Corp.*, 127 F. Supp. 3d 568 (D.S.C. 2015), *dismissed sub nom. PCS Nitrogen Inc. v. Ross Dev. Corp. and Rivers*, No. 16-1540 (L), 2018 WL 2111081 (4th Cir. Mar. 19, 2018).

Plaintiffs' claims are not barred by the doctrine of laches. The Board began discussing options in regard to short term rentals in October of 2018. *See* Ex. B to Complaint. On May 28, 2019, the Board announced the short-term rental moratorium. *See* Ex. E to Complaint. The Summons and Complaint were filed June 25, 2019, less than a month after the moratorium announcement and five months before the moratorium was filed of record (See footnote #2). Plaintiffs clearly did not delay, no prejudice has been shown on the part of Defendant and, therefore, Defendant's claim of laches fails.

d. Failure to Exhaust Administrative Remedies

A party is not required to exhaust administrative remedies if the issue is one that cannot be ruled upon by an administrative body. *Charleston Trident Home Builders, Inc. v. Town Council of Town of Summerville*, 369 S.C. 498, 502, 632 S.E.2d 864, 867 (2006) (citing *Ward*, 343 S.C. 14, 538 S.E.2d 245). "The doctrine of exhaustion of administrative remedies only comes into play when a litigant attempts to invoke the original jurisdiction of a circuit court to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." *Thomas Sand Co. v. Colonial Pipeline Co.*, 349 S.C. 402, 413, 563 S.E.2d 109, 115 (Ct.App.2002). A litigant need not exhaust administrative remedies where "there are no administrative remedies for the wrongs it assertedly suffered." *Id.* "Whether administrative remedies must be exhausted is a matter within the trial judge's sound discretion and his decision will not be disturbed on appeal absent an abuse thereof." *Hyde v. S.C. Dep't of Mental Health*, 314 S.C. 207, 208, 442 S.E.2d 582, 582-83 (1994).

Failure to exhaust administrative remedies has no role here. Plaintiffs were not required to bring their claims before an administrative body prior to filing the instant lawsuit. There are no administrative or statutory schemes available to Plaintiffs in this situation which would afford or require an administrative remedy. Defendant's assertion that failure to exhaust administrative remedies bars Plaintiffs' claims is without merit.

e. Statute of Frauds

Any contract for an interest in land or any agreement that is not to be performed within one year must be in writing and signed by the party against whom it is seeking to be enforced. S.C. Code Ann. § 32-3-10(4). Failure to put such a contract in writing renders it void. S.C. Code Ann. § 27-35-20 (1976). Moreover, a contract required to be in writing by the South Carolina Statute of Frauds cannot be orally modified. *Windham v. Honeycutt*, 279 S.C. 109, 302 S.E.2d 856 (1983).

The Statute of Frauds does not bar Plaintiffs' claims. Plaintiffs brought an action based on breach of the Master Deed which are in writing and have been signed and recorded in the public record. The Statute of Frauds does not apply here.

f. The Parole Evidence Rule

"The parole evidence rule prevents the introduction of extrinsic evidence of agreements or understandings contemporaneous with or prior to execution of a written instrument when the extrinsic evidence is to be used to contradict, vary or explain the written instrument." *Gilliland v. Elmwood Properties*, 301 S.C. 295, 302, 391 S.E.2d 577, 581 (1990). Where a written instrument is unambiguous, parole evidence is inadmissible to ascertain the true intent and meaning of the parties. *Penton v. J.F. Cleckley & Co.*, 326 S.C. 275, 486 S.E.2d 742 (1997). Where a contract is silent as to a particular matter and because of the nature and character of the transaction an ambiguity arises, parole evidence may be admitted in order to supply a deficiency in the language

of the contract and to establish the true intent and meaning of the parties. *Soulios v. Mills Novelty Co.*, 198 S.C. 355, 17 S.E.2d 869 (1941); 32A C.J.S. *Evidence* § 1008 at 592 (1964).

Defendant asserts that the parole evidence rule bars Plaintiffs' claims. There is nothing in the Master Deed or Bylaws preventing Plaintiffs from renting their units on a short-term basis; in fact, the language of the Master Deed explicitly allows the leasing of units, and states nothing about a minimum duration of lease. However, Defendant asserts the residential and business portions of the deed preclude short term rentals. Plaintiffs dispute that the Master Deed is ambiguous as to the issue before the Court, but to the extent there is any ambiguity, where ambiguity exists or a contract is silent on a certain matter, parole evidence may be allowed. Thus, Defendant's assertion that parole evidence bars Plaintiffs' claims is without merit.

For these reasons as well as the others that follow, it is appropriate for the Court to grant Plaintiffs' motion for summary judgment and deny Defendant's motion for summary judgment.

III. By breaching the Master Deed, the Board has placed a restriction on Plaintiffs' alienation of their units; therefore it is appropriate for the Court to grant Plaintiffs a restraining order and an injunction against the moratorium, and the Court hereby grants said injunctive relief.

"Restrictive covenants are contractual in nature, and thus the language used in the restrictive covenant is to be construed according to its plain and ordinary meaning." *Penny Creek Assocs., LLC v. Fenwick Tarragon Apartments, LLC*, 375 S.C. 267, 271, 651 S.E.2d 617, 620 (Ct. App. 2007). The nature of the relationship between homeowner's associations and their members is contractual. See *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) (holding real covenants are "agreements... to do, or refrain from doing certain things with respect to real property") (ellipsis in original) (quoting 20 Am. Jur. 2d *Covenants, Conditions, and Restrictions* §1 (2005)); *id.* ("Covenants, in

a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract.”) Further, “[A] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto. A homeowner’s association is bound to follow its covenants and bylaws and cannot defend something that violates those documents on the basis it is a reasonable alternative.” *Fisher v Shipyard Vill. Council of Co-Owners, Inc.*, 409 S.C. 164, 180-81; 760 S.E.2d 121, 129-30 (2014).

Although a court shall not automatically issue a mandatory injunction once it finds a restrictive covenant has been violated, a court must balance the equities between the parties. *Sea Pines Plantation Co. v. Wells*, 294 S.C. 266, 274, 363 S.E.2d 891, 896 (1987). It is within the court’s discretion to determine the weight of injury to the Defendant, and compare that to Plaintiff’s benefit if the restriction were to stand. *Hunnicut v. Rickenbacker*, 268 S.C. 511, 515-16, 234 S.E.2d 887, 889 (1977) (quoting 29 Am. Jur.2d *Covenants*, etc., § 328). “Courts tend to strictly interpret restrictive covenants and resolve any doubt or ambiguities in a covenant on the presumption of free and unrestricted land use. *Cedar Cove Homeowners Ass’n, Inc. v. DiPietro*, 368 S.C. 254, 270, 628 S.E.2d 284, 292 (Ct. App. 2006) (Anderson, J. dissenting). “Covenants that restrict the free use of property must be strictly construed against limitations upon the property’s free use.” *Id.* 368 S.C. at 271, 628 S.E.2d at 292 (citing *Hyer v. McRee*, 306 S.C. 210, 212, 410 S.E.2d 604, 605 (Ct. App. 1991). “Restrictive covenants are to be construed most strictly against the grantor and persons seeking [to] enforce them, and liberally in favor of the grantee, all doubts being resolved in favor of a free use of property and against restrictions.” 26 C.J.S., *Deeds*, § 163; see also *Sprouse v. Winston*, 212 S.C. 176, 185, 46 S.E.2d 874, 878 (1948).

Due to the moratorium, at least one Plaintiff has faced financial hardship in attempting to sell a unit in Defendant’s HOA regime. Plaintiff Leo Cornejo sold one of his units subsequent to

the purported moratorium and was forced to reduce the price after the prospective purchasers became aware they would not be able to rent the unit short-term. (See Aff. of Leo Cornejo).

Despite Defendant's assertions that Plaintiffs are not affected by the moratorium because their right to continue to rent their units on a short-term basis was "grandfathered," the value and marketability of Plaintiffs' units has been negatively affected, as Defendant has publicly taken the position that the moratorium would apply to any owner who purchased a unit after it was imposed. In the absence of the moratorium, the Board's powers will not be impaired. As provided in the Master Deed, the Board will still have the ability to regulate use of the common areas, and could still present for a vote by the members a proposed amendment to the Master Deed restricting or prohibiting short-term rentals.

Enjoining the moratorium will limit the Board's authority to regulate the members' use of their units, but that limitation is already contained within the Master Deed. The Court is not taking away any powers granted to the Board; instead the Court is simply enforcing rights granted to the Owners and the Board in the Master Deed. It is not the Court's place to rewrite the Master Deed, but the Court can and should enforce the Master Deed according to its plain and obvious meaning in allowing Plaintiffs and all other members of the Association to lease their units with no minimum lease duration.

For all these reasons, the Court hereby grants the following injunctive relief:

Pursuant to Rule 65(b), SCRCP, the Court grants Plaintiffs a Temporary Restraining Order compelling and requiring Defendant, under penalty of contempt, to immediately cease and desist in regard to any attempt to impose a purported "moratorium" on short-term rentals, including by future owners, and to refrain from any effort to prohibit, restrict or limit short-term rentals until

and unless such a provision is duly enacted as an amendment to the Master Deed in accordance with the procedures set forth in Article XI, Section 1(b) of said Master Deed.

Pursuant to Rule 65(a), SCRCPP, the Court grants Plaintiffs a Temporary Injunction compelling and requiring Defendant, under penalty of contempt, to immediately cease and desist in regard to any attempt to impose or enforce a purported “moratorium” on short-term rentals and to refrain from any effort to prohibit, restrict or limit short-term rentals until and unless such a provision is duly enacted as an amendment to the Master Deed in accordance with the procedures set forth in Article XI, Section 1 (b) of said Master Deed.

Defendant may continue to enforce existing covenants in the Master Deed applicable to all rentals, including the provision in Article IX, Section 7 that states “Units may be rented provided the occupancy is only by the lessee and his immediate family.”

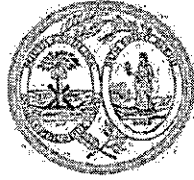
Further, within 30 days of the filing of this Order, Defendant shall cause to be recorded in the Charleston County Register of Deeds office an instrument which shall cite the four versions of the moratorium, including their dates of recording with book and page references (See footnote 1), and which shall state that all four versions of the moratorium have been cancelled of record by this Court’s Order and are no longer in effect. Within 15 days of recording the cancellation instrument, Defendant shall ensure that a filed copy is distributed, along with this Order, to all Owners in Mariner’s Cay, in the same manner in which notices for the annual meetings are distributed.

Nothing in this Order forbids the Defendant from pursuing its original intent to hold a vote on whether or not an Amendment to the Master Deed to forbid short term rentals at Mariner’s Cay can be held. Likewise, in conformity with the terms of Article III, Section 3 (e) the Master Deed, the Defendant is within its authority to state and enforce the rules which apply to the use and access of the HOA’s common elements by Unit Owners and their guests.

IV. Declaratory Judgment

Pursuant to S.C. Code Ann. §§ 15-53-20, 15-53-30, and 15-53-40, the Court hereby declares that Defendant's unilateral actions in creating and enforcing the moratorium were in violation of the aforementioned Master Deed and the common law of contract in South Carolina jurisprudence, and that the moratorium on short-term rentals at Mariner's Cay, including all versions enacted, is invalid, impermissible, and unenforceable.

[SIGNATURE PAGE FOLLOWS]



Charleston Common Pleas

Case Caption: Dustin Grotzke , plaintiff, et al VS Mariners Cay Racquet & Yacht Club Homeowners Association Inc , defendant, et al
Case Number: 2019CP1003390
Type: Master/Order/Other

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2023-03-29 10:33:51 page 31 of 31

ELECTRONICALLY FILED - 2023 Mar 29 10:47 AM - CHARLESTON - COMMON PLEAS - CASE#2019CP1003390

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2019CP1003390

Dustin Grotzke et al
PLAINTIFF(S)

Mariners Cay Racquet & Yacht Club Homeowners Association Inc et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (*CHECK REASON*):** ☐ Rule 12(b), SCRCPP; ☐ Rule 41(a), SCRCPP (Vol. Nonsuit); ☐ Rule 43(k), SCRCPP (Settled);
☐ Other
- ☐ **ACTION STRICKEN (*CHECK REASON*):** ☐ Rule 40(j), SCRCPP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

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

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Upon careful consideration of the Defendant's Motion to Alter or Amend, filed April 10, 2023, this Court respectfully DENIES the Motion.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 04/17/2023 .

Ed Thaler
Mary Thaler
Kelly Hill
Doe, Jane
Jane Doe
John Doe
Doe, John
Leslie Kelly
Brianna Stello
Jenn Odom
Lisa Essig

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Charleston Common Pleas

Case Caption: Dustin Grotzke , plaintiff, et al VS Mariners Cay Racquet & Yacht
Club Homeowners Association Inc , defendant, et al
Case Number: 2019CP1003390
Type: Order/Electronic Form 4

So Ordered

s/Mikell R. Scarborough 3062

Electronically signed on 2023-04-17 14:46:20 page 3 of 3

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Dustin Grotzke, Christine Grotzke,
Leo Comejo, Steve Falciani, Nancy Falciani,
Robert St. Louis, Lindsay Layton, George Lauderback,
Beth Lauderback, Jan Prentice, Julie Haynie,
Lynn Alexander, Lisa Scott, Ron Woolf,
Rabeca Woolf, Nancy Zai, Meg White, Ginger Adler,
Gerry Murphy, Sam Ogden, Joey Winchester,
Frank Duffy, Betty Duffy, Lois Stefan, Kelly Hill,
Mary Thaler, Ed Thaler, Lisa Essig, Jenna Odom,
Brianna Stello, and Leslie Kelly,

Plaintiff(s)

vs.

Mariner's Cay Racquet & Yacht Club
Homeowners' Association, Inc.

Defendant(s)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

2019-CP-10-3390

CIVIL ACTION COVERSHEET

FILED
JUN 24 PM 3:59
CLERK OF COURT

Submitted By: Sean A. O'Connor/Finkel Law Firm, LLC
Address: 4000 Faber Place, Suite 450
North Charleston, South Carolina 29405

SC Bar #: 68382
Telephone #: 843-577-5460
Fax #: 800-866-7954
Other:
E-mail: soconnor@finkellaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing cases that are NOT E-Filed. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint. This form is NOT required to be filed in E-Filed Cases.

DOCKETING INFORMATION (Check all that apply)

*If Action Is Judgment/Settlement do not complete

- ☐ JURY TRIAL demanded in complaint. ☒ NON-JURY TRIAL demanded in complaint.
☐ This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☒ This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
☐ This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

Contracts ☐ Construction (100) ☐ Debt Collection (110) ☐ General (130) ☒ Breach of Contract (140) ☐ Fraud/Bad Faith (150) ☐ Failure to Deliver/ Warranty (160) ☐ Employment Discrim (170) ☐ Employment (180) ☐ Other (199)	Torts - Professional Malpractice ☐ Dental Malpractice (200) ☐ Legal Malpractice (210) ☐ Medical Malpractice (220) Previous Notice of Intent Case # 20: <u>NI</u> ☐ Notice/ File Med Mal (230) ☐ Other (299)	Torts - Personal Injury ☐ Conversion (310) ☐ Motor Vehicle Accident (320) ☐ Premises Liability (330) ☐ Products Liability (340) ☐ Personal Injury (350) ☐ Wrongful Death (360) ☐ Assault/Battery (370) ☐ Slander/Libel (380) ☐ Other (399)	Real Property ☐ Claim & Delivery (400) ☐ Condemnation (410) ☐ Foreclosure (420) ☐ Mechanic's Lien (430) ☐ Partition (440) ☐ Possession (450) ☐ Building Code Violation (460) ☐ Other (499)
Inmate Petitions ☐ PCR (500) ☐ Mandamus (520) ☐ Habeas Corpus (530) ☐ Other (599)	Administrative Law/Relief ☐ Reinstatement License (800) ☐ Judicial Review (810) ☐ Relief (820) ☐ Permanent Injunction (830) ☐ Forfeiture Petition (840) ☐ Forfeiture - Consent Order (850) ☐ Other (899)	Judgments/Settlements ☐ Death Settlement (700) ☐ Foreign Judgment (710) ☐ Magistrate's Judgment (720) ☐ Minor Settlement (730) ☐ Transcript Judgment (740) ☐ Lis Pendens (750) ☐ Transfer of Structured Settlement Payment Rights	Appeals ☐ Arbitration (900) ☐ Magistrate-Civil (910) ☐ Magistrate-Criminal (920) ☐ Municipal (930) ☐ Probate Court (940) ☐ SCDOT (950) ☐ Worker's Comp (960) ☐ Zoning Board (970)

Special/Complex/Other		☐ Application (760)	☐ Public Service Comm. (990)
☒ Environmental (600)	☐ Pharmaceuticals (630)	☐ Confession of Judgment (770)	☐ Employment Security Comm (991)
☐ Automobile Arb. (610)	☐ Unfair Trade Practices (640)	☐ Petition for Workers Compensation Settlement Approval (780)	☐ Other (999) _____
☐ Medical (620)	☐ Out-of-State Depositions (650)	☐ Incapacitated Adult Settlement (790)	
☐ Other (690) _____	☐ Motion to Quash Subpoena in an Out-of-County Action (660)	☐ Other (799) _____	
☐ Sexual Predator (610)	☐ Pre-Suit Discovery (670)		
☐ Permanent Restraining Order (680)			
☐ Interpleader (690)			

Submitting Party Signature: *Sam A. O'Connell*

Date: June 24, 2019

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCROP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

Effective January 1, 2016, Alternative Dispute Resolution (ADR) is mandatory in all counties, pursuant to Supreme Court Order dated November 12, 2015.

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

Pursuant to the ADR Rules, you are required to take the following action(s):

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210th day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs.
4. Cases are exempt from ADR only upon the following grounds:
 - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
 - b. Requests for temporary relief;
 - c. Appeals;
 - d. Post Conviction relief matters;
 - e. Contempt of Court proceedings;
 - f. Forfeiture proceedings brought by governmental entities;
 - g. Mortgage foreclosures; and
 - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

Please Note: You must comply with the Supreme Court Rules regarding ADR.
Failure to do so may affect your case or may result in sanctions.

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Dustin Grotzke, Christine Grotzke,
Leo Cornejo, Steve Falciani,
Nancy Falciani, Robert St. Louis,
Lindsay Layton, George Lauderback,
Beth Lauderback, Jan Prennee,
Julie Haynie, Lynn Alexander,
Lisa Scott, Ron Woolf, Rebecca Woolf,
Nancy Zai, Meg White, Ginger Adler,
Gerry Murphy, Sam Ogden,
Joey Winchester, Frank Duffy,
Betty Duffy, Lois Stefan, Kelly Hill,
Mary Thaler, Ed Thaler, Lisa Essig,
Jenn Odom, Brianna Stoffo, and
Leslie Kelly

Plaintiffs,

Mariner's Cay Racquet & Yacht Club
Homeowners' Association, Inc.

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

CASE NO. 2019-CP-10-3390

SUMMONS

2019 JUN 21 PM 3:59
CLERK OF COURT

YOU ARE HEREBY SUMMONED and required to answer the Complaint of Plaintiffs in this action, a copy of which is served herewith upon you, and to serve a copy of your Answer to said Complaint upon the subscriber at his office at 4000 Faber Place Drive, Suite 450, North Charleston, South Carolina 29405, within thirty (30) days after the service hereof upon you, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, Plaintiffs will apply to the Court for the relief demanded in the Complaint.

[SIGNATURE PAGE FOLLOWS]

*Dustin Grotzke et al. v. Mariner's Cay Racquet & Yacht Club
Homeowners' Association, Inc.*
SUMMONS

Respectfully submitted,

FINKEL LAW FIRM LLC



Sean A. O'Connor (S.C. Bar No. 68382)

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soconnor@finkellaw.com

Attorneys for Plaintiffs

June 24, 2019

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Dustin Grötzke, Christine Grötzke,
Leo Comejo, Steve Falciani,
Nancy Falciani, Robert St. Louis,
Lindsay Layton, George Lauderback,
Beth Lauderback, Jan Prentice,
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Gerry Murphy, Sam Ogden,
Joey Winchester, Frank Duffy,
Betty Duffy, Lois Stefan, Kelly Hill,
Mary Thaler, Ed Thaler, Lisa Essig,
Jenn Odom, Brianna Stello, and
Leslie Kelly,

Plaintiffs,

Mariner's Cay Racquet & Yacht Club
Homeowners' Association, Inc.

Defendant.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Civil Action No. 2019-CP-10-3390

COMPLAINT
(Non-jury)

2019 JUN 24 PM 3:53
CLERK OF COURT
JANET L. BROWN

Plaintiffs above named, by and through their undersigned counsel, complaining against Defendant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc. ("Defendant"), allege and state as follows:

PARTIES

1. Each Plaintiff is the owner of a condominium unit in Mariner's Cay Racquet & Yacht Club, located and situated in Charleston County, South Carolina.
2. Defendant is a South Carolina corporation, authorized to do business and doing business in South Carolina.

JURISDICTION AND VENUE

3. This Court has personal and subject matter jurisdiction over the parties and venue is proper in Charleston County under S.C. Code Ann. § 15-7-10(1).

FACTUAL BACKGROUND

4. Each Plaintiff owns a condominium unit in Mariner's Cay Racquet & Yacht Club, a condominium community located within the City of Folly Beach, South Carolina.

5. Each Plaintiff has in the past rented his or her condominium unit on a short term basis to vacationers, and to further that purpose has marketed and advertised his or her unit online on vacation rental websites and/or applications as being available for such short-term rentals.

6. The Master Deed for Mariner's Cay Racquet & Yacht Club ("Master Deed"), was recorded on May 12, 1982 at Book J128, Page 300 in the Charleston County Register of Deeds office. A copy is attached as Exhibit A.

7. The Master Deed does not prohibit or restrict short-term rentals of condominium units in any manner.

8. In fact, the Master Deed specifically and explicitly allows leasing of the units. Article III, titled "PROPERTY RIGHTS," Section 2, titled "Units," states in relevant part as follows:

Each Unit, together with its Percentage Interest in the General Common Area and Facilities and the Limited Common Area and Facilities, shall for all purposes constitute a separate parcel of real property which, subject to the provisions of this Master Deed, may be owned in fee simple and which may be conveyed, transferred, *leased* and encumbered in the same manner as any other real property. Each Owner, subject to the provisions of the Act and this Master Deed, shall be entitled to the exclusive ownership and possession of his Unit.

(Emphasis added.)

9. In Article III, Section 3, titled "Common Area and Facilities," subsection (e), the Board is provided the authority to promulgate rules and regulations. The Section states in relevant part:

The Board shall have the right to promulgate rules and regulations limiting the use of the General Common Area and Facilities to Unit Owners and their guests as well as to provide for the exclusive use of a part of the General Common Area and Facilities by a Unit owner and his guests for special occasions which exclusive use may be conditioned, among other things, upon the payment of a fee.

Notably, Article III, Section 3 explicitly states that such rules and regulations may limit "the use of the General Common Area and Facilities." It is therefore unmistakably clear that rules and regulations promulgated by the Board may not limit or restrict the owners' use of their units.

10. Article IX, titled "UNIT RESTRICTION," Section 7, "Leasing of Units," states as follows:

Units may be rented provided the occupancy is only by the lessee and his immediate family unless otherwise provided by the Association's Board of Directors. No less than all of a Unit may be rented. This Section 7 shall not apply, however, to any lease or leases which may be entered into by the Grantor.

11. The Board discretion provided in Article IX, Section 7 is unambiguously limited to only deciding whether unrelated persons, i.e., persons other than the lessee and his or her immediate family, may occupy a unit under a lease.

12. Article IX, Section 7 does not grant to the Board broad, unlimited or undefined authority to impose other restrictions on rentals, such as prohibiting or imposing limitations on short-term rentals. Such an interpretation would conflict with Article III, Section 3, which states

explicitly that the units may be leased, states no qualifications or limitations, and does not state "subject to the Board's right to restrict rentals in Section 7 of this Article."

13. Because Article IX, Section 7 specifically references only the Board's authority to decide whether units may be rented to persons other than the lessee and his immediate family, any purported broader interpretation that Article IX, Section 7 authorizes the Board to impose other unspecified restrictions on rentals, such as prohibiting or imposing limitations on short-term rentals, would directly conflict with the well-settled canon of contract construction which states that "where there are two clauses in any respect conflicting, that which is specially directed to a particular matter controls in respect thereto over one which is general in its terms." *Mutual Life Ins. Co. v. Hill*, 193 U.S. 551 (1904).

14. On October 5, 2018, the Board of Directors of Mariner's Cay Racquet & Yacht Club ("Board") sent an email to the unit owners. In the email the Board, without factual evidence and based on anecdotal accounts, complained about and criticized what it characterized as the negative effects of short-term rentals of units to vacationers. A copy is attached as Exhibit B.

15. The final paragraph of the Board's October 5, 2018 email to the unit owners stated:

After much discussion and debate and with the input of many of our residents, your Board of Directors has determined that *the best way to maintain the residential quality of Mariners Cay is to amend the Master Deed and to prohibit the Short Term Rental of units within our community. This is a very important step and would require a vote of 75% of the owners within Mariners Cay.* This is not a step that we take lightly. We have had our options reviewed by legal counsel and this appears to be the best step to maintain the character of Mariners Cay as we go forward. The Board asks that you consider this situation and respond with any and all input and concerns. Thank you for your consideration.

(Emphasis added.)

16. On October 18, 2018, the Board sent an email to the unit owners announcing a "Town Hall Meeting" to address the topic of short-term rentals. A copy is attached as Exhibit C. The October 18, 2018 email stated in part, "One of the suggested options available to the Mariners Cay community is to limit rentals to not less than 30 consecutive days. This is a common restriction among multi-family residences. *This would require a Vote to amend the Mariners Cay Master Deed.*" (Emphasis added.)

17. Despite the explicit acknowledgment by the Board in two separate emails to the owners in October 2018 that amending the Master Deed would be required in order to prohibit or restrict short-term rentals of units, no vote has been taken on any proposed amendment of the Master Deed aimed at prohibiting or restricting short-term rentals of units.

18. Plaintiffs are in possession of evidence that the Board was made aware that of the 135 units in Mariner's Cay Racquet & Yacht Club, approximately 42 units (some 31 percent) intended to vote against the proposed changes to the Master Deed. Thus the proposed amendment would have failed to achieve the required 75% approval. As a result the Board did not proceed with presenting the proposed amendment to the owners for a vote.

19. Unable to restrict short term rentals lawfully via an amendment to the Master Deed as required, the Board instead announced via an email to the owners on May 28, 2019 that a "moratorium" on short-term rentals would be imposed. A copy is attached as Exhibit D.

20. The Board's May 28, 2019 to the owners stated in part as follows:

Mariner's Cay Board of Directors Chooses a Direction

At the April Board meeting the Board voted on a recommendation from the Livability Committee to research the ability to place a rental Moratorium on future owners to allow sufficient time to work with the

homeowners to develop long-term solutions while preserving the character of Mariner's Cay.

Board of Directors Makes a Decision

At the May 23, 2019 Monthly Board Meeting, the Board voted 7 to 0 to approve a Rental Moratorium after careful consideration and an open discussion with the larger than normal attendance of homeowners at the Board Meeting.

TEMPORARY MORATORIUM REGARDING FUTURE RENTING WITHIN THE MARINER'S CAY COMMUNITY

WHEREAS a clear majority of the members of the Mariner's Cay Home Owners Association (HOA) have expressed an interest in limiting the number of Short Term Rental (STR) units available within Mariner's Cay, and in an effort to maintain the residential character of the community, the Board of Directors of the HOA has determined that a Moratorium shall be placed on all new owners who have entered into a verifiable offer to purchase Mariner's Cay units after July 1, 2019, whether through consummated sale or transfer of title, from entering into any rental agreement, license and/or from offering the temporary possession or occupancy of their respective Mariner's Cay unit for less than 30 consecutive days in exchange for monetary consideration. This provision excludes new owners who obtain title to a Mariner's Cay unit from a family member. This particular Moratorium shall remain in effect until April 30, 2020 or until such time as the Mariner's Cay HOA has addressed the issues associated with Short Term Rentals to the satisfaction of a majority of the home owners.

21. Without exception every mandate that the owners in Mariner's Cay are required to follow under the recorded governing documents must necessarily be either (1) a Covenant in the Master Deed, (2) a By-Law, or (3) a rule or regulation that the Board is authorized to promulgate under Article III, Section 3, subsection (e).

22. It is explicitly clear in Article III, Section 3, subsection (e) that the rules and regulations may only limit "the use of the General Common Area and Facilities." It is therefore likewise clear that rules and regulations may not limit or restrict the owners' use of their units.

Restrictions involving owners' use of their units must be enacted only via amendment of the Master Deed.

23. Since the purported moratorium on short-term rentals was indisputably not enacted via an amendment of the Master Deed or By-Laws, and since it was enacted by the Board without a vote by the owners, it can only be, and must necessarily be, an attempted rule or regulation under Article III, Section 3.

24. The moratorium is not a permissible rule or regulation, as it does not seek to only limit "the use of the General Common Area and Facilities"; instead it clearly and overtly seeks to limit or restrict the owners' use of their units.

25. As stated above in Paragraphs 10 – 13, Article IX, Section 7 does not grant the Board unlimited or undefined authority to impose other restrictions on rentals, such as prohibiting or imposing limitations on short-term rentals. Instead, the Board discretion provided in Article IX, Section 7 is unambiguously and narrowly limited to only deciding whether unrelated persons, i.e., persons other than the lessee and his immediate family, may occupy a unit under a lease.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

26. Plaintiffs fully reassert and reallege Paragraphs 1 through 25 above as though repeated here verbatim.

27. Master Deed Article XI, titled "GENERAL PROVISIONS," Section 6, titled "Enforcement," states in relevant part:

Each Owner shall comply strictly with the By-Laws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in this Master Deed or in

the deed to his Unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both maintainable by the Board of Directors on behalf of the Association or by an aggrieved Owner.

28. Thus Plaintiffs have standing to bring this action against Defendant to enforce the covenants, conditions and restrictions set forth in the Master Deed.

29. Although the purported moratorium as written attempts to apply not to current owners of units but only to future owners who have yet to acquire title, it nonetheless indisputably does affect, injure and damage current owners, including Plaintiffs, as it impairs and hinders current owners' ability to sell their units and diminishes the property value of the current owners' units.

30. Based on the recorded Master Deed, Plaintiffs have a vested legal right to lease their units, including on a short-term basis if desired. Plaintiffs also have the ability to convey that vested right to a purchaser, a right which has appreciable monetary value. By imposing the purported moratorium, Defendant seeks to deprive Plaintiffs of the ability to convey that valuable vested right.

31. By imposing a purported "moratorium" on short-term rentals of units without amending the Master Deed as would be required to impose any such restriction, the Association, acting through the Board, has violated and breached the Master Deed.

32. As direct result of Defendant's actions, Plaintiffs have sustained the following damages:

- a. Unreasonable interference with Plaintiffs' use and enjoyment of their property;

- b. Lost revenue from short-term rentals which are permissible and not in any way prohibited or restricted by the Master Deed;
- c. Diminution in the value of Plaintiffs' real property;
- d. Destruction of Plaintiffs' ability to convey to a purchaser the valuable vested legal right of leasing the units, including on a short-term basis if desired.

FOR A SECOND CAUSE OF ACTION
(Temporary Injunction / Temporary Restraining Order)

33. Plaintiffs fully reassert and reallege Paragraphs 1 through 32 above as though repeated herein verbatim.

34. Pursuant to Rule 65(a), SCRPC, Plaintiffs seek a Temporary Injunction compelling and requiring Defendant, under penalty of contempt, to immediately cease and desist in regard to any attempt to impose a purported "moratorium" on short-term rentals and to refrain from any effort to prohibit, restrict or limit short-term rentals until and unless such a provision is duly enacted as an amendment to the Master Deed in accordance with the procedures set forth in Article XI, Section 1 (b) of said Master Deed.

35. Pursuant to Rule 65(b), SCRPC, Plaintiffs seek a Temporary Restraining Order compelling and requiring Defendant, under penalty of contempt, to immediately cease and desist in regard to any attempt to impose a purported "moratorium" on short-term rentals, including by future owners, and to refrain from any effort to prohibit, restrict or limit short-term rentals until and unless such a provision is duly enacted as an amendment to the Master Deed in accordance with the procedures set forth in Article XI, Section 1(b) of said Master Deed.

36. Plaintiffs request an order from this court providing that Defendant shall be

specifically enjoined and barred from hindering or interfering in any manner with any short-term rentals of any units within Mariner's Cay Racquet & Yacht Club by any owner, present or future, including appurtenant or related activities such as advertising, marketing or promoting such units for short-term rentals, under penalty of contempt.

37. Defendant's actions described herein above have caused and are continuing to cause Plaintiffs immediate and irreparable injury, loss or damage.

38. Plaintiffs do not have any other adequate remedy at law.

39. Considering the balance of hardships between Plaintiffs and Defendant, the equitable remedy sought herein is warranted.

40. Public policy and the public interest would not be disserved and the weighing thereof supports the award of the injunctive relief sought herein, as Plaintiffs seek only to restrain Defendant from further injuring Plaintiffs irreparably.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

41. Plaintiffs fully reassert and reallege Paragraphs 1 through 40 above as though repeated herein verbatim.

42. In light of the herein described facts and circumstances, there exists an actual controversy between the parties involving their various rights, obligations and legal relations relative to the aforementioned Master Deed. As stated herein above, Plaintiffs explicitly have standing and the legal authority to enforce all of their rights under applicable law and under the Master Deed. Plaintiffs seek a judgment from this Court declaring the various rights, obligations and legal relations of the parties pursuant to S.C. Code Ann. §§ 15-53-20, 15-53-30, and 15-53-40; specifically, that Defendant's actions as described herein are and have been repugnant to and

in violation of the aforementioned Master Deed and the common law of contract in South Carolina jurisprudence.

WHEREFORE, Plaintiffs pray that this Honorable Court award to them the following relief and remedies:

- A. Such amount of actual damages as the court shall determine;
- B. An Order declaring the herein described actions of Defendant to be in breach of the terms of the Master Deed to which the Association and all owners are declared to be bound;

43. A Temporary Restraining Order and/or Temporary Injunction compelling and requiring Defendant, under penalty of contempt, to immediately vacate and cancel the purported moratorium, and to publish and distribute notification of same to the owners in the same manner in which the two October 2018 emails were distributed; and that Defendant cease and desist in regard to any further attempt to impose a purported "moratorium" on short-term rentals, by either present or future owners, and to refrain from any effort to prohibit, restrict or limit short-term rentals until and unless such a provision is duly enacted as an amendment to the Master Deed in accordance with the procedures set forth in Article XI, Section 1 (b) of said Master Deed;

44. An Order providing that Defendant, under penalty of contempt, shall be specifically enjoined and barred from hindering or interfering in any manner with any short-term rentals of any units within Mariner's Cay Racquet & Yacht Club by any owner, present or future, including appurtenant or related activities such as advertising, marketing or promoting such units for short-term rentals;

- C. Costs of this action;
- D. Plaintiffs' reasonable attorneys' fees; and

*Dustin Grotzka et al. v. Mariner's Cay Racquet & Yacht Club
Homeowners Association, Inc.*
COMPLAINT

E. Any and all such further relief as this Court may deem just, equitable and proper.

[SIGNATURE PAGE FOLLOWS]

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Dustin Grotzke et al. v. Mariner's Cay Racquet & Yacht Club
Homeowners' Association, Inc.
COMPLAINT

Respectfully submitted,

FINKEL LAW FIRM LLC



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Attorneys for Plaintiff

June 24, 2019

3K J 12875300

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)

MASTER DEED
FOR
MARINER'S CAY RACQUET AND YACHT CLUB
A SOUTH CAROLINA HORIZONTAL PROPERTY REGIME
(an expandable regime)

KNOW ALL MEN BY THESE PRESENTS, that this Master Deed is made on the date hereinafter set forth by Mariner's Cay Development Corp., hereinafter called "Grantor", a corporation organized and existing pursuant to the laws of the State of South Carolina;

W I T N E S S E T H:

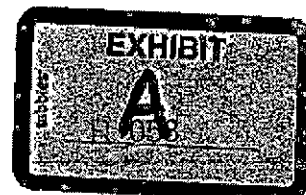
WHEREAS, Grantor is the owner in fee simple of real property and buildings and improvements thereon which property is located in Charleston County, South Carolina, which is more particularly described in EXHIBIT "A" attached hereto and incorporated herein by this reference (hereinafter referred to as the "property"); and

WHEREAS, Grantor desires to submit the property to the provisions of the Horizontal Property Act, 1976 South Carolina Code of Laws §27-31-10 et. seq., as amended (hereinafter sometimes referred to as the "Act") thereby creating an expandable Horizontal Property Regime known as Mariner's Cay Racquet and Yacht Club; and

WHEREAS, Grantor desires to publish a plan for the individual ownership of the several Apartment Units and the ownership of individual interests in that real property hereinafter defined as "Common Area and Facilities" and "Limited Common Area and Facilities"; and

WHEREAS, Grantor desires to convey the property pursuant and subject to certain protective covenants, conditions and restrictions, reservations, liens and charges hereinafter set forth;

NOW, THEREFORE, Grantor hereby submits the property to the provisions of the Horizontal Property Act, 1976 South Carolina Code of Laws §27-31-10 et. seq., as amended; and hereby publishes its plan as to the division of the property, the imposition of covenants, conditions, restrictions, reservations, liens and charges thereon and the individual ownership thereof. Grantor hereby specifies that this Master Deed shall constitute covenants, conditions and restrictions which shall run with the property and shall bind and inure to the benefit of Grantor, its successors and



assigns, and all subsequent owners of any interest in the property, their grantees, successors, heirs, executors, administrators, devisees or assigns.

ARTICLE I

DEFINITIONS

Section 1. Definitions. Unless defined herein or unless the context requires otherwise, the words defined in §27-31-10 of the Act, when used in this Master Deed or any amendment hereto shall have the meaning therein provided; the following words when used in this Master Deed or any amendment hereto, unless the context requires otherwise, shall have the following meanings:

(a) "Act" means the Horizontal Property Act, 1976 South Carolina Code of Laws §27-31-10 et. seq., as amended, and as may be further amended from time to time.

(b) "Apartment" means a part of the property intended for a type of independent use and is more particularly defined in Article III, Section 2.

(c) "Assessment" means an owner's share of the common expenses assessed against such owner and his Unit from time to time by the Association in the manner hereinafter provided.

(d) "Association" means Mariner's Cay Racquet and Yacht Club Homeowner's Association, Inc., an association of and limited to Owners of the Apartment Units located in Mariner's Cay Horizontal Property Regime in the form of a non-profit, non-stock membership corporation organized under the laws of the State of South Carolina.

(e) "Board of Directors" or "Board" means the Board of Directors of the Mariner's Cay Racquet and Yacht Club Homeowner's Association, Inc., and "director" or "directors" means a member or members of the Board.

(f) "Co-Owner" means a person, firm, corporation, partnership, association, trust or other legal entity, or any combination thereof, who owns an Apartment Unit or any interest therein within the building.

(g) "Common Area and Facilities" and "Common Elements" means and includes all of the Condominium Property after excluding the Apartment Units.

(h) "Common Expenses" means and includes (a) all expenses incident to the administration, maintenance, repair and replacement of the Common Area and Facilities and the Limited Common Area and Facilities, after excluding therefrom such expenses which are the responsibility of a Unit

Owner as set forth in Section 2 of Article VIII hereof; (b) expenses determined by the Association to be Common Expenses and which are lawfully assessed against Unit Owners, and (c) expenses declared to be Common Expenses by the Unit Ownership Act or the Condominium Documents.

(i) "Condominium Documents" means and includes the Master Deed for Mariner's Cay Racquet and Yacht Club Homeowner's Association, Inc. and the By-Laws of said Association, and all exhibits and attachments to the foregoing, all as amended from time to time.

(j) "Condominium Property" or "Property" means and includes all the property submitted to the Horizontal Property Act by this Master Deed.

(k) "Future Phases" shall mean and refer to the further future development of Mariner's Cay Racquet and Yacht Club. As presently contemplated the Grantor anticipates expanding the Horizontal Property Regime through merger. See Article IV, Section 8, Merger of Additional Phases.

(l) "General Common Elements" and "General Common Area and Facilities" shall mean and include generally all of the Horizontal Property Regime property after excluding the Apartment Units and the Limited Common Area and Facilities and more specifically:

- (1) the land on the buildings stand;
- (2) the Guardhouse, Clubhouse, tennis courts and swimming pool;
- (3) the foundations, main walls, load bearing walls, roofs, non-reserved parking areas, ~~said Associa~~
- (4) all interior roads and roadways, ~~the foregoing~~
- (5) all yards, open spaces and gardens;
- (6) the compartments or installations of central services such as power, light, gas, cold and hot water, sewerage, refrigeration, water tanks and pumps, and the like;
- (7) all devices or installations existing for common use; and
- (8) all other elements of the property rationally of common use or necessary to its existence, upkeep and safety, as well as all those common elements enumerated in Article III, Section 3 as Common Elements and not embraced within the definition of Limited Common Area and Facilities.

(m) "Grantor" shall mean and refer to Mariner's Cay Development Corp., a corporation organized and existing pursuant to the laws of the State of South Carolina, its successors and assigns.

(n) "Limited Common Elements" and "Limited Common Area and Facilities" means and includes those common elements which are reserved for the use of a certain number of Apartments to the exclusion of the other Apartments, such as special corridors, stairways, elevators, balconies, patios and sanitary services common to and appurtenant to the Apartments of a particular floor or building, and the like, and includes those areas so designated in EXHIBIT "B" attached hereto and incorporated herein by reference.

(o) "Mariner's Cay" shall mean and refer to that certain expandable Horizontal Property Regime known as Mariner's Cay Racquet and Yacht Club, which has been and is being developed on real property now owned by Grantor in Charleston County, South Carolina, together with such additions thereto as may from time to time be designated by Grantor.

(p) "Mortgage" shall include chattel mortgage, bill of sale to secure debt, deed to secure debt, deed of trust, security agreements and financing statements and any and all other similar instruments given to secure the payment of an indebtedness.

(q) "Owner" means the record owner, whether one or more persons, of fee simple title in and to any Apartment Unit excluding, however, those persons having such interest merely as security for the performance of an obligation.

(r) "Percentage Interest" means the percentage of undivided interest each Unit Owner owns as tenant in common in the Common Areas and Facilities.

(s) "Phase I" shall mean and refer to the 87 apartment units and related amenities, Common and Limited Area and Facilities to the constructed and located as more particularly shown in EXHIBIT "C".

(t) "Regime" shall mean and refer to Mariner's Cay Racquet and Yacht Club, a Horizontal Property Regime.

(u) "Survey Plat" or "Surveys" means and includes the survey of the Condominium Property, Units, and Limited Common Area and Facilities by Harold LeMond, Registered Land Surveyor, dated March 13, 1981, and entitled Survey Prepared for Mariner's Cay Development Corp., which will be filed for record in the Office of the Register of Mesne Conveyance for Charleston County, South Carolina, simultaneously with the filing for record of this Master Deed.

(v) "Trustee" means the financial institution, if any, selected by Grantor or the Association to hold certain funds of the Association.

(w) "Unit" shall mean and be synonymous with Apartment.

(x) "Unit Owner" shall mean and be synonymous with "Owner" as hereinabove defined.

(y) "Unit Plans" means and includes the architectural plans of the Units erected or to be erected on the Condominium Property which plans were prepared by Reg Narmour, The Architectural Group, entitled Mariner's Cay Racquet and Yacht Club, Phase I, Units 1-87, which will be filed for record in the Office of the Register of Mesne Conveyance for Charleston County, South Carolina, simultaneously with the filing for record of this Master Deed and which Unit Plans are more particularly detailed in EXHIBIT "C", attached hereto and made a part hereof.

(z) The use of the masculine pronoun shall include the neuter and feminine, and the use of the singular shall include the plural where the context so requires.

ARTICLE II

MARINER'S CAY RACQUET AND YACHT CLUB HOMEOWNER'S ASSOCIATION

Section 1. Responsibility for Administration. The administration of the Mariner's Cay Horizontal Property Regime, the maintenance, repair, replacement and operation of the General Common Area and Facilities and Limited Common Area and Facilities as herein provided, and those acts required of the Association by the Condominium Documents shall be the responsibility of the Association. Such administration shall be in strict accordance with the provisions of the Act, this Master Deed, and the By-Laws of the Association.

Section 2. Agreements. The Association shall be and hereby is authorized to enter into such agreements, including without limitation, management contracts, as it may deem necessary or desirable for the administration and operation of the development. Each Owner by acquiring or holding an interest in any Apartment Unit thereby agrees to be bound by the terms and conditions of all such agreements entered into by the Board of Directors on behalf of the Association. A copy of all such agreements shall be made available at the office of the Association for review by each Owner.

1. HOMEOWNER'S ASSOCIATION

Mariner's Cay Horizontal Property Regime, the maintenance, repair, replacement and operation

ARTICLE III

PROPERTY RIGHTS

Section 1. Development Plan. Grantor shall construct or cause to be constructed on the property during Phase I, residential buildings containing a total of eighty-seven (87) Apartment Units. Each of the buildings shall be constructed substantially in accordance with the Unit Plans, Master Plan, and Surveys all of which are contained in EXHIBIT "C" attached hereto and incorporated herein by this reference, and show the buildings, number and identity of Units and the materials of which the Units are to be constructed. The Grantor expressly reserves the right, during the course of construction, to revise, modify or change in whole or in part any of such Apartment Units; provided, however, (i) Grantor shall adhere to the general scheme of development as set forth in EXHIBIT "C" attached hereto and made a part hereof and (ii) Grantor shall not make any such alterations to any Apartment Unit sold or under a valid sales contract without having first obtained the express written consent of the Owner thereof. Any such change or modification shall not alter the Percentage Interest set forth in EXHIBIT "C" without the unanimous consent (100%) of the Unit Owners expressed in an amendment hereto duly recorded. Some Units may be conveyed and occupied prior to the completion of other Units; provided, however, that prior to the conveyance of each Unit, Grantor shall provide each Purchaser with an attached verified statement of a registered architect or licensed professional engineer certifying that the Unit Plans and Surveys theretofore filed, or supplemental Unit Plans and/or Surveys being filed simultaneously therewith together with such plans and surveys as may have been filed prior thereto, fully depict the layout, location, identification, dimensions, and materials used in the construction of such Unit as built.

In further accordance with the applicable provisions of the Act, Grantor hereby indicates an intent to expand this Regime by annexing thereto that property shown and designated as Phases II through VI in EXHIBIT "D" in accordance with the options set forth hereinbelow.

1. The property subjected to this Master Deed is more particularly shown and delineated on the land survey and plot plan entitled Phase I in EXHIBIT "A" and the building plans attached hereto as EXHIBIT "C", said Exhibits being incorporated herein by reference. The Phase I improvements will include apartment buildings containing eighty-seven (87) apartments and adjacent roadways and parking areas, clubhouse, tennis courts and swimming pool together with this Master Deed, said EXHIBIT "C" constitutes a graphic description of all apartments, including their identification numbers, locations, areas and dimensions, and all

common elements (general and limited), their relative locations and approximate dimensions.

2. Grantor further plans, in its sole discretion, to expand this Regime by adding up to five hundred sixty-four (564) additional apartments spread over an additional five phases, with their respective common elements, said expansion areas being shown and delineated as Phases II through VI on EXHIBIT "D" hereto attached. A legal description of the land area of Phases II through VI is set out in detail in EXHIBIT "D".

3. Grantor hereby reserves unto itself, the option, to be exercised in its sole discretion, to

(a) expand this Regime by submitting Phase II, III, IV, V and VI property as shown and delineated in EXHIBIT "D"; or

(b) allow this Regime to continue as is without any further expansion.

4. In the event Grantor elects to proceed to enlarge this Regime by adding Phase II, the Grantor shall execute an amendment or amendments to this Master Deed which shall be filed for record in the R.M.C. Office for Charleston County, South Carolina not later than five (5) years from the date hereof. Any such amendment or amendments shall fully describe the property being added to this Regime and submit such property to all of the provisions of this Master Deed and exhibits attached hereto, as amended. Such amendment or amendments expanding this Regime, as aforesaid, may be accomplished unilaterally by Grantor without the approval or consent of any co-owner, or mortgagee of any co-owner, of the Regime as constituted at the time of such amendment. Upon the exercise of any such option to expand, as aforesaid, the provisions of this Master Deed shall then be understood and construed as embracing Phase I property and such property as may be described in such amendment, together with all improvements constructed thereon.

5. In the event Grantor elects to proceed to enlarge this Regime by adding Phase III, the Grantor shall execute an amendment or amendments to this Master Deed which shall be filed for record in the R.M.C. Office for Charleston County, South Carolina not later than eight (8) years from the date hereof. Any such amendment or amendments shall fully describe the property being added to this Regime and submit such property to all of the provisions of this Master Deed and exhibits attached hereto, as amended. Such amendment or amendments expanding this Regime, as aforesaid, may be accomplished unilaterally by Grantor without the approval or consent of any co-owner, or mortgagee of any co-owner, of the Regime as constituted at the time of such amendment.

Upon the exercise of any such option to expand, as aforesaid, the provisions of this Master Deed shall then be understood and construed as embracing Phase I property and such property as may be described in such amendment, together with all improvements constructed thereon.

6. In the event Grantor elects to proceed to enlarge this Regime by adding Phase IV, the Grantor shall execute an amendment or amendments to this Master Deed which shall be filed for record in the R.M.C. Office for Charleston County, South Carolina not later than eleven (11) years from the date hereof. Any such amendment or amendments shall fully describe the property being added to this Regime and submit such property to all of the provisions of this Master Deed and exhibits attached hereto, as amended. Such amendment or amendments expanding this Regime, as aforesaid, may be accomplished unilaterally by Grantor without the approval or consent of any co-owner, or mortgagee of any co-owner, of the Regime as constituted at the time of such amendment. Upon the exercise of any such option to expand, as aforesaid, the provisions of this Master Deed shall then be understood and construed as embracing Phase I property and such property as may be described in such amendment, together with all improvements constructed thereon.

7. In the event Grantor elects to proceed to enlarge this Regime by adding Phase V, the Grantor shall execute an amendment or amendments to this Master Deed which shall be filed for record in the R.M.C. Office for Charleston County, South Carolina not later than fourteen (14) years from the date hereof. Any such amendment or amendments shall fully describe the property being added to this Regime and submit such property to all of the provisions of this Master Deed and exhibits attached hereto, as amended. Such amendment or amendments expanding this Regime, as aforesaid, may be accomplished unilaterally by Grantor without the approval or consent of any co-owner, or mortgagee of any co-owner, of the Regime as constituted at the time of such amendment. Upon the exercise of any such option to expand, as aforesaid, the provisions of this Master Deed shall then be understood and construed as embracing Phase I property and such property as may be described in such amendment, together with all improvements constructed thereon.

8. In the event Grantor elects to proceed to enlarge this Regime by adding Phase VI, the Grantor shall execute an amendment or amendments to this Master Deed which shall be filed for record in the R.M.C. Office for Charleston County, South Carolina not later than seventeen (17) years from the date hereof. Any such amendment or amendments shall fully describe the property being added to this Regime and submit such property to all of the provisions of this Master Deed and exhibits attached hereto, as amended. Such amendment or amendments expanding this Regime, as aforesaid, may be

accomplished unilaterally by Grantor without the approval or consent of any co-owner, or mortgagee of any co-owner, of the Regime as constituted at the time of such amendment. Upon the exercise of any such option to expand, as aforesaid, the provisions of this Master Deed shall then be understood and construed as embracing Phase I property and such property as may be described in such amendment, together with all improvements constructed thereon.

Should the expansion options not be exercised within the term specified, it shall in all respects expire and be of no further force and effect. In such event, the Grantor shall not be obligated to impose on the Phase II through VI property any covenants, conditions or restrictions the same or similar to those contained herein; and in such event, all co-owners in Phase I waive any right they may have in or to that property shown as Phase II through VI in EXHIBIT "D".

Section 2. Units. Each Unit, together with its Percentage Interest in the General Common Area and Facilities and the Limited Common Area and Facilities, shall for all purposes constitute a separate parcel of real property which, subject to the provisions of this Master Deed, may be owned in fee simple and which may be conveyed, transferred, leased and encumbered in the same manner as any other real property. Each Owner, subject to the provisions of the Act and this Master Deed, shall be entitled to the exclusive ownership and possession of his Unit.

The Grantor, in order to implement condominium ownership of the above-described premises, covenants and agrees to, and hereby does, subdivide the above-described Phase I property vertically and horizontally into the following Freehold Estate:

(a) Eighty-seven (87) separate parcels of property, being the eighty-seven (87) apartments, together with the shares in the general and limited common elements appurtenant to each apartment, hereinbefore and hereinafter more particularly described, and as shown graphically in EXHIBITS "A" and "C", attached hereto. Said Exhibits delineate the dimensions of each apartment at floor level, the elevation of all floors and ceilings from USC and GS datum, the location and dimension of the perimeter walls, and the locations, dimensions and area of each apartment with reference to established geographical points. Each of the said apartments consisting of:

(1) the volumes or cubicles of space enclosed by the unfinished interior surfaces of perimeter walls and the unfinished surfaces of interior walls, ceilings and floors of the apartment, and by any vents, chimneys, doors, windows and such other structural elements that are ordinarily regarded as enclosures of space; and

(2) all interior dividing walls and partitions (including the space occupied by such walls or partitions) excepting, however, load bearing walls and those interior walls and partitions enclosing the common pipe chases and other common facilities; and

(3) the decorated interior surfaces of perimeter walls and the decorated surfaces of interior walls (including load bearing walls, chimneys, and walls enclosing the common pipe chases), floors and ceilings, consisting of, as the case may be, wallpaper, paint, plaster, carpeting, tiles, and any and all other finishing materials affixed or installed as a part of the physical structure of the apartment; and

(4) all fixtures, appliances, mechanical systems and equipment installed in said apartment which are intended for the sole and exclusive use of the apartment. No pipes, wires, conduits or other public utility lines or installations constituting a part of the over-all systems designated for the service of any other apartment, nor any of the structural members or portions of the apartment building, nor any other property of any kind, including fixtures and appliances within the apartment, which are not removable without jeopardizing the soundness, safety or usefulness of the remainder of the building, shall be deemed to be a part of any individual apartment. The word "apartment" when used throughout this instrument shall be deemed to refer to each of the aforesaid apartments as herein described, and shall have the same meaning as set forth in the Act.

Section 3. Common Area and Facilities.

(a) Percentage Interest. The Unit Owners shall own the General Common Area and Facilities and Limited Common Area and Facilities as tenants in common with each Unit having appurtenant thereto the Percentage Interest in said General Common Area and Facilities and Limited Common Area and Facilities as set forth in the Master Plan contained in EXHIBIT "C" attached hereto; provided, however, the use of the Limited Common Area and Facilities shall be restricted as set forth in Section 3(f) of this Article III. The Percentage Interest appurtenant to each Unit has been determined by dividing the stated fair market value of such Unit as of the effective date of the Master Deed by the aggregate stated fair market value of all of the Units as of said date. The stated Percentage Interest and stated values are permanent in character and cannot be altered without (1) the consent of all (100%) of the Unit Owners expressed in an amendment to the Master Deed duly recorded or (2) unless revised by merger (see Article IV, Section 8) when

(b) Common Elements. A description of the common elements of the Regime (including both the general common

elements and the limited common elements) as defined herein and in the Act is as follows:

- (1) The parcel of land described and shown as Phase I in EXHIBIT "A" attached hereto; and
- (2) Those portions of the apartment buildings not otherwise herein defined as being embraced within the individual apartments, including but not limited to balconies, the foundation, roofs, floors, ceilings, perimeter walls of apartments, load bearing interior walls and partitions, walls enclosing common pipe chases and other common facilities, slabs, lobbies, corridors, laundry, trash, service and storage rooms, meter and machinery rooms, club houses, lounges and other recreation areas, stairways, entrance and exit or communication ways, patios, pipes, wires, conduits, chimneys, air ducts and public utility lines, including the space actually occupied by the above, all as are more particularly shown in EXHIBIT "B" attached hereto; and
- (3) All improvements to the premises constructed or to be constructed, such as utilities, roadways, walkways, plants, trees, shrubbery, yards, lawns, gardens, swimming pools, tennis courts, playgrounds, etc., located on said parcel of land; and
- (4) Parking spaces shown in EXHIBIT "C"; and
- (5) All other elements of the buildings, not included within the apartments, constructed or to be constructed on the aforesaid parcel of land, rationally of common use or necessary to their existence, upkeep and safety and, in general, all other devices or installations existing for common use; and
- (6) All other property of the Regime, whether land, building, improvements, personal property, or otherwise, except such as is included in the apartments as more particularly described in Article III, Section 2 herein next above; and
- (7) All assets of Mariner's Cay Racquet and Yacht Club Homeowners' Association, Inc. (a non-profit corporation organized for the purpose of carrying out the powers, duties, and obligations of the "Council and Co-Owners" as defined in the Act); and
- (8) Easements through apartments for conduits, ducts, plumbing, chimneys, wiring and other facilities for the furnishing of utility services to apartments and the general common elements; and

(9) An easement of support in every portion of an apartment which contributes to the support of the building; and

(10) Easements through the apartments and general common elements for maintenance, repair and replacement of the apartments and general common elements; and

(11) Installations for the furnishing of utility services to more than one apartment or the general common elements or to an apartment other than the one containing the installation, which installation shall include conduits, ducts, plumbing, chimneys, wiring and other facilities for the rendering of such services.

(c) Inseparability of Percentage Interests. The Percentage Interest in the General Common Area and Facilities and the Limited Common Area and Facilities cannot be separated from the Unit to which it appertains and shall be automatically conveyed or encumbered with the Unit even though such interest is not expressly mentioned or described in the deed or other instrument.

(d) No Partition. The General Common Area and Facilities and Limited Common Area and Facilities shall remain undivided and no right to partition the same or any part thereof shall exist except as provided in the Horizontal Property Act, the By-Laws, and this Master Deed.

(e) Use of General Common Area and Facilities. The Unit Owners may use the General Common Area and Facilities in accordance with the purposes for which they are intended without hindering the exercise of or encroaching upon the rights of other Unit Owners. The Board of Directors shall, if any question arises, determine the purpose for which a part of the General Common Area and Facilities is intended to be used. The Board shall have the right to promulgate rules and regulations limiting the use of the General Common Area and Facilities to Unit Owners and their guests as well as to provide for the exclusive use of a part of the General Common Area and Facilities by a Unit Owner and his guests for special occasions which exclusive use may be conditioned, among other things, upon the payment of a fee. Any Owner may delegate, in accordance with the provisions of this Master Deed and the By-Laws, his right to use the General Common Area and Facilities to the immediate members of his family, to a limited number of guests, or to his tenants who reside in his Apartment Unit. The developer, Mariner's Cay Development Corp., its successors and assigns, those persons who have rented slips at the marina and their guests shall have unlimited access to the marina (see Grantor's easement reservations in Article X, Section 4).

(F) Limited Common Area and Facilities. Portions of the common elements are hereby set aside and reserved for the restricted and exclusive use of certain Apartments to the exclusion of the other Apartments, and such portions shall be known and referred to herein as limited common elements. The limited common elements restricted to the use of certain Apartments are those portions of any walls which are deemed to be common elements and which are within the individual Apartments, any roof which covers only one Apartment, the stairs, balconies, porches, patios, and entrance decks as shown graphically in EXHIBIT "B". Ownership of each Apartment Unit shall entitle the Owner or Owners thereof to the exclusive use of the Limited Common Area and Facilities adjacent and appurtenant to such Unit and so designated in EXHIBIT "B"; which exclusive use may be delegated by such Owner to the immediate members of his family, to his guests, or to his tenants who reside in his Apartment Unit. Owners may place plants, furniture, grills and other similar items within the Limited Common Area and Facilities adjacent and appurtenant to their Unit, provided that such plants shall not be allowed to grow or climb to a height higher than the wall or rail enclosing such Limited Common Area and Facility unless the placement of such plants shall have been approved in writing prior to reaching said height by the Board of Directors or by an architectural committee appointed thereby as provided in Section 1 of Article VII hereof, and provided that such plants shall be properly maintained by such occupants.

Section 4. Conveyance by Warranty Deed. All conveyances of title of any Apartment Unit shall be by general warranty deed.

ARTICLE IV

ASSESSMENTS

Section 1. Creation of Lien and Personal Obligation for Assessments. Each Apartment Unit is and shall be subject to a lien and permanent charge in favor of the Association for the annual and special Assessments set forth in Section 2 and 3 of this Article IV. Each Assessment together with interest thereon and cost of collection thereof as hereinafter provided, shall be a permanent charge and continuing lien upon the Apartment Unit against which it relates, and shall also be the joint and several personal obligation of each Owner of such Apartment Unit at the time Assessment comes due and upon such Owner's successor in title if unpaid on the date of the conveyance of such unit, and each and every Owner by acquiring or holding an interest in any Apartment Unit thereby covenants to pay such amount to the Association when the same shall become due. The purchaser of a Apartment Unit at a judicial or foreclosure

sale shall be liable only for the Assessments coming due after the date of such sale.

Section 2. Annual Assessments. No later than December 1 of each calendar year, the Board of Directors shall set the annual Assessments by estimating the Common Expenses to be incurred during the immediately succeeding calendar year and shall prorate such Common Expenses among the Owners of the Apartment Units in accordance with the Percentage Interest appurtenant to such Apartment Units, and shall give written notice to each Unit Owner of the annual Assessment fixed against his Unit for such immediately succeeding calendar year. The annual Assessments levied by the Association shall be collected by the Treasurer as provided in Section 4 of this Article IV.

The annual Assessments shall not be used to pay for the following:

(a) Casualty insurance of individual Owners on their possessions within the Units, and liability insurance of such owners insuring themselves and their families individually, which shall be the sole responsibility of such Owners;

(b) Telephone, gas, or electrical utility charges for each Unit which shall also be the sole responsibility of the Owners of such Units.

Grantor anticipates that ad valorem taxes and other governmental assessments, if any, upon the property will be assessed by the taxing authority upon the Unit Owners, and that each assessment will include the assessed value of the Apartment Unit and of the undivided interest of the Unit Owner in the Common Area and Facilities and Limited Common Area and Facilities. Any such taxes and governmental assessments upon the property which are not so assessed shall be included in the Association's budget as a recurring expense and shall be paid by the Association as a Common Expense. Each Unit Owner is responsible for making his own return of taxes and such return shall include such Owner's undivided interest in the Common Area and Facilities and Limited Common Area and Facilities as such undivided interest is determined by law for purposes of returning taxes. If no provision is made by law or the taxing authorities for the determination of an Owner's share of the undivided interest in the Common Area and Facilities and Limited Common Area and Facilities, each Owner shall return that percentage of the undivided interest in the Common Area and Facilities and Limited Common Area and Facilities attributable to his Unit under EXHIBIT "C".

Section 3. Special Assessments. In addition to the annual Assessments, the Association may levy in any calendar

year, special Assessments for the purpose of supplementing the annual Assessments if the same are inadequate to pay the Common Expenses and of defraying, in whole or in part, the cost of any construction or reconstruction, repair or replacement of the Limited Common Area and Facilities, the Common Area and Facilities, including the necessary fixtures and personal property related thereto; provided, however, that any such special Assessment shall have the assent of a majority of the votes represented, in person or by proxy, at a meeting, at which a quorum is present, duly called for the express purpose of approving such expenditure, written notice of which shall be sent to all Owners not less than ten (10) days nor more than sixty (60) days in advance of the meeting, which notice shall set forth the purpose of the meeting. Special Assessments shall be fixed against the Units according to their Percentage Interests; the period of the Assessment and manner of payment shall be determined by the Board.

Section 4. Date of Commencement of Annual Assessment; Due Dates. Although the annual Assessment is calculated on a calendar year basis, each Owner of a Apartment Unit shall be obligated to pay to the Treasurer of the Association such Assessment in equal monthly installments on or before the first day of each month during such calendar year, or in such other reasonable manner as the Board of Directors shall designate.

The annual Assessments provided for in this Article IV shall as to each Apartment Unit commence upon the conveyance thereof. (the "commencement date") from the first monthly payment of the annual Assessment for each such Unit shall be an amount (rounding to the nearest whole dollar) equal to the monthly payment for the fiscal year in progress on such commencement date, divided by the number of days in the month of conveyance, and multiplied by the number of days then remaining in such month.

The Association shall, upon demand at any time, furnish to any Apartment Owner liable for any such Assessment a certificate in writing signed by an officer of the Association, setting forth whether the same has been paid. A reasonable charge, as determined by the Board, may be made for the issuance of such certificates. Such certificate shall be conclusive evidence of payment of any assessment therein stated to have been paid.

Section 5. Effect of Non-Payment of Assessment; The Personal Obligation of the Owner; the Lien; Remedies of Grantor. If an Assessment is not paid on the date when due, as hereinabove provided, then such Assessment together with such interest thereon and any cost of collection thereof as hereinafter provided, shall be a charge and continuing lien on the Unit to which it relates, and shall bind such property

in hands of the Apartment Owner, his heirs, legal representatives, successors, and assigns. The personal obligation of the then Apartment Owner to pay such Assessment, however, shall remain his personal obligation and if his successor in title assumes his personal obligation, such prior Apartment Owner shall nevertheless remain as fully obligated as before to pay to the Association any and all amounts which he was obligated to pay immediately preceding the transfer; and such prior Apartment Owner and his successor in title who assumes such liabilities shall be jointly and severally liable with respect thereto, notwithstanding any agreement between such prior Apartment Owner and his successor in title creating the relationship of principle and surety as between themselves other than one by virtue of which such prior Apartment Owner and his successor in title would be jointly and severally liable to pay such amounts.

Any such Assessment not paid by the 10th of the month within which such Assessment is due shall bear interest, from such date (the "delinquency date") at the maximum legal rate allowable under South Carolina law. The Association may bring legal action against the Apartment Owner personally obligated to pay the same or foreclose its lien against the Apartment Unit to which it relates or pursue either such course at the same time or successively. In any such event, the Association shall also be entitled to recover attorney's fees actually incurred but not exceeding fifteen percent (15%) of the amount of the delinquent assessment, and all other costs of collection. Each Apartment Owner, by his acceptance of a deed or other conveyance to an Apartment Unit, vests in the Association or its agent the right and power to bring all actions against him personally for the collection of such charges as a debt and to foreclose the aforesaid lien in any appropriate proceeding at law or in equity. The Association shall have the power to bid in the Unit at any foreclosure sale and to require, hold, lease, mortgage and convey the same. No Apartment Owner may be relieved from liability from the Assessments provided for herein by abandonment of his Apartment Unit or otherwise.

Section 6. Subordination of the Charges and Liens to Mortgages.

(a) The lien and permanent charge for the annual and special Assessments (together with interest thereon and any cost of collection) authorized herein with respect to any Unit is hereby made subordinate to the lien of any mortgage or his assigns placed on such Apartment Unit if, but only if all such Assessments with respect to such lot having a due date on or prior to the date such mortgage is filed for record have been paid. The lien and permanent charge hereby subordinated is only such lien and charge as relates to Assessments authorized hereunder having a due date subsequent to the date such mortgage is filed for a record and

prior to the satisfaction, cancellation or foreclosure of such mortgage or the sale or transfer of the mortgaged property pursuant to any proceeding in lieu of foreclosure or the sale under power contained in such mortgage.

(b) Such subordination is merely a subordination and shall not relieve the Apartment Owner of the mortgaged property of his personal obligation to pay all Assessments coming due at a time when he is the Apartment Owner; shall not relieve such property from the lien and permanent charge provided for herein (except as to the extent of subordinated lien and permanent charge is extinguished as a result of such subordination or against a mortgagee or such mortgagees, assignee, or transferee by foreclosure or by sale or transfer in any proceeding in lieu of foreclosure or by sale under power); and no sale or transfer of such property to the mortgagee or to any other person pursuant to a foreclosure sale, or pursuant to any other proceeding in lieu of foreclosure, or pursuant to a sale under power, shall relieve any existing or previous Apartment Owner of such property of any personal obligation, or relieve subsequent Apartment Owners from liability for any Assessment coming due after such sale or transfer.

(c) Notwithstanding the foreclosure, the Association may in writing, at any time, whether before or after any mortgage or mortgages are placed on such property, waive, relinquish or quit-claim in whole or part the right of the Association to Assessments provided for hereunder with respect to such property coming due during the period while such property is or may be held by mortgagee or mortgagees pursuant to said sale or transfer.

Section 7. Exempt Property. Each Apartment Unit shall be exempt from the Assessments created herein until such Unit is conveyed by Grantor to an Owner. Except as expressly provided herein, no Unit and its appurtenant Percentage Interest shall be exempt from said Assessments.

Section 8. Merger of Additional Phases. In the future, but not later than the times specified in Article III, Section 1 through 8, Grantor may wish to merge additional phases (See EXHIBIT "D" attached hereto, entitled ADDITIONAL PROPERTY - FUTURE PHASES AND MERGERS) into the Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime established hereby. The maximum number of additional units which may be annexed and merged to the Property Regime established hereby shall not exceed Eighty-four (84) Apartment Units in the aggregate in Phase II; One Hundred Twenty (120) Apartment Units in the aggregate in Phase III; One Hundred Twenty (120) Apartment Units in the aggregate in Phase IV; One Hundred Twenty (120) Apartment Units in the aggregate in Phase V; and One Hundred Twenty (120) Apartment Units in the aggregate in Phase VI.

The aggregate maximum total of square footage (Phase II, III, IV, V, and VI) which Grantor may add to this Property Regime shall not exceed 697,710 square feet and the total value of the additional property (determined solely for the purposes of complying with the Act) shall not exceed \$53,330,440.00. Owners of Apartment Units within such additional property shall bear their proportionate share of the Common Expenses payable by existing Co-owners and the Percentage Interest of existing owners in the Common Area and Facilities shall change in direct proportion to the percentage that the value of the additional property bears to the sum of the value of the Property hereby subject to the Apartment Ownership and value of the additional property as more particularly set forth in EXHIBIT "C". Owners of such merged property shall assume all rights and obligations as the original owners of Phase I have hereunder.

ARTICLE V

INSURANCE AND CASUALTY LOSSES

Section 1. Insurance. The Board of Directors or its authorized agent shall obtain insurance for all of the improvements on the property (excepting the personal property of the Apartment Owners, their guests and lessees and all improvements and betterments made by such Owners at their expense) against loss or damage by fire or other hazards, including extended coverage, vandalism and malicious mischief, in an amount sufficient to cover the full cost of any repair, reconstruction or replacement in the event of damage or destruction from any such hazard, and shall also obtain a public liability policy covering the General Common Area and Facilities, Limited Common Area and Facilities and all damage or injury caused by the negligence of the Association or any of its agents which public liability policy shall have reasonable limits set by the Board of Directors. Premiums for all such insurance shall be Common Expenses and paid by the Association. All such insurance coverage obtained by the Board of Directors shall be written in the name of the Association for the Owners of the Units in same percentage as the Percentage Interest appurtenant to their Units. Such insurance policies shall comply with the provisions hereinafter set forth.

(a) All policies shall be written with a company licensed to do business in the State of South Carolina and holding a rating of "AAA" or better by Best's Insurance Reports.

(b) All policies shall be for the benefit of the Unit Owners and their mortgagees as their interests may appear.

(c) Provision shall be made for the issuance of a certificate of insurance to each Owner and his mortgagee, if

any, which shall specify the proportionate amount of such insurance attributable to the particular Owner's Unit.

(d) The original of all policies and endorsements thereto shall be deposited with the Trustee which shall hold them subject to the provisions of Section 2 of this Article V.

(e) Exclusive authority to adjust losses under policies hereafter in force on the property shall be vested in the Board of Directors or its duly authorized agent; provided, however, that no mortgagee having an interest in such losses may be prohibited from participating in the settlement negotiations related thereto.

(f) In no event shall any recovery or payment under the insurance coverage obtained and maintained by the Board of Directors hereunder be affected or diminished by insurance purchased by individual owners or their mortgagees.

(g) Each Owner may obtain additional insurance at his own expense; provided, however, that no Owner shall be entitled to exercise his right to maintain insurance coverage in such a way as to decrease the amount which the Board of Directors, on behalf of all of the Owners and their mortgagees, may realize under any insurance policy which the Board of Directors may have in force on the property at any particular time.

(h) Any Owner who obtains an individual insurance policy covering any portion of the property, other than on personal property belonging to such Owner and on improvements and betterments made by such Owner at his expense, shall file a copy of such policy with the Board of Directors within 30 days after purchase of such insurance.

(i) Each Owner at his own expense may obtain on his Unit or the contents thereof title insurance, homeowner's liability insurance, theft and other insurance covering improvements, betterments and personal property, damage and loss.

(j) The Board of Directors shall conduct an annual insurance review for the purposes of determining the full insurable value of the entire property including all dwellings, the Limited Common Area and Facilities and the General Common Area and Facilities, without respect to depreciation, of all improvements on the property (with the exception of improvements and betterments made by the respective owners at their expense) by one or more qualified persons.

(k) The Board of Directors or its duly authorized agent shall make reasonable efforts to secure insurance policies that will provide for the following: (1) a waiver

of subrogation by the insurer as to any claims against the Board of Directors, its duly authorized agents and the Owners and their respective servants, agents and guests; (2) a waiver of insurer's right to repair or reconstruct instead of paying cash; (3) a waiver of insurer's right to cancel, invalidate or suspend the policy on account of the acts of fewer than five Owners or the conduct of any director, officer or employee of the Association or its duly authorized agent without a prior demand in writing delivered to the Association to cure the defect and the allowance of a reasonable time thereafter within which the defect may be cured by the Association, its agent, any owner or mortgagee; and (4) that any "other insurance" clause in the master policy or policies exclude individual owners' policies from consideration.

(1) Each Owner shall be required to notify the Board of Directors of all improvements made by such Owner to his Unit, the value of which is in excess of One Thousand Dollars (\$1,000.00).

Section 2. No Partition. There shall be no judicial partition of the property or any part thereof, and Grantor and every person acquiring any interest in the property or any part thereof shall acquire the same subject to this Master Deed and shall be deemed to have waived any right to seek any such judicial partition until the happening of the conditions set forth in Section 4 of this Article V in the case of damage or destruction or until the property has been removed from the provision of the Act as provided for in this Master Deed.

Section 3. Trustee. (a) All insurance policies purchased by and in the name of the Association by the Board of Directors shall provide that proceeds covering property losses shall be paid jointly to the Association and Trustee. Immediately upon the receipt by the Association of such proceeds, the Association shall endorse the instrument by means of which such proceeds are paid and deliver such instrument to Trustee. The Trustee shall not be liable for payment of premiums, for the renewal or the sufficiency of the policies or for the failure to collect any insurance proceeds. Nor shall the Trustee have any obligation to inspect the property to determine whether a loss has been sustained or to file any claim or claims against any insurer or any other person.

(b) Among other things, the duty of Trustee shall be to receive proceeds delivered to it and to hold such proceeds in trust for the benefit of the Owners and their mortgagees for the purposes of reconstruction, repair and replacement or distribution as the case may be. An undivided share of such proceeds on account of damage or destruction

to the General Common Area and Facilities and Limited Common Area and Facilities shall be allocated and assigned for the Owners in accordance with the Percentage Interest appurtenant to their Units. Proceeds on account of damage or destruction to Units shall be allocated and assigned for the Owners of the damaged or destroyed Units in proportion to the cost of repairing or reconstructing the damage or destruction suffered by each such Owner. In the event that a mortgagee endorsement has been issued as to any particular Unit, the share of such Unit Owner shall be held in trust for such Owner and his mortgagee as their interests may appear.

(c) Proceeds of insurance policies received by the Trustee shall be disbursed as follows:

(i) If the damage or destruction for which the proceeds are paid is to be repaired or reconstructed, the proceeds, or such portion thereof as may be required for such purpose, shall be disbursed in payment for such repairs or reconstruction as hereinafter provided. Any proceeds remaining after defraying such costs shall be paid into the Trust Fund for the benefit of all Owners.

(ii) If it is determined, as provided in Section 4 of this Article V, that the damage or destruction for which the proceeds are paid shall not be repaired or reconstructed, such proceeds shall be disbursed to such persons as therein provided.

(iii) Any and all disbursements of funds by the Trustee for any purpose whatsoever shall be made pursuant to and in accordance with a certificate of the Association signed by the President or Vice President and attested by the Secretary or Assistant Secretary directing the Trustee to make the disbursements.

If the damage or destruction is to the General Common Area and Facilities and/or to the Limited Common Area and Facilities, and is to be repaired or reconstructed, said certificate shall also be signed by or on behalf of the mortgagee known by the Trustee to have the largest interest in or lien upon such General Common Area and Facilities and/or Limited Common Area and Facilities. If the damage or destruction is to one or more Units and is to be repaired or reconstructed, said certificate shall also be signed by or on behalf of the mortgagee or mortgagees, if any, known by the Trustee to have an interest in or lien upon such Unit or Units. The Trustee shall not incur liability to any Owner, mortgagee or other person for any disbursements made by it pursuant to and in accordance with any such certificates or written authorizations.

Section 4. Damage and Destruction.

(a) Immediately after all or any part of the property covered by insurance written in the name of the Association is damaged or destroyed by fire or other casualty, the Board of Directors or its duly authorized agent shall proceed with the filing and adjustment of all claims arising under such insurance and obtain reliable and detailed estimates of the cost of repair or reconstruction of the damaged or destroyed property. Repair or reconstruction, as used in this paragraph means repairing or restoring the property to substantially the same condition in which it existed prior to the fire or other casualty with each Unit, the General Common Area and Facilities and the Limited Common Area and Facilities having the same vertical and horizontal boundaries as before.

(b) Any such damage or destruction to an Apartment Unit which does not render such Unit untenable shall be repaired unless all the Owners unanimously agree in writing not to repair, reconstruct or rebuild the property in accordance with provisions of the Act. Any such damage or destruction which renders any Apartment Unit untenable or uninhabitable, or any such damage or destruction to the General Common Area and Facilities and Limited Common Area and Facilities, shall be repaired and reconstructed unless at least 75 percent (75%) of the total vote of the Association, evidenced by a written agreement, within 60 days after the casualty vote not to repair or reconstruct. If for any reason, the amount of the insurance proceeds to be paid as a result of such damage or destruction, or reliable and detailed estimates of the cost of repair or reconstruction are not made available to the Association within said period of 60 days after the casualty, then such period shall be extended until such information shall be made available to the Association; provided, however, that said extension of time shall not exceed 90 days. No mortgagee shall have any right to participate in the determination as to whether the damage or destruction shall be repaired or reconstructed.

(c) In the event that it is determined by the Association in the manner prescribed above that the damage or destruction shall not be repaired or reconstructed, then and in that event (i) the property shall be deemed to be owned by the Unit Owners as tenants in common, (ii) the undivided interest in the property owned in common which shall appertain to each Unit Owner shall be the percentage of Percentage Interest appurtenant to each Unit, (iii) any liens affecting any of the Units shall be deemed to be transferred in accordance with the existing priorities to the percentage of Percentage Interest of the Unit Owner, and (iv) the property shall be subject to an action for partition at the instance of any Unit Owner, in which event the net proceeds of sale shall be paid to the Trustee. Said net proceeds of sale, together with the net proceeds of the insurance on the property, shall be considered as one fund which, after

paying all expenses of the Trustee, shall be divided among all of the Unit Owners in a percentage equal to the Percentage Interest appurtenant to their Units, after first paying out of the respective share of the Unit Owners, to the extent sufficient for such purpose, all liens on the undivided interest in the property owned by each Unit Owner. Disbursements to such Owners shall be made pursuant to certificates provided for in Section 3 of this Article V.

Section 5. Repair and Reconstruction.

(a) If the damage or destruction for which the insurance proceeds are paid to the Trustee is to be repaired or reconstructed, and such proceeds are not sufficient to defray the cost thereof, the Board of Directors shall levy a special Assessment against the Owners of damaged or affected Units in sufficient amounts to provide funds to pay such excess cost of repair or reconstruction. Additional Assessments may be made at any time during or following the completion of any repair or reconstruction. That portion of such Assessments levied against each such Unit Owner shall be equal to that percentage computed by dividing the Percentage Interest appurtenant to such Owner's Unit by the total of the Percentage Interests appurtenant to all Units affected.

(b) Any and all sums paid to the Association under and by virtue of those special Assessments provided for in paragraph (a) of this Section shall be deposited by the Association with the Trustee. Such proceeds from insurance and Assessments, if any, received by the Trustee shall be disbursed as provided in Section 3 of this Article V.

Section 6. Association as Agent of Each Owner by acquiring or holding an interest, equitable or legal, in any Apartment thereby expressly accepts and acknowledges the irrevocable appointment of the Association as his, her or its duly appointed agent for each Owner and for each owner of a mortgage or other lien upon an Apartment and for each Owner of any other interest in the Regime property to adjust all claims arising under insurance policies purchased by the Association, and to execute and deliver releases upon the payment or satisfaction of claims, including claims for the cost of repair or reconstruction. That portion of

ARTICLE VI

CONDEMNATION

Section 1. General. Whenever all or any part of the property shall be taken by any authority having the power of condemnation or eminent domain, each Owner shall be entitled to notice thereof and to participate in the proceedings incident thereto unless otherwise prohibited by law. The award made for such taking shall be payable to the Trustee.

Unless otherwise required by law at the time of such taking, any award made therefor shall be disbursed by the Trustee, as hereinafter provided in this Article VI.

Section 2. General Common Area. If the taking is confined to the General Common Area and Facilities on which improvements shall have been constructed and if at least seventy-five percent (75%) of the total vote of the Association shall decide within 60 days after such taking to replace said improvements, or any part thereof, on the remaining land included in the General Common Area and Facilities and according to plans therefor to be approved by the Association, then the Board of Directors shall arrange for such replacement and the Trustee shall disburse the proceeds of such award in the same manner as they are required to disburse insurance proceeds where damage or destruction to the property is to be repaired or reconstructed as provided for in Article V hereof; subject, however, to the right hereby reserved to the Association which may be exercised by a majority of the total vote thereof to provide for the disbursement by the Trustee of the remaining proceeds held by it (after payment of all costs incident to such replacement) to the Owners of any one or more of them in amounts disproportionate to the Percentages Interest appurtenant to their Units established herein, which disproportionate amounts shall correspond with the disproportionate damages sustained by the Owners or any one or more of them as the Association may determine. If at least seventy-five percent (75%) of the total vote of the Association shall not decide within 60 days after such taking to replace such improvements or if the taking is confined to the General Common Area and Facilities on which no improvements shall have been constructed, then the Association or the Trustee, as the case may be, shall disburse the proceeds of the award in the manner hereinabove provided for the disbursement of the remaining proceeds of an award after payment of all costs incident to replacement of improvements taken, including the right reserved to the Association to provide for the disbursement by the Trustee of the remaining proceeds held by it to the Owners in disproportionate amounts.

Section 3. Units. If the taking includes one or more Units, any part or parts thereof or the Limited Common Area and Facilities, or parts thereof, to which a Unit has exclusive use then the award shall be disbursed and all related matters, including, without limitation, alteration of the Percentage Interest appurtenant to each Unit, shall be handled pursuant to and in accordance with the consent of all Owners expressed in a duly recorded amendment to this Master Deed. In the event that such an amendment shall not be recorded within 90 days after such taking, then such taking shall be deemed to be and shall be treated as damage or destruction which shall not be repaired or reconstructed

as provided for in Section 4 of Article V herein, whereupon the development will be terminated in the manner therein prescribed.

ARTICLE VII

ARCHITECTURAL CONTROL

Section 1. Approval Required for Changes. To preserve the original architectural appearance of the Mariner's Cay Racquet and Yacht Club Horizontal Property Regime, after the purchase of an Apartment Unit from Grantor, its successors or assigns, no exterior construction of any nature whatsoever, except as specified in the Condominium Documents, shall be commenced or maintained upon any building, including without limitation, the Limited Common Area and Facilities nor shall there be any change, modification or alteration of any nature whatsoever of the design and appearance of any of the exterior surfaces, patios, balconies or facades, nor shall any Owner paint, decorate, or change the color of any exterior surface, gate, fence or roof, nor shall any Owner change the design or color of the exterior lights, nor shall any Owner install, erect or attach to any part of the exterior any sign of any kind whatsoever, nor shall any exterior addition or change, including without limitation the generality of the foregoing, the erection or construction of any fence or wall, be made unless and until the plans and specifications showing the nature, kind, shape, height, materials, color and location of the same shall have been submitted to and approved in writing as to harmony of exterior design, color and location in relation to the surrounding structures by the Board of Directors of the Association or by an architectural committee composed of three or more representatives appointed by the Board. Failure of the Board, or its designated committee, to approve or disapprove such plans and specifications within 30 days after their being submitted to it shall constitute approval.

ARTICLE VIII

EXTERIOR MAINTENANCE

Section 1. Responsibility of Association. Except as specifically provided to the contrary herein, the Association shall maintain, repair and replace, at its expense, all parts of the General Common Area and Facilities and Limited Common Area and Facilities whether located inside or outside of the Apartment Unit, the cost of which shall be charged to the Unit Owners as a Common Expense subject to the provisions of Section 2 of this Article VIII. The Association shall have the irrevocable right, to be exercised by the Board of Directors, or its agent, to have access to each Apartment Unit from time to time during

reasonable hours as may be necessary for the inspection, maintenance, repair or replacement of any of the General Common Area and Facilities and/or Limited Common Area and Facilities therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the General Common Area and Facilities, Limited Common Area and Facilities or to other Units.

Section 2. Responsibility of Owner. In the event that the Board of Directors should determine that the need for maintenance or repairs by the Association as provided for in Section 1 of this Article VIII is caused through the willful or negligent act of an Owner, his family, guests or invitees, the cost of which is not covered or paid for by insurance then the cost, both direct and indirect, of such maintenance or repairs shall be added to and become a part of the assessment to which such owner and his Unit is subject. Each Owner shall maintain, repair and replace at his own expense all portions of his Unit which may become in need thereof, including the heating and air-conditioning system for such Unit, all bathroom and kitchen fixtures and appliances, light fixtures, interior nonload-bearing walls, carpeting, drapes and other items within the Unit. Further, each Owner shall, at his own expense, maintain, repair and replace, when necessary, that portion of the air-conditioning system servicing his Unit which is located adjacent to his Unit and each Owner shall, at his own expense, keep the Limited Common Area and Facilities to which his Unit has exclusive access and to which he has exclusive use clean and neat. If the Owner does not make those repairs to be made by him within thirty days from written demand from the Association, the same may be repaired by the Association and the cost thereof shall be assessed against the Unit owned by such Owner.

ARTICLE IX

UNIT RESTRICTION covered or paid for

Section 1. Residential Purposes. Buildings and all Units contemplated in the development shall be, and the same hereby are, restricted exclusively to residential use with the exception of the "Ships Store", which shall be located within the confines of the Regime as reflected on the Site Plan in EXHIBIT "E" for the benefit of all Co-Owners as well as to service the Grantor's adjacent marina. No structures of a temporary character, trailer, basement, tent, shack, carport, garage, barn or other outbuilding shall be used as a residence on any portion of the property at any time.

Section 2. Construction and Sale Period. Anything contained herein to the contrary notwithstanding, it shall be permissible for Grantor to maintain, during the period of construction and sale of said Units, upon such portion of

the property as the Grantor may deem necessary, such facilities as in the sole opinion of the Grantor may be reasonably required, convenient or incidental to the construction and sale of said Units, including, but without limitation, a business office, storage area, construction yards, signs, model units and sales office. This section shall apply to any and all future phases of Mariner's Cay Racquet and Yacht Club Horizontal Property Regime, as well as to Phase I. Grantor further reserves the right to operate and occupy a sales office and related facilities in certain areas of the Regime common facilities. Grantor shall occupy such Common Area and Facilities as it deems necessary and advisable and shall do so without necessity of paying any rents or assessments, provided, however, that Grantor shall pay any and all utility charges and fees that may be incurred in the occupation of such space. Grantor further agrees to vacate any and all such occupied space no later than sixty (60) days after the final closing of the last unit in the last phase (including any and all Future Phases) and to restore said facilities to their original condition excepting normal wear and tear.

Section 3. Animals and Pets. No animals, livestock or poultry of any kind shall be raised, bred or kept on any part of the property, except that dogs, cats or other household pets may be kept by the respective Owners in their respective Units provided that they are not kept, bred or maintained for any commercial purpose and do not endanger the health or, in the sole discretion of the Board of Directors, unreasonably disturb the Owner of any Unit or any resident thereof.

Section 4. Signs and Business Activities. No advertising signs, billboards, unsightly objects, or nuisances shall be erected, placed or permitted to remain on the property, nor shall the property be used in any way or for any purpose which may endanger the health or unreasonably disturb the Owner of any Unit or any resident thereof. No business activities of any kind whatever shall be conducted in any building or in any portion of the property; provided, however, the foregoing covenants shall not apply to the business activities, signs and billboards of Grantor, its agents or assigns during the construction and sale period.

Section 5. Clotheslines, Garbage Cans, Etc.. No outside clotheslines shall be permitted, and all garbage cans and similar items shall be kept screened so as to conceal them from view of neighboring units.

Section 6. Exterior Antennas. No exterior television or radio antennas shall be placed on any improvements without prior written approval of the Board of Directors.

Section 7. Leasing of Units. Units may be rented provided the occupancy is only by the lessee and his immediate family unless otherwise provided by the Association's Board of Directors. No less than all of a Unit may be rented. This Section 7 shall not apply, however, to any lease or leases which may be entered into by the Grantor.

Section 8. Mortgaging. No Owner may mortgage his Unit nor any interest therein without the approval of the Association's Board of Directors, except to its former Owner, a bank, insurance company, a federal savings and loan association or a corporation or partnership acting as a mortgage broker whose primary interest in making any such mortgage is the placement and servicing of same with and on behalf of one of such other lending institutions. The existence of a "permanent commitment" from any such lending institution to purchase any such mortgage from such mortgage broker shall be conclusive evidence of such mortgage broker's intent to place any such mortgage with one of such other lending institutions whether or not such commitment is ultimately fulfilled. The approval of any mortgagee as provided for above may be upon conditions determined by the Board of Directors or may be arbitrarily withheld.

Section 9. Void Transactions. Any mortgage or lease which is not authorized pursuant to the terms of this Master Deed shall be voidable at the option of any Owner or the Board of Directors until such time as same shall be approved by the Board of Directors.

ARTICLE X

EASEMENTS

Section 1. Encroachments. If any portion of the General Common Area and Facilities and/or the Limited Common Area and Facilities encroaches upon any Unit or any Unit encroaches upon any other Unit or upon any portion of the General Common Area and Facilities and/or the Limited Common Area and Facilities as a result of settling or shifting of a building, an easement for the encroachment and for the maintenance of the same so long as the building stands, shall exist. If any building, any Unit, any adjoining Unit, or any adjoining part of the General Common Area and Facilities and/or the Limited Common Area and Facilities shall be

partially or totally destroyed as a result of fire or other casualty or as a result of eminent domain proceedings, and then rebuilt, encroachments of parts of the General Common Area and Facilities and/or the Limited Common Area and Facilities upon any Unit or of any Unit upon any other Unit or upon any portion of the General Common Area and Facilities and/or the Limited Common Area and Facilities, due to such rebuilding, shall be permitted, and valid easements for such encroachments and the maintenance thereof shall exist so long as the subject building shall stand.

Section 2. Utilities, Etc. There is hereby granted a blanket easement upon, across, over and under all of the property for ingress, egress, installation, replacing, repairing and maintaining a master television antenna system and all utilities, including, but not limited to, water, gas, sewers, telephones and electricity. Such easements grant to appropriate utility companies the right to erect and maintain the necessary poles, cables, pipes, and other necessary equipment on the property and to affix and maintain utility wires, circuits, and conduits on, above, across and under the roofs and exterior walls of the Units.

Section 3. Other. There is hereby granted to the Association, its directors, officers, agents and employees and to any Manager employed by the Association as provided for in Section 2 of Article V hereof, and to all policemen, firemen, ambulance personnel and all similar emergency personnel an easement to enter upon the property or any part thereof in the proper performance of their respective duties. Except in the event of emergencies, the rights under this Section 3 of Article X shall be exercised only during reasonable daylight hours, and then, whenever practicable, only after advance notice to the Owner or Owners affected thereby.

Section 4. Reservations of Developer's Marina and Boat Ramp Easements. There is hereby reserved unto Mariner's Cay Development Corp., its successors and assigns, (a) an alienable easement in perpetuity, for unlimited ingress and egress over, across and upon the interior streets, roadways, sidewalks, walkways, and parking lots to the marina and associated facilities (ownership of which is and remains vested in Mariner's Cay Development Corp.), such easement shall be for the benefit of Mariner's Cay Development Corp., its successors and assigns, the lessees of marina slip spaces and their respective agents, licensees, invitees and for customers of the Ship's Store, together with (b) an alienable easement in perpetuity, along, across, over, through and adjacent to the Horizontal Property Regime, as shown on EXHIBIT "F", attached hereto, in order to allow Mariner's Cay Development Corp., its successors and assigns, the right and privilege to attach, affix and maintain the docking and structure constituting the marina facilities to

the Horizontal Property Regime in such space, size, shape, width and depth as Grantor in its sole discretion deems necessary to sufficiently moor and maintain the marina to the Horizontal Property Regime, together with (c) an alienable easement in perpetuity, for ingress and egress, in addition to those hereinabove reserved, to the "Boat Ramp" shown on EXHIBIT "F", attached hereto, such easement is for the benefit of Mariner's Cay Development Corp., its successors and assigns, marina slip lessees, and invitees, guests and licensees of the foregoing so that such users may have access to said boat ramp and the adjacent marina and waterways, together with (d) an alienable easement in perpetuity for such parking spaces as might be necessary for the operation of the marina, together with (e) an alienable easement in perpetuity, to construct and operate a "Ship's Store" which shall be located 35 feet N07°35'06"W of the point where the centerline of the 15 foot interior road intersects Traverse Line T-0 as shown on EXHIBIT "F" and shall occupy and be erected upon a parcel of land twelve (12') feet by twelve (12') feet, which said parcel shall have sides located S07°35'06"E and N82°24'54"E, said easement being for the benefit of Mariner's Cay Development Corp., its successors and assigns, Regime residents and Marina slip lessees, their invitees and for customers of the Ship's Store.

The foregoing easements are all more particularly shown and delineated as the shaded portions of a plat of Little Oak Island (a/k/a Rook Island) dated March 13, 1981 and revised May 27, 1981 by Sigma Engineers, Inc.

Section 5.

Reservation of Easement to All Future Phases. There is hereby reserved unto Mariner's Cay Development Corp., its successors and assigns, an unlimited perpetual alienable and divisible easement for unlimited ingress and egress over, across, through and upon the interior and exterior streets, sidewalks, walkways, roadways, entrances and exits and parking lots of the Regime so as to provide access to and from that certain tract of land designated as Phase II, III, IV, V and VI and as shown on EXHIBIT "D", which is attached hereto and made a part hereof, said reservation is for the benefit of the Grantor and its successors and assigns.

Section 6. Reservation and Grant of Reciprocal Easements Between Phases One and All Future Phases.

There is hereby reserved unto Mariner's Cay Development Corp., its successors and assigns, and granted to all Co-Owners of Apartment Units within Phase One and such future phases as may be added to the Regime created herein, an unlimited, perpetual, alienable and divisible easement between Phase One and each of the potential future phases as Grantor may hereafter elect to merge in the Regime created herein, said reciprocal easement reserves upon Grantor, its

successors and assigns and grants to the Co-Owners of any Apartment Unit within any and all phases of Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime the perpetual right and privilege of unlimited ingress and egress over, across and upon, as well as the use of, the exterior streets, sidewalks, walkways, roadways and parking lots, recreational facilities and Common Area and Facilities of any other Phase of Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime. Said reciprocal easement shall attach to and remain appurtenant to each Apartment Unit.

ARTICLE XI

GENERAL PROVISIONS

Section 1. Amendment. Amendments to this Master Deed, except as herein expressly provided to the contrary, shall be proposed by the Board of Directors or by any member of the Association in accordance with the following procedure:

(a) Notice. Notice of the subject matter of the proposed amendment shall be included in the notice of the meeting of the Association at which such proposed amendment is to be considered.

(b) Adoption. The Master Deed may be amended at any time and from time to time after notice as hereinabove provided has been given by a vote of not less than seventy-five percent (75%) of the total vote of the Association; provided, however, that if the Association shall vote to amend the By-Laws in any respect, such amendment shall be set forth in an amendment to this Master Deed and shall be valid when approved by a vote of not less than seventy-five percent (75%) of the total vote of the Association.

(c) Recording. A copy of each amendment provided for in this Section 1 shall be certified by the Board of Directors of the Association as having been duly adopted and shall be effective when recorded.

(d) Expandable Regime Exception. As an express exception to the amendment procedure hereinabove enumerated, the Grantor may elect to expand the Horizontal Property Regime as provided herein as and when such additional property is submitted to this Regime without the consent of any Co-Owner or lien holder. Any such amendment shall become effective upon its filing in the R.M.C. Office for Charleston County, South Carolina.

Section 2. Termination. The Regime may be terminated and the property removed from the provisions of the Act in the following manner:

By the Association or by any Co-Owner, at any time, by a vote of not less than seventy-five percent (75%) of the total vote of the Association, an amendment to this Master Deed may be adopted which shall terminate the Regime and the property shall be removed from the provisions of the Act.

(a) Agreement. All of the Unit Owners may remove the property from the provisions of the Act by an instrument to that effect, duly recorded, provided that the holders of all liens affecting any of the Units consent thereto or agree, in either case by instruments duly recorded, that their liens be transferred so as to affect and be a lien upon only the Percentage Interest appurtenant to the Unit subject to such lien.

(b) Destruction. In the event it is determined in the manner provided in Section 4 of Article V hereof, that the property shall not be repaired or reconstructed after casualty, the Regime will be terminated and the Condominium Documents revoked. The determination not to repair or reconstruct after casualty shall be evidenced by a certificate of the Association certifying as to facts effecting the termination, which certificate shall become effective upon being recorded.

(c) Condemnation. In the event that one or more Units, any part or parts thereof, or the Limited Common Area and Facilities, or parts thereof, to which a Unit has exclusive use shall be taken by any authority having the power of eminent domain and the consent of all Owners as provided in Section 3 of Article VI hereof, shall not be expressed in an amendment to this Master Deed duly recorded within 90 days after such taking, the Regime will be terminated and the Condominium Documents revoked. Such taking shall be evidenced by a certificate of the Association certifying as to facts effecting the termination, which certificate shall become effective upon being recorded.

(d) Ownership After Termination. After termination of the Regime, the rights of the Unit Owners and their respective mortgagees and lienholders shall be determined in the manner provided in Section 5 of Article V hereof.

Section 3. Covenants Running with the Land. All provisions of this Master Deed shall be construed to be covenants running with the land, and with every part thereof and interest therein including, but not limited to, every Unit and the appurtenances thereto; and each and every provision of the Master Deed shall bind and inure to the benefit of all Unit Owners and claimants of the Land or any part thereof or interest therein, and their heirs, executors, administrators, successors and assigns.

Section 4. Duration. So long as South Carolina law limits the period during which covenants restricting lands to certain uses may run, it shall be the duty of the Board of Directors to cause the covenants contained herein, as amended from time to time, to be extended when necessary by filing a document bearing the signatures of a majority of the then Owners reaffirming and newly adopting the Master

Deed and covenants then existing in order that the same may continue to be covenants running with the land. Such adoption by a majority shall be binding on all, and each Owner of any Unit, by acceptance of a deed therefor, is deemed to agree that the Master Deed and covenants may be extended as provided in this Section 4.

Section 5. By-Laws. A true copy of the By-Laws of the Association, which together with this Master Deed shall govern the administration of the Regime, is attached hereto as EXHIBIT "G" and, by reference, made a part hereof.

Section 6. Enforcement. Each Owner shall comply strictly with the By-Laws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in this Master Deed or in the deed to his Unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both maintainable by the Board of Directors on behalf of the Association or by an aggrieved Owner. Failure by the Association or any Owner to enforce any of the foregoing shall in no event be deemed a waiver of the right to do so thereafter.

Section 7. Severability. Invalidation of any covenant, condition, restriction or other provision of this Master Deed or the By-Laws shall not affect the validity of the remaining portions thereof which shall remain in full force and effect.

Section 8. Perpetuities and Restraints on Alienation. If any of the covenants, conditions, restrictions or other provisions of this Master Deed shall be unlawful, void or voidable for violation of the rule against perpetuities, then such provision shall continue only until 21 years after the death of the last survivors of the now living descendants of Ronald Reagan, President of the United States, or Jimmy E. Carter, former President of the United States.

Section 9. Gender and Grammar. The singular wherever used herein shall be construed to mean the plural when applicable, and the necessary grammatical changes required to make the provision hereof apply either to corporations or individuals, men or women, shall in all cases be assumed as though in each case fully expressed.

Section 10. Agent for Service of Process. In accordance with the provisions of the Act, Ronald G. Bruce, Esq., of Richland County, South Carolina, is hereby designated to receive service of process. The address of the said Registered Agent is Post Office Box 11716, 1310 Lady Street, Suite 600, Keenan Building, Columbia, South Carolina, 29211.

In the event of said agent's death, resignation or removal, his successor shall be appointed by the Board of Directors of the Association by an instrument duly recorded in the Office of the Register of Mesne Conveyances of Charleston County, South Carolina.

Section 11. Headings. The headings appearing herein are intended for purposes of convenience only and are not to be considered in construing this instrument.

ARTICLE XII

ASSIGNED VALUE AND UNIT VOTE

Section 1. Unit and Property Values. The Master Plan contained in EXHIBIT "C" attached hereto shows the value of each Unit as of the date this Master Deed is recorded and the percentage of undivided interest in the General Common Area and Facilities and Limited Common Area and Facilities appurtenant to such Unit for all purposes. The value of the property is equal to the total value of all Units together with the value of the Percentage Interest in the General Common Area and Facilities and Limited Common Area and Facilities appurtenant to such Units, all as shown on EXHIBIT "C".

Section 2. Unit Votes. The voting rights of each Unit in the Association shall be in accordance with the provisions of Article IV, Section 7 of the By-Laws.

IN WITNESS WHEREOF, Grantor has executed this Master Deed this 26 day of MAY, 1982.

WITNESSES:
DEVELOPMENT CORP.

MARINER'S Bay Development Corp.

BY: Robert G. Doran, Jr.
Its: President

ATTESTED:

Secretary

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

PROBATE

PERSONALLY APPEARED BEFORE ME James C. G. G. G.,
 who, being duly sworn, deposes and says that s/he saw the
 within-named Mariner's Cay Development Corp., by Robert J.
 Doran, Jr., its President, sign, seal and as its act and
 deed, deliver the within-written instrument for the uses and
 purposes therein mentioned and that s/he with Handwritten
A. L. L. witnessed the execution thereof.

SWORN TO BEFORE ME THIS 20th

day of April MAY, 1982

Nancy D. Bass (L.S.)
 Notary Public for South Carolina
 My Commission Expires: 1-18-89

Handwritten Signature

" EXHIBIT G "

BK J 128PG300

BY-LAWS

OF

MARINER'S CAY RACQUET & YACHT CLUB HOMEOWNER'S ASSOCIATION, INC.

ARTICLE I

NAME, LOCATION AND MEMBERSHIP

Section 1. Name. The name of the association is Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. (the "Association").

Section 2. Location. The principal office of the Association shall be located at Clubhouse, Mariner's Cay, Folly Beach, South Carolina, but meetings of the Board of Directors may be held at such places designated by the Board in accordance with the provisions of these By-Laws.

Section 3. Membership. Each and every record owner of a fee or undivided fee interest in Mariner's Cay Racquet & Yacht Club, a Horizontal Property Regime (expandable) shall be a member of the Association, excluding persons who hold such interest under a deed to secure debt, mortgage or deed of trust. Membership in the Association shall be confined to such Co-Owners and shall be appurtenant to and inseparable from Apartment ownership. Such Co-Owner or Co-Owners of each Apartment Unit shall designate, in writing delivered to the Secretary, one member of the Association from among such Co-Owner or Co-Owners of such Unit, or a member of the immediate family of such Co-Owner or Co-Owners, and such member shall represent the Co-Owner or Co-Owners of such Unit in connection with the activities of the Association and exercise the voting rights thereof. Such designation shall be valid until revoked, in writing delivered to the Secretary, or until such Co-Owner sells his Apartment Unit whichever event shall first occur. No Apartment Unit Co-Owner shall be required to pay any initiation fee whatsoever for his membership. In the event such a writing is not delivered to the Secretary, then the Secretary shall have complete freedom to recognize as sole representative of that particular Apartment Unit any person, corporation, or agent thereof that might show to the satisfaction of the Secretary that he has a recorded fee simple interest thereto.

Section 4. Suspension of Membership and Voting Rights. During any period in which a Co-Owner or Co-Owners of an Apartment Unit shall be in default of the payment of any annual or special Assessment levied by the Association, the voting rights of the member designated by such Co-Owner or Co-Owners and the rights of such Co-Owner or Co-Owners, the members of their family or families, and the tenants who reside in such Co-Owner's or Co-Owners' Apartment Unit to use and enjoy the Common Area and Facilities and Limited Common Area and Facilities may also be suspended by the Board of Directors until such time as the Assessment has been paid. Such rights may also be suspended by the Board of

Directors for the violation of the published rules and regulations with respect to the use of the Common Area and Facilities and the Limited Common Area and Facilities as published from time to time by the Board of Directors. Such rules shall be kept in the Office of the Association as a matter of record, and copies thereof shall be furnished to any Apartment Unit Co-Owner on request.

Section 5. Applicability. These By-Laws are established pursuant to the "Horizontal Property Act", 1976 S. C. Code of Laws §27-31-150, et. seq.; are applicable to the Mariner's Cay Racquet & Yacht Club Horizontal Property Regime, Common Area and Facilities, Limited Common Area and Facilities, and the Association; and are binding on all Apartment Unit Co-Owners, their families, tenants and guests, and any other person residing in or occupying an Apartment Unit. Each and every person who accepts a deed to, a lease of, or who occupies any Apartment Unit thereby consents to be bound by the provisions of these By-Laws.

Section 6. Expandable Regime. These By-Laws take express cognizance that Mariner's Cay Racquet & Yacht Club, a Horizontal Property Regime is an expandable regime, as more fully defined as discussed in the Master Deed, and, that in connection therewith, should the present Regime be expanded by merger then in that event Co-Owners of Apartment Units in any such future phases would automatically become members of the Association which would have the effect of reducing the Percentage Interest of the Co-Owners of Apartment Units of Phase One, all as more fully discussed in the Master Deed.

ARTICLE II

DEFINITIONS

Section 1. Definitions. The terms used in these By-Laws, unless the context requires otherwise or unless otherwise specified herein, shall have the same meaning as in the recorded Master Deed for Mariner's Cay Racquet & Yacht Club, a South Carolina Horizontal Property Regime to which these By-Laws are annexed.

Section 2. Mariner's Cay Development Corp. shall include its successors and assigns herein where used.

ARTICLE III

PROPERTY RIGHTS: RIGHTS OF ENJOYMENT

Section 1. Delegation of Property Rights. Each member of the Association shall be entitled to the use and enjoyment of the Common Area and Facilities and the Limited Common Area and Facilities as provided in the Master Deed. Any member may assign his rights of enjoyment and use of the Common Area and Facilities and the Limited Common Area and Facilities to the members of his immediate family, to his guests, or to his tenants who reside in his Apartment Unit. Such member shall notify the Secretary of the Association in writing of the name or names

of any such assignees. The rights and privileges of such assignees are subject to suspension to the same extent as those of the member.

ARTICLE IV

MEETINGS OF MEMBERS

Section 1. Place of Meeting. Meetings of the Association shall be held at Clubhouse, Mariner's Cay, Folly Beach, South Carolina, at such suitable place convenient to the members as may be designated by Grantor with regard to the first annual meeting and by the Board of Directors with regard to all subsequent meetings.

Section 2. Annual Meeting. The first annual meeting of members shall be called by Grantor and shall be held on the 27th day of May, 1982 at ten (10:00) A.M. at 4 Carriage Ln., Suite 300, Charleston, SC 29407. Thereafter, regular annual meetings shall be held on the first Saturday in June of each calendar year at ten (10:00) A.M., unless otherwise provided by the members at any previous meeting. If the date of the annual meeting shall fall on a legal holiday, the meeting shall be held at the same hour on the next following business day.

Section 3. Special Meetings. Special meetings of the Association may be called at any time by the President, by resolution of the Board of Directors, or upon the receipt by the Secretary of a petition signed by members holding greater than forty (40%) percent of the total vote of the Association. The call of a special meeting shall be by notice stating the date, time, place, purpose and order of business of such special meeting. Only the business stated in the notice may be transacted at a special meeting.

Section 4. Notice of Meetings. The Secretary shall mail a notice of each annual or special meeting, stating the purpose thereof as well as the time and place where it is to be held, to each member at the last address of such member furnished to the Secretary at least ten (10) but not more than twenty (20) days prior to such meeting. Mailing notice as herein provided shall be deemed delivery thereof. Any member may waive notice of the meeting in writing either before or after the meeting. Attendance of a member at a meeting, either in person or by proxy, except for the purpose of stating, at the beginning of the meeting, any objection to the transaction of business, shall constitute waiver of notice and any objection of any nature whatsoever as to the transaction of any business at such meeting. Notice given to one tenant in common, joint tenant or tenant by the entirety shall be deemed notice to all such Co-Owners.

Section 5. Order of Business. The order of business at each annual meeting shall be as follows:

- a. Roll call.
- b. Proof of notice of meeting or waiver of notice.

- c. Reading of minutes of preceding meeting.
- d. Reports of officers.
- e. Reports of committees, if any.
- f. Election of directors, if applicable.
- g. Unfinished business.
- h. New business.

Section 6. Quorum. At all meetings, regular or special, a quorum shall consist of the presence in person or by proxy, of members holding greater than fifty (50%) percent of the total vote of the Association. If a quorum shall not be present at any meeting, a majority vote of that percentage present, in person or by proxy, may adjourn the meeting from time to time until a quorum can be obtained. At any such adjourned meeting, any business which might have been transacted at the meeting as originally called may be transacted without further notice.

Section 7. Voting Rights.

(a) This Association shall be a membership corporation without certificates or shares of stock. The Association shall have two classes of membership.

(i) Class A. Class A Members shall be all Co-Owners with the exception of the Grantor, unless Grantor makes election, provided in (ii). Class A Membership shall be nonvoting for the five year period dating from the date of recordation of the Master Deed, thereafter Class A voting rights shall be as detailed hereinafter in this subsection. The maximum total number of votes for all members of Class A shall be one hundred (100) and after the expiration of the foregoing five year period voting rights shall attach to Class A membership and the person designated by the Co-Owner or Co-Owners of each Apartment Unit shall be entitled to cast the number of votes equal to the Percentage Interest appurtenant to the Apartment Unit owned by such Co-Owner or Co-Owners. Said Percentage Interest is set forth as an exhibit to the Master Deed and shall not be divisible nor may the vote thereof be cast in part.

(ii) Class B. The sole Class B Member shall be the Grantor. The maximum total number of votes for Class B shall be one thousand (1,000). Voting rights attach to Class B immediately upon recordation of the Master Deed, as well as upon merger of any or all future phases of the Regime as provided herein. The Grantor shall be entitled to cast the number of votes the product of which shall be equal to the Percentage Interest appurtenant to each Apartment Unit still retained by Grantor multiplied by ten (10). Said Percentage Interest is set forth as an exhibit to the Master Deed. The Class B membership appurtenant to a particular Apartment Unit shall be automatically converted into Class A membership immediately upon conveyance of such particular Apartment Unit by the Grantor to any third party. Class B shall have a maximum duration of the earlier of, one ten years, or, two, such period of time during which Grantor retains ownership of and actively pursues the sale of any Apartment Units in Phase One or such future phases as may be added to Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime (expandable). Class B membership may be converted into Class A membership at any time upon the election of Grantor in writing to the Association. Such an election once made shall be irrevocable.

(b) In addition to those voting rights granted hereinabove, and any provisions herein or in the Master Deed and related exhibits to the contrary notwithstanding, Grantor shall have the following rights and powers:

(i) Until such time as Grantor has sold, conveyed or otherwise disposed of all Apartment Units located in Phase One of the Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime (expandable), the Master Deed and By-Laws shall not be changed, altered, amended, or revoked with regard to the method of selecting the managing agent, the imposition of Assessment, the repair or reconstruction of any Apartment Unit, the method and procedure of adopting rules and regulations pertaining to the conduct of members and the use of the Common Area and facilities and Limited Area and facilities without the express written approval of Grantor first had and in writing obtained.

Section 8. Proxy. Votes may be cast in person or by proxy. Proxies must be filed with the Secretary before the designated time of each meeting.

Section 9. Majority Vote. Acts authorized, approved or ratified by the casting of a majority of the votes represented at a meeting at which a quorum is present; in person or by proxy, shall be the acts of the Association, except where a higher percentage vote is required by these By-Laws or by law, and shall be binding for all purposes.

Section 10. Actions Without Meeting. Any action which may be taken at a meeting of the membership may be taken without a meeting if a consent or ratification, in writing, setting forth the action so taken or to be taken shall be signed by persons who would be entitled to cast seventy-five (75%) percent of the votes of membership of the Association at a meeting and such consent is filed with the Secretary of the Association and is inserted in the Minutes Book thereof.

ARTICLE V

BOARD OF DIRECTORS, NUMBER, POWERS, MEETINGS

Section 1. Number, Term and Qualification. The business and affairs of the Association shall be governed by a Board of Directors (herein sometimes referred to as the "Board"), all of whom, after all Class B membership has been converted into Class A membership, shall be Co-Owners of Apartment Units within Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime at all times during their term as directors. From and after the first annual meeting of Co owners the Board of Directors shall consist of nine (9) persons. Until the first annual meeting of Co-Owners, the Board shall consist of three persons appointed by Grantor, none of whom need be Co-Owners. At the first annual meeting of Co-Owners three (3) directors shall be elected to serve for a term of one year, three (3) directors shall be elected to serve for a term of two years and the remaining three (3)

directors shall be elected to serve for three years. At the expiration of the initial term of office of each director, his or her successors shall be elected to serve for a term of three years. The directors shall hold office for the term herein fixed and until their successors have been qualified and elected. There shall be no limit on the number of successive terms a director may serve on the Board, if elected as herein provided.

Section 2. Powers and Duties. The Board of Directors shall manage and direct the affairs of the Association and, subject to any restrictions imposed by law, by the Master Deed, or these By-Laws, may exercise all the powers of the Association. The Board of Directors shall exercise such duties and responsibility as shall be incumbent upon it by law, the Master Deed, or these By-Laws as it may deem necessary or appropriate in the exercise of its powers, including, without limitation, the collection of assessments and charges from the owners, the establishment and amendment from time to time of reasonable regulations governing the use of the Common Area and Facilities and the Limited Common Area and Facilities, and the employment and dismissal of personnel necessary for the maintenance and operation of the Common Area and Facilities and Limited Common Area and Facilities. Additionally, the Board of Directors may require that all employees of the Association handling or responsible for Association funds shall furnish adequate fidelity bonds. The premium on such bonds shall be paid by the Association.

Section 3. Management. The Board of Directors may employ for the Association a managing agent under such terms and conditions as the Board may authorize; provided, however, the Board shall not delegate to such agent the complete and total responsibility of the Association in violation of the Board's duties. Such managing agent shall have such duties and shall receive such compensation as determined by the Board.

Section 4. Vacancies. Vacancies on the Board of Directors caused by any reason other than the removal of a director by a vote of the Association shall be filled by vote of the majority of the remaining directors, even though they may constitute less than a quorum, and each person so elected shall be a director until a successor is elected at the next annual meeting of the Association. Vacancies caused by removal shall be filled by vote of the Association at the same meeting at which a director or directors were removed.

Section 5. Removal of Directors. At any regular or special meeting of the Association duly called, any one or more of the directors, may be removed with or without cause by a vote of eighty (80%) per cent of the total of all Class A and B memberships authorized to vote thereon, and a successor may then and there be elected to fill the vacancy thus created. Any director whose removal has been proposed by any Co-Owner or Co-Owners shall be given an opportunity to be heard at such meeting. After the conversion of all Class B memberships into Class A memberships the sale of his Apartment Unit shall automatically terminate his directorship.

Section 6. Regular Meeting. The first regular meeting of the Board of Directors shall be held immediately following the first annual meeting of the members of the Association and regular meetings thereafter shall be held on such dates and at such place and hour, but not less frequently than bi-annually, as may be fixed from time to time by resolution of the Board. Notice of regular meetings of the Board shall be given to each director, personally or by mail, telephone or telegraph, at least three (3) days prior to the day of such meeting; provided, however, notice of the first regular meeting shall not be required to be given to the directors provided that a majority of the entire Board is present at such meeting. Should any such meeting fall upon a legal holiday, then that meeting shall be held at the same time on the next day which is not a legal holiday.

Section 7. Special Meetings. Special meetings of the Board of Directors may be called by the President on three (3) days notice to each director, given personally or by mail, telephone or telegraph, which notice shall state the date, time, place (as hereinabove provided) and purpose of the meeting. Special meetings of the Board of Directors shall be called by the President or Secretary in like manner and on like notice upon the written request of at least two (2) directors.

Section 8. Waiver of Notice. Before or at any meeting of the Board of Directors any director may, in writing, waive notice of such meeting and such waiver shall be deemed equivalent to the giving of such notice. Attendance by a director at any meeting of the Board shall be a waiver of notice by him of the date, time and place thereof. If all the directors are present at any meeting of the Board, no notice shall be required and any business may be transacted at such meeting.

Section 9. Quorum. At all meetings of the Board of Directors, a majority of the then qualified directors shall constitute a quorum for the transaction of business, and the acts of the majority of the directors present at a meeting at which a quorum is present shall be the acts of the Board of Directors. If, at any meeting of the Board of Directors, there be less than a quorum present, the majority of those present may adjourn the meeting from time to time. At any such adjourned meeting, any business which might have been transacted at the meeting as originally called may be transacted without further notice.

Section 10. Compensation. No director shall receive compensation for any service he may render to the Association nor shall the Association make any loan, directly or indirectly, to a director; provided, however, a director may be reimbursed for the expenses incurred by him in the performance of his duties.

Section 11. Action by Board Without A Meeting. The Board of Directors shall have the right to take any action which it could take at a meeting by obtaining the written approval of all directors thereto. Any action so approved shall have the same effect as though taken at a meeting of the Board.

Section 12. Liability of Directors. To the extent not expressly forbidden by South Carolina Statutory Law, no director shall be liable

to any Co-Owner for injury or damage caused by such director in the performance of his duties unless due to the willful misfeasance or malfeasance of such director. Furthermore, each director shall be indemnified by the Association against all liabilities and expenses, including attorney's fees, reasonably incurred and imposed upon him in connection with any proceeding to which he may be a party or in which he becomes involved by reason of his being or having been a director of the Association, whether or not he is a director of the Association at the times such expenses and liabilities are incurred; except in such cases where the director is adjudged guilty of willful misfeasance or malfeasance in the performance of his duties; provided, however, that in the event of a settlement, the indemnification shall apply only when the Board approves such settlement and reimbursement as being in the best interest of the Association.

ARTICLE VI

OFFICERS

Section 1. Number and Election. There shall be elected annually by and from the Board of Directors a President (who shall also be Chairman of the Board), a Secretary and a Treasurer. The office of Secretary and Treasurer may be filled by the same person. The directors may also elect from time to time such other officers as their judgment may be needed, which officers need not be directors.

Section 2. Removal and Vacancies. Except as herein provided to the contrary, the officers shall be elected annually and hold office at the pleasure of the Board. A vacancy in any office may be filled by the Board at its next meeting. The officer elected to such vacancy shall serve for the remainder of the term of the officer he replaces.

Section 3. Duties. The duties of the officers shall be as follows:

(a) President. The President shall be the chief executive officer and shall preside at all meetings of the Board of Directors and the Association, shall see that orders and resolutions of the Board are carried out, shall appoint committees consisting of members of the Association as in his opinion is necessary, shall co-sign with the Treasurer all checks, promissory notes and similar documents, if any, and shall perform such other duties as may be delegated to him by the Board. He shall have all the general powers and duties which are incident to the office of President of a corporation, consistent with S. C. Code §33-13-130 (1976), and control and management of the Association in accordance with such Code and these By-Laws.

(b) Secretary. The Secretary shall record the votes and keep the minutes of all meetings and proceedings of the Board and the Association; keep appropriate current records, showing the members of the Association together with their addresses and designating those members entitled to vote; keep custody of and attest the seal of the Association; and perform such other duties as may be required of him by

the Board or incident to the office of Secretary of a corporation under S. C. Code §33-13-130 (1976).

(c) Treasurer. The Treasurer shall be responsible for the funds of the Association, shall co-sign with the President all checks, promissory notes and similar documents, shall maintain full and accurate fiscal accounts and records, and shall perform such other duties as may be designated by the Board of Directors or incident to the office of Treasurer of a corporation under S. C. Code §33-13-130 (1976).

Section 4. Compensation. Officers shall not be compensated on a regular basis for the usual and ordinary services rendered to the Association incident to their offices, nor shall the Association make loans, directly or indirectly, to any officer of the Association. The officers may be reimbursed for reasonable expenses incurred on behalf of the Association.

Section 5. Liability of Officers. To the extent not expressly forbidden by South Carolina Statutory Law, no officer shall be liable to any Co-Owner for injury or damage caused by such officer in the performance of his duties unless due to the willful misfeasance or malfeasance of such officer. Furthermore, each officer shall be indemnified by the Association against all liabilities and expenses, including attorney's fees, reasonably incurred and imposed upon him in connection with any proceeding to which he may be a party or in which he becomes involved by reason of his being or having been an officer of the Association, whether or not he is an officer of the Association at the times such expenses and liabilities are incurred, except in such cases where the officer is adjudged guilty of willful misfeasance or malfeasance in the performance of his duties; provided, however, that in the event of a settlement the indemnification shall apply only when the Board approves such settlement and reimbursement as being in the best interest of the Association.

ARTICLE VII

OBLIGATIONS OF THE CO-OWNERS

Section 1. Agreements. All Co-Owners are obligated to pay monthly assessments imposed by the Association as provided in the Master Deed to meet Common Expenses, which may include the expense of liability insurance coverage and/or hazard insurance coverage for repair and reconstruction. A Co-Owner is required to reimburse the Association for any expense incurred by it in repairing or replacing Common Elements and/or Limited Common Areas and Facilities damaged by such Co-Owner.

Section 2. Maintenance and Repair.

(a) All maintenance of and repair to any Apartment Unit whether structural or non-structural, ordinary or extraordinary, other than maintenance of and repair to any Common Elements contained therein or any Limited Common Area and Facility adjacent and appurtenant thereto,

and not necessitated by the misuse or neglect of the Co-Owner or Co-Owners of another Apartment Unit, shall be made by the Co-Owner or Co-Owners thereof, and such Co-Owner or Co-Owners shall keep the same in good condition and repair. Each such Co-Owner shall be responsible for any and all damage to any and all other Apartment Units, to the Common Elements and Limited Common Area and Facilities caused by his failure to do so.

(b) All maintenance, repairs and replacements to the Common Elements and Limited Common Area and Facilities, whether located inside or outside of the Apartment Units, unless necessitated by the negligence, misuse, or neglect of the Co-Owner or Co-Owners of an Apartment Unit, in which case the cost shall be borne by the Co-Owner or Co-Owners of such Apartment Unit, shall be made by the Association or at its direction and shall be charged to the members thereof as a Common Expense.

Section 3. Right of Entry. Each and every Co-Owner by accepting a deed to an Apartment Unit thereby grants to the managing agent or such other person designated by the Board of Directors, in the event that fire or some similar emergency is, in the opinion of such agent or designated person, threatening his Apartment Unit, the right to enter the same regardless of whether such Co-Owner is present at such time. For such purpose, each and every Co-Owner shall provide the Association with a key to his Apartment Unit.

Section 4. Conduct. All Co-Owners, their families, guests, visitors and tenants, and each and every occupant of each Apartment Unit shall at all times observe the published rules of conduct which may be established from time to time by the Association or its Board of Directors.

Section 5. Notices. A Co-Owner who mortgages his dwelling or executes and delivers a deed to secure debt, deed of trust or other security instrument which may become a lien on his Apartment Unit shall notify the President or the Board of Directors of the name and address of his mortgagee, or the holder of such deed to secure debt, deed of trust or security instrument, and thereby authorize the Association to furnish such information as such mortgagees may request respecting unpaid assessments, taxes or other reasonable information concerning such Apartment Unit.

ARTICLE VIII

COMPLIANCE

These By-Laws are set forth to comply with the requirements of Section 27-31-150 et. seq. of the 1976 South Carolina Code of Laws. In the event any of these By-Laws conflict with the provisions of said Statutory Sections, the provisions of said Sections will control.

ARTICLE IX

BOOKS AND RECORDS

Section 1. Inspection. The books, records and papers of the Association shall at all times during reasonable business hours be subject to inspection by any member at the principal office of the Association. The Master Deed and the By-Laws of the Association shall be available for inspection by any member at the principal office of the Association, where copies may be purchased for a reasonable price.

ARTICLE X

ASSOCIATION SEAL

Section 1. Description. The Association shall have a seal in circular form having within its circumference the words: "Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc."

ARTICLE XI

AMENDMENTS

Section 1. By-Laws. These By-Laws may be amended by a vote of not less than seventy-five percent (75%) of the total vote of the Association at a duly constituted meeting of such purpose, in strict accordance with the recorded Master Deed to which they are attached. Said amendments shall be set forth in an amended Master Deed and duly recorded. Each and every Co-Owner of an Apartment Unit by accepting a deed therefor thereby agrees to be bound by and benefit from any such amendment hereto.

Section 2. Master Deed. The Master Deed for Mariner's Cay Racquet & Yacht Club, a South Carolina Horizontal Property Regime shall be amended only upon the written consent of seventy-five (75%) percent of the total Percentage Interest authorized to vote thereon.

Section 3. Conflicts. In the event of any conflict between the provisions of the Master Deed and the provisions of these By-Laws, the provisions of the Master Deed shall control.

CERTIFICATION

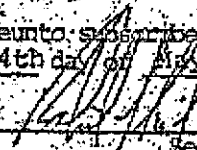
I, the undersigned, do hereby certify:

THAT I am the duly elected and acting Secretary of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc., a South Carolina Non-profit Corporation, and

BK U 128PG300

THAT the foregoing By-Laws constitute the original By-Laws of said Association, as duly adopted at a meeting of the Board of Directors thereof, held on the 3rd day of May, 1982.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Association this 4th day of May, 1982.


Secretary



From: Mariners Cay Yacht & Racquet Club - Liz Thomas <liz@postonco.com>
Sent: Friday, October 5, 2018 11:10 AM
To: [REDACTED]
Subject: Short Term Rentals - Mariner's Cay

Mariners Cay Board of Directors
Folly Beach, South Carolina

Dear Neighbors:

As your Board of Directors we are charged with maintaining our property values, as well as enhancing our living environment. Mariners Cay was established as a residential community where we all have an active stake in our community and its values. In recent months the board has received a number of complaints regarding violations of some of our basic rules at Mariners Cay. Although most short term renters are wonderful people, with fine families, the number of renters has been having a great impact on our residential community.

The board receives regular complaints about cars being parked in unauthorized spaces and people dumping trash in the recycling bins. Items are stored in walkways, dog mess is a continuing problem. Glass bottles continue to be brought to the pool even though DHEC would require the pool to be closed and drained if broken glass was discovered at the pool. The cost for draining and refilling would be approximately \$4,000 plus pool closure for several days. Recently one of our neighbors had their home broken into and TVs, electronics and many personal items were stolen. Cars have been vandalized and tires have been punctured.

Earlier this year, a fire was discovered under a stairway in building 4. The fire marshal determined it was likely started by a careless smoker renting one of the units. Luckily for all, the fire was detected before it caused major fire damage and before it could ignite an old propane tank which was improperly stored under the building. This small lapse of judgment could very easily have turned into a disaster for all of us. A board member overheard two renters saying that although they were instructed not to use grills on the porches, it would be ok as long as they weren't seen.

It is quite clear that vacationers treat our community very differently than our residents. The pool area has been a continuing source of concern. Although your board of directors has just concluded a project to restrap all the chairs at the pool, it is a still a problem to find a chair to use during the summer. The once quiet and peaceful pool area is filled with young families almost always having parties under the gazebo. It is almost impossible to find a chair in the shade or to use a charcoal grill. These vacation families are just having a good time but their good time can be loud and off putting to those of us looking for a quiet place to read and enjoy friends. Additionally, it seems that vacationing families feel they have the right to invite others to their parties and it is clear that unauthorized people are using our pool and getting access through our gates.

These above events are not just lifestyle problems but can go directly to the value of our properties. As long as renters are using our property, rental units can be evaluated differently for insurance purposes. We may have to pay far higher premiums for liability insurance if we continue to allow business invitees to use our property. (A renter was recently injured in a fall on a stairway and the potential liability to a renter is far higher than the duty owed to owners and their guests) The town of Folly Beach now considers Mariners Cay as a business rather than a residential community and has begun to curtail services we have previously

enjoyed. Investors simply do not have the same Pride of Ownership as those who live here full time and therefore have different concerns and motivations than full time residents. Mortgage companies may begin charging higher rates to purchase in Mariners Cay. With the surge in Air B&B and other short term rental sites, these problems are being addressed in communities across the nation as well as here in the low country.

Typically, those who rent their units claim that the business opportunity will increase our property values. According to real estate experts, the opposite is actually true. Past experiences show that when a community becomes known as a rental or resort property, the property values actually fall rather than rise. Long term maintenance is ignored in favor of short term gains. Your board is trying to protect your long term interests. In the past several months we have repaved the parking lot, completed a landscape project for the entire community, are studying an enhanced security system and planning a major project to protect our properties for years to come.

After much discussion and debate and with the input of many of our residents, your Board of Directors has determined that the best way to maintain the residential quality of Mariners Cay is to amend the Master Deed and to prohibit the Short Term Rental of units within our community. This is a very important step and would require a vote of 75% of the owners within Mariners Cay. This is not a step that we take lightly. We have had our options reviewed by legal counsel and this appears to be the best step to maintain the character of Mariners Cay as we go forward. The Board asks that you consider this situation and respond with any and all input and concerns. Thank you for your consideration.

Sincerely,

Your Board of Directors

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From: Mariners Cay Yacht & Racquet Club - Liz Thomas <liz@postonco.com>
Sent: Friday, October 19, 2018 11:11 AM
To: [REDACTED]
Subject: Town Hall Meeting

10/18/18

Re: Mariners Cay HOA Board Oct. 27 Town Hall Meeting

As expected the topic of short-term rentals (STR), is a very emotional topic. The STR debate is not limited to Mariners Cay. It is being debated and acted on in neighborhoods and cities across the country. Like many communities, Mariners Cay is at a crossroads; will Mariners Cay be a neighborhood community, or an investment community? Both a neighborhood community and an investment community have their place, but have not been shown to coexist without divisions.

The Mariners Cay HOA is having a Town Hall meeting on Oct 27, 2018 to discuss and take input on this very important topic, and determine the next step forward. Please make arrangements to attend the meeting, and if you are not able to attend, please email your comments to MarinersCayga@gmail.com. Time permitting, we will plan to read them to the attendees at the meeting.

The Board would like to clear up some misinformation and concerns. Over the past 2-3 years many homeowners have approached the Board, both formerly and informally, expressing their concerns about the negative impact STRs are having on the Mariners Cay community. The Board represents all homeowners and is providing a forum for homeowners to express their concerns, suggest options and determine the path forward.

One of the suggested options available to the Mariners Cay community is to limit rentals to not less than 30 consecutive days. This is a common restriction among multi-family residences. This would require a Vote to amend the Mariners Cay Master Deed.



A Vote to amend the Master Deed has never been on the Agenda for the October 27 meeting. This is an informational meeting.

As for the fear of an immediate change, there are many things that would need to take place and this would occur over several months. As stated earlier, a formal vote of the homeowners would be required to change the Master Deed, and should a change occur, a reasonable transition period would be necessary to eliminate or reduce any hardship. It is very conceivable that any transition could take 12-18 months.

In case the Second Meeting Notice was missed this week, it has been added here for your convenience.

Dear Mariners Cay Home Owner,

The Mariners Cay Board of Directors will be holding a very important town hall meeting on October 27, 2018 from 9:00 to 12:00 at the Club House to discuss the impact of Short Term Rentals on the Mariners Cay community. This meeting is for ALL Mariners Cay residents including Little Oak Island.

This meeting is being held due to increasing complaints from Mariners Cay homeowners and neighboring HOAs regarding issues with Short Term Rentals and the impact on our community.

The outcome of this and other meetings will determine the action the HOA Board will take on behalf of the homeowners.

Sincerely,
Board of Directors
Mariners Cay Racquet and Yacht Club

Short Term Rental Topics will include, but will not be limited to the following:

What's your vision for the Mariners Cay Community?

Livability Issues

Security Issues

Property Values

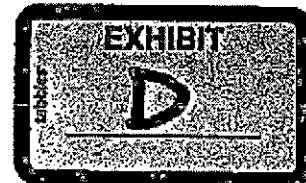
Liability to you the owner

Rules and Regulations Enforcement

Burden on the Property
Burden on the Owners
Increasing Need for Onsite Management
Feedback from neighboring homeowners who have rental restrictions
Proposed Restrictions for Mariners Cay Short Term Rentals
Available Legal Options

Sincerely
The Mariners Cay Board of Directors

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From: Mariners Cay Yacht & Racquet Club - Liz Thomas <liz@postonco.com>
Sent: Tuesday, May 28, 2019 10:44 AM
To: [REDACTED]
Subject: Mariner's Cay Important Announcement - PLEASE SEND ALL RESPONSES TO MARINERSCAYHOA@gmail.com

*****PLEASE SEND ALL RESPONSES IN REGARDS TO THIS TOPIC TO
MARINERSCAYHOA@gmail.com*****

Mariner's Cay Owners,

Over the last 8 months the Mariner's Cay's Board of Directors, (Board), has struggled to find solutions to address the increasing concerns to maintain Mariner's Cay's neighborhood character and preserve the HOA's future financial stability.

Review of the Charleston county tax records show that 50% of all new condo purchases in the past three and half years have been for investment rental use. This is an increasing trend year over year. Mariner's Cay is still a beautiful place for our families and friends to enjoy. But complaints are on the rise, parking violations, noise complaints, gate damage, litter and vandalism, just to name a few. These complaints can't be attributed to renters alone but are proportional to the increase in non-resident occupancy and associated housekeeping and personnel supporting the rental units. As more condos are utilized as transient rental units, neighbors have become strangers. Pool loungers sunning or reading a good book have become groups of people on vacation. Long-term residents that have shaped the character of our community are seriously considering moving if a solution can not found to protect the neighborhood character of Mariner's Cay. These same full and part time neighbors volunteer their time at no cost to the community to keep Mariner's Cay a nice place.

Board members are frustrated; instead of handling the important day-to-day operations of Mariner's Cay they are spending more time addressing the aforementioned issues. As Mariner's Cay is working to address the ongoing wood rot project the Board has found limited conventional financing opportunities due to the growing residence to rental ratio. Lending institutions have begun to classify Mariner's Cay a "Condotel" due to the multiple nightly rentals advertised on the internet.

What should be done? Do homeowners want to preserve the neighborhood character of Mariner's Cay or allow the ongoing transition into a rental business community? The Board is addressing the issue by involving our community via emails, a town hall meeting, a survey and recommendations during the 2019 Annual HOA Meeting. As active members of the community Board members receive ongoing input on these issues and encourages all owners to communicate their opinions and constructive comments

Livability Committee and Findings

A Livability Committee was formed in February to explore all available options to address these concerns.

A majority of the current owners want "some" rental restrictions per the survey. But what are acceptable requirements and restrictions?

Mariner's Cay is shifting from a full time and part time owner occupied community into a vacation renter's dream. Individual investors have identified Mariner's Cay's appeal and are capitalizing on the beautiful neighborhood environment and location as an investment opportunity.

Realtors are promoting Mariner's Cay as a great rental investment opportunity compounding the resident to rental ratios. This type of advertising steers investors towards Mariner's Cay and full and part time owners away from Mariner's Cay.

These transient rental concerns are not exclusive to Mariner's Cay. The City of Charleston has addressed the transient rental issue with new ordinances and enforcement to maintain the character of their neighborhoods. Mount Pleasant has a stronger proposal in City Council to address similar concerns.

Mariner's Cay Board of Directors Chooses a Direction

At the April Board meeting the Board voted on a recommendation from the Livability Committee to research the ability to place a rental Moratorium on future owners to allow sufficient time to work with the homeowners to develop long-term solutions while preserving the character of Mariner's Cay.

Board of Directors Makes a Decision

At the May 23, 2019 Monthly Board Meeting, the Board voted 7 to 0 to approve a Rental Moratorium after careful consideration and an open discussion with the larger than normal attendance of homeowners at the Board Meeting.

TEMPORARY MORATORIUM REGARDING FUTURE RENTING WITHIN THE MARINER'S CAY COMMUNITY

WHEREAS a clear majority of the members of the Mariner's Cay Home Owners Association (HOA) have expressed an interest in limiting the number of Short Term Rental (STR) units available within Mariner's Cay, and in an effort to maintain the residential character of the community, the Board of Directors of the HOA has determined that a Moratorium shall be placed on all new owners who have entered into a verifiable offer to purchase Mariner's Cay units after July 1, 2019, whether through consummated sale or transfer of title, from entering into any rental agreement, license and/or from offering the temporary possession or occupancy of their respective Mariner's Cay unit for less than 30 consecutive days in exchange for monetary consideration. This provision excludes new owners who obtain title to a Mariner's Cay unit from a family member. This particular Moratorium shall remain in effect until April 30, 2020 or until such time as the Mariner's Cay HOA has addressed the issues associated with Short Term Rentals to the satisfaction of a majority of the home owners.

Frequently Asked Questions:

Q. Does the STR Moratorium Impact Current Mariner's Cay Homeowners?

A. A Current Homeowner who Short Term Rents today is not impacted during the Moratorium.

And Current Homeowners who are not ST Renting today can start ST Renting during the Moratorium.

Q. Who does the Moratorium affect?

A. New condo owners, they will be limited to rental agreements of not less than 30 days.

Q. What constitutes a "New" condo owner?

A. Any condo buyer who signs a purchase agreement for a Mariner's Cay condo after July 1, 2019. So if you are selling your condo and you have verifiable purchase agreement before July 1, 2019 the "New" owner will have the ability to Short Term Rent during the Moratorium. So one does not have to close before July 1, 2019 but you the seller must have a signed purchased agreement before July 1.

Q. What is the purpose of the Moratorium?

A. The Moratorium provides the Livability Committee more time to work on long-term solutions with the community while providing a freeze or soft CAP on the number of ST Rental investors.

Q. Why does the community need a CAP on rental investors during the Moratorium?

A. Mariner's Cay's current Rental Ratio is impacting the HOA's ability to obtain favorable financing which will be needed as we move forward to address the wood rot issues. Many institutions have indicated that an increasing, high, rental ratio will start impacting prospective purchaser's ability to obtain conventional financing as well. And the number of Short Term Rentals is at the center of the livability discussion.

Q. Can the Board of Directors propose and implement this Moratorium?

A. The Board was advised by Mariner's Cay's legal counsel that the Board was within its authority and responsibility to move forward with the temporary Moratorium. This Moratorium is not a proposal to change the Master Deed.

Respectfully
Livability Committee
Mariner's Cay HOA

*******PLEASE SEND ALL RESPONSES IN REGARDS TO THIS TOPIC TO
MARINERSCAYHOA@gmail.com*******

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Common Pleas
Clerk : Julie Armstrong
Charleston County Judicial Center
Charleston, SC 29401
Phone:(843) 958-5000 Fax:(843) 958-5020

Received From: O'Connor, Sean A.
4000 Faber Place Drive
North Charleston, SC 294058578
Paying for: Grotzke, Dustin

Date: 6/24/2019
Receipt #: 604737
Clerk: COCAXB

Transaction Type: Payment
Payment Type: Check \$150.00
Total Paid: \$150.00
Reference #: 5922
Comment: Non-Refundable

Total Received: \$150.00
Change Due: \$0.00
You may check the status of your Charleston case at:
<http://www.sccourts.org/caseSearch/>

Case #	Caption	Previous Balance	Amount Paid	Balance Due	S/T
2019CP1003390	Dustin Grotzke VS Mariners Cay Racquet & Yacht Club Homeowners Associations Inc	\$150.00	\$150.00	\$0.00	140



Total Cases: 1	\$150.00	\$150.00	\$0.00

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2019-CP-10-03390

Dustin Grotzke, Christine Grotzke, Leo
Cornejo, Steve Falciani, Nancy Falciani,
Robert St. Louis, Lindsay Layton, George
Landerback, Beth Landerback, Jan Prentice,
Julie Haynie, Lynn Alexander, Lisa Scott,
Ron Woolf, Rebecca Woolf, Nancy Zai,
Meg White, Ginger Adler, Gerry Murphy,
Sam Ogden, Joey Winchester, Frank Duffy,
Betty Duffy, Lois Stefan, Kelly Hill, Mary
Thaler, Ed Thaler, Lisa Essig, Jenn Odom,
Brianna Stello, and Leslie Kelly,

Plaintiffs,

vs.

Mariner's Cay Racquet & Yacht Club
Homeowners' Association, Inc.,

Defendant/Third-Party Plaintiff,

vs.

Jane and John Doe Defendants,

Third-Party Defendants.

SUMMONS

Jury Trial Demanded

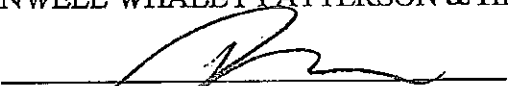
2019 SEP 10 AM 11:25
FILED
CLERK OF COURT

TO: THE ABOVE-NAMED THIRD-PARTY DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to respond to the Counterclaim/Third-Party Complaint of the Defendant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc., a copy of which is herewith served upon you, and to appear and defend by serving a copy of your Answer or other responsive pleading on the subscriber at his office at Barnwell Whaley Patterson & Helms, LLC, 288 Meeting Street, Suite 200, Charleston, SC 29401 within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer or otherwise respond to the Counterclaim within the time aforesaid, judgment by default will be rendered against you for the

relief demanded in the Third-Party Complaint.

BARNWELL WHALEY PATTERSON & HELMS, LLC

BY: 

PHILLIP S. FERDERIGOS
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(843) 577-7700

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*ATTORNEYS FOR THE
DEFENDANT/THIRD-PARTY PLAINTIFF*

DATED: Sept 9 2019
Charleston, South Carolina

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2019-CP-10-03390

Dustin Grotzke, Christine Grotzke, Leo
Cornejo, Steve Falciani, Nancy Falciani,
Robert St. Louis, Lindsay Layton, George
Lauderback, Beth Lauderback, Jan Prentice,
Julie Haynie, Lynn Alexander, Lisa Scott,
Ron Woolf, Rebecca Woolf, Nancy Zai,
Meg White, Ginger Adler, Gerry Murphy,
Sam Ogden, Joey Winchester, Frank Duffy,
Betty Duffy, Lois Stefan, Kelly Hill, Mary
Thaler, Ed Thaler, Lisa Essig, Jenn Odom,
Brianna Stello, and Leslie Kelly,

Plaintiffs,

vs.

Mariner's Cay Racquet & Yacht Club
Homeowners' Association, Inc.,

Defendant/Third-Party Plaintiff,

vs.

Jane and John Doe Defendants,

Third-Party Defendants.

ANSWER AND COUNTERCLAIMS
OF DEFENDANT/THIRD-PARTY
PLAINTIFF

(Jury Trial Demanded)

TO: SEAN A. O'CONNOR, COUNSEL FOR THE PLAINTIFFS;

Reserving all rights to amend this Answer within thirty (30) days pursuant to Rule 15 (a) of the South Carolina Rules of Civil Procedure and reserving all rights to include in the Answer any defenses and/or objections under Rule 12 of the South Carolina Rules of Civil Procedure, and reserving all rights to make any motions under Rule 12 of the South Carolina Rules of Civil Procedure, Defendant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc. (hereinafter "Defendant") answers the Complaint as follows:

FOR A FIRST DEFENSE

1. Defendant denies each and every allegation of the Complaint not hereinafter specifically and unconditionally admitted.

2. Upon information and belief, Defendant admits paragraphs 2 and 3, but denies paragraphs 1 and 4 as written as some alleged Plaintiffs are not owners of any unit. Defendant craves reference to the relevant Charleston County RMC records concerning the ownership of any particular unit.

3. Answering paragraph 5, Defendant does not have sufficient information to respond and denies the same and demands strict proof hereof.

4. Answering paragraphs 6, 7, 8, 9, 10, 11, 12 and 13, Defendant craves reference to the Master Deed document itself and denies Plaintiff's attempt to incorrectly interpret and/or apply the express provisions of the Master Deed. Defendant denies paragraph 7 and the commentary/argument set forth in paragraphs 9, 11, 12, and 13.

5. Answering paragraphs 14, 15, 16, and 17, Defendant craves reference to the October 5, 2018 email and the October 18, 2018 email, which speak for themselves. Defendant admits no vote to amend the Master Deed for any proposed amendment occurred in or about October 2018. Defendant denies the remainder of such paragraphs.

6. Answering paragraph 18, Defendant does not have sufficient information to admit or deny what Plaintiff claims to be "evidence," therefore, said paragraph is denied.

7. Answering paragraphs 19, 20, 21, 22, 23, 24, and 25, Defendant craves reference to the May 28, 2019 email itself, which speaks for itself. Defendant further craves reference to the Master Deed document itself and denies Plaintiff's attempt to incorrectly interpret and/or apply the express provisions of the Master Deed.

FOR A FIRST CAUSE OF ACTION
(Breach of Contract)

8. Answering paragraph 26, Defendant repeats and realleges its responses to paragraphs 1 through 25 above as if set forth verbatim herein.

9. Answering paragraph 27, Defendant craves reference to the Master Deed which speaks for itself.

10. Answering paragraphs 28, 29, 30, 31, 32 and its sub-parts, said paragraphs allege conclusions of law to which no response is necessary and Defendant otherwise denies said paragraphs and demands strict proof hereof.

FOR A SECOND CAUSE OF ACTION
(Temporary Injunction / Temporary Restraining Order)

11. Answering paragraph 33, Defendant repeats and realleges its responses to paragraphs 1 through 32 as if set forth verbatim herein.

12. Answering paragraphs 34, 35, 36, 37, 38, 39, and 40, said paragraphs allege conclusions of law to which no response is necessary and Defendant otherwise denies said paragraphs and demands strict proof hereof.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

13. Answering paragraph 41, Defendant repeats and realleges its responses to paragraphs 1 through 40 above as if set forth verbatim herein.

14. Answering paragraph 42, said paragraph alleges conclusions of law to which no response is necessary and Defendant otherwise denies said paragraph and demands strict proof hereof.

FOR A SECOND DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Failure to State a Claim and Judgment on the Pleadings)

15. Plaintiffs have failed to state facts sufficient to constitute a cause of action against Defendant pursuant to SCRCP Rules 12(b)(6) and 12(c) and Plaintiffs' Complaint should be dismissed.

**FOR A THIRD DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Failure to Mitigate)**

16. Plaintiffs have failed to mitigate their damages as required by law.

**FOR A FOURTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Waiver, Estoppel, Unclean Hands, Laches)**

17. Plaintiffs' claim may be barred by the doctrines of Waiver, Estoppel and/or Laches.

**FOR A FIFTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Intervening Acts of Third Parties)**

18. Plaintiffs damages, if any, are the direct and proximate result of intervening and superseding acts of third parties not affiliated with Defendant and not under Defendant's domain or control.

**FOR A SIXTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Contributory/Comparative Negligence/Assumption of Risk)**

19. Any damage suffered by the Plaintiffs may be a direct and proximate result of their own comparative and contributory negligence and/or assumption of risk and Plaintiffs' recovery should be barred, or alternatively, reduced proportionately to Plaintiffs' comparative negligence or assumption.

**FOR A SEVENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Punitive Damages)**

20. The Defendant would show that the claim of the Plaintiffs for punitive damages cannot be had because any award of punitive damages under South Carolina law without bifurcation of the trial so that any punitive damages issues are tried only after and if liability on the merits of the action have been found would violate Defendant's due process rights guaranteed by the United States Constitution and the South Carolina Constitution and would violate the common law and public policy of the State of South Carolina.

The Defendant would show that the claim of the Plaintiffs for punitive damages cannot be had because an award of punitive damages under South Carolina law without being subject to a pre-determined limit on the amount of punitive damages that a jury might impose would violate Defendant's due process rights guaranteed by the United States Constitution and The South Carolina Constitution and would violate the common law of the State of South Carolina.

The Defendant alleges that the claim of the Plaintiffs for punitive damages cannot be had because an award of punitive damages under South Carolina law by a jury that is not: a) provided with sufficiently clear standards for determining the appropriateness of the punitive damages award or size of such award; b) provided with accurate instructions as to the limits of punitive damages awards as determined by the principals underlying such an award; c) instructed that awarding punitive damages on invidiously discriminatory characteristics of the Defendant is improper; d) instructed to consider punitive damages under a standard for determining the amount that is neither vague, arbitrary nor capricious and that defines with reasonable clarity the actions of the Defendant upon which an award of punitive damages may be based; e) subjected to judicial review at both the trial and appellate court level under objective standards for determining appropriateness and reasonableness; and f) instructed that an award of punitive damages based on anything other than Defendant's conduct in connection with this alleged

incident that is the subject of this lawsuit is forbidden; would violate the Defendant's equal protection and due process rights as guaranteed by the United States Constitution and the South Carolina Constitution and would also violate the laws of the State of South Carolina.

The Defendant alleges and says that the imposition of punitive damages on the basis of Plaintiffs' claims giving rise to this lawsuit would represent the deprivation of liberty and property without due process of law, the imposition of cruel and unusual punishment and excessive fines and deny the equal protection of the laws and violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to The Constitution of the United States and the comparable provisions of the State of South Carolina.

**FOR AN EIGHTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Sufficient Investigation)**

21. The Defendant has not had an opportunity to conduct a sufficient investigation and will engage in a quick discovery touching on the circumstances of the Plaintiffs' allegations in the Complaint. The Defendant intends to act as best as he can to inform himself as to the pertinent facts and prevailing circumstances concerning the damages to the Plaintiffs as alleged and give notice of their intent to assert further affirmative defenses and that the information gathered and processed may indicate, supported by fact and law, including but not limited to a defense that this action is barred in whole or in part by any applicable statutes, contracts, releases, covenants and/or the Doctrine of Laches. The Defendant does reserve the right to amend its Answer to assert any such defenses.

**FOR A NINTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Non-Profit Corporation Act, the Horizontal Property Regime Act,
and Business Judgment Rule)**

22. Defendant raises the protection of the Non-Profit Corporation Act, the Horizontal Property Regime Act, and the Business Judgment Rule as additional defenses to Defendant's counterclaims.

**FOR A TENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Failure to Exhaust Administrative Remedies)**

23. Defendant raises Plaintiffs' failure to exhaust administrative remedies as a defense to Plaintiffs' claims.

**FOR AN ELEVENTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Statute of Frauds)**

24. Plaintiffs' claims are barred by the statute of frauds.

**FOR A TWELFTH DEFENSE
AND BY WAY OF AN AFFIRMATIVE DEFENSE THERETO
(Parol Evidence Rule)**

25. Plaintiffs' claims are barred by the parol evidence rule.

**FOR A THIRTEENTH DEFENSE AND BY WAY OF A COUNTERCLAIM
PARTIES, JURISDICTION, AND VENUE**

26. Mariner's Cay Racquet and Yacht Club ("Mariner's Cay") is a residential condominium community located on the Folly River in James Island, South Carolina.

27. The Defendant, Mariner's Cay Racquet and Yacht Club Homeowners' Association, Inc. (the "Residential Association") is a residential homeowners association incorporated under the laws of the State of South Carolina.

28. The Residential Master Deed for Mariner's Cay Racquet and Yacht Club was recorded May 12, 1982 in the ROD Office for Charleston County in Book J128, Page 300 (as amended or supplemented, the "Master Deed"). Attached as Exhibit G to the Master Deed is the

“By-Laws of Mariner’s Cay Racquet and Yacht Club Homeowners’ Association, Inc.” (the “By-Laws”).

29. The above-named Plaintiffs are owners of residential condominium units (“Unit or “Units”) at Mariner’s Cay and members of the Residential Association. The Jane and John Doe Defendants (“third-party Defendants”) are members of the Residential Association who acquired their Units at Mariner’s Cay after July 1, 2019 and who are engaging in short term rental of their Units for periods less than thirty (30) days. The claims asserted herein involve property rights in Charleston County, South Carolina.

30. This Court has jurisdiction over the parties and the subject matter of the dispute and venue is proper.

FACTUAL BACKGROUND

31. Mariner’s Cay has always been a residential community comprised of full-time and part-time residents.

32. The Master Deed provides that the Residential Association, acting through its board of directors, is authorized to enforce “the covenants, conditions and restrictions set forth in the Master Deed or in the deed to his (a member’s) Unit.”

33. Additionally, Article II, Section 1. of the Master Deed empowers the board of directors with authority to administer the Residential Association including, in part, responsibility for “maintenance, repair, replacement and operation of the General Common Area and Facilities and the Limited Common Area and Facilities.” The Master Deed further requires the board of directors’ administration be in “strict accordance with provisions of the Act [The Horizontal Property Regime Act], this Master Deed, and the By-Laws of the [Residential] Association.”

34. Article IX, Section 1 of the Master Deed provides, in part, as follows:

Buildings and all Units contemplated in the development shall be, and the same hereby are, restricted exclusively to residential use with the exception of the "Ship Store," which shall be located within the confines of the Regime as reflected on the Site Plan in EXHIBIT "E" for the benefit of all Co-Owners as well as to service the Grantor's adjacent marina. (emphasis added).

35. Article IX, Section 4 of the Master Deed provides, in part, as follows:

No advertising signs, billboards, unsightly objects, or nuisances shall be erected, placed or permitted to remain on the property, nor shall the property be used in any way or for any purpose which may endanger the health or unreasonably disturb the Owner of any Unit or any resident thereof. No business activities of any kind whatever shall be conducted in any building or in any portion of the property . . . (emphasis added).

36. Article IX, Section 7 of the Master Deed provides as follows:

Units may be rented provided the occupancy is only by the lessee and his immediate family unless otherwise provided by the Association's Board of Directors. No less than all of a Unit may be rented. This Section 7 shall not apply, however, to any lease or leases which may be entered into by the Grantor.

37. Article III, Section 3(e) and (f) of the Master Deed limits each Unit Owners use of the General Common Area and Facilities and Limited Common Area and Facilities to uses "without hindering the exercise of or encroaching upon the rights of the other Unit Owners" and empowers the board of directors with authority to promulgate rules and regulations which protect Unit Owner's rights under this Section. Additionally under Section 3(e) and (f), a Unit Owner is granted the right to permit "immediate members of his family, to a limited number of guests, or to his tenants who reside in his Apartment Unit" to use the General Common Area and Facilities and Limited Common Area and Facilities consistent with this Section.

38. Article XI, Section 6 of the Master Deed provides:

Each Owner shall comply strictly with the By-Laws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in this Master Deed or in the deed to his Unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both maintainable by the Board of Directors on behalf of the Association or by an aggrieved Owner. Failure by the Association or any Owner to enforce any of the foregoing shall in no event be deemed a waiver of the right to do so thereafter.

39. Article V, Section 2 of the Residential Association By-Laws provide, in part:

The Board of Directors shall manage and direct the affairs of the Association and, subject to any restrictions imposed by law, by the Master Deed, or by these By-laws, may exercise all the powers of the Association. The Board of Directors shall exercise such duties and responsibility as shall be incumbent upon it by law, the Master Deed, or these By-laws as it may deem necessary or appropriate in the exercise of its powers, including, without limitation, the collection of assessments and charges from the owners, the establishment and amendment from time to time of reasonable regulations governing the use of the Common Area and Facilities and the Limited Common Area and Facilities and the employment and dismissal of personnel necessary for the maintenance and operation of the Common Area and Facilities and Limited Common Area and Facilities . . .

40. Article III, Section I of the By-Laws permits Unit owners to assign rights of enjoyment to the Common Area and Facilities and Limited Common Area and Facilities to "immediate members of his family, to a limited number of guests, or to his tenants who reside in his Apartment Unit" and requires Unit owners provide the Secretary of the Residential Association with written notice of the name or names of "any such assignee."

41. As the Plaintiffs admit in paragraph 5 of the Complaint, the Plaintiffs rent their Units on a short-term basis and advertise and market their Units for rent on vacation rental

websites. Upon information and belief, the third-party Defendants are likewise engaging in short term rental activity and advertise and market their Units for rent on vacation rental websites.

42. Upon information and belief, some or all of the Plaintiffs and third-party Defendants' short-term rentals are not made pursuant to valid lease agreements and are made to renters who are not immediate family members.

43. Recently, the Plaintiff and third-party Defendants' short term rental activities have produced a significant increase in the number of people visiting and staying at Mariner's Cay as well as service providers for the Plaintiffs and third-party Defendants which, in turn, has had a detrimental impact on the Residential Association's Common and Limited Areas and Facilities. Additionally, the short-term rental activity is causing security issues for the Residential Association. As a result of the Plaintiffs and third-party Defendants' short-term rental activities, the Residential Association will incur additional costs associated with maintaining, repairing, replacing and operating the General and Limited Common Areas and Facilities.

44. The Plaintiffs and third-party Defendants' short-term rental activities are also encroaching on and hindering the rights of other Residential Association members whose quiet enjoyment and use of the General and Limited Common Areas and Facilities is negatively impacted by the short-term rental activity. Furthermore, the Plaintiffs and third-party Defendants are not providing the Secretary of the Residential Association with written notice of names of "immediate members of his family," "a limited number of guests," or "his tenants who reside in his Apartment Unit" when they wish to assign rights of enjoyment to the Common Area and Facilities and Limited Common Area and Facilities as required by the By-Laws.

45. Responding to the conditions created by the Plaintiffs' short term rental activities and the Plaintiffs' disregard for the restrictions set forth in the Residential Association's Master Deed and By-Laws and anticipating future similar conduct by the third-party Defendants, on May 28, 2019 the Board of Directors passed a Moratorium addressing short term rental activity at Mariner's Cay. (Defendant craves reference to the Moratorium which speaks for itself). Balancing the interests of all Residential Association members while seeking to fulfill its obligations to administer and operate the Residential Association consistent with the Master Deed and By-Laws, the Moratorium does not apply to any of the Plaintiffs but only to new Residential Association members who acquire a Unit at Mariners Cay after July 1, 2019 ("new members"). The Moratorium limits rental activity for new members to rental contracts of not less than 30 days. Finally, the Moratorium is set to expire on April 30, 2020.

FOR A FIRST CAUSE OF ACTION
(Preliminary and Permanent Injunction)

46. Each and every allegation above is incorporated by reference as if restated verbatim.

47. As set forth in more detail herein, the Master Deed and By-Laws:

- a. limit use of a Unit to "residential use" only;
- b. do not permit a Residential Association member to use his or her Unit for "business activity of any kind whatsoever";
- c. do not permit a Residential Association member to rent to a non-lessee;
- d. do not permit a Residential Association member to rent to a lessee who invites non-immediate family members to stay in the Unit and;
- e. do not permit a Residential Association member to engage in conduct which restricts or encroaches upon the rights of other Unit owners.

- f. limit a Unit owner's right to 'assign rights of enjoyment to Common Area and Facilities or Limited Common Area and Facilities only to a "immediate family members", "a limited number of guests", or "tenants who reside" in the Unit owner's Apartment and require the Unit owner provide the Secretary of the Association with written notice of the assignee names before an assignment is made.
- g. require that "no less that all of a unit may be rented."

48. The Plaintiffs and third-party Defendants' short-term rental activity and future activity violates the restrictions in the Master Deed set forth above in Paragraph 47 (a) – (g).

49. The Master Deed grants the board of directors authority to enforce provisions in the Master Deed and requires that the board of directors manage and operate the Residential Association in strict compliance with the Master Deed.

50. Accordingly, the Residential Association is entitled to an Order(s) granting a preliminary and permanent injunction against the Plaintiffs and third-party Defendants' prohibiting any use of their Units in violation of the Master Deed, By-Laws, the Moratorium or other governing document.

51. The Residential Association further asserts it is entitled to recover the costs and fees associated with bringing this action.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract)

52. Each and every allegation above is incorporated by reference as if restated verbatim.

53. The Plaintiffs and third-party Defendants are bound by the terms of the Master Deed, By-Laws, and the Moratorium.

54. As set forth herein, the Plaintiffs and third-party Defendants' short-term rental activity is violating and breaching the Master Deed, By-Laws and the Moratorium.

55. As a result of Plaintiff and the third-party Defendants' breach of the Master Deed, By-Laws and Moratorium, the Residential Association has suffered and will continue to suffer actual and consequential damages which it is entitled to recover from Plaintiffs and the third-party Defendants. The Residential Association is further entitled to recover the costs and associated with bringing this suit.

FOR A THIRD CAUSE OF ACTION
(Declaratory Judgment)

56. Each and every allegation above is incorporated by reference as if restated verbatim.

57. The Plaintiffs and third-party Defendants are bound by the terms of the Master Deed and the Moratorium.

58. As set forth herein, the Plaintiffs and third-party Defendants' short-term rental activity is violating and breaching the Master Deed and the Moratorium.

59. As a result of the Plaintiffs and third-party Defendants' acts and omissions, an actual controversy exists between the parties regarding the rights and obligations of the parties under the Master Deed, By-Laws, the Moratorium, and other governing documents which apply to the Residential Association and its members.

60. Pursuant to the authority granted this Court under S.C. Code Section 15-53-10 *et. seq.*, the Residential Association is entitled to a declaration determining the rights and obligations of the parties relevant to the above-reference matters and for an award of relief as the Court deems just and proper.

WHEREFORE, the Residential Association prays that this Court inquire into the matters and things alleged herein and issue an Order(s):

(1) entering a preliminary and permanent injunction against the Plaintiffs and third-party Defendants prohibiting any short-term rental activity inconsistent with the Master Deed, By-Laws, Moratorium or other governing document;

(2) for an award of damages on the Breach of Contract claim;

(3) for a declaratory judgment determining the rights and obligations of the parties under the Master Deed, By-Laws, the Moratorium, and other governing documents which apply to rental activity at the Residential Association and of its members;

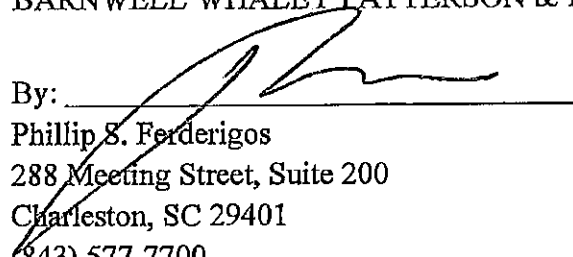
(4) having fully answered the Plaintiffs' Complaint, the Defendant prays that the same be dismissed with costs;

(5) awarding the Residential Association its costs and fees; and

(6) for such other and further relief as the Court may deem just and proper.

Respectfully submitted,

BARNWELL WHALEY PATTERSON & HELMS, LLC

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COUNSEL FOR THE DEFENDANT/THIRD-
PARTY PLAINTIFF

Dated: Sept 9, 2019
Charleston, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of September 2019, I caused a copy of the foregoing Answer and Counterclaims to be mailed to counsel of record with sufficient postage and correctly addressed as follows:

Sean A. O'Connor, Esquire
4000 Faber Place Drive, Suite 450
North Charleston, SC 29405

Barnwell Whaley Patterson & Helms, LLC

By:

Beverly Milton
Beverly Milton, Legal Assistant

2019 SEP 10 AM 11:25
FILED
CLERK OF COURT

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT

Dustin Grotzke, Christene Grotzke,
Leo Cornejo, Steve Falciani,
Nancy Falciani, Robert St. Louis
Lindsay Layton, George Lauderback,
Beth Lauderback, Lynn Alexander,
Ron Woolf, Roberta Woolf, Nancy
Zaj, Meg White, Joey Winchester,
Kelly Hill, Mary Thaler, Ed Thaler,
Lisa Essig, Brianna Stello, and Leslie
Kelly,

CASE NO.: 2019-CP-10-03390

**MOTION AND
INCORPORATED MEMORANDUM
TO QUASH DISCOVERY
OR IN THE ALTERNATIVE,
FOR PROTECTIVE ORDER**

Plaintiffs,

v.

Mariner's Cay Racquet & Yacht Club
Homeowners' Association, Inc.,

Defendant.

TO: DEFENDANT MARINER'S CAY RACQUET & YACHT CLUB HOMEOWNERS' ASSOCIATION, INC., BY AND THROUGH ITS COUNSEL OF RECORD:

Plaintiffs, by and through their undersigned counsel, hereby move before this court for an order quashing *Defendant's Set of Interrogatories to Plaintiff (Exhibit A)* and *Defendant's First Set of Requests for Production of Documents to Plaintiff (Exhibit B)*(collectively, "Discovery Requests"). In the alternative, Plaintiffs request a protective order relieving them from responding to the Discovery Requests at issue or at least staying such discovery until after the Master-in-Equity has heard and ruled upon anticipated cross-motions for summary judgment by the parties as to the straightforward issue of contract interpretation that is central to and presumably dispositive of this case, as stated in the filed Order of Reference to the Master-in-Equity. As yet another potential alternative, Plaintiff should be allowed to produce any such information and/or

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TO QUASH DISCOVERY OR IN THE ALTERNATIVE,
FOR PROTECTIVE ORDER*

documents under a protective order which would include the language stated in Paragraph 4 herein below.

This Motion is based upon the following grounds:

1. The information and materials sought by Defendant in its Discovery Requests are beyond the scope of Rule 26(b)(1) SCRPC because the materials sought are neither relevant to the issues raised in this action (critically, the portion of the action referred to in the Order of Reference to the Master-in-Equity) nor reasonably calculated to lead to the discovery of admissible evidence.

2. To the extent Defendant's Discovery Requests seek information not relevant to the issues raised in this action (critically, the portion of the action referred to in the Order of Reference to the Master-in-Equity) nor reasonably calculated to lead to the discovery of admissible evidence, Plaintiffs aver that they should not be required to produce it. Plaintiffs crave the court's reference to the Order of the Reference to the Master-in-Equity filed on January 20, 2020, which states in relevant part, "As to the claims for relief by Plaintiffs and Defendant in their respective pleadings, the parties have jointly agreed to set aside for the time being any and all legal claims which have demanded monetary relief, in order that the Master-in-Equity for Charleston County may first hear and rule upon the equitable claims they have asserted. Plaintiffs and Defendant have agreed that the central issue to be heard by the Master-in-Equity is whether the Board may restrict the short-terms rental of condominium units pursuant to the existing language of its Master Deed and governing documents."

3. The issue before the court is one of straightforward contract interpretation. The content of the recorded governing documents of Defendant Association is not in dispute, nor are

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any of the other writings cited or referenced in the Complaint. Accordingly, the broad variety of information and documents sought by Defendants in their Discovery Requests is entirely ancillary to the issue to be decided and ruled upon by the Master-in-Equity.

4. It is clear and apparent under the circumstances that Defendants' Discovery Requests are inappropriate and abusive, in that they are primarily if not exclusively intended to vex, harass, intimidate and unfairly burden Plaintiffs. In support of this assertion, Plaintiffs aver that the undersigned counsel, on behalf of Plaintiffs, proposed that Plaintiff would produce the information and materials sought in the subject Discovery Requests under a consent protective order in an effort to resolve this discovery dispute. Defendant refused to agree to the proposed consent protective order. The specific portion that Defendant objected to and refused to agree to stated as follows:

4. Persons obtaining access to the documents produced in accordance with this Confidentiality Order shall use the information only for the preparation and trial of this action (including appeals and retrials) and shall not use such information for any other purpose.

a. Any other purpose shall include, but is not limited to, disciplinary proceedings or any action or procedure internal to the HOA or the imposition and/or attribution of violations, fines, or any other sanctions or penalties against the Plaintiffs by the Defendant HOA based upon the Plaintiffs' confidential information disclosed during the course of discovery.

This patently demonstrates that Defendant's intention and motivation in serving the Discovery Requests at issue is entirely beyond and separate from the herein pending action. It is clear that Defendant harbors an untoward ulterior motive which is in bad faith and is wholly inconsistent with and outside the scope of discovery under Rule 26, SCRCP.

INFORMATION AND DOCUMENTS AT ISSUE

The information and documents sought by Defendant which Plaintiffs request that this court quash or otherwise order that Plaintiffs not be requested to produce, includes:

Interrogatories

- a. Plaintiffs' money damages (see Order of Reference to Master-in-Equity);
- b. Whether Plaintiffs have a business license;
- c. The rental income received by Plaintiffs;
- d. The business expenses incurred by Plaintiffs;
- e. Whether or not Plaintiffs have provided information to Defendant's Board of Directors;
- f. The names and addresses of all persons who stayed in Plaintiffs' units;
- g. Whether Plaintiffs or their agents have ever stayed in their units while the rest of the unit is being rented;
- h. The number of people who have stayed in Plaintiffs' units and how many of those were over the age of 18;
- i. Plaintiffs' processes and procedures for screening their renters;
- j. The location where Plaintiffs keep their personal and/or valuable items when their units are rented;
- k. The method by which Plaintiffs' renters gain initial access to Mariner's Cay via the security gate;
- l. How many gate cards Plaintiffs, their agents and contractors, including cleaning services, have in their possession;
- m. The names, addresses and phone numbers of the people or agencies on whom Plaintiffs rely to explain the Mariner's Cay Rules and Regulations and to deliver the keys to new renters;
- n. The methods by which Plaintiffs receive payment for rental of their units;
- o. The rates Plaintiffs charge to rent their units;
- p. The number of bedrooms in Plaintiffs' units
- q. The specific terms of Plaintiffs' rental agreements;
- r. The identities of the people and/or agencies Plaintiffs have hired to clean and maintain their units;
- s. Plaintiffs' procedure for payment of cleaning fees and the amount of same;
- t. Whether Plaintiffs' units have a fireplace;
- u. The methodology Plaintiffs use to confirm that all renters are part of the same immediate family;

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 Mariner's Cay Racquet & Yacht Club
 Homeowners' Association, Inc.
 Case No.: 2019-CP-10-03390
 MOTION AND INCORPORATED MEMORANDUM
 TO QUASH DISCOVERY OR IN THE ALTERNATIVE,
 FOR PROTECTIVE ORDER*

- v. Whether short term renters use the common areas more frequently than long term renters or owners who live in their units;
- w. The methodology Plaintiffs' contracted rental agents, cleaning services, and/or maintenance contractors utilize to gain access to their units and open the entrance security gate;
- x. Whether Plaintiffs' units are their primary legal residence, information regarding their property taxes, and the address of their primary residence if not in Mariner's Cay;
- y. The number of rental properties Plaintiff or their business entities own and/or how many of those rental units are available for less than a 30-day rental;
- z. Information regarding the income tax filings of Plaintiffs and their entities;
- aa. The number of nights Plaintiffs have stayed in their units;

Requests For Production

- a. Plaintiffs' tax returns;
- b. Plaintiffs' business licenses or lack thereof;
- c. The files of Plaintiffs' respective property managers (which are not in Plaintiffs' possession or control);
- d. Plaintiffs' business license applications;
- e. Itemized lists of Plaintiffs' business expenses;
- f. Plaintiffs' online or print advertisements;
- g. Documentation supporting Plaintiffs' claims for damages (see Order of Reference to Master-in-Equity);

LEGAL STANDARD

Rule 26(b)(1) of the South Carolina Rules of Civil Procedure provides, unless otherwise limited by order of the court, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . It is not ground for objection that the information sought will be inadmissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." If the discovery process threatens to become abusive or create a particularized harm to a litigant or third party, the trial court may issue an order "to protect a party or person from annoyance, embarrassment, oppression,

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or undue burden by expense.” Rule 26(c), SCRCF; *See also Hamm v. S.C. Pub. Serv. Comm’n*, 312 S.C. 238, 241, 439 S.E.2d 852, 854 (1994). “Although the scope of discovery is broad, requests must show a reasonable expectation of obtaining information that will aid in the dispute’s resolution. Thus, discovery requests must be ‘reasonably tailored’ to include only relevant matters,” *Oncology and Hematology Assoc. of S.C., LLC v. SCDHEC*, 387 S.C. 380, 338, 692 S.E.2d 920, 924-25 (2010). If a person requesting a protective order shows a particularized harm which will be caused by allowing the discovery, the opposing party has the burden of showing the information sought is “relevant and necessary” to the case. *Hollman v. Woolfson*, 384 S.C. 571, 578, 683 S.E.2d 495, 498 (2009) (citations omitted).

In determining whether a protective order is necessary, the trial court weighs the factors of whether the information sought is “relevant and necessary” evidence against any particularized harm the opposing party may suffer. *Id.* In determining whether information is necessary, the party seeking the information must “demonstrate with specificity exactly how the lack of information will impair the presentation of the case on the merits to the point that an unjust result is a real, rather than a merely possible, threat.” *Id.* The trial court must determine whether there are reasonable alternatives available to discover the information. *Id.* “The rules of civil procedure allow the trial judge broad latitude in limiting the scope of discovery when the discovery process threatens to become abusive.” *Gattison v. S.C. State College*, 318 S.C. 148, 456 S.E.2d 414, 415 (Ct. App. 1995). “Rule 26(c) authorizes the Court, in appropriate circumstances, to issue a protective order which limits, in whole or part, discovery related to a particular matter.” *Doe v. American National Red Cross*, 788 F.Supp. 884, 889 (D.S.C. 1992).

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ARGUMENT

The issue before the Master-in-Equity is one of straightforward contract interpretation. The position Defendant has taken in this case is an overt, knowing and intentional interference with a lawful vested right held by Plaintiffs. The Master Deed for Mariner's Cay Racquet & Yacht Club ("Master Deed"), recorded on May 12, 1982 at Book J128, Page 300 in the Charleston County Register of Deeds office, was of public record and Plaintiffs relied on it in purchasing their properties, making significant expenditures and entering into binding contractual relationships. Plaintiffs, therefore, have an absolute vested right to rent their properties without any restriction by the HOA as to the length of the rental term, as it is indisputable that no such restriction is contained in the Master Deed.

The case of *Daniels v. City of Goose Creek*, 314 S. C. 494, 431 S.E.2d 256 (Ct. App 1993), stands for the proposition that a landowner has a vested right to continue a nonconforming use already in existence at the time the property was zoned in the absence of a showing that the continuance of the use would constitute a detriment to the public health, safety, welfare. That same point of law applies to a restrictive covenant that seeks to change an existing use. For example, courts have found that property owners that have made expenditures or who have incurred contractual obligations in substantial amounts, and who have acted in good faith to comply with existing requirements, acquire vested rights against changed or amended restrictive covenants. *See Town of Hillsboro v. Smith*, 170 S.E.2d 904, 909 (N.C. 1969); *Lake Bluff Housing Partners v. City of E. Milwaukee*, 540 N.W.2d 189, 196 (Wis. 1995).

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Plaintiffs further posit that the Board's purported moratorium on short-term rentals as well as any other actions by the HOA aimed at prohibiting, restricting or limiting short-terms rentals are *ultra vires*. The case of *Brown v. Spring Valley Homeowners Association*, 2016 S. C. App. Unpub. Lexis 406 (Ct. App 2016), stands for the proposition that any action by the Homeowners Association or its Board of Directors must be authorized by the restrictive covenants. Here, neither the Master Deed nor any other recorded governing document empowers the Board of Directors to create restrictions on the use of the lot owners' properties. Such a restriction must be done through adoption of new or amended restrictive covenants. The Master Deed only authorizes the HOA to enact restrictions on use of the units through recorded restrictive covenants.

Defendant's argument that short-term rentals of the condominium units at Mariner's Cay are prohibited by the Master Deed on the basis that such rentals are a "business" or "commercial" use is a red herring and is entirely unpersuasive and untenable. That theory has been soundly rejected by the great majority of courts that have considered that issue.

"A negative covenant, prohibiting business and commercial uses of the property, does not bar short-term residential vacation rentals." *Russell v. Donaldson*, 731 S.E.2d 535, 539 (N.C. Ct. App. 2012). "[R]enting this dwelling to people who use it for the purposes of eating, sleeping, and other residential purposes does not violate the prohibition on commercial and business activity as such terms are commonly understood." *Pinehaven Planning Bd. v. Brooks*, 70 P.3d 664, 668 (Idaho 2003). "The owner's receipt of rental income either from short- or long-term rentals in no way detracts or changes the residential characteristics of the use by the tenant." *Ross v. Bennett*, 203 P.3d 383, 388 (Wash. Ct. App. 2008).

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We agree with [owner] Bennett that the trial court erred in finding that short-term vacation rentals were prohibited by the CPE Covenant. On its face, the CPE Covenant does not prohibit the short-term rental Bennett's house to a single family who resides in the home. The CPE Covenant merely restricts use of the property to residential purposes. Renting the Bennett home to people who use it for the purposes of eating, sleeping, and other residential purposes is consistent with the plain language of the CPE Covenant. The transitory or temporary nature of such use by vacation renters does not defeat the residential status. This is consistent both with the evidence of context and with preserving the free use of the land.

Id. “If a vacation renter uses a home ‘for the purposes of eating, sleeping, and other residential purposes,’ this use is residential, not commercial, no matter how short the rental duration.” *Wilkinson v. Chiwawa Cmty. Ass’n*, 327 P.3d 614, 620 (Wash. 2014), citing *Ross, supra*. “[T]he critical issue is whether the renters are using the property for ordinary living purposes such as sleeping and eating, not the duration of the rental.” *Santa Monica Beach Prop. Owners Ass’n v. Acord*, 219 So. 3d 111, 114 (Fla. Ct. App 2017), citing *Wilkinson, supra*. “[T]he nature of the property’s use is not transformed from residential to business simply because the owner earns income from the rentals.” *Id.* at 115, citing *Lowden v. Bosley*, 909 A.2d 261, 262 (Md. 2006).

“When the [owners] rent their cabin, they no doubt realize some pecuniary gain, but neither that financial benefit nor the advertisement of the property or the remittance of a lodging tax transforms the nature of the use of the property from residential to commercial. *Slaby v. Mt. River Estates Residential Ass’n*, 100 So. 3d 569, 580 (Ala. Civ. App. 2012). “While [the owner’s] renting of the property as a dwelling on a short-term basis may have constituted an economic endeavor on [the owner’s] part, to construe that activity as one forbidden by the language of the deed restrictions is unreasonable and strained. Strictly and reasonably construed, the deed restrictions do not forbid short-term rental for dwelling purposes.” *Mason Family Trust v. Devaney*, 207 P.3d 1176, 1178

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(N.M. Ct. App. 2009). “We agree with the cases discussed above and conclude that short-term vacation rentals such as [owner] Houston’s are not barred by the commercial use prohibition in the covenants. *Houston v. Wilson Mesa Ranch Homeowners Ass’n*, 360 P.3d 255, 260 (Colo. Ct. App. 2015)(noting that the court in *Slaby*, *supra*, “reviewed case law from other states and agreed with ‘the majority of other jurisdictions’ that rental of the cabin for eating, sleeping, and other residential purposes did not amount to commercial use.”)

Adopting Silsby’s reading [prohibiting rentals] would result in an affirmative rule of law holding that every single- or multi-family residence that is rented for use by someone other than the owner is a commercial enterprise. Under such a rule of law, innumerable properties would invariably run afoul of local zoning ordinances prohibiting commercial uses. The use of this property is residential; the fact that this use may involve income in some fashion does not change a fundamentally residential use to a commercial enterprise.

Silsby v. Belch, 952 A.2d 218, 222-23 (Me. 2008).

The case of *Yogman v. Parrott*, 937 P.2d 1019 (Or. 1997), involved a short-term vacation rental in a beachfront subdivision. The property in *Yogman* was restricted to use “exclusively for residential purposes” and not for “commercial enterprise.” *Id.* at 1020. The Oregon Supreme Court followed the principle of strict construction because the use complained of was not “plainly within the provisions of the covenant.” *Id.* In doing so, the court determined that the short-term vacation rental of the property was not plainly included within the provisions of the covenant and held in favor of the owners of the vacation property. *Id.* at 1023.

CONCLUSION

For all the reasons stated above, Plaintiffs request an order quashing Defendants’ Discovery Requests or protecting Plaintiffs and any other witnesses in this case from responding

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to the Discovery Requests propounded by Defendant and producing the information and materials sought thereby, on the grounds that the information and materials sought by Defendant are beyond the scope of Rule 26(b)(1) SCRPC in that such information and materials sought are neither relevant to the issues raised in this action nor reasonably calculated to lead to the discovery of admissible evidence. In the alternative, such discovery should be stayed until after the Master-in-Equity has heard and ruled upon anticipated cross-motions for summary judgment by the parties as to the straightforward issue of contract interpretation that is central to and presumably dispositive of this case, as stated in the filed Order of Reference to the Master-in-Equity. As yet another potential alternative, Plaintiff should be allowed to produce any such information and/or documents under a protective order which would include the language stated in Paragraph 4 herein above.

WHEREFORE, Plaintiffs prays this Court grant the following relief:

1. An order quashing Defendant's Discovery Requests; or
2. Alternatively, a protective order staying such Discovery Requests at least until after the Master-in-Equity has heard and ruled upon cross-motions for summary judgment by the parties as to the straightforward issue of contract interpretation that is central to and presumably dispositive of to this case, as stated in the filed Order of Reference to the Master-in-Equity; or

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3. Plaintiff should be allowed to produce any such information and/or documents under a protective order which would include the language stated in Paragraph 4 herein above.
4. Such other and further relief as the Court may deem just and proper.

[SIGNATURE PAGE FOLLOWS]

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Respectfully submitted,

FINKEL LAW FIRM LLC

s/ Sean A. O'Connor
Sean A. O'Connor (S.C. Bar No. 68382)
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North Charleston, South Carolina 29405
T: 843.577.5460
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soconnor@finkellaw.com

Attorneys for Plaintiffs

February 21, 2022

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
C/A NO. 2019-CP-10-03390

Dustin Grotzke, Christine Grotzke, Leo
Cornejo, Steve Falciani, Nancy Falciani,
Robert St. Louis, Lindsay Layton, George
Lauderback, Beth Lauderback, Jan Prentice,
Julie Haynie, Lynn Alexander, Lisa Scott,
Ron Woolf, Rabecca Woolf, Nancy Zai,
Meg White, Ginger Adler, Gerry Murphy,
Sam Ogden, Joey Winchester, Frank Duffy,
Betty Duffy, Lois Stefan, Kelly Hill, Mary
Thaler, Ed Thaler, Lisa Essig, Jenn Odom,
Brianna Stello, and Leslie Kelly,

Plaintiffs,

vs.

Mariner's Cay Racquet & Yacht Club
Homeowners' Association, Inc.,

Defendant.

INTERROGATORIES TO PLAINTIFFS

TO: SEAN A. O'CONNOR, COUNSEL FOR THE PLAINTIFFS:

Defendant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc. hereby requires the Plaintiffs, within thirty (30) days after service hereof, to answer under oath the Interrogatories hereinafter set forth, in accordance with Rule 33(b) of the South Carolina Rules of Civil Procedure.

DEFINITIONS AND INSTRUCTIONS

The terms listed below are defined as follows:

1. "Document" means every writing or record of every type and description that is or has been in the Plaintiffs' possession, custody, or control, or of which the Plaintiffs have knowledge, including, but not limited to, correspondence, memoranda, tapes, electronic mail or e-mail, data, computer printouts, computer discs, stenographic or handwritten notes, studies, publications, books, pamphlets, voice recordings, minutes or statistical compilations, or any other recorded or graphic material in whatever form, including drafts and reproductions.
2. "Person" means any natural person, corporation, partnership, proprietorship, association, governmental entity, agency, group, organization, or group of persons.
3. To "identify" a document means to provide the following information irrespective of

whether the document is deemed privileged or subject to any claim of privilege;

- a) The title or other means of identification of each document;
- b) The date of each such document;
- c) The author of each such document;
- d) The recipient or recipients of each such document;
- e) The present location of any and all copies of each such document in the care, custody or control of Plaintiffs;
- f) The names and current addresses of any and all persons who have custody or control of each such document or copies thereof; and
- g) If all copies of the document have been destroyed, the names and current addresses of the person or persons authorizing the destruction of the document and the date the document was destroyed.

In lieu of "identifying" any document, it shall be deemed a sufficient compliance with these interrogatories to produce a copy of each such document, and reference said document to the particular interrogatory to which the document is responsive.

4. To "identify" a natural person means to state that person's full name, title or affiliation, and last known address and telephone number. To "identify" a person that is a business, organization, or group of persons, means to state the full name of such business, organization, or group of persons, the form of the business, organization, or group of persons, and to "identify" the natural person who would have knowledge of the information sought by the interrogatory.

5. "Relate to" or "related to" shall mean relating to, reflecting, concerning, or evidencing in any way.

6. "Complaint" refers to the Complaint and/or any Amended Complaints filed by Plaintiffs in this action, as well as any Counterclaims or Cross-claims filed by Defendant or other parties in this action.

7. If any interrogatory cannot be answered in full, answer to the extent possible and specify the reason(s) for the inability to answer.

8. Terms in the singular shall be deemed to include the plural and the terms in the plural shall be deemed to include the singular. Masculine and feminine pronouns are to be considered interchangeable. The words "and" and "or" are to be construed interchangeably and in the broadest sense, so that each word includes both conjunctive and disjunctive forms.

INTERROGATORIES

1. If you or your attorneys know of any persons who are or might be witnesses to the facts of this case, please give the following information:

- (a) What are their names and addresses?
 - (b) Do you have either written or recorded statements from any of them?
 - (c) If you do, please state from whom you have such statements.
 - (d) If you have such statements, who is in possession of them?
2. For each person known to the Plaintiffs or to counsel to be a witness concerning the facts of the case, please:
- (a) Set forth a summary of the important facts known to or observed by such witness; or
 - (b) Provide a copy of any written or recorded statements from such witness.
3. Please set forth a list of photographs, plats, sketches or other prepared documents that might be in your possession relating to your claim.
4. Please list the names and addresses of any expert witnesses whom you propose to use in the trial of this case.
5. Set forth an itemized statement of all damages, claimed to have been sustained by each party.
6. Please provide the date of your original business license.
7. Please list your gross rental income for each of the last five years generated from each of your Mariner's Cay properties.
8. Please produce an itemized list of all business expenses claimed for your Short-Term Rental business for the last five years.
9. Pursuant to Article III of the By-Laws, have you ever notified JoLyn Branch of the names of your renters? If the answer is "No," please explain this violation of the Master Deed.
10. Please list the names and addresses of all persons who stayed in your unit for the past five years and the dates of their stay.
11. Have you or your agent ever stayed in your apartment unit while the rest of the unit is being rented?
12. How many people have stayed in your apartment unit each year for the past five years? Of the total number of people listed above, how many were over the age of 18?
13. Please explain the steps you take to insure the reputation and character of all the people who stay in your apartment unit within Mariner's Cay.

14. How do you insure that your renters will not present a danger to homeowners or property with Mariner's Cay?

15. Where do you keep personal and/or valuable items when your unit is rented? How do you protect the above items?

16. How does your renter gain initial access to Mariner's Cay via the security gate? How many Gate cards do you, your agents, and your contractors including cleaning services have in their possession?

17. Please list the name, address and phone number of those people or agencies on whom you rely to explain the Mariner's Cay Rules and Regulations and to deliver the keys to new renters.

18. How do you receive payment for the use of your apartment unit within Mariner's Cay?

19. How do you advertise that your unit is for rent?

20. As to each Plaintiff's rental, how much do you charge per night for a stay in your apartment unit with Mariner's Cay?

21. As to each Plaintiff's rental, how many bedrooms within your unit? Do you have any limits to the amount of renters within your unit each night? Do you limit the amount of renters within your unit by bedroom? Do you allow pets?

22. Please list the name, address and phone number of all people or agencies that you have hired to clean and maintain your property between rental periods.

23. Who pays the cleaning fee between rentals, you, the management company or the renter? How much is the cleaning fee and how is it determined?

24. Do you have a fireplace within your unit?

25. Please describe in detail the method you use to determine that all renters are part of the same immediate family as required by Article IX Section 7 of the Master Deed.

26. Please list with specificity the authority you rely upon that supports your right to Short Term Rent within Mariner's Cay.

27. Is it your contention that Plaintiff is permitted to operate a short-term rental business in Mariner's Cay?

28. Is it your contention that your Mariner's Cay neighbors are required to not only endure the presence of your tenants but also pay for the increased use of common areas by such tenants? Does Plaintiff believe it is fair to treat Plaintiff's neighbors in such a manner?

29. As to each Plaintiff, how do your contracted rental agents, cleaning services, maintenance contractors gain access to your unit and how do they open the entrance security gate?

30. As to each Plaintiff, is your Mariner's Cay condo your primary legal residence, second home, or rental business? Do you have a homestead credit applied to your property taxes? What is the address of your primary residence if not Mariner's Cay?

31. As to each Plaintiff, how many rental properties do you or your Corp, LLC own? How many of those rental units are available for less than a 30-day rental?

32. As to each Plaintiff, do you declare your Mariner's Cay rental income and expenses on your personal taxes or via a Corp, LLC or other entity.

33. As to each Plaintiff, how many nights have you stayed in your Mariner's Cay condo in each of the last five years?

Respectfully submitted,

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: 

Phillip S. Ferderigos

P.O. Drawer H

Charleston, SC 29402

288 Meeting Street, Suite 200 (29401)

(843) 577-7700

pferderigos@barnwell-whaley.com

Dated: 02/13, 2019

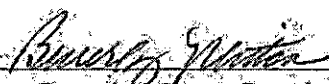
COUNSEL FOR THE DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October 2019, I caused a copy of the foregoing Interrogatories to be mailed to counsel of record with sufficient postage and correctly addressed as follows:

Sean A. O'Connor, Esquire
4000 Faber Place Drive, Suite 450
North Charleston, SC 29405

Barnwell Whaley Patterson & Helms, LLC

By: 
Beverly Mitton, Legal Assistant



STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

COUNTY OF CHARLESTON)

C/A NO. 2019-CP-10-03390

Dustin Grotzke, Christine Grotzke, Leo)
Cornejo, Steve Falciani, Nancy Falciani,)
Robert St. Louis, Lindsay Layton, George)
Lauderback, Beth Lauderback, Jan Prentice,)
Julie Haynie, Lynn Alexander, Lisa Scott,)
Ron Woolf, Rebecca Woolf, Nancy Zai,)
Meg White, Ginger Adler, Gerry Murphy,)
Sam Ogden, Joey Winchester, Frank Duffy,)
Betty Duffy, Lois Stefan, Kelly Hill, Mary)
Thaler, Ed Thaler, Lisa Essig, Jenn Odom,)
Brianna Stello, and Leslie Kelly,)

**REQUEST TO PRODUCE
TO PLAINTIFFS**

Plaintiffs,)

vs.)

Mariner's Cay Racquet & Yacht Club)
Homeowners' Association, Inc.,)

Defendant.)

TO: SEAN A. O'CONNOR, COUNSEL FOR THE PLAINTIFFS:

Defendant Mariner's Cay Racquet & Yacht Club Homeowners' Association, Inc., by and through the undersigned attorneys, requests the Plaintiffs herein to produce for inspection and copying the following described documents and things in the possession, custody, access or control of the Plaintiffs, their attorney(s) and/or other representative(s) or agent(s), pursuant to Rule 34 of the South Carolina Rules of Civil Procedure:

DEFINITIONS AND INSTRUCTIONS

The terms listed below are defined as follows:

1. "You" and "your" shall mean the Plaintiff, as well as their/its agents, attorneys, and any other individual or entity associated or affiliated with them or purporting to act on their/its behalf.
2. "Plaintiff" means any and all of the above-named Plaintiffs and further means all officers, employees, agents, attorneys, and/or representatives of Plaintiffs.
3. "Writing" or "document" as used herein shall be understood to mean all originals and drafts of any kind of written, graphic, printed, typed, or otherwise recorded matter, however produced or reproduced, whether or not privileged, and whether or not in the actual or constructive possession,

custody, care, or control of you, your agents, employees, and attorneys, included but not limited to all contracts of any nature, all correspondence, tapes, disks, microfilms, photographs, telegrams, notes, sound recordings, minutes of meetings, memoranda of all types, interoffice communications, reports, contracts, licenses, agreements, ledgers, books of accounts, vouchers, bank checks, invoices, purchase orders, charge slips, hotel charges, copies of tax returns, tax reports, receipts, working papers, computer printouts, computer generated or electronic data, computer disks, statistical records, delivery records, stenographers' notebooks, desk calendars, appointment books, diaries, time sheets and logs, and any papers or recordings similar thereto, whether made or received by you.

4. The singular of any word herein shall be deemed to include the plural of such word and the plural shall include the singular. The masculine shall be deemed to include the feminine, and the feminine shall be deemed to include the masculine. The word "and" shall be deemed to include the word "or," and the word "or" shall be deemed to include the word "and." Each of the functional words "each," "any," and "all" shall be deemed to include each of the other functional words.

5. "Person" shall mean any individual, firm, partnership, corporation, association, business, or governmental entity or subdivision, agency, department, and any "person" acting by or through, directly or indirectly, any other "person" as well as any "person" by whom such "person" was controlled with respect to the matter in question.

6. A communication, document, or writing "relating," "related," or "which relates" to any given subject means communication, document, or writing that constitutes, contains, embodies, evidences, reflects, identifies, states, refers to, deals with, or is in any way pertinent to that subject, including without limitation documents concerning the preparation of other documents.

INSTRUCTIONS

1. In the event that any objection is made to the production of any document fairly comprised within the scope of the following requests, you shall furnish in lieu of the production of such a document, a list of each document withheld from production together with the following information: (a) the reason for withholding production; (b) a statement of the facts constituting the basis for your withholding production; and (c) a brief description of the document withheld, including: (i) the date upon which the document originated; (ii) the identity of its author or preparer; (iii) the identity of each person who was a recipient of the document; (iv) the specific request which encompasses the document; (v) a brief description of the subject matter of the document; and (vi) the identity of all persons who have personal knowledge of the subject matter.

2. For each request or part thereof that you refuse to respond to on the grounds of burdensomeness, the response should state: (a) the number of files and/or documents needed to be searched; (b) the location of each such file; (c) the number of hours required to conduct the search; and (d) the estimated cost of the search in dollars.

3. If any document requested herein or fairly comprised within the scope of the request has been lost or destroyed, you shall provide in lieu of a true and correct copy thereof a list of each document so lost or destroyed together with the following information: (a) the date of origin; (b) a brief description of such document; (c) the author or preparer of the document; (d) the date on which the document was lost or destroyed; and (e) a brief statement of the manner in which the document was lost or destroyed.

4. With respect to the following requests, you shall identify and/or prepare all documents which are known to you or which can be located or discovered by you through diligent effort on the part of you, your employees, representatives, attorneys, accountants, including but not limited to all documents which are in the business or personal files of your employees, in the possession of your representatives, attorneys, or accounts, or accessible to you, your employees, or your representatives, attorneys, or accountants.

5. These Requests for Production shall be deemed continuing in nature. Should Plaintiff acquire additional documents responsive to these requests after serving responses hereto, the responses shall be supplemented immediately.

REQUEST TO PRODUCE

1. Copies of all statements, written or recorded, of any persons, including parties hereto, who are or may be witnesses to any of the matters complained of in the Complaint.

2. All photographs relating in any way to the matters referred to in the Complaint or the damages claimed.

3. All diagrams, plats, reports or other documents relating to the matters in suit and referred to in Plaintiffs' Responses to Defendant's Interrogatories.

4. As to each Plaintiff, Federal and State income tax returns for the years 2014, 2015, 2016, 2017, 2018 plus all evidence of any and all income earned and its source(s) for the year 2019.

5. As to each Plaintiff, copies of any and all business licenses.

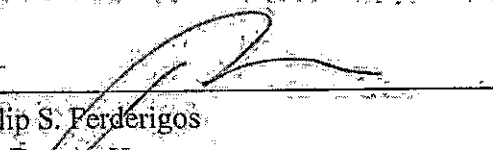
6. As to each Plaintiff, complete copies of their respective property managers' files, including but not limited to a print out of all tenants of each Plaintiff's property, the website advertisements for such property, the gross funds generated and paid to the Plaintiff, and the total expenses (property manager, advertising, cleaning services, cable bills, electric bills, water bills, television/internet bills, and all other expenses for the rental of such property). This includes any and

all printouts from VRBO, Air B-n-B, Booking.com, Travelocity and/or other property management companies reflecting any and all monthly/annual revenues and expenses associated with Plaintiff's short-term rental business within Mariner's Cay.

7. As to each Plaintiff, produce a complete copy of your business license application.
8. Please produce an itemized list of all business expenses claimed for your short-term rental business for the last five years.
9. Please produce a copy of all online or print advertisements within the past five years.
10. Copies of all reports of experts which may pertain, in any way, to the issues involved in this case.
11. Please produce copies of any and all documentation supporting any claims for damages.

Respectfully submitted;

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: 

Phillip S. Ferderigos

P.O. Drawer H

Charleston, SC 29402

288 Meeting Street, Suite 200 (29401)

(843) 577-7700

pferderigos@barnwell-whaley.com

Dated: Oct 13, 2019

COUNSEL FOR THE DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of October 2019, I caused a copy of the foregoing Request to Produce to be mailed to counsel of record with sufficient postage and correctly addressed as follows:

Sean A. O'Connor, Esquire
4000 Faber Place Drive, Suite 450
North Charleston, SC 29405

Barnwell Whaley Patterson & Helms, LLC

By: 

Beverly Mitton, Legal Assistant

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)
DUSTIN GROTZKE, et al.,)
Plaintiffs,)
vs.)
MARINER'S CAY RACQUET & YACHT)
CLUB HOMEOWNERS ASSOCIATION,)
INC.,)
Defendant/Third-Party)
Plaintiff)
vs.)
JANE AND JOHN DOE DEFENDANTS,)
Third-Party Defendants.)

IN THE COURT OF COMMON PLEAS

NINTH JUDICIAL CIRCUIT

CASE NO.: 2019-CP-10-03390

**DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT**

TO: PLAINTIFFS AND SEAN A. O'CONNOR, ESQ.

YOU WILL PLEASE TAKE NOTICE that Defendant/Third-Party Plaintiff Mariner's Cay Racquet & Yacht Club Homeowners Association, Inc. ("HOA"), by and through its undersigned counsel, will move before the Honorable Mikell R. Scarborough, Master-in-Equity (or another presiding judge of the Ninth Judicial Circuit) at the Charleston County Courthouse, Charleston, South Carolina, on July 19, 2022 at 10:30 a.m., or at such other time and place as may be set by the Court, for an Order granting it summary judgment in the above-referenced case on the grounds that there exists no genuine issue of material fact and that HOA is entitled to judgment as a matter of law. In support of this Motion, attached hereto is an Affidavit of Roger Camp in Support of Motion for Partial Summary Judgment.

On January 20, 2020, the Honorable Jennifer B. McCoy entered a Consent Order of Reference to Master-in-Equity. The order states, in part, that:

Plaintiffs and Defendant have agreed that the central issue to be heard by the Master-in-Equity is whether the Board may restrict the short-terms rental of condominium units pursuant to the existing language of its Master Deed and governing documents.

Plaintiffs and Defendant do not waive, abandon or relinquish any of their claims or causes of action, including but not limited to those which seek monetary relief; nor do the parties waive, abandon or relinquish their right to have such claims tried by a jury in Common Pleas court. Instead, they have jointly agreed and consented to set aside any such non-equitable claims temporarily for the purposes and aims stated herein, and to have such non-equitable claims addressed at a later time in Common Pleas court if necessary and appropriate.

In accordance with that Consent Order referring this case to the Master-in-Equity, this Motion will *only* address the equitable issues asserted in this case. HOA reserves the right to move for summary judgment as to any legal issues or claims at the appropriate time in the future.

The bases for this Motion for Partial Summary Judgment include, but are not limited to, the following:

- HOA is entitled to summary judgment on Plaintiffs' claims for equitable relief because Plaintiffs' do not have standing to bring this action concerning the short-term rental moratorium. Plaintiffs all owned property prior to the effective date of the moratorium and have not had their ability to rent out their properties on a short term basis infringed in any way. Additionally, Plaintiffs can present no evidence of actual harm supporting standing because there is no evidence of an actionable injury to their property values.
- The moratorium on short-term rentals is proper because such rentals are not a "residential use" and constitute "business activities."
- The moratorium on short-term rentals was a proper exercise of the powers of the HOA's Board of Directors and is not *ultra vires*.

This motion will be based on the South Carolina Rules of Civil Procedure, common and statutory law of South Carolina, affidavits, depositions and any other evidence which may be admissible by the Court. As previously instructed by the Court, HOA will file a Memorandum in Support of this Motion on or before July 15, 2022.

BARNWELL, WHALEY, PATTERSON, AND
HELMS, LLC

By: s/ John W. Fletcher
M. Dawes Cooke, Jr., Esq. (SC Bar No.: 1376)
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- and -

PARKER POE ADAMS & BERNSTEIN, LLC

By: s/ Robert H. Jordan
Robert H. Jordan, Esq. (SC Bar No.: 13612)
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200 Meeting St., Suite 301
Charleston, SC 29401
(843) 727-2670

Dated: July 8, 2022
Charleston, South Carolina

*Counsel for Defendant/Third-Party Plaintiff Mariner's
Cay Racquet & Yacht Club Homeowners Association,
Inc.*

STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
 NINTH JUDICIAL CIRCUIT

Dustin Grotzke, Christene Grotzke,
 Leo Cornejo, Steve Falciani,
 Nancy Falciani, Robert St. Louis
 Lindsay Layton, George Lauderback,
 Beth Lauderback, Lynn Alexander,
 Ron Woolf, Roberta Woolf, Nancy
 Zaj, Meg White, Joey Winchester,
 Kelly Hill, Mary Thaler, Ed Thaler,
 Lisa Essig, Brianna Stello, and Leslie
 Kelly,

CASE NO.: 2019-CP-10-03390

**PLAINTIFFS' MOTION
 FOR SUMMARY JUDGMENT**

Plaintiffs,

v.

Mariner's Cay Racquet & Yacht Club
 Homeowners' Association, Inc.,

Defendant.

**TO: DEFENDANT MARINER'S CAY RACQUET & YACHT CLUB HOMEOWNERS'
 ASSOCIATION, INC., BY AND THROUGH ITS COUNSEL OF RECORD:**

Plaintiffs, through their undersigned counsel, hereby move for an order granting summary judgment in favor of Plaintiffs pursuant to Rule 56 of the South Carolina Rules of Civil Procedure. Plaintiffs specifically request that the Court's order grant Plaintiffs the following relief:

(1) Declaring the various rights, obligations and legal relations of the parties pursuant to S.C. Code Ann. §§ 15-53-20, 15-53-30, and 15-53-40; specifically, that Defendant's actions as described in the Complaint are and have been repugnant to and in violation of Defendant's recorded Master Deed and the common law of contract in South Carolina jurisprudence;

(2) Granting a restraining order and/or injunction in favor of Plaintiffs, compelling and requiring Defendant, under penalty of contempt, to immediately vacate and cancel the purported moratorium and any amendments or renewals to same, and to publish and distribute notification

of same to the owners in the same manner in which the two October 2018 emails were distributed; and that Defendant cease and desist in regard to any further attempt to impose a purported "moratorium" on short-term rentals, by either present or future owners, and to refrain from any effort to prohibit, restrict or limit short-term rentals until and unless such a provision is duly enacted as an amendment to the Master Deed in accordance with the procedures set forth in Article XI, Section 1 (b) of said Master Deed; and

(3) Ordering that Defendant, under penalty of contempt, shall be specifically enjoined and barred from hindering or interfering in a manner with any short-term rentals of any units within Mariner's Cay Racquet & Yacht Club by any owner, present or future, including appurtenant or related activities such as advertising, marketing, or promoting such units for short-term rentals;

(4) Denying Defendant's motion for summary judgment in this action;

(5) Dismissing Defendant's counterclaim in this action in its entirety with prejudice;

(6) Such other and further relief as may be equitable, reasonable, just and proper.

[SIGNATURE PAGE FOLLOWS]

*Dustin Grotzke et al. v. Mariner's Cay Racquet & Yacht Club
Homeowners' Association, Inc.
CASE NO. 2019-CP-10-03390
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT*

Respectfully submitted,

FINKEL LAW FIRM LLC

Sean A. O'Connor
Sean A. O'Connor (S.C. Bar No. 68382)
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Attorneys for Plaintiffs

July 8, 2022

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: <u>2019-CP-10-03390</u>
DUSTIN GROTZKE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	MEMORANDUM IN SUPPORT OF
	)	DEFENDANT/THIRD-PARTY
	)	PLAINTIFF'S MOTION FOR
MARINER'S CAY RACQUET & YACHT	)	PARTIAL SUMMARY JUDGMENT
CLUB HOMEOWNERS ASSOCIATION,	)	AND IN OPPOSITION TO
INC.,	)	PLAINTIFF'S MOTION FOR
	)	SUMMARY JUDGMENT
	)	
Defendant/Third-Party	)	
Plaintiff	)	
	)	
vs.	)	
	)	
JANE AND JOHN DOE DEFENDANTS,	)	
	)	
Third-Party Defendants.	)	
	)	

Defendant/Third-Party Plaintiff Mariner's Cay Racquet & Yacht Club Homeowners Association, Inc. ("HOA"), by and through its undersigned attorneys, submits the following Memorandum in Support of Motion for Summary Judgment, pursuant to Rule 56 of the South Carolina Rules of Civil Procedure:

INTRODUCTION

This lawsuit involves, *inter alia*, the enforceability of a moratorium that the HOA's Board of Directors have duly enacted concerning the topic of short-term rentals. Plaintiffs claim that the moratoria violates South Carolina law and are unenforceable. In response, the HOA asserts that its short-term rental moratoria are enforceable. It also asserts counterclaims against Plaintiffs for breaches of the HOA's various governing documents.

A. Relevant Provisions of the Master Deed

Mariner's Cay Racquet & Yacht Club ("Mariner's Cay") is a gated condominium community with over 135 separate units ("Unit") located in Folly Beach, South Carolina. (See Affidavit of Roger Camp attached as Exhibit A ¶ 6. Mariner's Cay is governed by a May 11, 1982 Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime ("Master Deed"), which is attached hereto as Exhibit B. The Master Deed provides that "[e]ach Unit, together with its Percentage Interest in the General Common Area and Facilities and the Limited Common Area and Facilities, shall for all purposes constitute a separate parcel of real property which, subject to the provisions of this Master Deed, may be . . . leased." (See Ex. B ¶ III.2).

The Master Deed also includes a number of provisions regulating the rental of property by owners. For example, the Master Deed provides that entire "[u]nits may be rented provided the occupancy is **only by the lessee and his immediate family** unless otherwise provided by the Association's Board of Directors." (See Ex. B ¶ IX.7). The Master Deed authorizes the HOA's Board of Directors to "promulgate rules and regulations limiting the use of the General Common Area and Facilities to Unit Owners and their guests as well as to provide for the exclusive use of a part of the General Common Area and Facilities by a Unit owner and his guests for special occasions which exclusive use may be conditioned, among other things, upon the payment of a fee." (See Ex. B ¶ III.3). Moreover, all "tenants, and each and every occupant of each Apartment Unit shall at all times observe the published rules of conduct which may be established from time to time by the Association or its Board of Directors." (See Ex. B ¶ VII.4).

Under the HOA's governing documents, "[b]uildings and all Units contemplated in the development shall be, and the same hereby are, **restricted exclusively to residential use.**" (See Ex. B ¶ IX.1). Moreover, the Master Deed **prohibits any business activities** at Mariner's Cay:

No advertising signs, billboards, unsightly objects/or nuisances shall be erected, placed or permitted to remain on the property, nor shall the property be used in any way or for any purpose which may endanger the health or unreasonably disturb the Owner of any Unit or any resident thereof. **No business activities of any kind whatever shall be conducted in any building or in any portion of the property;** provided, however, the foregoing covenants shall not apply to the business activities, signs and billboards of Granter, its agents or assigns during the construction and sale period

(See Ex. B ¶ IX.4). The Master Deed requires Unit Owners renting units to tenants to register with the HOA's secretary. (See Ex. B ¶ III.1). Furthermore, the Master Deed limits the use of common areas to immediate family members, a limited number of guests, and/or tenants who reside in the Unit Owner's apartment. (See Countercl. ¶ 47).

Traditionally, Mariner's Cay has been a residential community, whose owners have lived in their units. (See Ex. A ¶ 8). Over the years, many owners of condominium units at Mariner's Cay have increasingly rented their units on a short-term basis, often for a period of one week or less. (See Ex. A ¶ 9). These rentals have often been made to vacationers who do not reside in the Lowcountry and who have no ties to this area. (See Ex. A ¶ 10). Moreover, roughly 3000 short term renters come and go from Mariner's Cay in the peak four-month period from mid-May through mid-September. The influx of this many renters over the summer months stresses Mariner's Cay community in many ways. In connection with these short-term rentals, renters seek access to and use of Mariner's Cay's common areas and amenities, including the swimming pool. (See Ex. A ¶ 11). As a result, permanent residents of Mariner's Cay are frequently exposed to and interact with short-term renters. (See Ex. A ¶ 12).

It has been Mariner's Cay experience that short-term renters frequently engage in conduct that is loud, boisterous or otherwise disturbing to the permanent residents of Mariner's Cay. (See Ex. A ¶ 13). Short-term renters often leave messes in common areas that make life unpleasant for

permanent residents. (*See* Ex. A ¶ 14). The presence of short-term renters has greatly increased the number of people present at Mariner's Cay. (*See* Ex. A ¶ 9). More importantly, it has greatly increased the number of unfamiliar people with no ties to the community who have been at Mariner's Cay. (*See* Ex. A ¶ 10). There has also been a dramatic increase in the volume of service providers who pass through the gates of Mariner's Cay to perform work in connection with short-term rentals, often during weekends and outside of business hours, when such contractors are prohibited from engaging in work at Mariner's Cay. (*See* Ex. A ¶ 21). The short-term rental activity is causing security issues for the HOA and its owners in this secure, gated community. (*See* Ex. A ¶ 15). All of this has had a detrimental impact on the HOA's Common and Limited Areas and Facilities and on the owners' ability to enjoy their units and the amenities of Mariner's Cay. (*See* Ex. A ¶ 16).

As the number of short-term renters at Mariner's Cay has increased, complaints have been on the rise about, among other things, parking violations, noise complaints, gate damage, litter, increased burden on property management and Board members, and overcrowding of amenities by non-owners. (*See* Ex. A ¶ 17). The rental of units to short-term renters is frequently operated like a business. (*See* Ex. A ¶ 18). Many owners retain companies to manage the short-term rental of their units or engage in active advertising and marketing of their units for short-term rental. (*See* Ex. A ¶ 19). Owners of short-term rentals typically need to engage in work to clean and prepare their units between rentals; this work is often done by third-party companies who manage the short-term rental of units. (*See* Ex. A ¶ 20). This short-term rental cleaning and maintenance activity increases the number of non-owners coming and going from the community (*See* Ex. A ¶ 21).

B. The Temporary Moratorium on Short-Term Rentals

On May 23, 2019, HOA's Board of Directors adopted a resolution, entitled "Temporary Moratorium of Short-Term Rentals" ("Temporary Moratorium"), providing in relevant part:

WHEREAS a clear majority of the members of the Mariners Cay Home Owners Association (HOA) have expressed an interest in limiting the number of Short Term Rental (STR) units available within Mariners Cay, and in an effort to maintain the residential character of the community, the Board of Directors of the HOA has determined that a **Moratorium shall be placed on all new owners** who have entered into a verifiable offer to purchase Mariners Cay units after July 1, 2019, whether through consummated sale or transfer of title, from entering into any rental agreement, license and/or from offering the temporary possession or occupancy of their respective Mariners Cay unit for less than 30 consecutive days in exchange for monetary consideration. This provision excludes new owners who obtain title to a Mariners Cay unit from a family member. This particular Moratorium shall remain in effect until April 30, 2020 or until such time as the Mariners Cay HOA has addressed the issues associated with Short Term Rentals to the satisfaction of a majority of the home owners.

(See Temporary Moratorium attached as Exhibit C, at 2). Notably, the Temporary Moratorium did *not* restrict the current owners of units at Mariner's Cay from engaging in short-term leasing. Any owner of property purchased before July 1, 2019 would be exempt from that limitation and could rent their property on a short-term basis. To be clear, no named Plaintiff has been prohibited or restricted from engaging in short-term rentals.

On April 27, 2022, the HOA's Board of Directors adopted the current¹ version of the Temporary Moratorium, which states in relevant part:

WHEREAS a clear majority of the members of the Mariner's Cay Home Owners Association (HOA) have expressed an interest in limiting the number of Short Term Rental (STR) units available within Mariner's Cay, and in an effort to maintain the residential character of the community, **to the fullest extent allowable under the Master Deed, the By-Laws and South Carolina law**, the Board of Directors of the HOA has determined that a **Moratorium shall be placed on all new owners** who have entered into a verifiable offer to purchase Mariner's Cay units after July 1, 2019, whether through consummated sale or transfer of title, from entering into any rental agreement, license and/or from offering the temporary possession or

¹ In the interim, the Temporary Moratorium was extended by resolutions adopted on March 18, 2020 and April 16, 2021. (See Exs. D & E).

occupancy of their respective Mariner's Cay unit for less than 30 consecutive days in exchange for monetary consideration **which in any way violates the Master Deed, Bylaws or governing rules and/or restrictive covenants of the HOA**. This moratorium does not apply to Mariner's Cay unit owners who owned their unit prior to July 1, 2019 or spouses married prior to April 30, 2022 who receive the deed to a Mariner's Cay unit from their spouse. This particular Moratorium shall remain in effect until April 30, 2023 or until such time as the Mariner's Cay HOA has addressed the issues associated with Short Term Rentals to the satisfaction of a majority of the home owners.

(See Ex. F). Like all of its prior iterations, the current version of the Temporary Moratorium does *not* apply to owners (like Plaintiffs) who obtained their properties prior to July 1, 2019.

Since the adoption of the first Temporary Moratorium, Mariner's Cay units have continued to be marketable and to sell. (See Ex. A ¶ 22). It does not appear that the Temporary Moratorium has had any negative impact on the value or marketability of properties at Mariner's Cay. (See Ex. A ¶ 23). In fact, property values of units at Mariner's Cay have increased since the adoption of the first Temporary Moratorium, and sales prices have increased. (See Ex. A ¶ 24).

C. This Lawsuit

Plaintiffs Dustin Grotzke, Christine Grotzke, Leo Cornejo, Steve Falciani, Nancy Falciani, Robert St. Louis, Lindsay Layton, George Lauderback, Beth Lauderback, Jan Prentice, Julie Haynie, Lynn Alexander, Lisa Scott, Ron Woolf, Rabecca Woolf, Nancy Zai, Meg White, Ginger Adler, Gerry Murphy, Sam Ogden, Joey Winchester, Frank Duffy, Betty Duffy, Lois Stefan, Kelly Hill, Mary Thaler, Ed Thaler, Lisa Essig, Jenn Odom, Brianna Stello, and Leslie Kelly commenced this lawsuit against the HOA on June 24, 2019. Plaintiffs allege that they each "own[] a condominium unit in Mariner's Cay." (See Compl. ¶ 4). However, it appears that numerous of the named Plaintiffs no longer own units at Mariner's Cay.

Plaintiffs further allege that they all had, "in the past rented his or her condominium unit on a short term basis to vacationers, and to further that purpose has marketed and advertised his or

her unit online on vacation rental websites and/or applications as being available for such short-term rentals." (*See* Compl. ¶ 5). Plaintiffs further allege that, "[u]nable to restrict short term rentals lawfully via an amendment to the Master Deed as required, the Board instead announced via an email to the owners on May 28, 2019 that a 'moratorium' on short-term rentals would be imposed." (*See* Compl. ¶ 19). Among other things, Plaintiffs' Complaint prays for "[a]n Order declaring the herein described actions of Defendant to be in breach of the terms of the Master Deed to which the Association and all owners are declared to be bound." (*See* Pls.' Compl. ¶ 42(B)). They also request the following equitable relief:

43. A Temporary Restraining Order and/or Temporary Injunction compelling and requiring Defendant, under penalty of contempt, to immediately vacate and cancel the purported moratorium, and to publish and distribute notification of same to the owners in the same manner in which the two October 2018 emails were distributed; and that Defendant cease and desist in regard to any further attempt to impose a purported "moratorium" on short-term rentals, by either present or future owners, and to refrain from any effort to prohibit, restrict or limit short-term rentals until and unless such a provision is duly enacted as an amendment to the Master Deed in accordance with the procedures set forth in Article XI, Section 1 (b) of said Master Deed;

44. An Order providing that Defendant, under penalty of contempt, shall be specifically enjoined and barred from hindering or interfering in any manner with any short-term rentals of any units within Mariner's Cay Racquet & Yacht Club by any owner, present or future, including appurtenant or related activities such as advertising, marketing or promoting such units for short-term rentals;

(*See id.* ¶¶ 43-44).

On September 9, 2019, the HOA filed its Answer and Counterclaims, denying all of Plaintiffs' claims against it. (*See generally* Ans. and Countercl.). The HOA additionally asserted a counterclaim against Plaintiffs and third-party claims against HOA "members . . . who acquired their Units at Mariner's Cay after July 1, 2019 and who are engaging in short term rental of their Units for periods less than thirty (30) days." (*See* Ans. and Countercl. ¶ 29). The HOA's

counterclaims and third-party claims allege that short-term lessors are violating provisions of the HOA's governing documents that:

- a. limit use of a Unit to "residential use" only; (*See* Ex. B. ¶ IX.1)
- b. do not permit a Residential Association member to use his or her Unit for "business activity of any kind whatever"; (*See* Ex. B. ¶ IX.4)
- c. do not permit a Residential Association member to rent to a non-lessee; (*See* Ex. B. ¶ IX.7)
- d. do not permit a Residential Association member to rent to a lessee who invites non-immediate family members to stay in the Unit and; (*See* Ex. B. ¶ IX.7)
- e. do not permit a Residential Association member to engage in conduct which restricts or encroaches upon the rights of other Unit owners. (*See* Ex. B ¶ III.3(e)).
- f. limit a Unit owner's right to 'assign rights of enjoyment to Common Area and Facilities or Limited Common Area and Facilities only to a "immediate family members", "a limited number of guests", or "tenants who reside" in the Unit owner's Apartment and require the Unit owner provide the Secretary of the Association with written notice of the assignee names before an assignment is made. (*See* Ex. B ¶ III.3(f))
- g. require that "no less that all of a unit may be rented." (*See* Ex. B. ¶ IX.7)

(*See* Ans. and Countercl. ¶ 47).

The first count of the HOA's counterclaims and third-party claims bring equitable claims which seek "Order(s) granting a preliminary and permanent injunction against the Plaintiffs and third-party Defendants' prohibiting any use of their Units in violation of the Master Deed, By-Laws, the Moratorium or other governing document." (*See* Ans. and Countercl. ¶ 50). The HOA's second count is for breach of contract seeking damages for the violation of the HOA's governing documents by owners of short-term rental properties. Finally, the HOA requests a declaratory judgment as to the parties rights under the HOA's governing documents and the Temporary Moratorium.

On January 20, 2020, the Honorable Jennifer B. McCoy entered a Consent Order of Reference to Master-in-Equity. That order noted that this "is primarily an action for equitable relief in the form of injunctive relief and declaratory judgment." (See Jan. 20, 2020 Order, at 1).

The order further states that:

[T]he parties have jointly agreed to set aside for the time being any and all legal claims which have demanded monetary relief, in order that the Master-in-Equity for Charleston County may first hear and rule upon the equitable claims they have asserted. Plaintiffs and Defendant have agreed that the central issue to be heard by the Master-in-Equity is whether the Board may restrict the short-terms rental of condominium units pursuant to the existing language of its Master Deed and governing documents.

Plaintiffs and Defendant do not waive, abandon or relinquish any of their claims or causes of action, including but not limited to those which seek monetary relief; nor do the parties waive, abandon or relinquish their right to have such claims tried by a jury in Common Pleas court. Instead, they have jointly agreed and consented to set aside any such non-equitable claims temporarily for the purposes and aims stated herein, and to have such non-equitable claims addressed at a later time in Common Pleas court if necessary and appropriate.

(See Jan. 20, 2020 Order, at 2). As a result, the parties' equitable claims are all pending before the Master-in-Equity, while any legal claims have been stayed.

For the reasons that follow, the Court should grant the HOA partial summary judgment as to all equitable claims and counterclaims asserted in this matter and should deny Plaintiffs' Motion for Summary Judgment.

ARGUMENTS

A. Standard of Review

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." *Harbit v. City of Charleston*, 382 S.C. 383, 390, 675 S.E.2d 776, 779 (Ct. App. 2009) (quoting *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)). Summary judgment is proper when no issue exists as to any material fact and the moving party is

entitled to a judgment as a matter of law. *See Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n.2, 677 S.E.2d 612, 614 n.2 (Ct. App. 2009) (citing S.C.R. Civ. P. 56(c)).

The standards governing a motion for summary judgment are well-settled in South Carolina:

This court reviews the grant of a summary judgment motion under the same standard applied by the trial court pursuant to Rule 56(c), SCRCF. *Jackson v. Bermuda Sands, Inc.*, 383 S.C. 11, 14 n. 2, 677 S.E.2d 612, 614 n. 2 (Ct. App. 2009). Rule 56(c), SCRCF, provides that summary judgment shall be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "The purpose of summary judgment is to expedite the disposition of cases not requiring the services of a fact finder." *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n, Inc.*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citing *George v. Fabri*, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001)).

An adverse party may not rely on the mere allegations in his pleadings to withstand a summary judgment motion, but must set forth specific facts showing there is a genuine issue for trial. *Strickland v. Madden*, 323 S.C. 63, 68, 448 S.E.2d 581, 584 (Ct. App. 1994). Nonetheless, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

See Paine Gayle Props., LLC v. CSX Transp., Inc., 400 S.C. 568, 576, 735 S.E.2d 528, 532-33 (Ct. App. 2012) (affirming grant of summary judgment). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." *Town of Hollywood v. Floyd*, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013).

"[W]hen plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Moore v. Barony House Restaurant, LLC*, 382 S.C. 35, 40, 674 S.E.2d 500, 503 (Ct. App. 2009) (quoting *Rife v. Hitachi Constr. Mach. Ltd.*, 363 S.C. 209, 214, 609 S.E.2d 565, 568 (Ct. App. 2005)). Stated otherwise, "when the evidence is susceptible of only one reasonable interpretation, summary judgment may be granted." *Brooks v.*

Northwood Little League, Inc., 327 S.C. 400, 403, 489 S.E.2d 647, 648 (Ct. App. 1997). Where, as in this case, the non-moving party bears the burden of proof, it must present evidence sufficient to make a showing as to the required elements of its claim:

"[T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party **who fails to make a showing sufficient to establish the existence of an element essential to the party's case**, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. **The moving party is 'entitled to a judgment as a matter of law' because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof.**"

See Jones ex rel. Jones v. Enterprise Leasing Co., 383 S.C. 259, 263-64, 678 S.E.2d 819, 821 (Ct. App. 2009) (emphasis added) (*quoting Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 116, 410 S.E.2d 537, 545-46 (1991)).

Under these standards, the Court should grant Defendant HOA's Motion for Summary Judgment for the reasons set forth below.

B. Plaintiffs Do Not Possess Standing to Challenge the Temporary Moratorium

The principle of standing under the United States Constitution is "an essential and unchanging part of the case-or-controversy requirement of Article III." *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "As a general rule, to have standing, a litigant must have a personal stake in the subject matter of the litigation." *Ex parte Morris*, 367 S.C. 56, 62, 624 S.E.2d 649, 652 (2006), *quoted in Powell v. Bank of Am.*, 379 S.C. 437, 445, 665 S.E.2d 237, 241 (Ct. App. 2008). "One must be a real party in interest, i.e., a party who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." *Id. Georgetown Cty. League of Women Voters v. Smith Land*

Co., 393 S.C. 350, 358, 713 S.E.2d 287, 291-92 (2011) ("In other words, the party seeking relief must have a real, material, or substantial interest in the litigation, not a merely nominal or technical one.").

A party seeking to establish standing must prove the "irreducible constitutional minimum of standing," which consists of three elements: (1) the plaintiff must have suffered an injury in fact; (2) the injury and the conduct complained of must be causally connected; and (3) it must be likely, rather than merely speculative, that the injury will be redressed by a favorable decision. *See Sea Pines Ass'n for the Prot. of Wildlife v. South Carolina Dep't of Natural Res. & Cmty. Servs. Assocs., Inc.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001). "The party seeking to establish standing carries the burden of demonstrating each of the three elements." *Commander Health Care Facilities, Inc. v. South Carolina Dep't of Health & Envtl. Ctrl.*, 370 S.C. 296, 301, 634 S.E.2d 664, 666 (Ct. App. 2006). An injury-in-fact is "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *See Freemantle v. Preston*, 398 S.C. 186, 192-93, 728 S.E.2d 40, 43 (2012) (citations omitted).

In paragraphs 27-28 of their Complaint, Plaintiffs allege that they have standing to bring this action pursuant to the following provision of the Master Deed:

Each Owner shall comply strictly with the By-Laws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in this Master Deed or in the deed to his Unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both maintainable by the Board of Directors on behalf of the Association or by an aggrieved Owner.

(*See* Ex. B ¶ XI.6). They further allege that, even though the Temporary Moratorium does not apply to them, "it nonetheless indisputably does affect, injure and damage current owners,

including Plaintiffs, as it impairs and hinders current owners' ability to sell their units and diminishes the property value of the current owners' units." (*See* Pls.' Compl. ¶ 29). They additionally allege that they have a vested right to rent their properties and that they "have the ability to convey that vested right to a purchaser, a right which has appreciable monetary value." (*See* Pls.' Compl. ¶ 30). Because Plaintiffs are not subject to the moratorium, it is impossible for them to show they have standing with regard to the equitable claims asserted against the HOA.

First, it is clear that the Temporary Moratorium has no direct impact on Plaintiffs, who all allege that they owned Units at Mariner's Cay at the time of the Complaint, *i.e.*, June 24, 2019. (*See* Pls.' Compl. ¶ 4). As such, they all owned their Units before July 1, 2019 and before the effective date of the Temporary Moratorium; consequently, the Temporary Moratorium makes explicit that it does not apply to Plaintiffs. The Temporary Moratorium would have no direct effect on Plaintiffs or their ability to rent out their own Units on a short-term basis. Plaintiffs are, and have remained at all times, free to rent their Units on a short-term basis. They can rent their Units for less than 30 days. They can rent their Units to vacationers. So long as they comply with the Master Deed and other governing documents, Plaintiffs themselves are in precisely the same position today that they were in prior to the Temporary Moratorium with regard to their ability to rent their Units on a short-term basis. In other words, the Temporary Moratorium has no direct impact whatsoever on Plaintiffs' use of their Units.

As set forth above, Plaintiffs argue that — even though the Temporary Moratorium does not apply to them — they were harmed and possess standing because the Temporary Moratorium decreases their property values or infringes on their ability to market and sell their Units. However, Plaintiffs have not presented any evidence that the Temporary Moratorium has actually had any impact on property values or their ability to sell their Units. In fact, they have not presented any

evidence that any of them have unsuccessfully tried to sell their property. They have not presented any evidence that they had to sell properties for a lesser amount because of the Temporary Moratorium. If anything, the evidence shows that Mariner's Cay units are selling briskly and at market value. At this point, any claimed impact on property values is theoretical and speculative.

For the foregoing reason, the Court should grant the HOA summary judgment as to Plaintiffs' claims because Plaintiffs do not possess standing to assert these claims against the HOA.

C. The Law Is Clear That the Master Deed Prohibits Plaintiffs' Short-Term Rentals of Their Units to Transient Guests, as Those Rentals are Not "Residential," But Are More Similar to a Hotel's Rental of Accommodations to Transient Travelers.

"Restrictive covenants, sometimes referred to as 'real covenants,' are agreements 'to do, or refrain from doing, certain things with respect to real property.'" *Kinard v. Richardson*, 407 S.C. 247, 257, 754 S.E.2d 888, 893 (Ct. App. 2014) (quoting *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006)). "Restrictive covenants are construed like contracts and may give rise to actions for breach of contract." See *Matsell v. Crowfield Plantation Cmty. Servs. Ass'n*, 393 S.C. 65, 70, 710 S.E.2d 90, 93 (Ct. App. 2011) (citation and internal quotation marks omitted). "Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution." *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E.2d 862, 863 (1998). "[T]he paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document." *Id.* at 4, 498 S.E.2d at 863-64 (quotation marks omitted). When "the language imposing restrictions upon the use of property is unambiguous, the restrictions will be enforced according to their obvious meaning." *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992).

A restrictive covenant is ambiguous when its terms are reasonably susceptible of more than

one interpretation. *See South Carolina Dep't of Natural Res. v. Town of McClellanville*, 345 S.C. 617, 623, 550 S.E.2d 299, 302 (2001). "[A] restriction on the use of the property must be created in express terms or by plain and unmistakable implication, and all such restrictions are to be strictly construed, with all doubts resolved in favor of the free use of property." *Hamilton v. CCM, Inc.*, 274 S.C. 152, 157, 263 S.E.2d 378, 380 (1980). However, "the rule of strict construction should not be used to defeat the plain and obvious purpose of the restrictive covenants." *Hardy v. Aiken*, 369 S.C. 160, 166, 631 S.E.2d 539, 542 (2006).

Plaintiffs' primary argument in this case is that the Temporary Moratorium is unenforceable and void because such a restriction may only be created by a formal amendment to the Master Deed by a vote of the members of the HOA. For the reasons that follow, the HOA is entitled to summary judgment as to Plaintiffs' claims against it and as to its counter- and third-party claims. The evidence and the governing legal authority demonstrate that the HOA is entitled to judgment as a matter of law to the effect that the Temporary Moratorium is appropriate and legally enforceable.

1. **Under South Carolina Law, the Short-Term Rental of Accommodations to Transient Guests Is Not a "Residential Use," but Rather Is a "Business Activit[y]."**

As set forth above, the Master Deed provides that all Mariner's Cay Units are **"restricted exclusively to residential use."** (*See* Ex. B ¶ IX.1). Moreover, the Master Deed provides that **"[n]o business activities of any kind whatsoever shall be conducted in any building or in any portion of the property"** (*See* Ex. B ¶ IX.4). The language regarding business activities in the Master Deed is plain and unambiguous. Under South Carolina law, the "terms of an unambiguous deed may not be varied or contradicted by evidence drawn from sources other than the deed itself." (*See R.J. Griffin & Co. v. Beach Club II Homeowners Ass'n*, 384 F.3d 157, 160 n.

1 (4th Cir.2004)). There is an ambiguity only if “the terms of the contract [or deed] are reasonably susceptible of more than one interpretation.” (*See id.*). For the reasons that follow, the short-term rental of Units to transient guests, primarily out of town tourists, is not a “residential use” and is, in fact, a “business activit[y].” Therefore, Plaintiffs short-term rental businesses are in direct violation of the Master Deed. As a result, the Temporary Moratorium does not take away any contractual or other rights of Plaintiffs (or any other owners). Instead, it merely reaffirms what the Master Deed has always provided: that short-term rentals of accommodations to transient guests is prohibited by the Master Deed.

a. **South Carolina Law Supports that “Residential Use” Refers to Dwelling at a Location That Has Some Permanency, Not to Purely Transient Dwelling.**

As set forth above, Mariner’s Cay Units are limited to “residential” use. South Carolina law has not definitively ruled upon the question presented here: whether short-term (primarily vacation) rentals on a transient basis constitute a “residential use” under a Master Deed. However, South Carolina Courts have had numerous opportunities to discuss what “residential” means in various circumstances.

For example, the South Carolina Supreme Court long ago quoted the dictionary definitions of “residential,” which requires that the dwelling be occupied permanently or for a long period of time:

“Residence. Living or dwelling in a certain place permanently or for a considerable length of time; The place where a man makes his home, or where he dwells *permanently, or for an extended period of time.*” Black’s Law Dictionary, page 1543.

“Resident. Dwelling, or having an abode, in a place *for a continued length of time.*” Webster’s New International Dictionary.

See Ex parte Morrow, 183 S.C. 170, 175, 190 S.E. 506, 508 (1937) (emphasis added). Under this

definition, the short-term rental of property to transient travelers would not constitute "residential" use.

Moreover, South Carolina appellate court opinions discussing whether a relative is a "Class I" insured for purposes of stacking (i.e., a "resident" relative) are helpful. In the first Supreme Court decision defining a "resident" relative, the Court stated that "a resident of the same household is one, *other than a temporary or transient visitor*, who lives together with others in the same house for a period *of some duration*, although he may not intend to remain there permanently." *See Buddin v. Nationwide Mut. Ins. Co.*, 250 S.C. 332, 339, 157 S.E.2d 633, 636 (1967) (citations and internal quotation marks omitted), *quoted in Cook v. State Farm Auto. Ins. Co.*, 376 S.C. 426, 431, 656 S.E.2d 784, 787 (Ct. App. 2008); *accord Auto-Owners Ins. Co. v. Horne*, 356 S.C. 52, 586 S.E.2d 865 (Ct. App. 2003) (holding daughter was not resident relative of non-custodial father where she lived with mother and only occasionally visited father); *Richardson v. South Carolina Farm Bureau Mut. Ins. Co.*, 336 S.C. 233, 519 S.E.2d 120 (Ct. App. 1999) (holding daughter was not resident relative of parents' house where she moved away as graduate student, maintained residence in another town and kept few items at parents' home); *Auto Owners Ins. Co. v. Langford*, 330 S.C. 578, 500 S.E.2d 496 (Ct. App. 1998) (holding that claimant was not resident relative of grandmother where she usually lived with mother and only stayed with grandmother when she fought with mother).

As used in the Master Deed, "residential use" should be construed to mean long-term habitation, not a temporary vacation accommodation. Mariner's Cay was not developed as a hotel or vacation resort. It is the permanent residence for a great number of its owners. It has been observed at Mariner's Cay that, unlike a long-term renter — who will be motivated to be courteous to neighbors and to exercise care for common property because he or she will be there for a longer

period — vacation renters are more inclined to be inconsiderate, rowdy, and disruptive. (*See* Ex. A ¶ 22).

Many short-term renters spend much of their time, not in the rented Units, but using Mariner's Cay's amenities (particularly the swimming pool and tennis courts). They are therefore frequently intermingling with permanent residents, which significantly alters their community environment. Unlike a short-term rental of a single family home, where neighbors may not be exposed to short-term renters on a regular basis, permanent residents of Mariner's Cay are constantly surrounded by people who do not live there and who are on vacation. Given that approximately 3000 short term renters stay at Mariner's Cay during the peak summer months, short term rental activity turns Mariner's Cay's "residential" environment into that of a hotel. Strangers are constantly going in and out of Mariner's Cay who have no long term ties to the community (beyond a week or even a weekend). This is contrary to the ideal of a residential culture, where residents have security and consistency.

In fact, under Plaintiffs' interpretation of the law, a literal hotel would be for residential use, because guests sleep and eat there. Plaintiffs' argument misses the entire purpose of the "residential use" requirement. The residents of Mariner's Cay do not necessarily care about the nature of business occurring in these Units. That is not the problem. Instead, the Master Deed seeks to eliminate *any business* because — as is the case here — any business will bring unknown and unvetted people into Mariner's Cay. Whether those folks are there to sleep or have their taxes done is irrelevant. What matters is that a significant number of strangers are flooding into Mariner's Cay on a daily basis.

In light of the foregoing, the HOA respectfully submits that the definition of "residential use" under South Carolina law should not be contorted to include transient, short-term stays

(primarily by vacation renters). "Residential use" clearly connotes a longer term dwelling in a location, perhaps with an indefinite term and/or intent to remain indefinitely.

b. South Carolina Law Supports That "Business Activities" Would Encompass the Short-Term Rental of Accommodations on a Transient Basis.

Far from being a permissible "residential use," the short-term rentals occurring at Mariner's Cay are "business activities," which violate the Master Deed. The South Carolina Court of Appeals recently held that a student dormitory was a "business" under South Carolina Code § 4-1-170(A) and was appropriate for including in an "industrial or business park":

[T]he parties stipulated the dormitories "engage in the continuous activity of letting beds to students through the entering of a lease or other contractual arrangements between the student and the developer or property manager." We hold this type of activity is commercial, not residential, in nature. The dormitories engage in continuous commercial activity, are not owner-occupied, and are zoned commercially. The dormitories are classified as commercial properties because they involve the operating and leasing of off-campus accommodations for college students and the provision of specific services, including security, property management, and planned recreational activities. Because the word "business" in its ordinary meaning refers to commercial enterprises or activities, we find the dormitories satisfy the "business" requirement, and their inclusion in the industrial or business park does not violate the South Carolina Constitution or section 4-1-170.

See South Carolina Pub. Interest Found. v. City of Columbia, 431 S.C. 164, 169, 847 S.E.2d 257, 259 (Ct. App. 2020). Likewise, although the renters of Units at Mariner's Cay might sleep or eat there, the commercial nature of these short-term rentals creates an environment that is more like a hotel than a condominium. It is believed that the evidence will show — or at least create a genuine issue of fact that — the use of Units for short-term rentals is an impermissible "business activity" under the Master Deed. HOA sent a Rule 11 letter to Plaintiffs' counsel requesting full and complete responses to its discovery requests on December 10, 2021. In response to the Rule 11 letter, Plaintiffs filed a Motion to Quash Discovery or, in the alternative, for a Protective Order on

February 21, 2022. The parties appeared before the Court on the Motion to Quash on May 16, 2022. The Court continued the Motion pending a resolution of cross-motions for summary judgment. The HOA believe the discovery it will obtain will support its argument that short-term rental owners are engaged in a “business” activity.

The owners of short-term rentals behave just like other businesses. They quite often use professional property managers, and they advertise using the internet and other resources. They hire professional cleaners and other professional contractors to clean and maintain their Units for rental. They form corporations to operate these businesses. They register as businesses with Folly Beach or the state.²

To understand that short-term rentals are businesses, not residential uses, one need only look at how short-term rentals are regulated by government entities. For example, Folly Beach's Code of Ordinances heavily regulates the short-term rental of vacation properties, including rentals at Mariner's Cay, in an effort to control the impact from those businesses. The ordinance specifies five purposes of these regulations:

- (1) Protect the integrity of the city’s neighborhoods and the quality of life of its citizens;
- (2) Establish a system to track the short term rental inventory in the city;
- (3) To protect the health and safety of occupants of short term rental units;
- (4) To ensure a level playing field for individuals in the short term rental market; and
- (5) To protect the residential character of the residential districts of the city.

See Folly Beach Code of Ord. § 117.01(a). This ordinance defines "short term rentals" as

² Indeed, the City of Folly Beach requires short-term renters to obtain a business license. Clearly, Folly Beach recognizes short-term rentals to be a business activity.

"[r]esidential dwellings rented for less than 30 days, used in a manner consistent with the residential character of the dwelling"; the definition excludes tourist accommodations, including hotels, motels, inns, and bed and breakfasts. *See* Folly Beach Code of Ord. § 117.01(b).

The Ordinance requires that those engaging in short-term rentals: (a) ***obtain an annual business license*** (Section 117.02(A)); (b) make an **annual** short-term rental **registration** application (Section 117.02(B)); (c) pay "**local, county, and state taxes, including, but not limited to, sales, use, and accommodations taxes**" (Section 117.02(C)); (d) maintain documentation concerning short-term renters (Section 117.03(A)-(B)); and (e) comply with certain regulations concerning special events (Section 117.03(D)-(E)) (emphasis added). These regulations suggest very strongly that — even if their customers sleep or eat in rented Units — short-term rentals are truly businesses.

Folly Beach also imposes an **accommodations fee** on short-term rentals: "There is hereby levied and imposed a uniform fee of 2% of the gross proceeds derived *from the rental of any accommodation* within the city. The fee shall *not be levied* upon the gross proceeds derived from the *rental of accommodations to a resident*." *See* Folly Beach Code of Ordinances § 113.03(A) (emphasis added). Folly Beach's Code of Ordinances also provides the following relevant definitions concerning short-term rentals:

ACCOMMODATION. Any room (excluding meeting and conference rooms), campground spaces, recreational vehicle spaces, lodgings or sleeping accommodations furnished to transients by any hotel, motel, inn, condominium, bed and breakfast, **residence or any other place** in which rooms, lodgings or sleeping accommodations are **furnished to transients** for a consideration within the city. Gross proceeds received from the lease or rental of **ACCOMMODATIONS** provided to the same person or persons for a term of more than 30 continuous days are not considered proceeds from transients and shall not be subject to the accommodation fee imposed by this chapter.

RESIDENT. Any person who has or shall have the right of occupancy of any

rooms, lodgings or sleeping accommodations in the same place for a term of more than 30 continuous days.

TRANSIENT. Any person seeking accommodations for a temporary period of time, not to exceed 30 days.

See Folly Beach Code of Ordinances § 113.02.

Similarly, state law imposes a sales tax of 7% of proceeds from the rent of "any rooms, campground spaces, lodgings, or sleeping accommodations furnished to transients by any . . . hotel, inn, tourist court, tourist camp, motel, campground, residence, or any place in which rooms, lodgings, or sleeping accommodations are furnished to transients for a consideration." *See* S.C. Code § 12-36-920(A). The state tax does not apply "where the facilities consist of less than six sleeping rooms, contained on the same premises, which is used as the individual's place of abode." *See* S.C. Code § 12-36-920(A)(1). Additionally, a "sales tax of five percent is imposed on additional guest charges at any place where rooms, lodgings, or accommodations are furnished to transients for a consideration, unless otherwise taxed under this chapter. For purposes of this subsection, additional guest charges are limited to charges for: (1) room service; (2) laundering and dry cleaning services; (3) in-room movies; (4) telephone service; and (5) rentals of meeting rooms." *See* S.C. Code § 12-36-920(B). In sum, state and local governments tax business lodging activity, not "residential" activity. The Folly Beach tax demonstrates that the local government authority has determined that short-term rentals are a taxable business.

For these reasons, it is apparent that the short-term rental of Units at Mariner's Cay is a "business activity," which is forbidden under the Master Deed.

2. **Although There Is a Split Among the States on This Issue, the Most Well-Reasoned Cases Support the Conclusion That Short-Term Rentals of Accommodations to Transient Guests Is a "Business Activit[y]," Not a "Residential Use."**

We anticipate Plaintiffs will cite a number of out-of-state cases to support their argument that the short-term vacation rental of Units (irrespective of the particular facts and circumstances) is a "residential use" that does not constitute a "business use". While the HOA recognizes that there is a broad range of judicial decisions on this question, it submits that the line of authority that is best-reasoned and that advances the interests of property owners throughout South Carolina is the authority finding that short-term rentals are not a permissible residential use. This line of authority is also consistent with the Folly Beach taxing order.

Under those cases, short-term rentals are viewed as purely commercial due, in part, to the non-residential nature of such rentals:

[T]he nature of Plaintiff's use of the Property is not residential. Though Plaintiff argues that this case is distinguishable from *Teffeteller* because renters are not using the Property "like a motel," there is no meaningful difference between how renters in *Teffeteller* used that property and how Plaintiff's renters use his property. The undisputed facts establish that immediately after purchasing his lot in 2015, Plaintiff engaged Center Hill Chalets, a property management company that leases the Property as a short-term vacation rental for those visiting the area. It is also undisputed that Center Hill Chalets advertises Plaintiff's lot on as many as 25 different short-term vacation rental websites, requiring a minimum of a two-night stay and a maximum of 28 nights. To facilitate each rental, the management company provides key code access to short-term renters to access Plaintiff's cabin as well as laundry and cleaning services. It also provides concierge services for the renters. After each rental, the management company resets the cabin in preparation for the next renter. When considered in concert, these facts clearly show that Plaintiff's renters are using the Property for "the most temporary convenience of shelter in the course of a brief stay in the area." [Citation omitted.]

See Pandharipande v. FSD Corp., No. M2020-01174-COA-R3-CV, 2022 Tenn. App. LEXIS 172, at *16-18 (Ct. App. Apr. 29, 2022) (Ex. G); *accord Eager v. Peasley*, 322 Mich. App. 174, 181, 911 N.W.2d 470, 474 (2017) ("The terms 'private occupancy only' and 'a private dwelling' coupled with the prohibition against 'commercial use' in the restrictive covenant are clear and unambiguous, and defendant is prohibited from renting the property on a transient, short-term basis.").

As another court has said, short-term rentals are akin to "hotels," which provide transient accommodations, not true "residence":

The fact that the restrictions permit rentals does not render the restrictions ambiguous insofar as this case is concerned. The issue before us is whether Gadd's renting on a short-term, transient basis is permitted under the restrictions. The clear answer is "no." We have no difficulty concluding that short-term rentals are prohibited because Gadd's advertising of such rentals renders his property the equivalent of a hotel, which is not a permitted use on his lot. . . . The Court of Appeals' and Gadd's emphasis on residential uses — eating, sleeping, reading a book, watching TV — misses the point of the restrictions.

See Hensley v. Gadd, 560 S.W.3d 516, 525 (Ky. 2018).

The HOA respectfully submits that the Court should apply this line of cases because it best supports the interests of the community, is consistent with local laws, and is more logically sound. The ill effects that the referenced Master Deed provisions and Moratorium seek to avoid are the negative externalities that often accompany commercial enterprises: high traffic, members of the public entering the property without having an ownership interest or overall interest in the community, and the need for excessive people to enter the property to service (cleaning, contractors, etc.) the short-term rental business. These are the reasons why the HOA wants to regulate short-term rentals. There have already been many instances in which short-term rentals have harmed the overall nature of the community. The Temporary Moratorium is truly a compromise that allows the current Plaintiff owners to make a profit from their Units via longer term rentals, while seeking to reduce the negative impact of short-term rentals by limiting the activity of future owners. Moreover, the current Plaintiffs are free to rent out their properties on a short-term basis or a basis of more than 30-days to make a profit, the latter being far more congruent to the lifestyle and culture of Mariners' Cay.

Therefore, the Court should grant the HOA's Motion for Partial Summary Judgment and

deny Plaintiffs' motion.

D. Even If the Short-Term Rental of Units Is a Permissible "Residential Use," the Temporary Moratorium is a Valid Action by the HOA Board of Directors That Are Enforceable Against Plaintiffs.

Whether the Court concludes, ultimately, that the short-term rental of Units is a "residential use" or "business activity," the HOA's Board of Directors was authorized under South Carolina law and the HOA's governing documents, to regulate the operation of rentals in Mariner's Cay. The Temporary Moratorium is a permissible exercise of the authority vested in the Board of Directors.

In their Motion for Summary Judgment, Plaintiffs have also argued that the Temporary Moratorium is invalid because it is an *ultra vires* act of the HOA's Board of Directors. Specifically, they have contended that the HOA's governing documents (including the Master Deed) do not empower its Board of Directors to restrict the use of properties, except through adoption of a new or amended restrictive covenant. However, as set forth above, this is simply not the case. To the contrary, the relevant laws and governing documents grant the HOA's Board of Directors the authority to adopt the Temporary Moratorium.

For the following reasons, because the evidence shows that the Board of Directors had the authority to adopt the Temporary Moratorium, the Court should grant the HOA's Motion for Partial Summary Judgment and deny Plaintiffs' Motion for Summary Judgment.

1. The Court Should Dismiss Plaintiff's Claims Because the Corporate Actions of the HOA Can Only Be Challenged As *Ultra Vires* in a Derivative Action.

The Court must deny Plaintiffs' Motion for Summary Judgment to the extent it argues that the HOA engaged in *ultra vires* acts in adopting the Temporary Moratorium. In addition, the Court should further grant the HOA's Motion for Partial Summary Judgment. Irrespective of whether

the HOA's Board of Directors properly or improperly adopted the Temporary Moratorium, this lawsuit is not the appropriate vehicle for these Plaintiffs to challenge the Temporary Moratorium. Instead, they should have fulfilled the requirements for bringing a member's derivative action against the HOA.

Under the South Carolina Nonprofit Corporation Act, corporate action may not generally be challenged as being *ultra vires*:

(a) Except as provided in subsection (b), *the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.*

(b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.

(c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be brought by a director, the corporation, directly, derivatively, or through a receiver, a trustee, or other legal representative, or in the case of a public benefit corporation, by the Attorney General

See S.C. Code §33-31-304 (emphasis added); *accord Williamson v. Bermuda Run Investor Devel. Grp.*, 2006 WL 7286063 (Ct. App. June 13, 2006) (dismissing claim of *ultra vires* acts where member did not bring a derivative action) (attached hereto as Ex. H).

The Official Comment to this provision makes clear, from the onset, that it is intended "to do away with the *ultra vires* doctrine." *See* S.C. Code §33-31-304, Official Comment. The South Carolina Reporter's Comments state that "a member of a nonprofit corporation has *no right to bring a direct attack against a proposed action*. The claim may *only be brought derivatively*. If an action has been accomplished and the members believe that the directors or others in charge have done something wrong, have acted '*ultra vires*,' the members may bring a *derivative* action against the alleged wrongdoers." *See* S.C. Code §33-31-304, S.C. Reporter's Comments. Plaintiffs

here have not commenced a members derivative suit against the HOA. They have not complied with the requirement of South Carolina Rule of Civil Procedure 23(b)(1) and have not made any allegations to support bringing this action on a derivative basis. Plaintiffs have brought this lawsuit in their individual capacities to enforce their own rights. As a result, they are barred by statute from asserting that any action of the HOA was *ultra vires*.

Therefore, to the extent Plaintiffs argue that they are entitled to summary judgment because of alleged *ultra vires* actions, the Court should deny their Motion for Summary Judgment and should grant the HOA's Motion for Partial Summary Judgment.

2. The HOA's Board of Directors Possessed the Authority to Adopt the Temporary Moratorium, and Its Actions in Doing So Are Not *Ultra Vires*.

For the reasons that follow, the undisputed record shows that, far from being illegal or *ultra vires*, the Temporary Moratorium was squarely within the HOA Board of Directors' powers. As a result, the Court should deny Plaintiffs' motion and grant the HOA's Motion for Partial Summary Judgment.

Under South Carolina law, "[a] corporation may exercise only those powers granted to it by law, its charter or articles of incorporation, and any bylaws made pursuant thereto." [Citations omitted.] A corporation's actions taken within the scope of the powers granted it are considered *intra vires* acts; acts beyond the scope of its powers, however, are *ultra vires* acts." *Fisher v. Shipyard Vill. Council of Co.-Owners, Inc.*, 415 S.C. 256, 271, 781 S.E.2d 903, 911 (2016). South Carolina law identifies a number of powers of a nonprofit corporation, including (but not limited to) the following:

(11) to elect or appoint directors, officers, employees, and agents of the corporation, define their duties, and fix their compensation; . . .

(15) to impose dues, assessments, and admission and transfer fees upon its

members;

(16) to establish conditions for admission of members, admit members, and issue memberships;

(17) to carry on a business;

(18) to do all things necessary or convenient, not inconsistent with law, to further the activities and affairs of the corporation.

See S.C. Code § 33-31-302. Moreover, "all corporate powers [of a nonprofit corporation] must be exercised by or under the authority of and the affairs of the corporation managed under the direction of its board." S.C. Code § 33-31-801(b).

The By-Laws of the HOA provide for and grant the following broad powers to its Board of Directors:

The Board of Directors *shall manage and direct the affairs of the Association* and, subject to any restrictions imposed by law, by the Master Deed, or these By-Laws, may exercise all the powers of the Association. The Board of Directors shall *exercise such duties and responsibility as shall be incumbent (sic) upon it by law, the Master Deed, or these By-Laws as it may deem necessary or appropriate in the exercise of its powers*, including, without limitation, the collection of assessments and charges from the owners, the establishment and amendment from time to time of reasonable regulations governing the use of the Common Area and Facilities and the Limited Common Area and Facilities, and the employment and dismissal of personnel necessary for the maintenance and operation of the Common Area and Facilities and Limited Common Area and Facilities.

(See Ex. B § V.2 (emphasis added)).

In addition, the Master Deed *expressly authorizes* the HOA Board of Directors to regulate and restrict the rental of Units at Mariner's Cay. Specifically, under the Master Deed, "Units may be rented provided the occupancy is only by the lessee and his immediate family *unless otherwise provided by the Association's Board of Directors*." (See Ex. B ¶IX.7 (emphasis added)). This language expressly allows the Board of Directors prohibit, in its discretion, the rental of Units. This provision does not require an amendment to the Master Deed. It does not require a vote of

the membership. Instead, it empowers the Board to make rules dealing with rentals. In this case, the Board merely elected to place a moratorium on short-term rentals by owners who did not own their property before an effective date. The Temporary Moratorium does not outright prohibit the renting of property. It merely limits the short-term vacation rental of property, which negatively impacts other owners and the overall character of the community.

Plaintiffs construe this provision of only allowing the HOA's Board to regulate whether rental occupancy will be limited to the lessee and his immediate family. In other words, Plaintiffs construe the phrase "unless otherwise provided by the Association's Board of Directors" as: (a) only modifying "provided the occupancy is only by the lessee and his immediate family"; and (b) *not* modifying in any way "Units may be rented." Presumably, they base this construction on the "last antecedent rule" (perhaps relying on the absence of a comma before "unless" in this provision of the Master Deed).

The HOA respectfully submits that Plaintiffs' reading of this provision of the Master Deed is incorrect. The phrase "unless otherwise provided by the Association's Board of Directors" does not follow a list of separate clauses; rather, it follows an integrated description of a single concept

The last-antecedent rule generally applies where a statute contains a list, "reflect[ing] the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it." *Lockhart v. United States*, 577 U.S. 347, 351, 136 S. Ct. 958, 194 L. Ed. 2d 48 (2016). And the canon doesn't apply when "the modifier directly follows a concise and 'integrated' clause." *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S.Ct. 1061, 1077, 200 L. Ed. 2d 332 (2018). Here, the phrase "the provisions of any other Federal statute," 42 U.S.C. § 2000d-7(a)(1), "hangs together as a unified whole, referring to a single thing (a type of [provision])," *Cyan*, 138 S.Ct. at 1077. Thus, "the most natural way to view the modifier is as applying to the entire preceding clause." *See id.* (eschewing the last-antecedent rule to apply the modifier to the entire phrase "[a]ny covered class action brought in any State court involving a covered security," rather than the partial phrase "involving a covered security" (emphasis added)).

See Kadel v. North Carolina. State Health Plan Teachers & State Employees, 12 F.4th 422, 443

(4th Cir. 2021). As the United States Supreme Court wrote in *Cyan*, the "last antecedent rule" does not apply to a single, integrated clause:

because that clause hangs together as a unified whole, referring to a single thing (a type of class action). Consider the following, grammatically identical construction: "The woman dressed to the nines carrying an umbrella, as shown in the picture . . ." Would anyone think that "as shown in the picture" referred to anything less than the well-attired and rain-ready woman? No. And so too here, the modifier goes back to the beginning of the preceding clause. The rule of the last antecedent is not to the contrary. . . . [W]e have not applied the rule when the modifier directly follows a concise and "integrated" clause.

See Cyan, 138 S. Ct. at 1077.

The language of the Master Deed makes clear that the phrase "Units may be rented provided the occupancy is only by the lessee and his immediate family" is an integrated, single concept. That concept is that the only permissible rentals are to families (not to groups of unrelated single people). This is not a list. It is a single item or idea. As a result, the "unless otherwise provided by the Association's Board of Directors" applies to that single concept, not to only one portion of it. The last antecedent rule applies where the language provides multiple options: A, B or C. That is not present here. This provision only involves a single concept. Therefore, the "last antecedent rule" should not apply here.³

Plaintiffs previously cited the Court of Appeals' unpublished opinion in *Brown v. Spring Valley Homeowners Ass'n*, 2016 S.C. App. Unpub. LEXIS 406 (Ct. App 2016), "for the proposition that any action by the Homeowners Association or its Board of Directors must be authorized by the restrictive covenants." (*See* Feb. 21, 2022 Pls.' Mot. and Incorp. Mem. to Quash

³ Moreover, the Court should not be swayed by the absence of a comma. *See State v. Pilot Life Ins. Co.*, 257 S.C. 383, 391, 186 S.E.2d 262, 266 (1972) ("The presence or the absence of a comma, according to the whim of the printer or proofreader is so clearly fortuitous that it is wholly unsafe as an aid to statutory interpretation." (*quoting Erie R. Co. v. United States*, 240 F. 28, 32 (6th Cir. 1917))).

Disc. or, in the Alternative, for Prot. Order, at 8). However, the Court of Appeals rejected the owners' argument that the imposition of fines was not authorized under restrictive covenants:

We find no merit to Homeowner's argument that the restrictive covenants do not authorize the imposition of fines. The restrictive covenants require Homeowner to become a member of the Association and to abide by the Association's rules, regulations, and bylaws. These rules, regulations, and bylaws, which in turn authorize the imposition of fines, also constitute the contract between the Association and its members. Therefore, the restrictive covenants indirectly authorize the imposition of fines.

See id., at *9. Accordingly, nothing in *Brown* would require that the HOA's Temporary Moratorium be specifically or expressly authorized by the Master Deed.

For the foregoing reasons, the Court should grant the HOA's Motion for Partial Summary Judgment and should deny Plaintiffs' motion.

E. In the Alternative, the Court Should Defer Ruling on Plaintiffs' Motion for Summary Judgment and Compel Plaintiffs to Provide Complete Discovery Responses and Produce All Relevant Documents.

South Carolina law allows parties a full and fair opportunity to complete discovery. “Summary judgment is a drastic remedy, which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery.” *Baughman v. AT&T*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). “The non-moving party in a motion for summary judgment must demonstrate the likelihood that further discovery will uncover additional relevant evidence and that the party is not merely engaged in a fishing expedition.” *Matter of Estate of Smith*, 419 S.C. 111, 123, 796 S.E.2d 158, 164 (Ct. App. 2016)(citing *Schmidt v. Courtney*, 357 S.C. 310, 322, 592 S.E.2d 326, 333 (Ct. App. 2003) (internal quotation marks omitted)).

Here, Mariner’s Cay requests information related to the Plaintiffs’ short-term business

activity. The information sought includes, but is not limited to, short-term rental income; business licenses for the short-term rentals; and information about short-term renters. The information sought is relevant to the subject action and necessary to determine the validity of both parties' claims. The HOA limited their discovery requests to information directly related to the details of the short-term rental process and Plaintiff's short-term rental income. The information sought will allow the HOA to determine several key issues, which are all highly relevant to the question of whether the short-term rentals to transient travelers violate the Master Deed. This information includes, but is not limited to, (1) the volume of Plaintiffs' rentals and the short-term rental rates charged; (2) Plaintiffs' marketing of their Units for short-term rentals; (3) the manner in which Plaintiffs provide renters access to the building and common areas; (4) whether Plaintiffs comply with the Master Deed's limitation of rental occupancy to the lessee and his immediate family; (5) how Units are prepared for rentals; and (6) what business formalities (including licensures, and the manner of accounting for revenues) Plaintiffs follow.

The HOA's discovery requests make evident that the HOA only seeks information related to the issue at hand in the case: Plaintiffs' short-term rental activity. HOA's discovery requests intend to gather information about short-term rental activities in order to regulate short-term rental activity to protect the quiet enjoyment of all Unit Owners in the community. Further, HOA's discovery requests are properly limited in time and scope. Thus, the Court should defer ruling on Plaintiffs' Motion for Summary Judgment and should compel Plaintiffs' to provide full and complete discovery responses to HOA's discovery requests.

CONCLUSION

For all of the foregoing reasons, this Court should grant Mariner's Cay Racquet & Yacht Club Homeowners Association, Inc.'s Motion for Partial Summary Judgment as to all of Plaintiffs'

claims for equitable relief. In addition, the Court should deny Plaintiffs' Motion for Summary Judgment in this matter.

BARNWELL, WHALEY, PATTERSON,
AND HELMS, LLC

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John W. Fletcher, Esq.
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- and -

PARKER POE ADAMS & BERNSTEIN, LLC

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Dated: July 15, 2022
Charleston, South Carolina

*Counsel for Defendant/Third-Party Plaintiff
Mariner's Cay Racquet & Yacht Club
Homeowners Association, Inc.*

EXHIBIT A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: <u>2019-CP-10-03390</u>
DUSTIN GROTZKE, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
MARINER'S CAY RACQUET & YACHT	)	AFFIDAVIT OF ROGER CAMP IN
CLUB HOMEOWNERS ASSOCIATION,	)	SUPPORT OF DEFENDANT'S
INC.,	)	MOTION FOR PARTIAL SUMMARY
	)	JUDGMENT
Defendant/Third-Party	)	
Plaintiff	)	
	)	
vs.	)	
	)	
JANE AND JOHN DOE DEFENDANTS,	)	
	)	
Third-Party Defendants.	)	

Personally appeared before me, Roger Camp who, being duly sworn, states the following:

1. I am over the age of eighteen (18) and a resident of the State of South Carolina.
2. I have personal knowledge of the information identified herein and the matters discussed herein and, if called upon, could testify accordingly.
3. I am the President of Defendant Mariner's Cay Racquet & Yacht Club Homeowners Association, Inc. ("HOA").
4. The HOA is a South Carolina nonprofit corporation.
5. Based upon our records, *only* the following Plaintiffs remain as owners at Mariner's Cay: Dustin Grotzke, Christene Grotzke, Leo Cornejo, Lisa Essig, Steve Falciani, Nancy Falciani, Kelly Hill, Gerry Murphy, Robert St. Louis, Lindsay Layton, Lois Stefan, Ron Woolf, Roberta Woolf, Nancy Zaj, Meg White, Joey Winchester, Mary and Ed Thaler, and Brianna Stello.
6. Mariner's Cay Racquet & Yacht Club is a gated condominium community with more than 135 separate units located in Folly Beach, South Carolina.

8. Traditionally, Mariner's Cay has been a residential community, whose owners are primary and secondary home owners.

9. Over the years, a minority of owners of condominium units at Mariner's Cay have increasingly rented their units on a short-term basis, often for a period of one week or less. During the peak rental season of mid-May through mid-September, roughly 3000 renters come and go from Mariners Cay's small community.

10. These rentals are often made to vacationers who do not reside in the Lowcountry and who have no ties to this area.

11. In connection with these short term rentals, renters seek access to and use of Mariner's Cay's common areas and amenities, including the swimming pool.

12. As a result, permanent residents of Mariner's Cay are frequently exposed to and interact with short term renters.

13. It has been Mariner's Cay's experience that such short-term renters frequently engage in conduct that is loud, boisterous or otherwise disturbing to the permanent residents of Mariner's Cay.

14. Short-term renters at Mariner's Cay often leave messes in common areas that make life unpleasant for permanent residents.

15. The short-term rental activity is causing security issues for the HOA and its owners in this gated community.

16. The short-term rental activity has had a detrimental impact on the HOA's Common and Limited Areas and Facilities and on the owners' ability to enjoy their units and the amenities of Mariner's Cay.

17. As the number of short-term renters at Mariner's Cay has increased, complaints have been on the rise about, among other things, parking violations, excessive noise, gate damage, litter, increased burden on property management and Board members and, overcrowding of

amenities by non-owners.

18. The rental of units to short-term renters is frequently operated like a business.

19. Many owners retain companies to manage the short-term rental of their units or engage in active advertising and marketing of their units for short-term rental.

20. Owners of short-term rentals typically need to engage in work to clean and prepare their units between rentals; this work is often done by third-party companies who manage the short-term rental of units.

21. Owners of short-term rentals often contract with cleaning companies to maintain their units between lodgers. These contracted cleaning services often operate outside of normal business hours and frequently create noise in the early morning hours. This often occurs on weekends or outside of business hours, when contractors are prohibited from working at Mariner's Cay. These cleaning companies have gate keys and create increased traffic in and around Mariner's Cay.

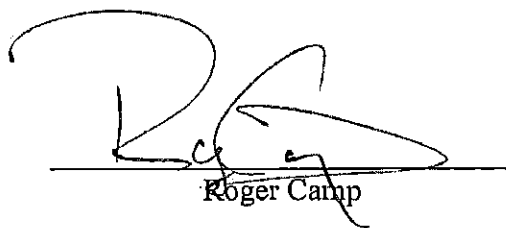
22. Since the adoption of the first Temporary Moratorium, Mariner's Cay units have continued to be marketable and to sell.

23. It does not appear that the Temporary Moratorium has had any negative impact on the value or marketability of properties at Mariner's Cay.

24. In fact, property values of units at Mariner's Cay have increased since the adoption of the first Temporary Moratorium and sales prices have increased, including sales prices for some plaintiffs who filed this suit and subsequently sold their unit.

25. I have reviewed the sales records on the Charleston County Register of Deed's website and compiled a list of sales since the first moratorium was passed. (See sales attached as Exhibit A). The eleven Plaintiffs in this lawsuit who have sold their units during the pendency of this lawsuit are highlighted in yellow. Thirty-five of thirty-seven sales transactions have been for higher prices, often substantially higher, than the original purchase price.

FURTHER AFFIANT SAYETH NOT!



Roger Camp

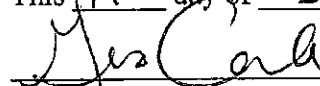
SWORN TO AND SUBSCRIBED before me
This 14th day of July, 2022

Notary Public for South Carolina
My Commission Expires: 9-15-2025

EXHIBIT A

Post July 1, 2019 Mariner's Cay Condo Sales

Rev. 7/12/2022

	Unit #	Selling Price	Date Sold	Purchased Price	Date Purchased
Building 1					
	5	\$ 550,000	3/23/2022	\$ 219,000	3/7/2013
	11	\$ 225,000	5/22/2020	\$ 77,000	3/17/1997
	13	\$ 533,081	2/22/2022	\$ 435,000	12/4/2020
	15	\$ 335,000	6/4/2021	\$ 249,900	11/20/2015
	19	\$ 398,000	7/15/2019	\$ 285,000	8/21/2009
	20	\$ 454,000	5/4/2022	\$ 210,000	8/27/2010
	22	\$ 429,999	12/28/2021	\$ 153,000	3/8/1999
7					
Building 2					
	24	\$ 480,000	6/16/2021	\$ 400,000	6/2/2005
	26	\$ 385,000	7/30/2019	\$ 245,000	6/15/2012
	31	\$ 345,000	8/31/2021	\$ 67,000	2/18/2004
	36	\$ 276,000	6/5/2020	\$ 50,000	4/26/1991
	39	\$ 545,000	3/8/2022	\$ 360,000	11/1/2005
	43	\$ 475,000	2/26/2021	\$ 310,000	1/29/2016
	45	\$ 359,000	3/25/2021	\$ 380,000	2/13/2017
7					
Building 3					
	50	\$ 525,000	9/15/2021	\$ 80,000	6/15/1989
	51	\$ 428,500	10/15/2021	\$ 67,466	1/28/1997
	54	\$ 395,000	6/11/2021	\$ 268,000	6/24/2016
	55	\$ 345,000	9/22/2020	\$ 277,500	3/15/2019
	56	\$ 505,000	10/15/2021	\$ 330,000	9/23/2016
	59	\$ 460,000	6/21/2022	\$ 85,000	2/27/1998
	60	\$ 335,000	2/23/2021	\$ 387,000	5/31/2016
	63	\$ 528,000	11/5/2021	\$ 255,000	2/8/2013
8					
Building 4					
	67	\$ 353,000	8/20/2019	\$ 325,000	7/31/2015
	69	\$ 380,000	7/8/2020	\$ 236,500	4/10/2013
	71	\$ 480,000	9/29/2021	\$ 290,000	10/26/2015
	75	\$ 470,000	5/28/2021	\$ 334,000	7/31/2017
	79	\$ 565,000	6/8/2022	\$ 90,000	11/3/1993
	86	\$ 528,000	12/5/2019	\$ 325,000	6/15/2009
6					
Building 5					
	91	\$ 500,000	1/14/2022	\$ 340,000	11/10/2004
	93	\$ 470,000	4/16/2021	\$ 400,000	2/26/2018
	117	\$ 400,000	8/30/2019	\$ 345,000	1/31/2014
3					
LOI					
	201	\$ 262,946	8/24/2021	\$ 138,000	4/1/2013
	202	\$ 226,000	7/16/2019	\$ 225,000	3/21/2005
	204	\$ 285,000	6/17/2019	\$ 126,000	9/1/1998
	205	\$ 244,000	6/25/2021	\$ 233,000	2/27/2018
	220	\$ 400,000	11/24/2020	\$ 357,000	3/4/2019
	230	\$ 350,000	2/26/2021	\$ 227,000	12/3/2013
6					

37 11 Plaintiffs that sold

EXHIBIT B

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STATE OF SOUTH CAROLINA)
)
 COUNTY OF CHARLESTON)

MASTER DEED
 FOR
 MARINER'S CAY RACQUET AND YACHT CLUB
 A SOUTH CAROLINA HORIZONTAL PROPERTY REGIME
 (an expandable regime)

KNOW ALL MEN BY THESE PRESENTS, that this Master Deed is made on the date hereinafter set forth by Mariner's Cay Development Corp., hereinafter called "Grantor", a corporation organized and existing pursuant to the laws of the State of South Carolina;

W I T N E S S E T H:

WHEREAS, Grantor is the owner in fee simple of real property and buildings and improvements thereon which property is located in Charleston County, South Carolina, which is more particularly described in EXHIBIT "A" attached hereto and incorporated herein by this reference (hereinafter referred to as the "property"); and

WHEREAS, Grantor desires to submit the property to the provisions of the Horizontal Property Act, 1976 South Carolina Code of Laws §27-31-10 et. seq., as amended (hereinafter sometimes referred to as the "Act") thereby creating an expandable Horizontal Property Regime known as Mariner's Cay Racquet and Yacht Club; and

WHEREAS, Grantor desires to publish a plan for the individual ownership of the several Apartment Units and the ownership of individual interests in that real property hereinafter defined as "Common Area and Facilities" and "Limited Common Area and Facilities"; and

WHEREAS, Grantor desires to convey the property pursuant and subject to certain protective covenants, conditions and restrictions, reservations, liens and charges hereinafter set forth;

NOW, THEREFORE, Grantor hereby submits the property to the provisions of the Horizontal Property Act, 1976 South Carolina Code of Laws §27-31-10 et. seq., as amended; and hereby publishes its plan as to the division of the property, the imposition of covenants, conditions, restrictions, reservations, liens and charges thereon and the individual ownership thereof. Grantor hereby specifies that this Master Deed shall constitute covenants, conditions and restrictions which shall run with the property and shall bind and inure to the benefit of Grantor, its successors and

assigns, and all subsequent owners of any interest in the property, their grantees, successors, heirs, executors, administrators, devisees or assigns.

ARTICLE I

DEFINITIONS

Section 1. Definitions. Unless defined herein or unless the context requires otherwise, the words defined in §27-31-10 of the Act, when used in this Master Deed or any amendment hereto shall have the meaning therein provided; the following words when used in this Master Deed or any amendment hereto, unless the context requires otherwise, shall have the following meanings:

(a) "Act" means the Horizontal Property Act, 1976 South Carolina Code of Laws §27-31-10 et. seq., as amended, and as may be further amended from time to time.

(b) "Apartment" means a part of the property intended for a type of independent use and is more particularly defined in Article III, Section 2.

(c) "Assessment" means an owner's share of the common expenses assessed against such owner and his Unit from time to time by the Association in the manner hereinafter provided.

(d) "Association" means Mariner's Cay Racquet and Yacht Club Homeowner's Association, Inc., an association of and limited to Owners of the Apartment Units located in Mariner's Cay Horizontal Property Regime in the form of a non-profit, non-stock membership corporation organized under the laws of the State of South Carolina.

(e) "Board of Directors" or "Board" means the Board of Directors of the Mariner's Cay Racquet and Yacht Club Homeowner's Association, Inc., and "director" or "directors" means a member or members of the Board.

(f) "Co-Owner" means a person, firm, corporation, partnership, association, trust or other legal entity, or any combination thereof, who owns an Apartment Unit or any interest therein within the building.

(g) "Common Area and Facilities" and "Common Elements" means and includes all of the Condominium Property after excluding the Apartment Units.

(h) "Common Expenses" means and includes (a) all expenses incident to the administration, maintenance, repair and replacement of the Common Area and Facilities and the Limited Common Area and Facilities, after excluding therefrom such expenses which are the responsibility of a Unit

2
Regime
co-ownership

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Owner as set forth in Section 2 of Article VIII hereof; (b) expenses determined by the Association to be Common Expenses and which are lawfully assessed against Unit Owners, and (c) expenses declared to be Common Expenses by the Unit Ownership Act or the Condominium Documents.

(i) "Condominium Documents" means and includes the Master Deed for Mariner's Cay Racquet and Yacht Club Homeowner's Association, Inc. and the By-Laws of said Association, and all exhibits and attachments to the foregoing, all as amended from time to time.

(j) "Condominium Property" or "Property" means and includes all the property submitted to the Horizontal Property Act by this Master Deed.

(k) "Future Phases" shall mean and refer to the further future development of Mariner's Cay Racquet and Yacht Club. As presently contemplated the Grantor anticipates expanding the Horizontal Property Regime through merger. See Article IV, Section 8, Merger of Additional Phases.

(l) "General Common Elements" and "General Common Area and Facilities" shall mean and include generally all of the Horizontal Property Regime property after excluding the Apartment Units and the Limited Common Area and Facilities and more specifically:

- (1) the land on the buildings stand;
- (2) the Guardhouse, Clubhouse, tennis courts and swimming pool;
- (3) the foundations, main walls, load bearing walls, roofs, non-reserved parking areas, of said Association;
- (4) all interior roads and roadways, the foregoing;
- (5) all yards, open spaces and gardens;
- (6) the compartments or installations of central services such as power, light, gas, cold and hot water, sewerage, refrigeration, water tanks and pumps, and the like;
- (7) all devices or installations existing for common use; and
- (8) all other elements of the property rationally of common use or necessary to its existence, upkeep and safety, as well as all those common elements enumerated in Article III, Section 3 as Common Elements and not embraced within the definition of Limited Common Area and Facilities.

(m) "Grantor" shall mean and refer to Mariner's Cay Development Corp., a corporation organized and existing pursuant to the laws of the State of South Carolina, its successors and assigns.

(n) "Limited Common Elements" and "Limited Common Area and Facilities" means and includes those common elements which are reserved for the use of a certain number of Apartments to the exclusion of the other Apartments, such as special corridors, stairways, elevators, balconies, patios and sanitary services common to and appurtenant to the Apartments of a particular floor or building, and the like, and includes those areas so designated in EXHIBIT "B" attached hereto and incorporated herein by reference.

(o) "Mariner's Cay" shall mean and refer to that certain expandable Horizontal Property Regime known as Mariner's Cay Racquet and Yacht Club, which has been and is being developed on real property now owned by Grantor in Charleston County, South Carolina, together with such additions thereto as may from time to time be designated by Grantor.

(p) "Mortgage" shall include chattel mortgage, bill of sale to secure debt, deed to secure debt, deed of trust, security agreements and financing statements and any and all other similar instruments given to secure the payment of an indebtedness.

(q) "Owner" means the record owner, whether one or more persons, of fee simple title in and to any Apartment Unit excluding, however, those persons having such interest merely as security for the performance of an obligation.

(r) "Percentage Interest" means the percentage of undivided interest each Unit Owner owns as tenant in common in the Common Areas and Facilities.

(s) "Phase I" shall mean and refer to the 87 apartment units and related amenities, Common and Limited Area and Facilities to be constructed and located as more particularly shown in EXHIBIT "C".

(t) "Regime" shall mean and refer to Mariner's Cay Racquet and Yacht Club, a Horizontal Property Regime.

(u) "Survey Plat" or "Surveys" means and includes the survey of the Condominium Property, Units, and Limited Common Area and Facilities by Harold LeMond, Registered Land Surveyor, dated March 13, 1981 and entitled Survey Prepared for Mariner's Cay Development Corp., which will be filed for record in the Office of the Register of Mesne Conveyance for Charleston County, South Carolina, simultaneously with the filing for record of this Master Deed.

(v) "Trustee" means the financial institution, if any, selected by Grantor or the Association to hold certain funds of the Association.

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(w) "Unit" shall mean and be synonymous with Apartment.

(x) "Unit Owner" shall mean and be synonymous with "Owner" as hereinabove defined.

(y) "Unit Plans" means and includes the architectural plans of the Units erected or to be erected on the Condominium Property which plans were prepared by Reg Narmour, The Architectural Group, entitled Mariner's Cay Racquet and Yacht Club, Phase I, Units 1-87, which will be filed for record in the Office of the Registrar of Masne Conveyance for Charleston County, South Carolina, simultaneously with the filing for record of this Master Deed and which Unit Plans are more particularly detailed in EXHIBIT "C", attached hereto and made a part hereof.

(z) The use of the masculine pronoun shall include the neuter and feminine, and the use of the singular shall include the plural where the context so requires.

ARTICLE II

MARINER'S CAY RACQUET AND YACHT CLUB HOMEOWNER'S ASSOCIATION

Section 1. Responsibility for Administration. The administration of the Mariner's Cay Horizontal Property Regime, the maintenance, repair, replacement and operation of the General Common Area and Facilities and Limited Common Area and Facilities as herein provided, and those acts required of the Association by the Condominium Documents shall be the responsibility of the Association. Such administration shall be in strict accordance with the provisions of the Act, this Master Deed, and the By-Laws of the Association.

Section 2. Agreements. The Association shall be and hereby is authorized to enter into such agreements, including without limitation, management contracts, as it may deem necessary or desirable for the administration and operation of the development. Each Owner by acquiring or holding an interest in any Apartment Unit thereby agrees to be bound by the terms and conditions of all such agreements entered into by the Board of Directors on behalf of the Association. A copy of all such agreements shall be made available at the office of the Association for review by each Owner.

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ARTICLE III

PROPERTY RIGHTS

Section 1. Development Plan. Grantor shall construct or cause to be constructed on the property during Phase I, residential buildings containing a total of eighty-seven (87) Apartment Units. Each of the buildings shall be constructed substantially in accordance with the Unit Plans, Master Plan, and Surveys all of which are contained in EXHIBIT "C" attached hereto and incorporated herein by this reference, and show the buildings, number and identity of Units and the materials of which the Units are to be constructed. The Grantor expressly reserves the right, during the course of construction, to revise, modify or change in whole or in part any of such Apartment Units; provided, however, (i) Grantor shall adhere to the general scheme of development as set forth in EXHIBIT "C" attached hereto and made a part hereof and (ii) Grantor shall not make any such alterations to any Apartment Unit sold or under a valid sales contract without having first obtained the express written consent of the Owner thereof. Any such change or modification shall not alter the Percentage Interest set forth in EXHIBIT "C" without the unanimous consent (100%) of the Unit Owners expressed in an amendment hereto duly recorded. Some Units may be conveyed and occupied prior to the completion of other Units; provided, however, that prior to the conveyance of each Unit, Grantor shall provide each Purchaser with an attached verified statement of a registered architect or licensed professional engineer certifying that the Unit Plans and Surveys theretofore filed, or supplemental Unit Plans and/or Surveys being filed simultaneously therewith together with such plans and surveys as may have been filed prior thereto, fully depict the layout, location, identification, dimensions, and materials used in the construction of such Unit as built.

In further accordance with the applicable provisions of the Act, Grantor hereby indicates an intent to expand this Regime by annexing thereto that property shown and designated as Phases II through VI in EXHIBIT "D" in accordance with the options set forth hereinbelow.

1. The property subjected to this Master Deed is more particularly shown and delineated on the land survey and plot plan entitled Phase I in EXHIBIT "A" and the building plans attached hereto as EXHIBIT "C", said Exhibits being incorporated herein by reference. The Phase I improvements will include apartment buildings containing eighty-seven (87) apartments and adjacent roadways and parking areas, clubhouse, tennis courts and swimming pool, together with this Master Deed, said EXHIBIT "C" constitutes a graphic description of all apartments, including their identification numbers, locations, areas and dimensions, and all

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common elements (general and limited), their relative locations and approximate dimensions.

2. Grantor further plans, in its sole discretion, to expand this Regime by adding up to five hundred sixty-four (564) additional apartments spread over an additional five phases, with their respective common elements, said expansion areas being shown and delineated as Phases II through VI on EXHIBIT "D" hereto attached. A legal description of the land area of Phases II through VI is set out in detail in EXHIBIT "D".

3. Grantor hereby reserves unto itself, the option, to be exercised in its sole discretion, to

(a) expand this Regime by submitting Phase II, III, IV, V and VI property as shown and delineated in EXHIBIT "D"; or

(b) allow this Regime to continue as is without any further expansion.

4. In the event Grantor elects to proceed to enlarge this Regime by adding Phase II, the Grantor shall execute an amendment or amendments to this Master Deed which shall be filed for record in the R.M.C. Office for Charleston County, South Carolina not later than five (5) years from the date hereof. Any such amendment or amendments shall fully describe the property being added to this Regime and submit such property to all of the provisions of this Master Deed and exhibits attached hereto, as amended. Such amendment or amendments expanding this Regime, as aforesaid, may be accomplished unilaterally by Grantor without the approval or consent of any co-owner, or mortgagee of any co-owner, of the Regime as constituted at the time of such amendment. Upon the exercise of any such option to expand, as aforesaid, the provisions of this Master Deed shall then be understood and construed as embracing Phase I property and such property as may be described in such amendment, together with all improvements constructed thereon.

5. In the event Grantor elects to proceed to enlarge this Regime by adding Phase III, the Grantor shall execute an amendment or amendments to this Master Deed which shall be filed for record in the R.M.C. Office for Charleston County, South Carolina not later than eight (8) years from the date hereof. Any such amendment or amendments shall fully describe the property being added to this Regime and submit such property to all of the provisions of this Master Deed and exhibits attached hereto, as amended. Such amendment or amendments expanding this Regime, as aforesaid, may be accomplished unilaterally by Grantor without the approval or consent of any co-owner, or mortgagee of any co-owner, of the Regime as constituted at the time of such amendment.

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Grantor without the approval
or consent of any co-owner,
or mortgagee of any co-owner,
of the Regime as constituted
at the time of such amendment.

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Upon the exercise of any such option to expand, as aforesaid, the provisions of this Master Deed shall then be understood and construed as embracing Phase I property and such property as may be described in such amendment, together with all improvements constructed thereon.

6. In the event Grantor elects to proceed to enlarge this Regime by adding Phase IV, the Grantor shall execute an amendment or amendments to this Master Deed which shall be filed for record in the R.M.C. Office for Charleston County, South Carolina not later than eleven (11) years from the date hereof. Any such amendment or amendments shall fully describe the property being added to this Regime and submit such property to all of the provisions of this Master Deed and exhibits attached hereto, as amended. Such amendment or amendments expanding this Regime, as aforesaid, may be accomplished unilaterally by Grantor without the approval or consent of any co-owner, or mortgagee of any co-owner, of the Regime as constituted at the time of such amendment. Upon the exercise of any such option to expand, as aforesaid, the provisions of this Master Deed shall then be understood and construed as embracing Phase I property and such property as may be described in such amendment, together with all improvements constructed thereon.

7. In the event Grantor elects to proceed to enlarge this Regime by adding Phase V, the Grantor shall execute an amendment or amendments to this Master Deed which shall be filed for record in the R.M.C. Office for Charleston County, South Carolina not later than fourteen (14) years from the date hereof. Any such amendment or amendments shall fully describe the property being added to this Regime and submit such property to all of the provisions of this Master Deed and exhibits attached hereto, as amended. Such amendment or amendments expanding this Regime, as aforesaid, may be accomplished unilaterally by Grantor without the approval or consent of any co-owner, or mortgagee of any co-owner, of the Regime as constituted at the time of such amendment. Upon the exercise of any such option to expand, as aforesaid, the provisions of this Master Deed shall then be understood and construed as embracing Phase I property and such property as may be described in such amendment, together with all improvements constructed thereon.

8. In the event Grantor elects to proceed to enlarge this Regime by adding Phase VI, the Grantor shall execute an amendment or amendments to this Master Deed which shall be filed for record in the R.M.C. Office for Charleston County, South Carolina not later than seventeen (17) years from the date hereof. Any such amendment or amendments shall fully describe the property being added to this Regime and submit such property to all of the provisions of this Master Deed and exhibits attached hereto, as amended. Such amendment or amendments expanding this Regime, as aforesaid, may be

such property to all of the provisions of this Master Deed and exhibits attached hereto, as amended. Such amendment or amendments expanding this Regime, as aforesaid, may be

the time of such amendment

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accomplished unilaterally by Grantor without the approval or consent of any co-owner, or mortgagee of any co-owner, of the Regime as constituted at the time of such amendment. Upon the exercise of any such option to expand, as aforesaid, the provisions of this Master Deed shall then be understood and construed as embracing Phase I property and such property as may be described in such amendment, together with all improvements constructed thereon.

Should the expansion options not be exercised within the term specified, it shall in all respects expire and be of no further force and effect. In such event, the Grantor shall not be obligated to impose on the Phase II through VI property any covenants, conditions or restrictions the same or similar to those contained herein; and in such event, all co-owners in Phase I waive any right they may have in or to that property shown as Phase II through VI in EXHIBIT "D".

Section 2. Units. Each Unit, together with its Percentage Interest in the General Common Area and Facilities and the Limited Common Area and Facilities, shall for all purposes constitute a separate parcel of real property which, subject to the provisions of this Master Deed, may be owned in fee simple and which may be conveyed, transferred, leased and encumbered in the same manner as any other real property. Each Owner, subject to the provisions of the Act and this Master Deed, shall be entitled to the exclusive ownership and possession of his Unit.

The Grantor, in order to implement condominium ownership of the above-described premises, covenants and agrees to, and hereby does, subdivide the above-described Phase I property vertically and horizontally into the following Freehold Estate:

(a) Eighty-seven (87) separate parcels of property, being the eighty-seven (87) apartments, together with the shares in the general and limited common elements appurtenant to each apartment, hereinbefore and hereinafter more particularly described, and as shown graphically in EXHIBITS "A" and "C", attached hereto. Said Exhibits delineate the dimensions of each apartment at floor level, the elevation of all floors and ceilings from USC and GS datum, the location and dimension of the perimeter walls, and the locations, dimensions and area of each apartment with reference to established geographical points. Each of the said apartments consisting of:

(1) the volumes or cubicles of space enclosed by the unfinished interior surfaces of perimeter walls and the unfinished surfaces of interior walls, ceilings and floors of the apartment, and by any vents, chimneys, doors, windows and such other structural elements that are ordinarily regarded as enclosures of space; and

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(2) all interior dividing walls and partitions (including the space occupied by such walls or partitions) excepting, however, load bearing walls and those interior walls and partitions enclosing the common pipe chases and other common facilities; and

(3) the decorated interior surfaces of perimeter walls and the decorated surfaces of interior walls (including load bearing walls, chimneys, and walls enclosing the common pipe chases), floors and ceilings, consisting of, as the case may be, wallpaper, paint, plaster, carpeting, tiles, and any and all other finishing materials affixed or installed as a part of the physical structure of the apartment; and

(4) all fixtures, appliances, mechanical systems and equipment installed in said apartment which are intended for the sole and exclusive use of the apartment. No pipes, wires, conduits or other public utility lines or installations constituting a part of the over-all systems designated for the service of any other apartment, nor any of the structural members or portions of the apartment building, nor any other property of any kind, including fixtures and appliances within the apartment, which are not removable without jeopardizing the soundness, safety or usefulness of the remainder of the building, shall be deemed to be a part of any individual apartment. The word "apartment" when used throughout this instrument shall be deemed to refer to each of the aforesaid apartments as herein described, and shall have the same meaning as set forth in the Act.

Section 3. Common Area and Facilities.

(a) Percentage Interest. The Unit Owners shall own the General Common Area and Facilities and Limited Common Area and Facilities as tenants in common with each Unit having appurtenant thereto the Percentage Interest in said General Common Area and Facilities and Limited Common Area and Facilities as set forth in the Master Plan contained in EXHIBIT "C" attached hereto, provided, however, the use of the Limited Common Area and Facilities shall be restricted as set forth in Section 3(f) of this Article III. The Percentage Interest appurtenant to each Unit has been determined by dividing the stated fair market value of such Unit as of the effective date of the Master Deed by the aggregate stated fair market value of all of the Units as of said date. The stated Percentage Interest and stated values are permanent in character and cannot be altered without (1) the consent of all (100%) of the Unit Owners expressed in an amendment to the Master Deed duly recorded or (2) unless revised by merger (see Article IV, Section 8).

(b) Common Elements. A description of the common elements of the Regime (including both the general common

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elements and the limited common elements) as defined herein and in the Act is as follows:

(1) The parcel of land described and shown as Phase I in EXHIBIT "A" attached hereto; and

(2) Those portions of the apartment buildings not otherwise herein defined as being embraced within the individual apartments, including but not limited to balconies, the foundation, roofs, floors, ceilings, perimeter walls of apartments, load bearing interior walls and partitions, walls enclosing common pipe chases and other common facilities, slabs, lobbies, corridors, laundry, trash, service and storage rooms, meter and machinery rooms, club houses, lounges and other recreation areas, stairways, entrance and exit or communication ways, patios, pipes, wires, conduits, chimneys, air ducts and public utility lines, including the space actually occupied by the above, all as are more particularly shown in EXHIBIT "B" attached hereto; and

(3) All improvements to the premises constructed or to be constructed, such as utilities, roadways, walkways, plants, trees, shrubbery, yards, lawns, gardens, swimming pools, tennis courts, playgrounds, etc., located on said parcel of land; and

(4) Parking spaces shown in EXHIBIT "C"; and

(5) All other elements of the buildings, not included within the apartments, constructed or to be constructed on the aforesaid parcel of land, rationally of common use or necessary to their existence, upkeep and safety and, in general, all other devices or installations existing for common use; and

(6) All other property of the Regime, whether land, building, improvements, or personal property, or otherwise, except such as is included in the apartments as more particularly described in Article III, Section 2 herein next above; and

(7) All assets of Mariner's Cay Racquet and Yacht Club Homeowners' Association, Inc. (a non-profit corporation organized for the purpose of carrying out the powers, duties, and obligations of the "Council and Co-Owners" as defined in the Act); and

(8) Easements through apartments for conduits, ducts, plumbing, chimneys, wiring and other facilities for the furnishing of utility services to apartments and the general common elements; and

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(9) An easement of support in every portion of an apartment which contributes to the support of the building; and

(10) Easements through the apartments and general common elements for maintenance, repair and replacement of the apartments and general common elements; and

(11) Installations for the furnishing of utility services to more than one apartment or the general common elements or to an apartment other than the one containing the installation, which installation shall include conduits, ducts, plumbing, chimneys, wiring and other facilities for the rendering of such services.

(c) Inseparability of Percentage Interests. The Percentage Interest in the General Common Area and Facilities and the Limited Common Area and Facilities cannot be separated from the Unit to which it appertains and shall be automatically conveyed or encumbered with the Unit even though such interest is not expressly mentioned or described in the deed or other instrument.

(d) No Partition. The General Common Area and Facilities and Limited Common Area and Facilities shall remain undivided and no right to partition the same or any part thereof shall exist except as provided in the Horizontal Property Act, the By-Laws, and this Master Deed.

(e) Use of General Common Area and Facilities. The Unit Owners may use the General Common Area and Facilities in accordance with the purposes for which they are intended without hindering the exercise of or encroaching upon the rights of other Unit Owners. The Board of Directors shall, if any question arises, determine the purpose for which a part of the General Common Area and Facilities is intended to be used. The Board shall have the right to promulgate rules and regulations limiting the use of the General Common Area and Facilities to Unit Owners and their guests as well as to provide for the exclusive use of a part of the General Common Area and Facilities by a Unit Owner and his guests for special occasions which exclusive use may be conditioned, among other things, upon the payment of a fee. Any Owner may delegate, in accordance with the provisions of this Master Deed and the By-Laws, his right to use the General Common Area and Facilities to the immediate members of his family, to a limited number of guests, or to his tenants who reside in his Apartment Unit. The developer, Mariner's Cay Development Corp., its successors and assigns, those persons who have rented slips at the marina and their guests shall have unlimited access to the marina (see Grantor's easement reservations in Article X, Section 4).

(f) Use of General Common Area and Facilities. The General Common Area and Facilities shall be used for the purposes for which they are intended.

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(f) Limited Common Area and Facilities. Portions of the common elements are hereby set aside and reserved for the restricted and exclusive use of certain Apartments to the exclusion of the other Apartments, and such portions shall be known and referred to herein as limited common elements. The limited common elements restricted to the use of certain Apartments are those portions of any walls which are deemed to be common elements and which are within the individual Apartments, any roof which covers only one Apartment, the stairs, balconies, porches, patios, and entrance decks as shown graphically in EXHIBIT "B". Ownership of each Apartment Unit shall entitle the Owner or Owners thereof to the exclusive use of the Limited Common Area and Facilities adjacent and appurtenant to such Unit and so designated in EXHIBIT "B"; which exclusive use may be delegated by such Owner to the immediate members of his family, to his guests, or to his tenants who reside in his Apartment Unit. Owners may place plants, furniture, grills and other similar items within the Limited Common Area and Facilities adjacent and appurtenant to their Unit, provided that such plants shall not be allowed to grow or climb to a height higher than the wall or rail enclosing such Limited Common Area and Facility unless the placement of such plants shall have been approved in writing prior to reaching said height by the Board of Directors or by an architectural committee appointed thereby as provided in Section 1 of Article VII hereof, and provided that such plants shall be properly maintained by such occupants.

Section 4. Conveyance by Warranty Deed. All conveyances of title of any Apartment Unit shall be by general warranty deed.

ARTICLE IV

ASSESSMENTS

Section 1. Creation of Lien and Personal Obligation for Assessments. Each Apartment Unit is and shall be subject to a lien and permanent charge in favor of the Association for the annual and special Assessments set forth in Section 2 and 3 of this Article IV. Each Assessment together with interest thereon and cost of collection thereof as hereinafter provided, shall be a permanent charge and continuing lien upon the Apartment Unit against which it relates, and shall also be the joint and several personal obligation of each Owner of such Apartment Unit at the time Assessment comes due and upon such Owner's successor in title if unpaid on the date of the conveyance of such unit, and each and every Owner by acquiring or holding an interest in any Apartment Unit thereby covenants to pay such amount to the Association when the same shall become due. The purchaser of a Apartment Unit at a judicial or foreclosure

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sale shall be liable only for the Assessments coming due after the date of such sale.

Section 2. Annual Assessments. No later than December 1 of each calendar year, the Board of Directors shall set the annual Assessments by estimating the Common Expenses to be incurred during the immediately succeeding calendar year and shall prorate such Common Expenses among the Owners of the Apartment Units in accordance with the Percentage Interest appurtenant to such Apartment Units, and shall give written notice to each Unit Owner of the annual Assessment fixed against his Unit for such immediately succeeding calendar year. The annual Assessments levied by the Association shall be collected by the Treasurer as provided in Section 4 of this Article IV.

The annual Assessments shall not be used to pay for the following:

(a) Casualty insurance of individual Owners on their possessions within the Units, and liability insurance of such owners insuring themselves and their families individually, which shall be the sole responsibility of such Owners;

(b) Telephone, gas, or electrical utility charges for each Unit which shall also be the sole responsibility of the Owners of such Units.

Grantor anticipates that ad valorem taxes and other governmental assessments, if any, upon the property will be assessed by the taxing authority upon the Unit Owners, and that each assessment will include the assessed value of the Apartment Unit and of the undivided interest of the Unit Owner in the Common Area and Facilities and Limited Common Area and Facilities. Any such taxes and governmental assessments upon the property which are not so assessed shall be included in the Association's budget as a recurring expense and shall be paid by the Association as a Common Expense. Each Unit Owner is responsible for making his own return of taxes and such return shall include such Owner's undivided interest in the Common Area and Facilities and Limited Common Area and Facilities as such undivided interest is determined by law for purposes of returning taxes. If no provision is made by law or the taxing authorities for the determination of an Owner's share of the undivided interest in the Common Area and Facilities and Limited Common Area and Facilities, each Owner shall return that percentage of the undivided interest in the Common Area and Facilities and Limited Common Area and Facilities attributable to his Unit under EXHIBIT "C".

Section 3. Special Assessments. In addition to the annual Assessments, the Association may levy in any calendar

year an assessment which shall include the assessed value of the Unit and of the undivided interest of the Unit Owner in the Common Area and Facilities and Limited Common Area and Facilities.

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year, special Assessments for the purpose of supplementing the annual Assessments if the same are inadequate to pay the Common Expenses and of defraying, in whole or in part, the cost of any construction or reconstruction, repair or replacement of the Limited Common Area and Facilities, the Common Area and Facilities, including the necessary fixtures and personal property related thereto; provided, however, that any such special Assessment shall have the assent of a majority of the votes represented, in person or by proxy, at a meeting, at which a quorum is present, duly called for the express purpose of approving such expenditure, written notice of which shall be sent to all Owners not less than ten (10) days nor more than sixty (60) days in advance of the meeting, which notice shall set forth the purpose of the meeting. Special Assessments shall be fixed against the Units according to their Percentage Interests; the period of the Assessment and manner of payment shall be determined by the Board.

No specific assessment

Section 4. Date of Commencement of Annual Assessment; Due Dates. Although the annual Assessment is calculated on a calendar year basis, each Owner of a Apartment Unit shall be obligated to pay to the Treasurer of the Association such Assessment in equal monthly installments on or before the first day of each month during such calendar year, or in such other reasonable manner as the Board of Directors shall designate.

The annual Assessments provided for in this Article IV shall as to each Apartment Unit commence upon the conveyance thereof (the commencement date) to the first monthly payment of the annual Assessment for each such Unit shall be an amount (rounding to the nearest whole dollar) equal to the monthly payment for the fiscal year in progress on such commencement date, divided by the number of days in the month of conveyance, and multiplied by the number of days then remaining in such month.

The Association shall, upon demand at any time, furnish to any Apartment Owner liable for any such Assessment, a certificate in writing signed by an officer of the Association, setting forth whether the same has been paid. A reasonable charge, as determined by the Board, may be made for the issuance of such certificates. Such certificate shall be conclusive evidence of payment of any assessment therein stated to have been paid.

Section 5. Effect of Non-Payment of Assessment; The Personal Obligation of the Owner; the Lien; Remedies of Grantor. If an Assessment is not paid on the date when due, as hereinabove provided, then such Assessment together with such interest thereon and any cost of collection thereof as hereafter provided, shall be a charge and continuing lien on the Unit to which it relates, and shall bind such property

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in hands of the Apartment Owner, his heirs, legal representatives, successors, and assigns. The personal obligation of the then Apartment Owner to pay such Assessment, however, shall remain his personal obligation and if his successor in title assumes his personal obligation, such prior Apartment Owner shall nevertheless remain as fully obligated as before to pay to the Association any and all amounts which he was obligated to pay immediately preceding the transfer; and such prior Apartment Owner and his successor in title who assumes such liabilities shall be jointly and severally liable with respect thereto, notwithstanding any agreement between such prior Apartment Owner and his successor in title creating the relationship of principle and surety as between themselves other than one by virtue of which such prior Apartment Owner and his successor in title would be jointly and severally liable to pay such amounts.

Any such Assessment not paid by the 10th of the month within which such Assessment is due shall bear interest, from such date (the "delinquency date") at the maximum legal rate allowable under South Carolina law. The Association may bring legal action against the Apartment Owner personally obligated to pay the same or foreclose its lien against the Apartment Unit to which it relates or pursue either such course at the same time or successively. In any such event, the Association shall also be entitled to recover attorney's fees actually incurred but not exceeding fifteen percent (15%) of the amount of the delinquent assessment, and all other costs of collection. Each Apartment Owner, by his acceptance of a deed or other conveyance to an Apartment Unit, vests in the Association or its agent the right and power to bring all actions against him personally for the collection of such charges as a debt and to foreclose the aforesaid lien in any appropriate proceeding at law or in equity. The Association shall have the power to bid in the Unit at any foreclosure sale and to require, hold, lease, mortgage and convey the same. No Apartment Owner may be relieved from liability from the Assessments provided for herein by abandonment of his Apartment Unit or otherwise.

Section 6. Subordination of the Charges and Liens to Mortgages.

(a) The lien and permanent charge for the annual and special Assessments (together with interest thereon and any cost of collection) authorized herein with respect to any Unit is hereby made subordinate to the lien of any mortgagee or his assigns placed on such Apartment Unit if, but only if all such Assessments with respect to such lot having a due date on or prior to the date such mortgage is filed for record have been paid. The lien and permanent charge hereby subordinated is only such lien and charge as relates to Assessments authorized hereunder having a due date subsequent to the date such mortgage is filed for a record and

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prior to the satisfaction, cancellation or foreclosure of such mortgage or the sale or transfer of the mortgaged property pursuant to any proceeding in lieu of foreclosure or the sale under power contained in such mortgage.

(b) Such subordination is merely a subordination and shall not relieve the Apartment Owner of the mortgaged property of his personal obligation to pay all Assessments coming due at a time when he is the Apartment Owner; shall not relieve such property from the lien and permanent charge provided for herein (except as to the extent of subordinated lien and permanent charge is extinguished as a result of such subordination or against a mortgagee or such mortgagees, assignee, or transferee by foreclosure or by sale or transfer in any proceeding in lieu of foreclosure or by sale under power); and no sale or transfer of such property to the mortgagee or to any other person pursuant to a foreclosure sale, or pursuant to any other proceeding in lieu of foreclosure, or pursuant to a sale under power, shall relieve any existing or previous Apartment Owner of such property of any personal obligation, or relieve subsequent Apartment Owners from liability for any Assessment coming due after such sale or transfer.

(c) Notwithstanding the foreclosure, the Association may in writing, at any time, whether before or after any mortgage or mortgages are placed on such property, waive, relinquish or quit-claim in whole or part the right of the Association to Assessments provided for hereunder with respect to such property coming due during the period while such property is or may be held by mortgagee or mortgagees pursuant to said sale or transfer. ~~Each Apartment Owner shall pay all assessments coming due at a time when he is the Apartment Owner.~~

Section 7. Exempt Property. Each Apartment Unit shall be exempt from the Assessments created herein until such Unit is conveyed by Grantor to an Owner. Except as expressly provided herein, no Unit and its appurtenant Percentage Interest shall be exempt from said Assessments.

Section 8. Merger of Additional Phases. In the future, but not later than the times specified in Article III, Section 1 through 8, a Grantor may wish to merge additional phases (See EXHIBIT "D" attached hereto, entitled ADDITIONAL PROPERTY - FUTURE PHASES AND MERGERS) into the Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime established hereby. The maximum number of additional units which may be annexed and merged to the Property Regime established hereby shall not exceed Eighty-four (84) Apartment Units in the aggregate in Phase II; One Hundred Twenty (120) Apartment Units in the aggregate in Phase III; One Hundred Twenty (120) Apartment Units in the aggregate in Phase IV; One Hundred Twenty (120) Apartment Units in the aggregate in Phase V; and One Hundred Twenty (120) Apartment Units in the aggregate in Phase VI.

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The aggregate maximum total of square footage (Phase II, III, IV, V, and VI) which Grantor may add to this Property Regime shall not exceed 697,710 square feet and the total value of the additional property (determined solely for the purposes of complying with the Act) shall not exceed \$53,330,440.00. Owners of Apartment Units within such additional property shall bear their proportionate share of the Common Expenses payable by existing Co-owners and the Percentage Interest of existing owners in the Common Area and Facilities shall change in direct proportion to the percentage that the value of the additional property bears to the sum of the value of the Property hereby subject to the Apartment Ownership and value of the additional property as more particularly set forth in EXHIBIT "C". Owners of such merged property shall assume all rights and obligations as the original owners of Phase I have hereunder.

ARTICLE V

INSURANCE AND CASUALTY LOSSES

Section 1. Insurance. The Board of Directors or its authorized agent shall obtain insurance for all of the improvements on the property (excepting the personal property of the Apartment Owners, their guests and lessees and all improvements and betterments made by such Owners at their expense) against loss or damage by fire or other hazards, including extended coverage, vandalism and malicious mischief, in an amount sufficient to cover the full cost of any repair, reconstruction or replacement in the event of damage or destruction from any such hazard, and shall also obtain a public liability policy covering the General Common Area and Facilities, Limited Common Area and Facilities and all damage or injury caused by the negligence of the Association or any of its agents which public liability policy shall have reasonable limits set by the Board of Directors. Premiums for all such insurance shall be Common Expenses and paid by the Association. All such insurance coverage obtained by the Board of Directors shall be written in the name of the Association for the Owners of the Units in same percentage as the Percentage Interest appurtenant to their Units. Such insurance policies shall comply with the provisions hereinafter set forth.

(a) All policies shall be written with a company licensed to do business in the State of South Carolina and holding a rating of "AAA" or better by Best's Insurance Reports.

(b) All policies shall be for the benefit of the Unit Owners and their mortgagees as their interests may appear.

(c) Provision shall be made for the issuance of a certificate of insurance to each Owner and his mortgagee, if

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any, which shall specify the proportionate amount of such insurance attributable to the particular Owner's Unit.

(d) The original of all policies and endorsements thereto shall be deposited with the Trustee which shall hold them subject to the provisions of Section 2 of this Article V.

(e) Exclusive authority to adjust losses under policies hereafter in force on the property shall be vested in the Board of Directors or its duly authorized agent; provided, however, that no mortgagee having an interest in such losses may be prohibited from participating in the settlement negotiations related thereto.

(f) In no event shall any recovery or payment under the insurance coverage obtained and maintained by the Board of Directors hereunder be affected or diminished by insurance purchased by individual owners or their mortgagees.

(g) Each Owner may obtain additional insurance at his own expense; provided, however, that no Owner shall be entitled to exercise his right to maintain insurance coverage in such a way as to decrease the amount which the Board of Directors, on behalf of all of the Owners and their mortgagees, may realize under any insurance policy which the Board of Directors may have in force on the property at any particular time.

(h) Any Owner who obtains an individual insurance policy covering any portion of the property, other than on personal property belonging to such Owner and on improvements and betterments made by such Owner at his expense, shall file a copy of such policy with the Board of Directors within 30 days after purchase of such insurance.

(i) Each Owner at his own expense may obtain on his Unit or the contents thereof title insurance, homeowner's liability insurance, theft and other insurance covering improvements, betterments and personal property damage and loss.

(j) The Board of Directors shall conduct an annual insurance review for the purposes of determining the full insurable value of the entire property including all dwellings, the Limited Common Area and Facilities and the General Common Area and Facilities, without respect to depreciation, of all improvements on the property (with the exception of improvements and betterments made by the respective owners at their expense) by one or more qualified persons.

(k) The Board of Directors or its duly authorized agent shall make reasonable efforts to secure insurance policies that will provide for the following: (1) a waiver

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of subrogation by the insurer as to any claims against the Board of Directors, its duly authorized agents and the Owners and their respective servants, agents and guests; (2) a waiver of insurer's right to repair or reconstruct instead of paying cash; (3) a waiver of insurer's right to cancel, invalidate or suspend the policy on account of the acts of fewer than five Owners or the conduct of any director, officer or employee of the Association or its duly authorized agent without a prior demand in writing delivered to the Association to cure the defect and the allowance of a reasonable time thereafter within which the defect may be cured by the Association, its agent, any owner or mortgagee; and (4) that any "other insurance" clause in the master policy or policies exclude individual owners' policies from consideration.

(1) Each Owner shall be required to notify the Board of Directors of all improvements made by such Owner to his Unit, the value of which is in excess of One Thousand Dollars (\$1,000.00).

Section 2. No Partition. There shall be no judicial partition of the property or any part thereof, and Grantor and every person acquiring any interest in the property or any part thereof shall acquire the same subject to this Master Deed and shall be deemed to have waived any right to seek any such judicial partition until the happening of the conditions set forth in Section 4 of this Article V in the case of damage or destruction or until the property has been removed from the provision of the Act as provided for in this Master Deed. ~~Owners or the conduct of any director~~ of the Association or its duly authorized agent.

Section 3. Trustee. (a) All insurance policies purchased by and in the name of the Association by the Board of Directors shall provide that proceeds covering property losses shall be paid jointly to the Association and Trustee. Immediately upon the receipt by the Association of such proceeds, the Association shall endorse the instrument by means of which such proceeds are paid and deliver such instrument to Trustee. The Trustee shall not be liable for payment of premiums, for the renewal or the sufficiency of the policies or for the failure to collect any insurance proceeds. Nor shall the Trustee have any obligation to inspect the property to determine whether a loss has been sustained or to file any claim or claims against any insurer or any other person.

(b) Among other things, the duty of Trustee shall be to receive proceeds delivered to it and to hold such proceeds in trust for the benefit of the Owners and their mortgagees for the purposes of reconstruction, repair and replacement or distribution as the case may be. An undivided share of such proceeds on account of damage or destruction

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to the General Common Area and Facilities and Limited Common Area and Facilities shall be allocated and assigned for the Owners in accordance with the Percentage Interest appurtenant to their Units. Proceeds on account of damage or destruction to Units shall be allocated and assigned for the Owners of the damaged or destroyed Units in proportion to the cost of repairing or reconstructing the damage or destruction suffered by each such Owner. In the event that a mortgagee endorsement has been issued as to any particular Unit, the share of such Unit Owner shall be held in trust for such Owner and his mortgagee as their interests may appear.

(c) Proceeds of insurance policies received by the Trustee shall be disbursed as follows:

(i) If the damage or destruction for which the proceeds are paid is to be repaired or reconstructed, the proceeds, or such portion thereof as may be required for such purpose, shall be disbursed in payment for such repairs or reconstruction as hereinafter provided. Any proceeds remaining after defraying such costs shall be paid into the Trust Fund for the benefit of all Owners.

(ii) If it is determined, as provided in Section 4 of this Article V, that the damage or destruction for which the proceeds are paid shall not be repaired or reconstructed, such proceeds shall be disbursed to such persons as therein provided.

(iii) Any and all disbursements of funds by the Trustee for any purpose whatsoever shall be made pursuant to and in accordance with a certificate of the Association signed by the President or Vice President and attested by the Secretary or Assistant Secretary directing the Trustee to make the disbursements.

If the damage or destruction is to the General Common Area and Facilities and/or to the Limited Common Area and Facilities, and is to be repaired or reconstructed, said certificate shall also be signed by or on behalf of the mortgagee known by the Trustee to have the largest interest in or lien upon such General Common Area and Facilities and/or Limited Common Area and Facilities, if the damage or destruction is to one or more Units and is to be repaired or reconstructed, said certificate shall also be signed by or on behalf of the mortgagee or mortgagees, if any, known by the Trustee to have an interest in or lien upon such Unit or Units. The Trustee shall not incur liability to any Owner, mortgagee or other person for any disbursements made by it pursuant to and in accordance with any such certificates or written authorizations.

Section 4. Damage and Destruction.

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(a) Immediately after all or any part of the property covered by insurance written in the name of the Association is damaged or destroyed by fire or other casualty, the Board of Directors or its duly authorized agent shall proceed with the filing and adjustment of all claims arising under such insurance and obtain reliable and detailed estimates of the cost of repair or reconstruction of the damaged or destroyed property. Repair or reconstruction, as used in this paragraph means repairing or restoring the property to substantially the same condition in which it existed prior to the fire or other casualty with each Unit, the General Common Area and Facilities and the Limited Common Area and Facilities having the same vertical and horizontal boundaries as before.

(b) Any such damage or destruction to an Apartment Unit which does not render such Unit untenable shall be repaired unless all the Owners unanimously agree in writing not to repair, reconstruct or rebuild the property in accordance with provisions of the Act. Any such damage or destruction which renders any Apartment Unit untenable or uninhabitable, or any such damage or destruction to the General Common Area and Facilities and Limited Common Area and Facilities, shall be repaired and reconstructed unless at least 75 percent (75%) of the total vote of the Association, evidenced by a written agreement, within 60 days after the casualty vote not to repair or reconstruct. If for any reason, the amount of the insurance proceeds to be paid as a result of such damage or destruction, or reliable and detailed estimates of the cost of repair or reconstruction are not made available to the Association within said period of 60 days after the casualty, then such period shall be extended until such information shall be made available to the Association; provided, however, that said extension of time shall not exceed 90 days. No mortgagee shall have any right to participate in the determination as to whether the damage or destruction shall be repaired or reconstructed.

(c) In the event that it is determined by the Association in the manner prescribed above that the damage or destruction shall not be repaired or reconstructed, then and in that event (i) the property shall be deemed to be owned by the Unit Owners as tenants in common, (ii) the undivided interest in the property owned in common which shall appertain to each Unit Owner shall be the percentage of Percentage Interest appurtenant to each Unit, (iii) any liens affecting any of the Units shall be deemed to be transferred in accordance with the existing priorities to the percentage of Percentage Interest of the Unit Owner, and (iv) the property shall be subject to an action for partition at the instance of any Unit Owner, in which event the net proceeds of sale shall be paid to the Trustee. Said net proceeds of sale, together with the net proceeds of the insurance on the property, shall be considered as one fund which, after

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paying all expenses of the Trustee, shall be divided among all of the Unit Owners in a percentage equal to the Percentage Interest appurtenant to their Units, after first paying out of the respective share of the Unit Owners, to the extent sufficient for such purpose, all liens on the undivided interest in the property owned by each Unit Owner. Disbursements to such Owners shall be made pursuant to certificates provided for in Section 3 of this Article V.

Section 5. Repair and Reconstruction.

(a) If the damage or destruction for which the insurance proceeds are paid to the Trustee is to be repaired or reconstructed, and such proceeds are not sufficient to defray the cost thereof, the Board of Directors shall levy a special Assessment against the Owners of damaged or affected Units in sufficient amounts to provide funds to pay such excess cost of repair or reconstruction. Additional Assessments may be made at any time during or following the completion of any repair or reconstruction. That portion of such Assessments levied against each such Unit Owner shall be equal to that percentage computed by dividing the Percentage Interest appurtenant to such Owner's Unit by the total of the Percentage Interests appurtenant to all Units affected.

(b) Any and all sums paid to the Association under and by virtue of those special Assessments provided for in paragraph (a) of this Section shall be deposited by the Association with the Trustee. Such proceeds from insurance and Assessments, if any, received by the Trustee shall be disbursed as provided in Section 3 of this Article V.

Section 6. Association as Agent. On Each Owner by acquiring or holding an interest, equitable or legal, in any Apartment thereby expressly accepts and acknowledges the irrevocable appointment of the Association as his, her or its duly appointed agent for each Owner and for each owner of a mortgage or other lien upon an Apartment and for each Owner of any other interest in the Regime property to adjust all claims arising under insurance policies purchased by the Association, and to execute and deliver releases upon the payment or satisfaction of claims.

ARTICLE VI

CONDEMNATION

Section 1. General. Whenever all or any part of the property shall be taken by any authority having the power of condemnation or eminent domain, each Owner shall be entitled to notice thereof and to participate in the proceedings incident thereto unless otherwise prohibited by law. The award made for such taking shall be payable to the Trustee.

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Unless otherwise required by law at the time of such taking, any award made therefor shall be disbursed by the Trustee, as hereinafter provided in this Article VI.

Section 2. General Common Area. If the taking is confined to the General Common Area and Facilities on which improvements shall have been constructed and if at least seventy-five percent (75%) of the total vote of the Association shall decide within 60 days after such taking to replace said improvements, or any part thereof, on the remaining land included in the General Common Area and Facilities and according to plans therefor to be approved by the Association, then the Board of Directors shall arrange for such replacement and the Trustee shall disburse the proceeds of such award in the same manner as they are required to disburse insurance proceeds where damage or destruction to the property is to be repaired or reconstructed as provided for in Article V hereof; subject, however, to the right hereby reserved to the Association which may be exercised by a majority of the total vote thereof to provide for the disbursement by the Trustee of the remaining proceeds held by it (after payment of all costs incident to such replacement) to the Owners of any one or more of them in amounts disproportionate to the Percentages Interest appurtenant to their Units established herein, which disproportionate amounts shall correspond with the disproportionate damages sustained by the Owners or any one or more of them as the Association may determine. If at least seventy-five percent (75%) of the total vote of the Association shall not decide within 60 days after such taking to replace such improvements or if the taking is confined to the General Common Area and Facilities on which no improvements shall have been constructed, then the Association or the Trustee, as the case may be, shall disburse the proceeds of the award in the manner hereinabove provided for the disbursement of the remaining proceeds of an award after payment of all costs incident to replacement of improvements taken, including the right reserved to the Association to provide for the disbursement by the Trustee of the remaining proceeds held by it to the Owners in disproportionate amounts.

Section 3. Units. If the taking includes one or more Units, any part or parts thereof or the Limited Common Area and Facilities, or parts thereof, to which a Unit has exclusive use then the award shall be disbursed and all related matters, including, without limitation, alteration of the Percentage Interest appurtenant to each Unit, shall be handled pursuant to and in accordance with the consent of all Owners expressed in a duly recorded amendment to this Master Deed. In the event that such an amendment shall not be recorded within 90 days after such taking, then such taking shall be deemed to be and shall be treated as damage or destruction which shall not be repaired or reconstructed

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as provided for in Section 4 of Article V herein, whereupon the development will be terminated in the manner therein prescribed.

ARTICLE VII

ARCHITECTURAL CONTROL

Section 1. Approval Required for Changes. To preserve the original architectural appearance of the Mariner's Cay Racquet and Yacht Club Horizontal Property Regime, after the purchase of an Apartment Unit from Grantor, its successors or assigns, no exterior construction of any nature whatsoever, except as specified in the Condominium Documents, shall be commenced or maintained upon any building, including without limitation, the Limited Common Area and Facilities nor shall there be any change, modification or alteration of any nature whatsoever of the design and appearance of any of the exterior surfaces, patios, balconies or facades, nor shall any Owner paint, decorate, or change the color of any exterior surface, gate, fence or roof, nor shall any Owner change the design or color of the exterior lights, nor shall any Owner install, erect or attach to any part of the exterior any sign of any kind whatsoever, nor shall any exterior addition or change, including without limitation the generality of the foregoing, the erection or construction of any fence or wall, be made unless and until the plans and specifications showing the nature, kind, shape, height, materials, color and location of the same shall have been submitted to and approved in writing as to harmony of exterior design, color and location in relation to the surrounding structures by the Board of Directors of the Association or by an architectural committee composed of three or more representatives appointed by the Board. Failure of the Board, or its designated committee, to approve or disapprove such plans and specifications within 30 days after their being submitted to it shall constitute approval.

ARTICLE VIII

EXTERIOR MAINTENANCE

Section 1. Responsibility of Association. Except as specifically provided to the contrary herein, the Association shall maintain, repair and replace, at its expense, all parts of the General Common Area and Facilities and Limited Common Area and Facilities whether located inside or outside of the Apartment Unit, the cost of which shall be charged to the Unit Owners as a Common Expense subject to the provisions of Section 2 of this Article VIII. The Association shall have the irrevocable right, to be exercised by the Board of Directors, or its agent, to have access to each Apartment Unit from time to time during

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reasonable hours as may be necessary for the inspection, maintenance, repair or replacement of any of the General Common Area and Facilities and/or Limited Common Area and Facilities therein or accessible therefrom, or for making emergency repairs therein necessary to prevent damage to the General Common Area and Facilities, Limited Common Area and Facilities or to other Units.

Section 2. Responsibility of Owner. In the event that the Board of Directors should determine that the need for maintenance or repairs by the Association as provided for in Section 1 of this Article VIII is caused through the willful or negligent act of an Owner, his family, guests or invitees, the cost of which is not covered or paid for by insurance then the cost, both direct and indirect, of such maintenance or repairs shall be added to and become a part of the assessment to which such owner and his Unit is subject. Each Owner shall maintain, repair and replace at his own expense all portions of his Unit which may become in need thereof, including the heating and air-conditioning system for such Unit, all bathroom and kitchen fixtures and appliances, light fixtures, interior nonload-bearing walls, carpeting, drapes and other items within the Unit. Further, each Owner shall, at his own expense, maintain, repair and replace, when necessary, that portion of the air-conditioning system servicing his Unit which is located adjacent to his Unit and each Owner shall, at his own expense, keep the Limited Common Area and Facilities to which his Unit has exclusive access and to which he has exclusive use clean and neat. If the Owner does not make those repairs to be made by him within thirty days from written demand from the Association, the same may be repaired by the Association and the cost thereof shall be assessed against the Unit owned by such Owner.

ARTICLE IX

UNIT RESTRICTION

Section 1. Residential Purposes. Buildings and all Units contemplated in the development shall be, and the same hereby are, restricted exclusively to residential use with the exception of the "Ships Store", which shall be located within the confines of the Regime as reflected on the Site Plan in EXHIBIT "E" for the benefit of all Co-Owners as well as to service the Grantor's adjacent marina. No structures of a temporary character, trailer, basement, tent, shack, carport, garage, barn or other outbuilding shall be used as a residence on any portion of the property at any time.

Section 2. Construction and Sale Period. Anything contained herein to the contrary notwithstanding, it shall be permissible for Grantor to maintain, during the period of construction and sale of said Units, upon such portion of

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the property as the Grantor may deem necessary, such facilities as in the sole opinion of the Grantor may be reasonably required, convenient or incidental to the construction and sale of said Units, including, but without limitation, a business office, storage area, construction yards, signs, model units and sales office. This section shall apply to any and all future phases of Mariner's Cay Racquet and Yacht Club Horizontal Property Regime, as well as to Phase I. Grantor further reserves the right to operate and occupy a sales office and related facilities in certain areas of the Regime common facilities. Grantor shall occupy such Common Area and Facilities as it deems necessary and advisable and shall do so without necessity of paying any rents or assessments, provided, however, that Grantor shall pay any and all utility charges and fees that may be incurred in the occupation of such space. Grantor further agrees to vacate any and all such occupied space no later than sixty (60) days after the final closing of the last unit in the last phase (including any and all Future Phases) and to restore said facilities to their original condition excepting normal wear and tear.

Section 3. Animals and Pets. No animals, livestock or poultry of any kind shall be raised, bred or kept on any part of the property, except that dogs, cats or other household pets may be kept by the respective Owners in their respective Units provided that they are not kept, bred or maintained for any commercial purpose and do not endanger the health or, in the sole discretion of the Board of Directors, unreasonably disturb the Owner of any Unit or any resident thereof.

Section 4. Signs and Business Activities. No advertising signs, billboards, unsightly objects, or nuisances shall be erected, placed or permitted to remain on the property, nor shall the property be used in any way or for any purpose which may endanger the health or unreasonably disturb the Owner of any Unit or any resident thereof. No business activities of any kind whatever shall be conducted in any building or in any portion of the property, provided, however, the foregoing covenants shall not apply to the business activities, signs and billboards of Grantor, its agents or assigns during the construction and sale period.

Section 5. Clotheslines, Garbage Cans, Etc. No outside clotheslines shall be permitted, and all garbage cans and similar items shall be kept screened so as to conceal them from view of neighboring units or kept on any

Section 6. Exterior Antennas. No exterior television or radio antennas shall be placed on any improvements without prior written approval of the Board of Directors.

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Section 7. Leasing of Units. Units may be rented provided the occupancy is only by the lessee and his immediate family unless otherwise provided by the Association's Board of Directors. No less than all of a Unit may be rented. This Section 7 shall not apply, however, to any lease or leases which may be entered into by the Grantor.

Section 8. Mortgaging. No Owner may mortgage his Unit nor any interest therein without the approval of the Association's Board of Directors, except to its former Owner, a bank, insurance company, a federal savings and loan association or a corporation or partnership acting as a mortgage broker whose primary interest in making any such mortgage is the placement and servicing of same with and on behalf of one of such other lending institutions. The existence of a "permanent commitment" from any such lending institution to purchase any such mortgage from such mortgage broker shall be conclusive evidence of such mortgage broker's intent to place any such mortgage with one of such other lending institutions whether or not such commitment is ultimately fulfilled. The approval of any mortgagee as provided for above may be upon conditions determined by the Board of Directors or may be arbitrarily withheld.

Section 9. Void Transactions. Any mortgage or lease which is not authorized pursuant to the terms of this Master Deed shall be voidable at the option of any Owner or the Board of Directors until such time as same shall be approved by the Board of Directors.

ARTICLE X FEDERAL SAVINGS AND LOAN ASSOCIATION

EASEMENTS

Section 1. Encroachments. If any portion of the General Common Area and Facilities and/or the Limited Common Area and Facilities encroaches upon any Unit or any Unit encroaches upon any other Unit or upon any portion of the General Common Area and Facilities and/or the Limited Common Area and Facilities as a result of settling or shifting of a building, an easement for the encroachment and for the maintenance of the same so long as the building stands, shall exist. If any building, any Unit, any adjoining Unit, or any adjoining part of the General Common Area and Facilities and/or the Limited Common Area and Facilities, shall be

partially or totally destroyed as a result of fire or other casualty or as a result of eminent domain proceedings, and then rebuilt, encroachments of parts of the General Common Area and Facilities and/or the Limited Common Area and Facilities upon any Unit or of any Unit upon any other Unit or upon any portion of the General Common Area and Facilities and/or the Limited Common Area and Facilities, due to such rebuilding, shall be permitted, and valid easements for such encroachments and the maintenance thereof shall exist so long as the subject building shall stand.

Section 2. Utilities, Etc. There is hereby granted a blanket easement upon, across, over and under all of the property for ingress, egress, installation, replacing, repairing and maintaining a master television antenna system and all utilities, including, but not limited to, water, gas, sewers, telephones and electricity. Such easements grant to appropriate utility companies the right to erect and maintain the necessary poles, cables, pipes, and other necessary equipment on the property and to affix and maintain utility wires, circuits, and conduits on, above, across and under the roofs and exterior walls of the Units.

Section 3. Other. There is hereby granted to the Association, its directors, officers, agents and employees and to any Manager employed by the Association as provided for in Section 2 of Article V hereof, and to all policemen, firemen, ambulance personnel and all similar emergency personnel an easement to enter upon the property or any part thereof in the proper performance of their respective duties. Except in the event of emergencies, the rights under this Section 3 of Article X shall be exercised only during reasonable daylight hours, and then, whenever practicable, only after advance notice to the Owner or Owners affected thereby.

Section 4. Reservations of Developer's Marina and Boat Ramp Easements. There is hereby reserved unto Mariner's Cay Development Corp., its successors and assigns, (a) an alienable easement in perpetuity, for unlimited ingress and egress over, across and upon the interior streets, roadways, sidewalks, walkways, and parking lots to the marina and associated facilities (ownership of which is and remains vested in Mariner's Cay Development Corp.), such easement shall be for the benefit of Mariner's Cay Development Corp., its successors and assigns, the lessees of marina slip spaces and their respective agents, licensees, invitees and for customers of the Ship's Store, together with (b) an alienable easement in perpetuity, along, across, over, through and adjacent to the Horizontal Property Regime, as shown on EXHIBIT "F", attached hereto, in order to allow Mariner's Cay Development Corp., its successors and assigns, the right and privilege to attach, affix and maintain the docking and structure constituting the marina facilities to

the Horizontal Property Regime in such space, size, shape, width and depth as Grantor in its sole discretion deems necessary to sufficiently moor and maintain the marina to the Horizontal Property Regime, together with (c) an alienable easement in perpetuity, for ingress and egress, in addition to those hereinabove reserved, to the "Boat Ramp" shown on EXHIBIT "F", attached hereto, such easement is for the benefit of Mariner's Cay Development Corp., its successors and assigns, marina slip lessees, and invitees, guests and licensees of the foregoing so that such users may have access to said boat ramp and the adjacent marina and waterways, together with (d) an alienable easement in perpetuity for such parking spaces as might be necessary for the operation of the marina, together with (e) an alienable easement in perpetuity, to construct and operate a "Ship's Store" which shall be located 35 feet N07°35'06"W of the point where the centerline of the 15 foot interior road intersects Traverse Line T-U as shown on EXHIBIT "F" and shall occupy and be erected upon a parcel of land twelve (12') feet by twelve (12') feet, which said parcel shall have sides located S07°35'06"E and N82°24'54"E, said easement being for the benefit of Mariner's Cay Development Corp., its successors and assigns, Regime residents and Marina slip lessees, their invitees and for customers of the Ship's Store.

The foregoing easements are all more particularly shown and delineated as the shaded portions of a plat of Little Oak Island (a/k/a Rook Island) dated March 13, 1981 and revised May 27, 1981 by Sigma Engineers, Inc.

Section 5.

Reservation of Easement to All Future Phases. There is hereby reserved unto Mariner's Cay Development Corp., its successors and assigns, an unlimited perpetual alienable and divisible easement for unlimited ingress and egress over, across, through and upon the interior and exterior streets, sidewalks, walkways, roadways, entrances and exits and parking lots of the Regime so as to provide access to and from that certain tract of land designated as Phase II, III, IV, V and VI and as shown on EXHIBIT "D", which is attached hereto and made a part hereof, said reservation is for the benefit of the Grantor and its successors and assigns.

Section 6. Reservation and Grant of Reciprocal Easements Between Phases One and All Future Phases.

There is hereby reserved unto Mariner's Cay Development Corp., its successors and assigns, and granted to all Co-Owners of Apartment Units within Phase One and such future phases as may be added to the Regime created herein, an unlimited, perpetual, alienable and divisible easement between Phase One and each of the potential future phases as Grantor may hereafter elect to merge in the Regime created herein, said reciprocal easement reserves upon Grantor, its

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successors and assigns and grants to the Co-Owners of any Apartment Unit within any and all phases of Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime the perpetual right and privilege of unlimited ingress and egress over, across and upon, as well as the use of, the exterior streets, sidewalks, walkways, roadways and parking lots, recreational facilities and Common Area and Facilities of any other Phase of Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime. Said reciprocal easement shall attach to and remain appurtenant to each Apartment Unit.

ARTICLE XI

GENERAL PROVISIONS

Section 1. Amendment. Amendments to this Master Deed, except as herein expressly provided to the contrary, shall be proposed by the Board of Directors or by any member of the Association in accordance with the following procedure:

(a) Notice. Notice of the subject matter of the proposed amendment shall be included in the notice of the meeting of the Association at which such proposed amendment is to be considered.

(b) Adoption. The Master Deed may be amended at any time and from time to time after notice as hereinabove provided has been given by a vote of not less than seventy-five percent (75%) of the total vote of the Association; provided, however, that if the Association shall vote to amend the By-Laws in any respect, such amendment shall be set forth in an amendment to this Master Deed and shall be valid when approved by a vote of not less than seventy-five percent (75%) of the total vote of the Association.

(c) Recording. A copy of each amendment provided for in this Section 1 shall be certified by the Board of Directors of the Association as having been duly adopted and shall be effective when recorded.

(d) Expandable Regime Exception. As an express exception to the amendment procedure hereinabove enumerated, the Grantor may elect to expand the Horizontal Property Regime as provided herein as and when such additional property is submitted to this Regime without the consent of any Co-Owner or lien holder. Any such amendment shall become effective upon its filing in the R.M.C. Office for Charleston County, South Carolina.

Section 2. Termination. The Regime may be terminated and the property removed from the provisions of the Act in the following manner:

amend the By-Laws in any respect, such amendment shall be set forth in an amendment to this Master Deed

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(a) Agreement. All of the Unit Owners may remove the property from the provisions of the Act by an instrument to that effect, duly recorded, provided that the holders of all liens affecting any of the Units consent thereto or agree, in either case by instruments duly recorded, that their liens be transferred so as to affect and be a lien upon only the Percentage Interest appurtenant to the Unit subject to such lien.

(b) Destruction. In the event it is determined in the manner provided in Section 4 of Article V hereof, that the property shall not be repaired or reconstructed after casualty, the Regime will be terminated and the Condominium Documents revoked. The determination not to repair or reconstruct after casualty shall be evidenced by a certificate of the Association certifying as to facts effecting the termination, which certificate shall become effective upon being recorded.

(c) Condemnation. In the event that one or more Units, any part or parts thereof, or the Limited Common Area and Facilities, or parts thereof, to which a Unit has exclusive use shall be taken by any authority having the power of eminent domain and the consent of all Owners as provided in Section 3 of Article VI hereof, shall not be expressed in an amendment to this Master Deed duly recorded within 90 days after such taking, the Regime will be terminated and the Condominium Documents revoked. Such taking shall be evidenced by a certificate of the Association certifying as to facts effecting the termination, which certificate shall become effective upon being recorded.

(d) Ownership After Termination. After termination of the Regime, the rights of the Unit Owners and their respective mortgagees and lienholders shall be determined in the manner provided in Section 5 of Article V hereof.

Section 3. Covenants Running with the Land. All provisions of this Master Deed shall be construed to be covenants running with the land, and with every part thereof and interest therein including, but not limited to, every Unit and the appurtenances thereto, and each and every provision of the Master Deed shall bind and inure to the benefit of all Unit Owners and claimants of the land or any part thereof or interest therein, and their heirs, executors, administrators, successors and assigns.

Section 4. Duration. So long as South Carolina law limits the period during which covenants restricting lands to certain uses may run, it shall be the duty of the Board of Directors to cause the covenants contained herein, as amended from time to time, to be extended when necessary by filing a document bearing the signatures of a majority of the then Owners reaffirming and newly adopting the Master

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Deed and covenants then existing in order that the same may continue to be covenants running with the land. Such adoption by a majority shall be binding on all, and each Owner of any Unit, by acceptance of a deed therefor, is deemed to agree that the Master Deed and covenants may be extended as provided in this Section 4.

Section 5. By-Laws. A true copy of the By-Laws of the Association, which together with this Master Deed shall govern the administration of the Regime, is attached hereto as EXHIBIT "G" and, by reference, made a part hereof.

Section 6. Enforcement. Each Owner shall comply strictly with the By-Laws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restrictions set forth in this Master Deed or in the deed to his Unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both maintainable by the Board of Directors on behalf of the Association or by an aggrieved Owner. Failure by the Association or any Owner to enforce any of the foregoing shall in no event be deemed a waiver of the right to do so thereafter.

Section 7. Severability. Invalidation of any covenant, condition, restriction or other provision of this Master Deed or the By-Laws shall not affect the validity of the remaining portions thereof which shall remain in full force and effect.

Section 8. Perpetuities and Restraints on Alienation. If any of the covenants, conditions, restrictions or other provisions of this Master Deed shall be unlawful, void or voidable for violation of the rule against perpetuities, then such provision shall continue only until 21 years after the death of the last survivors of the now living descendants of Ronald Reagan, President of the United States, or Jimmy E. Carter, former President of the United States.

Section 9. Gender and Grammar. The singular wherever used herein shall be construed to mean the plural when applicable, and the necessary grammatical changes required to make the provision hereof apply either to corporations or individuals, men or women, shall in all cases be assumed as though in each case fully expressed.

Section 10. Agent for Service of Process. In accordance with the provisions of the Act, Ronald G. Bruce, Esq., of Richland County, South Carolina, is hereby designated to receive service of process. The address of the said Registered Agent is Post Office Box 11716, 1310 Lady Street, Suite 600, Keenan Building, Columbia, South Carolina, 29211.

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perpetuities and restraints on alienation.

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In the event of said agent's death, resignation or removal, his successor shall be appointed by the Board of Directors of the Association by an instrument duly recorded in the Office of the Register of Mesne Conveyances of Charleston County, South Carolina.

Section 11. Headings. The headings appearing herein are intended for purposes of convenience only and are not to be considered in construing this instrument.

ARTICLE XII

ASSIGNED VALUE AND UNIT VOTE

Section 1. Unit and Property Values. The Master Plan contained in EXHIBIT "C" attached hereto shows the value of each Unit as of the date this Master Deed is recorded and the percentage of undivided interest in the General Common Area and Facilities and Limited Common Area and Facilities appurtenant to such Unit for all purposes. The value of the property is equal to the total value of all Units together with the value of the Percentage Interest in the General Common Area and Facilities and Limited Common Area and Facilities appurtenant to such Units, all as shown on EXHIBIT "C".

Section 2. Unit Votes. The voting rights of each Unit in the Association shall be in accordance with the provisions of Article IV, Section 7 of the By-Laws.

IN WITNESS WHEREOF, Grantor has executed this Master Deed this 22 day of May, 1982.

WITNESSES:
DEVELOPMENT CORP.

MARLINER'S Bay Development Corp.

BY: Robert J. Doran, Jr.
Its: President

ATTESTED:

Secretary

STATE OF SOUTH CAROLINA)

COUNTY OF CHARLESTON)

PROBATE

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PERSONALLY APPEARED BEFORE ME Edward C. Bostick,
 who, being duly sworn, deposes and says that s/he saw the
 within-named Mariner's Cay Development Corp., by Robert J.
 Doran, Jr., its President, sign, seal and as its act and
 deed, deliver the within-written instrument for the uses and
 purposes therein mentioned and that s/he with Humboldt
L. Frazier, witnessed the execution thereof.

SWORN TO BEFORE ME THIS 24th

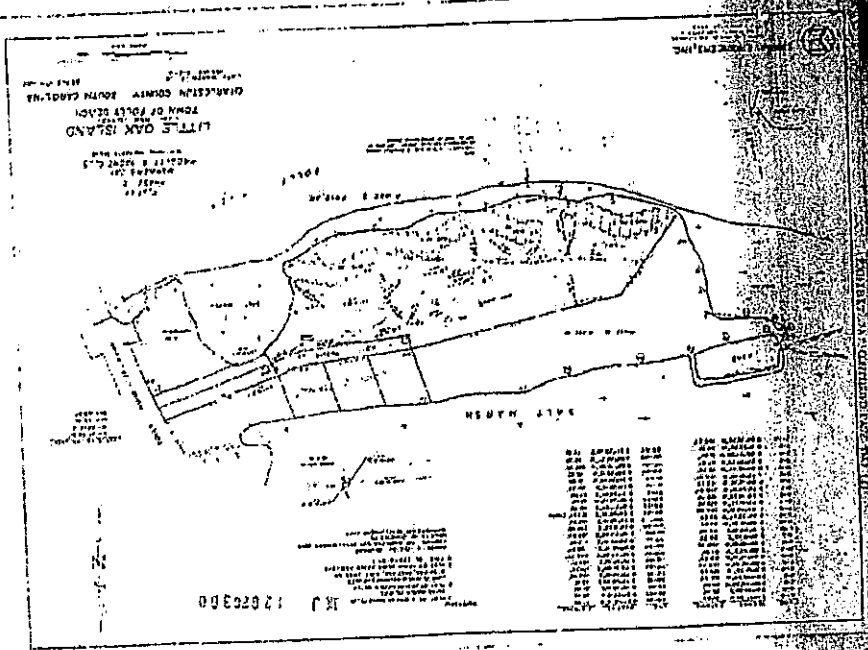
day of April MAY, 1982

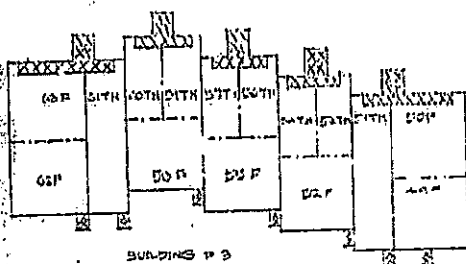
Nancy D. Bass (L.S.)
 Notary Public for South Carolina
 My Commission Expires: 1-18-89

Edward C. Bostick

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...the property and the western side of Holly Road at a point designated as "Point A". ...the property and the western side of Holly Road at a point designated as "Point A". ...the property and the western side of Holly Road at a point designated as "Point A".



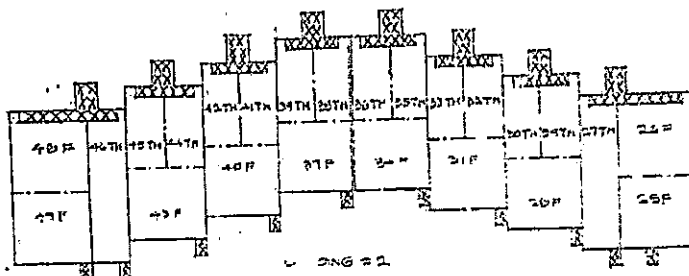


C. BUILDING PLAN #1 - UNIT NUMBERING
PLAN # 1 - 10-01



Sheet 5 of 17

Salmon's Club, Folly Beach, S.C.
Reg. Number/The Architectural Group
Charlotte, N.C.

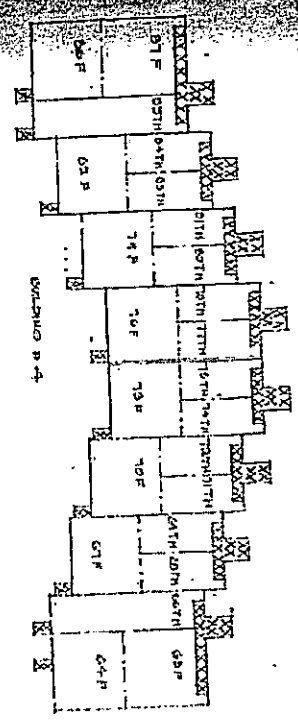


'A' BUILDING PLAN #2 - UNIT NUMBERING
SCALE 1"=30'-0"





PLAN BUILDING PLAN A-B UNIT NUMBERING
SCALE 1/8" = 1'-0"



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Mariner's Cove, 11th South, S.C.
New Nantuxville Architectural Group
Charleston, S.C.

311 1286300

EXHIBIT "A"

MASTER PLAN

Mariner's Cove Resort and Yacht Club,
Horizontal Property Regime (separable)

PHASE I

I. PROPERTY

The property which constitutes Mariner's Cove Resort and Yacht Club Horizontal Property Regime is set forth in Exhibit "A" to the Master Plan.

II. UNITS

There are four, non-contiguous, residential buildings located on the property, the name and location of which are shown on the Site Plan. Each building contains multiple Apartment Units constructed in one building by common walls. Each building is at least two stories high. Each "A" type building contains 25 separate Apartment Units, while the one "B" type building contains 15 separate Apartment Units. There are a total of 40 separate Apartment Units with these four buildings as follows:

How of building	Total Units
A Building: 11	4 - 1224 sq. ft., 1 bedroom flat, being units 1, 2, 23 and 24
	14 - 1217 sq. ft., 2 bedroom townhouse, being units 3, 5, 6, 8, 9, 11, 12, 14, 15, 17, 18, 20, 21, and 22
	6 - 1217 sq. ft., 2 bedroom flat, being units 4, 7, 10, 13, 16, and 19
	for 24 Total Apartments

EXHIBIT "C" CONTINUED

Building 72

1328 sq. ft., 2 bedroom
flat, being units 25, 26,
47, and 48

14 - 1217 sq. ft., 2 bedroom
townhouse, being units
27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37,
38, 39, 40, 41, 42, 43, 44, 45, and 46

5 - 1217 sq. ft., 2 bedroom
flat, being units 29, 31,
34, 37, 40, and 43

for 24 Total Apartments

Building 73

4 - 1328 sq. ft., 2 bedroom
flat, being units 49, 50,
61, and 62

8 - 1217 sq. ft., 2 bedroom
townhouse, being units
51, 52, 53, 54, 55, 56, 57, 58, 59, 60,
and 61

3 - 1217 sq. ft., 2 bedroom
flat, being units 62, 63,
and 64

for 15 Total Apartments

Building 74

4 - 1328 sq. ft., 3 bedroom
flat, being units 65, 66,
67, and 68

14 - 1217 sq. ft., 2 bedroom
townhouse, being units
69, 70, 71, 72, 73, 74, 75, 76,
77, 78, 79, 80, 81, 82, 83, and 84

4 - 1217 sq. ft., 2 bedroom
flat, being units 85, 86,
87, 88, and 89

for 22 Total Apartments

APPROXIMATE TOTAL IS 67

EXHIBIT "C" CONTINUED

In addition thereto there is a Roubin Club House, which is located, as reflected by the Site Plan, adjacent to the recreational facilities (which consists of two tennis courts and one swimming pool). The Guard House is located near the entrance to the Roubin, as reflected on the Site Plan and measures ten (10') feet by ten (10') feet.

III UNITS

The location, type and number of each apartment to shown on the Site Plan drawings and plans, which are a part of this EXHIBIT, are in the Master Book. Each Apartment is at least two stories in height and is more particularly described in Article III, Section 2 (a).

IV PERCENTAGE INTEREST IN APARTMENTS

The percentage of undivided interest appertaining to each Apartment in the General Common Area and Facilities and Limited Common Area and Facilities has been determined by the ratio of the stated fair market value of the subject Apartment as of the date of this Master Book to the sum of the stated fair market value of all Apartments on said date, all of which are set forth on the next three pages of this EXHIBIT "C". 1920, that the percentage interest appertaining to the Apartments in these are will be reduced as reflected hereinafter in the event that the Grantor, its successors or assigns elect to proceed with future phases of the Roubin.

LEGAL DESCRIPTION OF MARSHES
AND
PHASES III, IV, V, AND VI

PHASE III DESCRIPTION:

All that certain place, parcel or tract of land, situate, lying and being in the Town of Folly Beach, County of Charleston, State of South Carolina and being more particularly shown and delineated as Phase II containing 4.251 acres on a Plat of Phase I Marine's Cove Racquet & Yacht Club Horizontal Property Regime dated March 13, 1981 and last revised May 27, 1981, prepared by Sigma Engineers, Inc. and according to said Plat having boundaries and measurements as follows:

BEGINNING at an iron pin in the northeastern corner of said Tract at the intersection of the property and the western side of lands of Stringer at a point designated as M and running in a westerly direction along the property designated Phase I containing 7.915 acres S77°30'10"W for a distance of 610.0 feet to an iron pin; thence turning and running S35°53'01"W for a distance of 270.0 feet along the property designated Phase I containing 7.915 acres to a traverse point designated V; thence turning and running from traverse point V to traverse point W on a traverse line N20°18'37"W for a distance of 78.24 feet along property designated as Salt Marsh; thence continuing from traverse point W to traverse point X on a traverse line N24°27'23"W for a distance of 87.07 feet along property designated as Salt Marsh; thence continuing from traverse point X to traverse point Y on a traverse line N06°27'08"W for a distance of 61.64 feet along property designated as Salt Marsh; thence continuing from traverse point Y to traverse point Z on a traverse line N11°53'58"W for a distance of 64.71 feet along property designated as Salt Marsh; thence turning and running from traverse point Z to traverse point AA on a traverse line N83°39'25"W for a distance of 102.24 feet along property designated as Salt Marsh; thence continuing from traverse point AA to traverse point BB on a traverse line N77°13'17"W for a distance of 77.96 feet along property designated as Salt Marsh; thence turning and running from traverse point BB to traverse point CC on a traverse line N57°07'13"W for a distance of 38.69 feet along property designated as Salt Marsh; thence turning and running from traverse point CC to traverse point DD on a traverse line N16°45'01"E for a distance of 21.44 feet along property designated as Salt Marsh; thence turning and running from traverse point DD to traverse point EE S72°08'28"E for a distance of 43.61 feet along property designated as a Pond; thence turning and running from traverse point EE to traverse point FF on a traverse line N79°39'05"E for a distance of 120.46 feet along property designated as a Pond; thence continuing from traverse point FF to traverse point GG on a traverse line N74°21'00"E for a distance of 103.72 feet along property designated as a Pond; thence continuing from traverse point GG to traverse point HH on a traverse line N79°37'30"E for a distance of 134.71 feet along property designated as Salt Marsh; thence continuing from traverse point HH to traverse point JJ on a traverse line N82°49'22"E for a distance of 206.77 feet along property designated as Salt Marsh; thence continuing from traverse point JJ to traverse point KK on a traverse line N77°55'17"E for a distance of 228.87 feet along property designated as Salt Marsh;

thence continuing from traverse point J, to traverse point L, on a traverse line N84°20'41"E for a distance of 170.60 feet along property designated as Salt Marsh, thence turning and running from traverse point L, S18°00'00"E for a distance of 159.50 feet along property designated as lands of Stringer to point M, the POINT OF COMMENCEMENT.

THASFS III, IV, V, AND VI;

All that certain piece, parcel or tract of land, situate, lying and being in the Town of Folly Beach, County of Charleston, State of South Carolina and being more particularly shown and delineated on a Tax Map for Charleston County numbered Tax Map Number 328-0-0 and shown thereon as Lot 13. Said tract being composed of an island consisting of 32.6 acres, more or less, and being the first island located east of Folly Road and North of Folly River. Reference is craved to said Tax Map for a more accurate and detailed description.

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EXHIBIT "F"

EASEMENTS

ALL EASEMENTS ARE FULLY DESCRIBED AND SET FORTH IN ARTICLE X
OF THIS MASTER DEED AND THE LOCATION OF SAME AS SHOWN ON THE
ATTACHED PLAT AS THE SHADED AREA.

BY-LAWS

OF

MARINER'S CAY RACQUET & YACHT CLUB HOMEOWNER'S ASSOCIATION, INC.

ARTICLE I

NAME, LOCATION AND MEMBERSHIP

Section 1. Name. The name of the association is Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. (the "Association").

Section 2. Location. The principal office of the Association shall be located at Clubhouse, Mariner's Cay, Folly Beach, South Carolina, but meetings of the Board of Directors may be held at such places designated by the Board in accordance with the provisions of these By-Laws.

Section 3. Membership. Each and every record owner of a fee or undivided fee interest in Mariner's Cay Racquet & Yacht Club, a Horizontal Property Regime (expandable) shall be a member of the Association, excluding persons who hold such interest under a deed to secure debt, mortgage or deed of trust. Membership in the Association shall be confined to such Co-Owners and shall be appurtenant to and inseparable from Apartment ownership. Such Co-Owner or Co-Owners of each Apartment Unit shall designate, in writing delivered to the Secretary, one member of the Association from among such Co-Owner or Co-Owners of such Unit, or a member of the immediate family of such Co-Owner or Co-Owners, and such member shall represent the Co-Owner or Co-Owners of such Unit in connection with the activities of the Association and exercise the voting rights thereof. Such designation shall be valid until revoked, in writing delivered to the Secretary, or until such Co-Owner sells his Apartment Unit whichever event shall first occur. No Apartment Unit Co-Owner shall be required to pay any initiation fee whatsoever for his membership. In the event such a Co-Owner is not delivered to the Secretary, then the Secretary shall have complete freedom to recognize as sole representative of that particular Apartment Unit any person, corporation, or agent thereof that might show to the satisfaction of the Secretary that he has a recorded fee simple interest thereto.

Section 4. Suspension of Membership and Voting Rights. During any period in which a Co-Owner or Co-Owners of an Apartment Unit shall be in default of the payment of any annual or special Assessment levied by the Association, the voting rights of the member designated by such Co-Owner or Co-Owners and the rights of such Co-Owner or Co-Owners, the members of their family or families, and the tenants who reside in such Co-Owner's or Co-Owners' Apartment Unit to use and enjoy the Common Area and Facilities and Limited Common Area and Facilities may also be suspended by the Board of Directors until such time as the Assessment has been paid. Such rights may also be suspended by the Board of

Directors for the violation of the published rules and regulations with respect to the use of the Common Area and Facilities and the Limited Common Area and Facilities as published from time to time by the Board of Directors. Such rules shall be kept in the Office of the Association as a matter of record, and copies thereof shall be furnished to any Apartment Unit Co-Owner on request.

Section 5. Applicability. These By-Laws are established pursuant to the "Horizontal Property Act", 1976 S. C. Code of Laws §27-31-150, et. seq.; are applicable to the Mariner's Cay Racquet & Yacht Club Horizontal Property Regime, Common Area and Facilities, Limited Common Area and Facilities, and the Association; and are binding on all Apartment Unit Co-Owners, their families, tenants and guests, and any other person residing in or occupying an Apartment Unit. Each and every person who accepts a deed to, a lease of, or who occupies any Apartment Unit thereby consents to be bound by the provisions of these By-Laws.

Section 6. Expandable Regime. These By-Laws take express cognizance that Mariner's Cay Racquet and Yacht Club, a Horizontal Property Regime is an expandable regime, as more fully defined as discussed in the Master Deed, and, that in connection therewith, should the present Regime be expanded by merger then in that event Co-Owners of Apartment Units in any such future phases would automatically become members of the Association which would have the effect of reducing the Percentage Interest of the Co-Owners of Apartment Units of Phase One, all as more fully discussed in the Master Deed.

ARTICLE II

DEFINITIONS

Section 1. Definitions. The terms used in these By-Laws, unless the context requires otherwise or unless otherwise specified herein, shall have the same meaning as in the recorded Master Deed for Mariner's Cay Racquet & Yacht Club, a South Carolina Horizontal Property Regime to which these By-Laws are annexed.

Section 2. Mariner's Cay Development Corp. shall include its successors and assigns herein where used.

ARTICLE III

PROPERTY RIGHTS; RIGHTS OF ENJOYMENT

Section 1. Delegation of Property Rights. Each member of the Association shall be entitled to the use and enjoyment of the Common Area and Facilities and the Limited Common Area and Facilities as provided in the Master Deed. Any member may assign his rights of enjoyment and use of the Common Area and Facilities and the Limited Common Area and Facilities to the members of his immediate family, to his guests, or to his tenants who reside in his Apartment Unit. Such member shall notify the Secretary of the Association in writing of the name or names

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of any such assignees. The rights and privileges of such assignees are subject to suspension to the same extent as those of the member.

ARTICLE IV

MEETINGS OF MEMBERS

Section 1. Place of Meeting. Meetings of the Association shall be held at Clubhouse, Mariner's Cay, Folly Beach, South Carolina, at such suitable place convenient to the members as may be designated by Grantor with regard to the first annual meeting and by the Board of Directors with regard to all subsequent meetings.

Section 2. Annual Meeting. The first annual meeting of members shall be called by Grantor and shall be held on the 27th day of May, 19 82 at ten (10:00) A.M. at 4 Carriage Ln., Suite 300, Charleston, SC 29407. Thereafter, regular annual meetings shall be held on the first Saturday in June of each calendar year at ten (10:00) A.M.; unless otherwise provided by the members at any previous meeting. If the date of the annual meeting shall fall on a legal holiday, the meeting shall be held at the same hour on the next following business day.

Section 3. Special Meetings. Special meetings of the Association may be called at any time by the President, by resolution of the Board of Directors, or upon the receipt by the Secretary of a petition signed by members holding greater than forty (40%) percent of the total vote of the Association. The call of a special meeting shall be by notice stating the date, time, place, purpose and order of business of such special meeting. Only the business stated in the notice may be transacted at a special meeting.

Section 4. Notice of Meetings. The Secretary shall mail a notice of each annual or special meeting, stating the purpose thereof as well as the time and place where it is to be held, to each member at the last address of such member furnished to the Secretary at least ten (10) but not more than twenty (20) days prior to such meeting. Mailing notice as herein provided shall be deemed delivery thereof. Any member may waive notice of the meeting in writing either before or after the meeting. Attendance of a member at a meeting, either in person or by proxy, except for the purpose of stating, at the beginning of the meeting, any objection to the transaction of business, shall constitute waiver of notice and any objection of any nature whatsoever as to the transaction of any business at such meeting. Notice given to one tenant in common, joint tenant or tenant by the entirety shall be deemed notice to all such Co-Owners.

Section 5. Order of Business. The order of business at each annual meeting shall be as follows:

- Roll call.
- Proof of notice of meeting or waiver of notice.

- c. Reading of minutes of preceding meeting.
- d. Reports of officers.
- e. Reports of committees, if any.
- f. Election of directors, if applicable.
- g. Unfinished business.
- h. New business.

Section 6. Quorum. At all meetings, regular or special, a quorum shall consist of the presence in person or by proxy, of members holding greater than fifty (50%) percent of the total vote of the Association. If a quorum shall not be present at any meeting, a majority vote of that percentage present, in person or by proxy, may adjourn the meeting from time to time until a quorum can be obtained. At any such adjourned meeting, any business which might have been transacted at the meeting as originally called may be transacted without further notice.

Section 7. Voting Rights.

(a) This Association shall be a membership corporation without certificates or shares of stock. The Association shall have two classes of membership.

(i) Class A. Class A Members shall be all Co-Owners with the exception of the Grantor, unless Grantor makes election, provided in (ii). Class A Membership shall be nonvoting for the five year period dating from the date of recordation of the Master Deed, thereafter Class A voting rights shall be as detailed hereinafter in this subsection. The maximum total number of votes for all members of Class A shall be one hundred (100) and after the expiration of the foregoing five year period voting rights shall attach to Class A membership and the person designated by the Co-Owner or Co-Owners of each Apartment Unit shall be entitled to cast the number of votes equal to the Percentage Interest appurtenant to the Apartment Unit owned by such Co-Owner or Co-Owners. Said Percentage Interest is set forth as an exhibit to the Master Deed and shall not be divisible nor may the vote thereof be cast in part.

(ii) Class B. The sole Class B Member shall be the Grantor. The maximum total number of votes for Class B shall be one thousand (1,000). Voting rights attach to Class B immediately upon recordation of the Master Deed, as well as upon merger of any or all future phases of the Regime as provided herein. The Grantor shall be entitled to cast the number of votes the product of which shall be equal to the Percentage Interest appurtenant to each apartment unit still retained by Grantor multiplied by ten (10). Said Percentage Interest is set forth as an exhibit to the Master Deed. The Class B membership appurtenant to a particular Apartment Unit shall be automatically converted into Class A membership immediately upon conveyance of such particular Apartment Unit by the Grantor to any third party. Class B shall have a maximum duration of the earlier of, one ten years, or, two, such period of time during which Grantor retains ownership of and actively pursues the sale of any Apartment Units in Phase One or such future phases as may be added to Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime (expandable). Class B membership may be converted into Class A membership at any time upon the election of Grantor in writing to the Association. Such an election once made shall be irrevocable.

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(b) In addition to those voting rights granted hereinabove, and any provisions herein or in the Master Deed and related exhibits to the contrary notwithstanding, Grantor shall have the following rights and powers:

(i) Until such time as Grantor has sold, conveyed or otherwise disposed of all Apartment Units located in Phase One of the Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime (expandable), the Master Deed and By-Laws shall not be changed, altered, amended, or revoked with regard to the method of selecting the managing agent, the imposition of Assessment, the repair or reconstruction of any Apartment Unit, the method and procedure of adopting rules and regulations pertaining to the conduct of members and the use of the Common Area and facilities and Limited Area and facilities without the express written approval of Grantor first had and in writing obtained.

Section 8. Proxy. Votes may be cast in person or by proxy. Proxies must be filed with the Secretary before the designated time of each meeting.

Section 9. Majority Vote. Acts authorized, approved or ratified by the casting of a majority of the votes represented at a meeting at which a quorum is present, in person or by proxy, shall be the acts of the Association, except where a higher percentage vote is required by these By-Laws or by law, and shall be binding for all purposes.

Section 10. Actions Without Meeting. Any action which may be taken at a meeting of the membership may be taken without a meeting if a consent or ratification, in writing, setting forth the action so taken or to be taken shall be signed by persons who would be entitled to cast seventy-five (75%) percent of the votes of membership of the Association at a meeting and such consent is filed with the Secretary of the Association and is inserted in the Minute Book thereof.

ARTICLE V

BOARD OF DIRECTORS, NUMBER, POWERS, MEETINGS

Section 1. Number, Term and Qualification. The business and affairs of the Association shall be governed by a Board of Directors (herein sometimes referred to as the "Board"), all of whom, after all Class B membership has been converted into Class A membership, shall be Co-Owners of Apartment Units within Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime at all times during their term as directors. From and after the first annual meeting of Co-owners the Board of Directors shall consist of nine (9) persons. Until the first annual meeting of Co-Owners, the Board shall consist of three persons appointed by Grantor, none of whom need be Co-Owners. At the first annual meeting of Co-Owners three (3) directors shall be elected to serve for a term of one year, three (3) directors shall be elected to serve for a term of two years and the remaining three (3)

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directors shall be elected to serve for three years. At the expiration of the initial term of office of each director, his or her successors shall be elected to serve for a term of three years. The directors shall hold office for the term herein fixed and until their successors have been qualified and elected. There shall be no limit on the number of successive terms a director may serve on the Board, if elected as herein provided.

Section 2. Powers and Duties. The Board of Directors shall manage and direct the affairs of the Association and, subject to any restrictions imposed by law, by the Master Deed, or these By-Laws, may exercise all the powers of the Association. The Board of Directors shall exercise such duties and responsibility as shall be incumbent upon it by law, the Master Deed, or these By-Laws as it may deem necessary or appropriate in the exercise of its powers, including, without limitation, the collection of assessments and charges from the owners, the establishment and amendment from time to time of reasonable regulations governing the use of the Common Area and Facilities and the Limited Common Area and Facilities, and the employment and dismissal of personnel necessary for the maintenance and operation of the Common Area and Facilities and Limited Common Area and Facilities. Additionally, the Board of Directors may require that all employees of the Association handling or responsible for Association funds shall furnish adequate fidelity bonds. The premium on such bonds shall be paid by the Association.

Section 3. Management. The Board of Directors may employ for the Association a managing agent under such terms and conditions as the Board may authorize; provided, however, the Board shall not delegate to such agent the complete and total responsibility of the Association in violation of the Board's duties. Such managing agent shall have such duties and shall receive such compensation as determined by the Board.

Section 4. Vacancies. Vacancies on the Board of Directors caused by any reason other than the removal of a director by a vote of the Association shall be filled by vote of the majority of the remaining directors, even though they may constitute less than a quorum, and each person so elected shall be a director until a successor is elected at the next annual meeting of the Association. Vacancies caused by removal shall be filled by vote of the Association at the same meeting at which a director or directors were removed.

Section 5. Removal of Directors. At any regular or special meeting of the Association duly called, any one or more of the directors, may be removed with or without cause by a vote of eighty (80%) per cent of the total of all Class A and B memberships authorized to vote thereon, and a successor may then and there be elected to fill the vacancy thus created. Any director whose removal has been proposed by any Co-Owner or Co-Owners shall be given an opportunity to be heard at such meeting. After the conversion of all Class B memberships into Class A memberships the sale of his Apartment Unit shall automatically terminate his directorship.

Section 6. Regular Meeting. The first regular meeting of the Board of Directors shall be held immediately following the first annual meeting of the members of the Association and regular meetings thereafter shall be held on such dates and at such place and hour, but not less frequently than bi-annually, as may be fixed from time to time by resolution of the Board. Notice of regular meetings of the Board shall be given to each director, personally or by mail, telephone or telegraph, at least three (3) days prior to the day of such meeting; provided, however, notice of the first regular meeting shall not be required to be given to the directors provided that a majority of the entire Board is present at such meeting. Should any such meeting fall upon a legal holiday, then that meeting shall be held at the same time on the next day which is not a legal holiday.

Section 7. Special Meetings. Special meetings of the Board of Directors may be called by the President on three (3) days notice to each director, given personally or by mail, telephone or telegraph, which notice shall state the date, time, place (as hereinabove provided) and purpose of the meeting. Special meetings of the Board of Directors shall be called by the President or Secretary in like manner and on like notice upon the written request of at least two (2) directors.

Section 8. Waiver of Notice. Before or at any meeting of the Board of Directors any director may, in writing, waive notice of such meeting and such waiver shall be deemed equivalent to the giving of such notice. Attendance by a director at any meeting of the Board shall be a waiver of notice by him of the date, time and place thereof. If all the directors are present at any meeting of the Board, no notice shall be required and any business may be transacted at such meeting.

Section 9. Quorum. At all meetings of the Board of Directors, a majority of the then qualified directors shall constitute a quorum for the transaction of business, and the acts of the majority of the directors present at a meeting at which a quorum is present shall be the acts of the Board of Directors. If, at any meeting of the Board of Directors, there be less than a quorum present, the majority of those present may adjourn the meeting from time to time. At any such adjourned meeting, any business which might have been transacted at the meeting as originally called may be transacted without further notice.

Section 10. Compensation. No director shall receive compensation for any service he may render to the Association nor shall the Association make any loan, directly or indirectly, to a director; provided, however, a director may be reimbursed for the expenses incurred by him in the performance of his duties.

Section 11. Action by Board Without A Meeting. The Board of Directors shall have the right to take any action which it could take at a meeting by obtaining the written approval of all directors thereto. Any action so approved shall have the same effect as though taken at a meeting of the Board.

Section 12. Liability of Directors. To the extent not expressly forbidden by South Carolina Statutory Law, no director shall be liable

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to any Co-Owner for injury or damage caused by such director in the performance of his duties unless due to the willful misfeasance or malfeasance of such director. Furthermore, each director shall be indemnified by the Association against all liabilities and expenses, including attorney's fees, reasonably incurred and imposed upon him in connection with any proceeding to which he may be a party or in which he becomes involved by reason of his being or having been a director of the Association, whether or not he is a director of the Association at the times such expenses and liabilities are incurred, except in such cases where the director is adjudged guilty of willful misfeasance or malfeasance in the performance of his duties; provided, however, that in the event of a settlement, the indemnification shall apply only when the Board approves such settlement and reimbursement as being in the best interest of the Association.

ARTICLE VI

OFFICERS

Section 1. Number and Election. There shall be elected annually by and from the Board of Directors a President (who shall also be Chairman of the Board), a Secretary and a Treasurer. The office of Secretary and Treasurer may be filled by the same person. The directors may also elect from time to time such other officers as their judgment may be needed, which officers need not be directors.

Section 2. Removal and Vacancies. Except as herein provided to the contrary, the officers shall be elected annually and hold office at the pleasure of the Board. A vacancy in any office may be filled by the Board at its next meeting. The officer elected to such vacancy shall serve for the remainder of the term of the officer he replaces.

Section 3. Duties. The duties of the officers shall be as follows:

(a) President. The President shall be the chief executive officer and shall preside at all meetings of the Board of Directors and the Association, shall see that orders and resolutions of the Board are carried out, shall appoint committees consisting of members of the Association as in his opinion is necessary, shall co-sign with the Treasurer all checks, promissory notes and similar documents, if any, and shall perform such other duties as may be delegated to him by the Board. He shall have all the general powers and duties which are incident to the office of President of a corporation, consistent with S. C. Code §33-13-130 (1976), and control and management of the Association in accordance with such Code and these By-Laws.

(b) Secretary. The Secretary shall record the votes and keep the minutes of all meetings and proceedings of the Board and the Association; keep appropriate current records, showing the members of the Association together with their addresses and designating those members entitled to vote; keep custody of and attest the seal of the Association; and perform such other duties as may be required of him by

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the Board or incident to the office of Secretary of a corporation under S. C. Code §33-13-130 (1976).

(c) Treasurer. The Treasurer shall be responsible for the funds of the Association, shall co-sign with the President all checks, promissory notes and similar documents, shall maintain full and accurate fiscal accounts and records, and shall perform such other duties as may be designated by the Board of Directors or incident to the office of Treasurer of a corporation under S. C. Code §33-13-130 (1976).

Section 4. Compensation. Officers shall not be compensated on a regular basis for the usual and ordinary services rendered to the Association incident to their offices, nor shall the Association make loans, directly or indirectly, to any officer of the Association. The officers may be reimbursed for reasonable expenses incurred on behalf of the Association.

Section 5. Liability of Officers. To the extent not expressly forbidden by South Carolina Statutory law, no officer shall be liable to any Co-Owner for injury or damage caused by such officer in the performance of his duties unless due to the willful misfeasance or malfeasance of such officer. Furthermore, each officer shall be indemnified by the Association against all liabilities and expenses, including attorney's fees, reasonably incurred and imposed upon him in connection with any proceeding to which he may be a party or in which he becomes involved by reason of his being or having been an officer of the Association, whether or not he is an officer of the Association at the times such expenses and liabilities are incurred, except in such cases where the officer is adjudged guilty of willful misfeasance or malfeasance in the performance of his duties; provided, however, that in the event of a settlement the indemnification shall apply only when the Board approves such settlement and reimbursement as being in the best interest of the Association.

Section 6. Obligations of the Co-Owners. All Co-Owners shall be obligated to pay monthly assessments imposed by the Association as provided in the Master Deed to meet Common Expenses, which may include the expense of liability insurance coverage and/or hazard insurance coverage for repair and reconstruction. A Co-Owner is required to reimburse the Association for any expense incurred by it in repairing or replacing Common Elements and/or Limited Common Areas and Facilities damaged by such Co-Owner.

OBLIGATIONS OF THE CO-OWNERS

Section 1. Agreements. All Co-Owners are obligated to pay monthly assessments imposed by the Association as provided in the Master Deed to meet Common Expenses, which may include the expense of liability insurance coverage and/or hazard insurance coverage for repair and reconstruction. A Co-Owner is required to reimburse the Association for any expense incurred by it in repairing or replacing Common Elements and/or Limited Common Areas and Facilities damaged by such Co-Owner.

Section 2. Maintenance and Repair

(a) All maintenance of and repair to any Apartment Unit whether structural or non-structural, ordinary or extraordinary, other than maintenance of and repair to any Common Elements contained therein or any Limited Common Area and Facility adjacent and appurtenant thereto, shall be the responsibility of the Co-Owner. The Board of Directors may, in its discretion, require the Co-Owner to pay for such maintenance and repair to be in the best interest of the Association.

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and not necessitated by the misuse or neglect of the Co-Owner or Co-Owners of another Apartment Unit, shall be made by the Co-Owner or Co-Owners thereof, and such Co-Owner or Co-Owners shall keep the same in good condition and repair. Each such Co-Owner shall be responsible for any and all damage to any and all other Apartment Units, to the Common Elements and Limited Common Area and Facilities caused by his failure to do so.

(b) All maintenance, repairs and replacements to the Common Elements and Limited Common Area and Facilities, whether located inside or outside of the Apartment Units, unless necessitated by the negligence, misuse, or neglect of the Co-Owner or Co-Owners of an Apartment Unit, in which case the cost shall be borne by the Co-Owner or Co-Owners of such Apartment Unit, shall be made by the Association or at its direction and shall be charged to the members thereof as a Common Expense.

Section 3. Right of Entry. Each and every Co-Owner by accepting a deed to an Apartment Unit thereby grants to the managing agent or such other person designated by the Board of Directors, in the event that fire or some similar emergency is, in the opinion of such agent or designated person, threatening his Apartment Unit, the right to enter the same regardless of whether such Co-Owner is present at such time. For such purpose, each and every Co-Owner shall provide the Association with a key to his Apartment Unit, ~~in the event of a fire or other emergency, the right to enter the same shall be granted to the managing agent or such other person designated by the Board of Directors, in the opinion of such agent or designated person, threatening his Apartment Unit, the right to enter the same regardless of whether such Co-Owner is present at such time.~~

Section 4. Conduct. All Co-Owners, their families, guests, visitors and tenants, and each and every occupant of each Apartment Unit shall at all times observe the published rules of conduct which may be established from time to time by the Association or its Board of Directors.

Section 5. Notices. A Co-Owner who mortgages his dwelling or executes and delivers a deed to secure debt, deed of trust or other security instrument which may become a lien on his Apartment Unit shall notify the President or the Board of Directors of the name and address of his mortgagee, or the holder of such deed to secure debt, deed of trust or security instrument, and thereby authorize the Association to furnish such information as such mortgagees may request respecting unpaid assessments, taxes or other reasonable information concerning such Apartment Unit.

COMPLIANCE

These By-Laws are set forth to comply with the requirements of Section 27-31-150 et. seq. of the 1976 South Carolina Code of Laws. In the event any of these By-Laws conflict with the provisions of said Statutory Sections, the provisions of said Sections will control.

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ARTICLE IX

BOOKS AND RECORDS

Section 1. Inspection. The books, records and papers of the Association shall at all times during reasonable business hours be subject to inspection by any member at the principal office of the Association. The Master Deed and the By-Laws of the Association shall be available for inspection by any member at the principal office of the Association, where copies may be purchased for a reasonable price.

ARTICLE X

ASSOCIATION SEAL

Section 1. Description. The Association shall have a seal in circular form having within its circumference the words: "Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc."

ARTICLE XI

AMENDMENTS

Section 1. By-Laws. These By-Laws may be amended by a vote of not less than seventy-five percent (75%) of the total vote of the Association at a duly constituted meeting of such purpose, in strict accordance with the recorded Master Deed to which they are attached. Said amendments shall be set forth in an amended Master Deed and duly recorded. Each and every Co-Owner of an Apartment Unit by accepting a deed therefor thereby agrees to be bound by and benefit from any such amendment hereto.

Section 2. Master Deed. The Master Deed for Mariner's Cay Racquet & Yacht Club, a South Carolina Horizontal Property Regime shall be amended only upon the written consent of seventy-five (75%) percent of the total Percentage Interest authorized to vote thereon.

Section 3. Conflicts. In the event of any conflict between the provisions of the Master Deed and the provisions of these By-Laws, the provisions of the Master Deed shall control.

CERTIFICATION

I, the undersigned, do hereby certify:

THAT I am the duly elected and acting Secretary of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc., a South Carolina Non-profit Corporation, and

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THAT the foregoing By-Laws constitute the original By-Laws of said Association, as duly adopted at a meeting of the Board of Directors thereof, held on the 3rd day of May, 1982.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of said Association this 4th day of May, 1982.

Secretary



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**MARINER'S CAY RACQUET & YACHT CLUB
HOMEOWNER'S ASSOCIATION, INC.**

Board of Directors' Resolution

Temporary Moratorium of Short-Term Rentals

WHEREAS, the Board of Directors ("Board") of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. ("Association") is responsible for management, operation and control of Mariner's Cay Racquet and Yacht Club and the Association, and is also responsible for exercising for the Association all powers, duties and authority vested in or delegated to the Association and not reserved to the membership by other provisions of the Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime ("Deed") and the By-Laws of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. ("Bylaws") recorded May 12, 1982 in Book J128 at Page 300; First Amendment to Master Deed of Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded April 25, 1983 in Book H131, Page 292; First Supplemental Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded August 4, 1983 in Book N132, Page 035; Corrective First Supplemental Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded September 29, 1983 in Book D133 at Page 059; Second Supplemental Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded March 7, 1984 in Book 0135, Page 328; and Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded June 12, 1990 in Book Z193, Page 847, in the Charleston County Register of Deeds. Hereinafter, the Master Deed and amendments collectively referred to as the "Master Deed", and the Master Deed and Bylaws collectively referred to as "Governing Documents".

WHEREAS, the Board has determined it is in the best interests of the Association due to the concerns of the majority of Owners regarding short-term or vacation rentals to evaluate and assess the same (collectively, "Short-Term Rentals") at Mariner's Cay.

WHEREAS, Article V, Section 9 of the Bylaws states, "At all meetings of the Board of Directors, a majority of the then qualified directors shall constitute a quorum for the transaction of business, and the acts of the majority of the directors present at a meeting at which a quorum is present shall be the acts of the Board of Directors. ..."

WHEREAS, at a duly held and authorized meeting of the Board May 23, 2019, the within Resolution was put to a vote of the Board. The required quorum was present and this Resolution was approved by a unanimous vote of the Board.

NOW THEREFORE, in order to protect and assure an attractive, high quality community, the Board hereby adopts, ratifies and affirms this Resolution as follows:

1. The foregoing whereas paragraphs and recitals are and shall be deemed material and operative provisions of this Resolution, and not mere recitals, and are fully incorporated herein by this reference.

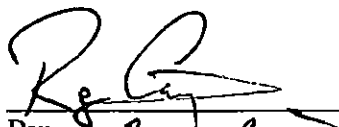
2. All capitalized terms used herein shall have the same meaning ascribed to them in the Master Deed and Bylaws, unless the context shall clearly suggest or imply otherwise.

3. The Board has concluded that a majority of the Owners of Mariner's Cay have expressed an interest in limiting the number of Units which may be used for Short Term Rentals within Mariners Cay. In order to maintain the residential character of the community, the Board has determined the following:

WHEREAS a clear majority of the members of the Mariners Cay Home Owners Association (HOA) have expressed an interest in limiting the number of Short Term Rental (STR) units available within Mariners Cay, and in an effort to maintain the residential character of the community, the Board of Directors of the HOA has determined that a Moratorium shall be placed on all new owners who have entered into a verifiable offer to purchase Mariners Cay units after July 1, 2019, whether through consummated sale or transfer of title, from entering into any rental agreement, license and/or from offering the temporary possession or occupancy of their respective Mariners Cay unit for less than 30 consecutive days in exchange for monetary consideration. This provision excludes new owners who obtain title to a Mariners Cay unit from a family member. This particular Moratorium shall remain in effect until April 30, 2020 or until such time as the Mariners Cay HOA has addressed the issues associated with Short Term Rentals to the satisfaction of a majority of the home owners.

4. Distribution. The Association's property manager is authorized and directed to circulate a copy of this Resolution to all Members. **MEMBERS ARE RESPONSIBLE FOR DISTRIBUTING THIS RESOLUTION TO ALL TENANTS, OCCUPANTS AND RESIDENTS.**

**MARINER'S CAY RACQUET & YACHT
CLUB HOMEOWNER'S ASSOCIATION, INC.**


By: Roger Camp
Its: President

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SIMONS & DEAN ATTY AT LAW
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CHARLESTON SC 29412

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Misc

Michael Miller, Register
Charleston County, SC

MAKER:

MARINER'S CAY ETC

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of Pages: 3

of References:

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Resolution

Michael Miller, Register
Charleston County, SC

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MARINER'S CAY ETC

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of Pages: 5

of References:

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MARINER'S CAY RACQUET & YACHT CLUB
HOMEOWNER'S ASSOCIATION, INC.

Board of Directors' Resolution

TEMPORARY MORATORIUM REGARDING FUTURE RENTING WITHIN THE
MARINER'S CAY COMMUNITY

WHEREAS, the Board of Directors ("Board") of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. ("Association") is responsible for management, operation and control of Mariner's Cay Racquet and Yacht Club and the Association, and is also responsible for exercising for the Association, all powers, duties and authority vested in or delegated to the Association and not reserved to the membership by other provisions of the Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime ("Deed") and the By-Laws of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. ("Bylaws") recorded May 12, 1982 in Book J128 at Page 300; First Amendment to Master Deed of Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded April 25, 1983 in Book H131, Page 292; First Supplemental Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded August 4, 1983 in Book N132, Page 035; Corrective First Supplemental Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded September 29, 1983 in Book D133 at Page 059; Second Supplemental Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded March 7, 1984 in Book 0135, Page 328; and Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded June 12, 1990 in Book Z193, Page 847, in the Charleston County Register of Deeds. Hereinafter, the Master Deed and amendments collectively referred to as the "Master Deed", and the Master Deed and Bylaws collectively referred to as "Governing Documents".

WHEREAS, the Board has determined it is in the best interests of the Association due to the concerns of the majority of Owners regarding short-term or vacation rentals to evaluate and assess the same (collectively, "Short-Term Rentals") at Mariner's Cay.

WHEREAS, Article V, Section 9 of the Bylaws states, "At all meetings of the Board of Directors, a majority of the then qualified directors shall constitute a quorum for the transaction of business, and the acts of the majority of the directors present at a meeting at which a quorum is present shall be the acts of the Board of Directors...."

WHEREAS, at a duly held and authorized meeting of the Board May 23, 2019, the within Resolution was put to a vote of the Board. The required quorum was present and this Resolution was approved by a unanimous vote of the Board.

NOW THEREFORE, in order to protect and assure an attractive, high quality community, the Board hereby adopts, ratifies and affirms this Resolution as follows:

WHEREAS a clear majority of the members of the Mariner's Cay Home Owners Association (HOA) have expressed an interest in limiting the number of Short Term Rental (STR)

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units available within Mariner's Cay, and in an effort to maintain the residential character of the community, to the fullest extent allowable under the Master Deed, the By-Laws and South Carolina law, the Board of Directors of the HOA has determined that a Moratorium shall be placed on all new owners who have entered into a verifiable offer to purchase Mariner's Cay units after July 1, 2019, whether through consummated sale or transfer of title, from entering into any rental agreement, license and/or from offering the temporary possession or occupancy of their respective Mariner's Cay unit for less than 30 consecutive days in exchange for monetary consideration. This provision excludes new owners who obtain title to a Mariner's Cay unit from a family member. This particular Moratorium shall remain in effect until April 30, 2021 or until such time as the Mariner's Cay HOA has addressed the issues associated with Short Term Rentals to the satisfaction of a majority of the home owners.

Home owners engaging in permitted rental activity are reminded the Master Deed and By-Laws provide, in part, the following:

Article IX, Section 4 of the Master Deed provides, in part, as follows:

No advertising signs, billboards, unsightly objects, or nuisances shall be erected, placed or permitted to remain on the property, nor shall the property be used in any way or for any purpose which may endanger the health or unreasonably disturb the Owner of any Unit or any resident thereof. No business activities of any kind whatever shall be conducted in any building or in any portion of the property . . . (emphasis added).

Article IX, Section 7 of the Master Deed provides as follows:

Units may be rented provided the occupancy is only by the lessee and his immediate family unless otherwise provided by the Association's Board of Directors. No less than all of a Unit may be rented. This Section 7 shall not apply, however, to any lease or leases which may be entered into by the Grantor.

Article XI, Section 6 of the Master Deed provides:

Each Owner shall comply strictly with the By-Laws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restriction set forth in this Master Deed or in the deed to his Unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both maintainable by the Board of Directors on behalf of the Association or by an aggrieved Owner. Failure by the Association or any Owner to enforce any of the foregoing shall in no event be deemed a waiver of the right to do so thereafter.

Article III, Section I of the By-Laws permits Unit owners to assign rights of enjoyment to the Common Area and Facilities and Limited Common Area and Facilities to "immediate members of his family, to a limited number of guests, or to his tenants who reside in his Apartment Unit" and requires Unit owners provide the Secretary of the Residential Association with written notice of the name or names of "any such assignee."

To the fullest extent permissible under the Master Deed, By-Laws and South Carolina law, the Board of Directors retains all rights to enforce the terms and conditions of the Master Deed

and By-Laws as they pertain to rental activity. Homeowners engaged in permitted rental activity are advised to conduct themselves accordingly.

Distribution. The Association's property manager is authorized and directed to circulate a copy of this Resolution to all Members. **MEMBERS ARE RESPONSIBLE FOR DISTRIBUTING THIS RESOLUTION TO ALL TENANTS, OCCUPANTS AND RESIDENTS.**

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the Association has caused this instrument to be executed by its duly authorized officer as of March, 18, 2020:

MARINER'S CAY RACQUET & YACHT
CLUB HOMEOWNER'S ASSOCIATION,
INC.

[Signature]
Witness #1

[Signature]
Witness #2 / Notary

By: [Signature] Roger Camp
Its: President

STATE OF South Carolina)
COUNTY OF Charleston)

ACKNOWLEDGMENT

The foregoing instrument was duly sworn to and acknowledged before me this 18 day of March, 2020, by [Signature] as President of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. He/she is personally known to me or has produced driver's license as identification.

[Signature]
Print Name: Chad Farrell
Notary Public for South Carolina
My Commission expires: Sept. 17, 2023

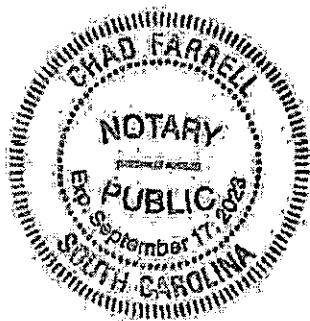


EXHIBIT E

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MARINER'S CAY RACQUET & YACHT CLUB
HOMEOWNER'S ASSOCIATION, INC.

Board of Directors' Resolution

**AMENDED TEMPORARY MORATORIUM REGARDING FUTURE RENTING WITHIN
THE MARINER'S CAY COMMUNITY**

WHEREAS, the Board of Directors ("Board") of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. ("Association") is responsible for management, operation and control of Mariner's Cay Racquet and Yacht Club and the Association, and is also responsible for exercising for the Association, all powers, duties and authority vested in or delegated to the Association and not reserved to the membership by other provisions of the Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime ("Deed") and the By-Laws of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. ("Bylaws") recorded May 12, 1982 in Book J128 at Page 300; First Amendment to Master Deed of Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded April 25, 1983 in Book H131, Page 292; First Supplemental Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded August 4, 1983 in Book N132, Page 035; Corrective First Supplemental Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded September 29, 1983 in Book D133 at Page 059; Second Supplemental Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded March 7, 1984 in Book 0135, Page 328; and Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded June 12, 1990 in Book Z193, Page 847, in the Charleston County Register of Deeds. Hereinafter, the Master Deed and amendments collectively referred to as the "Master Deed", and the Master Deed and Bylaws collectively referred to as "Governing Documents".

WHEREAS, the Board has determined it is in the best interests of the Association due to the concerns of the majority of Owners regarding short-term or vacation rentals to evaluate and assess the same (collectively, "Short-Term Rentals") at Mariner's Cay.

WHEREAS, Article V, Section 9 of the Bylaws states, "At all meetings of the Board of Directors, a majority of the then qualified directors shall constitute a quorum for the transaction of business, and the acts of the majority of the directors present at a meeting at which a quorum is present shall be the acts of the Board of Directors...."

WHEREAS, at a duly held and authorized meeting of the Board on May 23, 2019, the within Resolution was put to a vote of the Board. The required quorum was present and this Resolution was approved by a unanimous vote of the Board.

WHEREAS, at a duly held and authorized meeting of the Board on February 25, 2021, the Board reviewed the Resolution and amendments thereto and the amended Resolution set forth herein ("the amended Resolution") was put to a vote of the Board. The required quorum was present and this amended Resolution was approved by a unanimous vote of the Board.

NOW THEREFORE, in order to protect and assure an attractive, high quality community, the Board hereby adopts, ratifies and affirms this Resolution as follows:

WHEREAS a clear majority of the members of the Mariner's Cay Home Owners Association (HOA) have expressed an interest in limiting the number of Short Term Rental (STR) units available within Mariner's Cay, and in an effort to maintain the residential character of the community, to the fullest extent allowable under the Master Deed, the By-Laws and South Carolina law, the Board of Directors of the HOA has determined that a Moratorium shall be placed on all new owners who have entered into a verifiable offer to purchase Mariner's Cay units after July 1, 2019, whether through consummated sale or transfer of title, from entering into any rental agreement, license and/or from offering the temporary possession or occupancy of their respective Mariner's Cay unit for less than 30 consecutive days in exchange for monetary consideration which in any way violates the Master Deed, Bylaws or governing rules and/or restrictive covenants of the HOA. This provision excludes new owners who obtain title to a Mariner's Cay unit from a family member. This particular Moratorium shall remain in effect until April 30, 2022 or until such time as the Mariner's Cay HOA has addressed the issues associated with Short Term Rentals to the satisfaction of a majority of the home owners.

Home owners engaging in permitted rental activity are reminded the Master Deed and By-Laws provide, in part, the following:

Article IX, Section 4 of the Master Deed provides, in part, as follows:

No advertising signs, billboards, unsightly objects, or nuisances shall be erected, placed or permitted to remain on the property, nor shall the property be used in any way or for any purpose which may endanger the health or unreasonably disturb the Owner of any Unit or any resident thereof. No business activities of any kind whatever shall be conducted in any building or in any portion of the property . . . (emphasis added).

Article IX, Section 7 of the Master Deed provides as follows:

Units may be rented provided the occupancy is only by the lessee and his immediate family unless otherwise provided by the Association's Board of Directors. No less than all of a Unit may be rented. This Section 7 shall not apply, however, to any lease or leases which may be entered into by the Grantor.

Article XI, Section 6 of the Master Deed provides:

Each Owner shall comply strictly with the By-Laws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restriction set forth in this Master Deed or in the deed to his Unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both maintainable by the Board of Directors on behalf of the Association or by an aggrieved Owner. Failure by the Association or any Owner to enforce any of the foregoing shall in no event be deemed a waiver of the right to do so thereafter.

Article III, Section I of the By-Laws permits Unit owners to assign rights of enjoyment to the Common Area and Facilities and Limited Common Area and Facilities to *"immediate members of his family, to a limited number of guests, or to his tenants who reside in his Apartment Unit"* and requires Unit owners provide the Secretary of the Residential Association with written notice of the name or names of *"any such assignee."*

To the fullest extent permissible under the Master Deed, By-Laws and South Carolina law, the Board of Directors retains all rights to enforce the terms and conditions of the Master Deed and By-Laws as they pertain to rental activity. Homeowners engaged in permitted rental activity are advised to conduct themselves accordingly.

Distribution. The Association's property manager is authorized and directed to circulate a copy of this Resolution to all Members. **MEMBERS ARE RESPONSIBLE FOR DISTRIBUTING THIS RESOLUTION TO ALL TENANTS, OCCUPANTS AND RESIDENTS.**

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the Association has caused this instrument to be executed by its duly authorized officer as of APRIL, 16, 2021.

MARINER'S CAY RACQUET & YACHT CLUB HOMEOWNER'S ASSOCIATION, INC.

Kelly Hain
Witness #1

San Heu
Witness #2 / Notary

By: [Signature]
Its: President

STATE OF South Carolina)
COUNTY OF Charleston)

ACKNOWLEDGMENT

The foregoing instrument was duly sworn to and acknowledged before me this 16 day of April, 2021, by Roger Camp as President of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. He/she is personally known to me or has produced driver's license as identification.

San Heu
Print Name: Lauren Heuss
Notary Public for South Carolina
My Commission expires: 12/13/2027

EXHIBIT F



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**MARINER'S CAY RACQUET & YACHT CLUB
HOMEOWNER'S ASSOCIATION, INC.**

Board of Directors' Resolution

**AMENDED TEMPORARY MORATORIUM REGARDING FUTURE RENTING WITHIN
THE MARINER'S CAY COMMUNITY**

WHEREAS, the Board of Directors ("Board") of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. ("Association") is responsible for management, operation and control of Mariner's Cay Racquet and Yacht Club and the Association, and is also responsible for exercising for the Association, all powers, duties and authority vested in or delegated to the Association and not reserved to the membership by other provisions of the Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime ("Deed") and the By-Laws of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. ("Bylaws") recorded May 12, 1982 in Book J128 at Page 300; First Amendment to Master Deed of Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded April 25, 1983 in Book H131, Page 292; First Supplemental Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded August 4, 1983 in Book N132, Page 035; Corrective First Supplemental Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded September 29, 1983 in Book D133 at Page 059; Second Supplemental Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded March 7, 1984 in Book 0135, Page 328; and Amendment to Master Deed for Mariner's Cay Racquet and Yacht Club, a South Carolina Horizontal Property Regime recorded June 12, 1990 in Book Z193, Page 847, in the Charleston County Register of Deeds. Hereinafter, the Master Deed and amendments collectively referred to as the "Master Deed", and the Master Deed and Bylaws collectively referred to as "Governing Documents".

WHEREAS, the Board has determined it is in the best interests of the Association due to the concerns of the majority of Owners regarding short-term or vacation rentals to evaluate and assess the same (collectively, "Short-Term Rentals") at Mariner's Cay.

WHEREAS, Article V, Section 9 of the Bylaws states, "At all meetings of the Board of Directors, a majority of the then qualified directors shall constitute a quorum for the transaction of business, and the acts of the majority of the directors present at a meeting at which a quorum is present shall be the acts of the Board of Directors...."

WHEREAS, at a duly held and authorized meeting of the Board on May 23, 2019, the within Resolution was put to a vote of the Board. The required quorum was present and this Resolution was approved by a unanimous vote of the Board.

WHEREAS, at a duly held and authorized meeting of the Board on April 19, 2022, the Board reviewed the Resolution and amendments thereto and the amended Resolution set forth herein ("the amended Resolution") was put to a vote of the Board. The required quorum was present and this amended Resolution was approved by a unanimous vote of the Board.

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NOW THEREFORE, in order to protect and assure an attractive, high quality community, the Board hereby adopts, ratifies and affirms this Resolution as follows:

WHEREAS a clear majority of the members of the Mariner's Cay Home Owners Association (HOA) have expressed an interest in limiting the number of Short Term Rental (STR) units available within Mariner's Cay, and in an effort to maintain the residential character of the community, to the fullest extent allowable under the Master Deed, the By-Laws and South Carolina law, the Board of Directors of the HOA has determined that a Moratorium shall be placed on all new owners who have entered into a verifiable offer to purchase Mariner's Cay units after July 1, 2019, whether through consummated sale or transfer of title, from entering into any rental agreement, license and/or from offering the temporary possession or occupancy of their respective Mariner's Cay unit for less than 30 consecutive days in exchange for monetary consideration which in any way violates the Master Deed, Bylaws or governing rules and/or restrictive covenants of the HOA. This moratorium does not apply to Mariner's Cay unit owners who owned their unit prior to July 1, 2019 or spouses married prior to April 30, 2022 who receive the deed to a Mariner's Cay unit from their spouse. This particular Moratorium shall remain in effect until April 30, 2023 or until such time as the Mariner's Cay HOA has addressed the issues associated with Short Term Rentals to the satisfaction of a majority of the home owners.

Home owners engaging in permitted rental activity are reminded the Master Deed and By-Laws provide, in part, the following:

Article IX, Section 4 of the Master Deed provides, in part, as follows:

No advertising signs, billboards, unsightly objects, or nuisances shall be erected, placed or permitted to remain on the property, nor shall the property be used in any way or for any purpose which may endanger the health or unreasonably disturb the Owner of any Unit or any resident thereof. No business activities of any kind whatever shall be conducted in any building or in any portion of the property . . . (emphasis added).

Article IX, Section 7 of the Master Deed provides as follows:

Units may be rented provided the occupancy is only by the lessee and his immediate family unless otherwise provided by the Association's Board of Directors. No less than all of a Unit may be rented. This Section 7 shall not apply, however, to any lease or leases which may be entered into by the Grantor.

Article XI, Section 6 of the Master Deed provides:

Each Owner shall comply strictly with the By-Laws and with the administrative rules and regulations adopted pursuant thereto, as either of the same may be lawfully amended from time to time, and with the covenants, conditions and restriction set forth in this Master Deed or in the deed to his Unit. Failure to comply with any of the same shall be grounds for an action to recover sums due, for damages or injunctive relief, or both maintainable by the Board of Directors on behalf of the Association or by an aggrieved Owner. Failure by the Association or any Owner to enforce any of the foregoing shall in no event be deemed a waiver of the right to do so thereafter.

Article III, Section I of the By-Laws permits Unit owners to assign rights of enjoyment to the Common Area and Facilities and Limited Common Area and Facilities to *“immediate members of his family, to a limited number of guests, or to his tenants who reside in his Apartment Unit”* and requires Unit owners provide the Secretary of the Residential Association with written notice of the name or names of *“any such assignee.”*

To the fullest extent permissible under the Master Deed, By-Laws and South Carolina law, the Board of Directors retains all rights to enforce the terms and conditions of the Master Deed and By-Laws as they pertain to rental activity. Homeowners engaged in permitted rental activity are advised to conduct themselves accordingly.

Distribution. The Association’s property manager is authorized and directed to circulate a copy of this Resolution to all Members. **MEMBERS ARE RESPONSIBLE FOR DISTRIBUTING THIS RESOLUTION TO ALL TENANTS, OCCUPANTS AND RESIDENTS.**

[SIGNATURES ON FOLLOWING PAGE]

IN WITNESS WHEREOF, the Association has caused this instrument to be executed by its duly authorized officer as of 27th, April, 2022.

MARINER'S CAY RACQUET & YACHT
CLUB HOMEOWNER'S ASSOCIATION,
INC.

Kelly Ann

Witness #1

Gina Cornwell

Witness #2 / Notary

By: Roger Camp

Its: President

STATE OF South Carolina)
COUNTY OF Charleston)

ACKNOWLEDGMENT

The foregoing instrument was duly sworn to and acknowledged before me this 27th day of April, 2022, by Roger Camp as President of Mariner's Cay Racquet & Yacht Club Homeowner's Association, Inc. He/she is personally known to me or has produced driver's license as identification.

Gina Cornwell

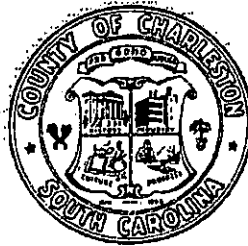
Print Name: Gina Cornwell

Notary Public for South Carolina

My Commission expires: 9-15-2025

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NOTE: This page MUST remain
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**Filed By:**

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Charleston County, SC

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EXHIBIT G

2022 WL 1280438

Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee,
AT NASHVILLE.

Pratik PANDHARIPANDE, M.D.

v.

FSD CORPORATION

No. M2020-01174-COA-R3-CV

February 3, 2022 Session

FILED 04/29/2022

Appeal from the Chancery Court for DeKalb County, No. 2019-CV-60, Jonathan L. Young, Judge

Attorneys and Law Firms

Ben M. Rose, Brentwood, Tennessee, for the appellant, Pratik Pandharipande, M.D.

Gerald C. Wigger and Emmie Kinnard, Nashville, Tennessee, for the appellee, FSD Corporation.

Frank G. Clement Jr., P.J., M.S., delivered the opinion of the Court, in which Andy D. Bennett and Arnold B. Goldin, JJ., joined.

OPINION

Frank G. Clement Jr., P.J.

*1 This is a dispute between a property owner and his homeowners' association concerning the scope and applicability of restrictive covenants. Two restrictive covenants are at issue. One is a covenant contained in the neighborhood's 1984 Declaration of Covenants, Conditions, and Restrictions that limited usage of the homes to residential use as "a residence by a single family." The other is a covenant contained in a 2018 Amendment that relaxed the 1984 residential use restriction by authorizing short-term rentals of no less than 30 consecutive days, subject to specific criteria. The plaintiff, who purchased a home in the development in 2015 and has been leasing it on a short-term vacation rental

basis to third parties as a business venture, seeks a declaratory judgment that he may lease his home for rentals as short as two days. For its part, the homeowners' association seeks to enforce the restrictive covenants in the 1984 Declaration as well as the 2018 Amendment. The trial court granted summary judgment in favor of the homeowners' association on both issues. In doing so, the court held that restrictions in the 1984 Declaration prohibited non-residential renting. The court also held that Plaintiff's current use of his property is subject to the 2018 Amendment, which authorized short-term leasing subject to stipulations including that "[t]he length of the lease must be for a minimum of 30 consecutive days." The plaintiff appeals. We affirm.

FACTS AND PROCEDURAL HISTORY

On March 29, 1984, FSD Corporation ("FSD"), the owner of a development known as the Four Seasons Development ("Four Seasons"), which overlooks Center Hill Lake in DeKalb County, Tennessee, duly recorded a Declaration of Covenants, Conditions, and Restrictions (the "1984 Declaration") with the Register of Deeds for Dekalb County, Tennessee, in Deed Book A6, Page 893.¹ The introductory portion of the preamble reads in pertinent part:

**DECLARATION OF COVENANTS,
CONDITIONS, AND RESTRICTIONS**

This Declaration of Covenants, Conditions, and Restrictions is made this 8th day of March, 1984, by FSD Corporation, a Tennessee corporation (hereinafter referred to as "Corporation");

WITNESSETH:

WHEREAS, Corporation is the owner of the real property described in Exhibit "A" attached hereto and incorporated herein by reference. Corporation intends by this Declaration to impose upon the Properties, as defined hereinafter, mutually beneficial restrictions under a general plan of improvement for the benefit of all owners of residential property within Four Seasons development, a subdivision of recreational lots, common areas and improvements thereto located in DeKalb County, Tennessee and made subject to this Declaration by the recording of this Declaration. Corporation desires to provide a flexible and reasonable procedure for the overall development of the Properties, as defined hereinafter, and to establish a method for the administration, maintenance,

preservation, use and enjoyment of such Properties as are now or may hereafter be subjected to this Declaration;

WHEREAS, Corporation desires that the real property described in Exhibit "A" be held, sold and conveyed subject to the provisions of this Declaration;

...

NOW, THEREFORE, Corporation hereby declares that all of the Properties described in Exhibit "A" and any additional property as may by Subsequent Amendment be added and subjected to this Declaration shall be held, sold, and conveyed subject to the following easements, restrictions, covenants, and conditions. Such easements, restrictions, covenants and conditions are for the purpose of protecting the value and desirability of the Properties and shall run with all real property subjected to this Declaration. They shall be binding on the Corporation and all other parties having any right, title, or interest in the described Properties or any part thereof, their heirs, successors, and assigns and shall inure to the benefit of each owner thereof.

Furthermore, Article XII, Section 1 states, in pertinent part:

(a) ... Except as otherwise provided in this Declaration, *each Lot shall be used for residential and no other purposes.* There shall not be constructed or maintained upon any Lot [any] duplex or multi-unit structure. Except as otherwise provided in [this] Declaration, the Common Area shall be used for recreational, [illegible], other purposes directly related to the single-family use [of] the lots authorized hereunder.

...

(j) ... *no gainful profession, occupation, trade or other nonresidential use shall be conducted in any Lot* or upon the Common Area of any portion thereof, provided that this restriction shall not prohibit consultations, conferences, or the transaction of business by telephone or other electronic devices.

*2 (Emphasis added).

The 1984 Declaration also provided that each owner of a lot within Four Seasons would be a "stockholder" in FSD, that the 1984 Declaration could be amended only by a majority vote of the stockholders, and that any amendments would be effective when recorded with the DeKalb County Register of Deeds Office.²

In November 2015, Dr. Pratik Pandharipande ("Plaintiff") purchased an improved lot with a cabin/house thereon within Four Seasons ("the Property"). He acquired the Property by warranty deed subject to the covenants, conditions, and restrictions set forth in the 1984 Declaration.

It is undisputed that Plaintiff purchased the Property with the intent of leasing it for short-term vacation rentals to third parties as a business venture and that he has utilized the Property in such a fashion since its purchase. Shortly after acquiring the Property and acting in furtherance of his business plan, Plaintiff retained a property management company, Center Hill Chalets, to market the Property for short-term vacation rentals. Since its inception, Center Hill Chalets has advertised the Property on as many as 25 different vacation rental websites for lease on a short-term basis, requiring a minimum two-night stay and a maximum 28-night stay for each rental.

*3 In 2018, the 1984 Declaration was amended by a majority vote of the stockholders (the "2018 Amendment") to authorize short-term rentals of no less than 30 days subject to specific criteria.³ The 2018 Amendment provided, in pertinent part:

Leasing homes owned by FSDC shareholders shall be allowed with the following stipulations:

i. The length of the lease must be for a minimum of 30 consecutive days.

A few months after the 2018 Amendment was duly recorded, counsel for FSD notified Plaintiff that the means by which he was renting his property was in violation of Four Seasons' restrictive covenants. Plaintiff responded by filing a Verified Complaint against FSD, seeking a declaratory judgment pursuant to Tennessee Code Annotated §§ 29-14-101 to -113 and injunctive relief. He contended, *inter alia*, that the 2018 Amendment could not apply to him because he acquired the Property in 2015, approximately three years before the 2018 Amendment went into effect. FSD responded by filing an Answer and Counterclaim, seeking to enforce the restrictive covenants. In doing so, FSD rejected Plaintiff's claim that the 2018 Amendment could not apply and asserted that, even if the 2018 Amendment was not applicable, the 1984 Declaration prohibited Plaintiff from leasing the Property as a short-term vacation rental.

On October 28, 2019, Plaintiff moved for summary judgment. In doing so, Plaintiff contended that the 1984 Declaration did not prohibit short-term vacation rentals. He also contended that the 2018 Amendment could not be applied retroactively. Alternatively, Plaintiff argued that if the 2018 Amendment did apply, he was entitled to summary judgment based on a grandfathering provision contained in the 2018 Amendment.⁴

Following a hearing on the motion for summary judgment, the trial court denied Plaintiff's motion. Shortly thereafter, FSD filed its own motion for summary judgment, which the trial court granted. In making its determination, the trial court found:

[T]he plain language contained in FSD's 1984 [Amendments] ... prohibited [Plaintiff] from using his property for short term renting or leasing. This Court is required to read the restrictive covenant as a contract. This Court finds that as a matter of law, *Shields Mountain Property Owners Ass'n v. Teffteller*, No. E2005-00871-COA-R3-CV, 2006 WL 408050 (Tenn. Ct. App. Feb. 22, 2006), a Tennessee Court of Appeals case which discusses language identical to this matter, demonstrates that the plain language contained in FSD's 1984 [Amendments] prohibited [Plaintiff] from short term leasing his property.

...

Second, this Court finds that [Plaintiff] is in violation of the 2018 Amendment by short term renting/leasing his property for less than thirty (30) days at one time. The plain language of the 2018 Amendment bars [Plaintiff] from leasing his property for less than thirty (30) days.

...

Therefore, the 2018 Amendment to the Declaration of Covenants, Conditions and Restrictions bars [Plaintiff] from short term leasing his property for less than thirty (30) days.

*4 This appeal followed.

ISSUES

Plaintiff and FSD each present two issues for our review. We have determined that the issues presented by FSD provide

a better means of achieving a reasoned analysis.⁵ Thus, we shall analyze the issues presented by FSD, which are:

- I. Did the trial court correctly rule that FSD Corporation's 1984 Declaration of Covenants, Conditions, and Restrictions prohibited [Plaintiff] from short-term renting his property?
- II. Did the trial court correctly rule that the 2018 Amendment prohibits [Plaintiff] from leasing his property for less than 30 days?

STANDARD OF REVIEW

The propriety of a trial court's summary judgment decision presents a question of law, which we review de novo with no presumption of correctness. *Kershaw v. Levy*, 583 S.W.3d 544, 547 (Tenn. 2019). Accordingly, we must make a fresh determination of whether the requirements of Tennessee Rule of Civil Procedure 56 have been satisfied. *Rye v. Women's Care Ctr. of Memphis, M PLLC*, 477 S.W.3d 235, 250 (Tenn. 2015); *Hunter v. Brown*, 955 S.W.2d 49, 50 (Tenn. 1997).

A trial court may grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Tenn. R. Civ. P. 56.04. "The moving party has the ultimate burden of persuading the court that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law." *Martin v. Norfolk S. Ry. Co.*, 271 S.W.3d 76, 83 (Tenn. 2008). As our Supreme Court explained in *Rye v. Women's Care Center of Memphis, M PLLC*:

[W]hen the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim or (2) by demonstrating that the nonmoving party's evidence *at the summary judgment stage* is insufficient to establish the nonmoving party's claim or defense.

477 S.W.3d at 264. However, “if the moving party bears the burden of proof on the challenged claim at trial, that party must produce at the summary judgment stage evidence that, if uncontroverted at trial, would entitle it to a directed verdict.” *TWB Architects, Inc. v. Braxton, LLC*, 578 S.W.3d 879, 888 (Tenn. 2019) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986)).

When a party files a properly supported motion for summary judgment pursuant to Rule 56, “to survive summary judgment, the nonmoving party ‘may not rest upon the mere allegations or denials of [its] pleading,’ but must respond, and by affidavits or one of the other means provided in Tennessee Rule 56, ‘set forth specific facts ... showing that there is a genuine issue for trial.’” *Rye*, 477 S.W.3d at 265 (alteration in original) (quoting Tenn. R. Civ. P. 56.06). “Whether the nonmoving party is a plaintiff or a defendant—and whether or not the nonmoving party bears the burden of proof at trial on the challenged claim or defense—at the summary judgment stage, ‘[t]he nonmoving party must demonstrate the existence of specific facts in the record which could lead a rational trier of fact to find in favor of the nonmoving party.’”⁶ *TWB Architects*, 578 S.W.3d at 889 (alteration in original) (quoting *Rye*, 477 S.W.3d at 265).

^{*5} In reviewing a trial court’s summary judgment decision, we accept the evidence presented by the nonmoving party as true; allow all reasonable inferences in his favor; and “resolve any doubts about the existence of a genuine issue of material fact in favor of” the party opposing summary judgment. *Id.* at 887.

ANALYSIS

At issue in this appeal are the restrictive covenants set forth in the 1984 Declaration and in the 2018 Amendment, and the material facts are not in dispute.

This court has consistently recognized that Tennessee disfavors restrictive covenants “because they act as an impediment to the free use and enjoyment of land.” *Jones v. Haynes*, No. 03A01-9707-CH-00241, 1998 WL 331311, at *2 (Tenn. Ct. App. June 24, 1998). For this reason, even valid restrictive covenants will “be strictly construed and will not be extended by implication and any ambiguity in the restriction will be resolved against the restriction.” *Waller v. Thomas*, 545 S.W.2d 745, 747 (Tenn. Ct. App.

1976) (citations omitted). Nevertheless, if they are properly promulgated and duly recorded, covenants and restrictions contained in a declaration may be recognized as legally valid, and if so, they are binding on all purchasers with notice. *See Ridley v. Haiman*, 47 S.W.2d 750, 753 (Tenn. 1932); *Laughlin v. Wagner*, 244 S.W. 475, 476–77 (Tenn. 1922).

“The construction of restrictive covenants, like other written contracts, is a question of law.” *Bernier v. Morrow*, No. M2012-01984-COA-R3-CV, 2013 WL 1804072, at *4 (Tenn. Ct. App. April 26, 2013) (quoting *Massey v. R.W. Graf, Inc.*, 277 S.W.3d 902, 908 (Tenn. Ct. App. 2008)). In interpreting the language of a restrictive covenant, a court should give “fair and reasonable meaning according to the intent of the parties, which may be determined with reference both to the language of the covenant and to the circumstances surrounding its making.” *Parks v. Richardson*, 567 S.W.2d 465, 467–68 (Tenn. Ct. App. 1977) (citations omitted).

I. THE 1984 DECLARATION

On March 29, 1984, FSD duly recorded the 1984 Declaration of Covenants, Conditions, and Restrictions with the Register of Deeds for Dekalb County, Tennessee, in Deed Book A6, Page 893. In pertinent part, the 1984 Declaration states:

[The Properties] subjected to this Declaration shall be held, sold, and conveyed subject to the following easements, restrictions, covenants, and conditions. Such easements, restrictions, covenants and conditions are for the purpose of protecting the value and desirability of the Properties and shall run with all real property subjected to this Declaration. They shall be binding on the Corporation and all other parties having any right, title, or interest in the described Properties or any part thereof, their heirs, successors, and assigns

Further, Article XIII, Section 1 of the 1984 Declaration states that the Declaration would automatically extend for successive ten-year periods unless the majority of the FSD owners signed an instrument terminating the Declaration.

There have been no filings to terminate the 1984 Declaration. Thus, at the time Plaintiff purchased the Property in 2015, the 1984 Declaration was in effect and subject to any amendments approved by a majority of the stockholders.

Significantly, the 1984 Declaration included mandatory provisions requiring that all lots within the Four Seasons neighborhood be devoted exclusively to residential use. Article 1, Section 7 defined "Lot" as follows: "'Lot' or 'Lots' shall mean a portion or portions of the Properties made subject to the terms and conditions of this Declaration and intended for any type of independent ownership for construction and use as a residence by a single family." (Emphasis added). Further, Article XII, Section 1(a), titled "Use Restrictions," stated:

*6 Except as otherwise provided in this Declaration, *each Lot shall be used for residential and no other purposes.* There shall not be constructed or maintained upon any Lot [any] duplex or multi-unit structure. Except as otherwise provided in [this] Declaration, the Common Area shall be used for recreational, [illegible], and other purposes directly related to the single-family use [of] the Lots authorized hereunder.

(Emphasis added).

Subsection (j) of Article XII also prohibited any "nonresidential use" of the lots. In pertinent part it stated:

[N]o gainful profession, occupation, trade or other nonresidential use shall be conducted in any Lot or upon the Common Area of any portion thereof, provided that this restriction shall not prohibit consultations, conferences, or the transaction of business by telephone or other electronic devices

(Emphasis added).

As previously discussed, the 1984 Declaration was in effect when Plaintiff purchased the Property in July 2015. Accordingly, the question is whether the 1984 Declaration prohibits Plaintiff's short-term renting of the Property.

For his part, Plaintiff contends the 1984 Declaration contemplated leasing activities, such as short-term rentals, by which FSD stockholders, meaning the owners of lots within Four Seasons, could rent their lots to tenants for the purpose of enjoying the common areas and facilities. Plaintiff also contends, "[a]t a minimum, there is no language specifically prohibiting such arrangements by owners, like [Plaintiff], and certainly nothing that would have prevented FSD from proscribing them if its membership was inclined to do so. Until 2018, it was not."

For its part, FSD contends that, though the 1984 Declaration expressly states that the use of the lots within Four Seasons shall be solely for residential purposes, Plaintiff has never used his property as a residence for himself or his family, only as a business. More specifically, FSD contends that Plaintiff's use of the Property as a short-term vacation rental is in violation of the residential-use-only restriction. In making this argument, FSD principally relies on this court's decision in *Shields Mountain Property Owners Ass'n, Inc. v. Teffeteller*, No. E2005-00871-COA-R3-CV, 2006 WL 408050 (Tenn. Ct. App. Feb. 22, 2006). In *Teffeteller*, we considered whether a restrictive covenant stating that "[a]ll lots shall be used for residential purposes exclusively" prohibited a landowner from renting his property on a short-term basis. *Id.* at *1 (emphasis added). Following a thorough analysis, we determined that such language prohibited short-term vacation rentals because, while "the length of the stay by itself is not dispositive of whether a use is residential," the landowner's renters were "using the property for 'the most temporary convenience of shelter in the course of a brief stay in the area.'" *Id.* at *4 (quoting *Parks*, 567 S.W.2d at 469). Further, we concluded that "while [renters] may well eat, sleep, relax, and bathe while there, they do not reside there. Instead ... renters use the property in the same way that people use a motel." *Id.*

Almost identically, the 1984 Declaration at issue here restricts Plaintiff's use of the Property, his lot and cabin, to residential uses. This is evident from the provision that states: "each Lot shall be used for residential and no other purposes." In our view, the phrase "no other purposes" is no different from "exclusively," as both clearly indicate an intent to prohibit any non-residential use. As the trial court correctly found, while

the 1984 Declaration does not expressly prohibit short-term rentals, it expressly prohibits any short-term rental that is not *residential* in nature. See *Teffeteller*, 2006 WL 408050, at *4. Thus, the relevant inquiry is whether Plaintiff's renters are using the Property on a short-term residential basis or as a short-term vacation rental. See *id.*

*7 Like *Teffeteller*, and as the trial court noted, the nature of Plaintiff's use of the Property is not residential. Though Plaintiff argues that this case is distinguishable from *Teffeteller* because renters are not using the Property "like a motel," there is no meaningful difference between how renters in *Teffeteller* used that property and how Plaintiff's renters use his property. The undisputed facts establish that immediately after purchasing his lot in 2015, Plaintiff engaged Center Hill Chalets, a property management company that leases the Property as a short-term vacation rental for those visiting the area. It is also undisputed that Center Hill Chalets advertises Plaintiff's lot on as many as 25 different short-term vacation rental websites, requiring a minimum of a two-night stay and a maximum of 28 nights. To facilitate each rental, the management company provides key code access to short-term renters to access Plaintiff's cabin as well as laundry and cleaning services. It also provides concierge services for the renters. After each rental, the management company resets the cabin in preparation for the next renter. When considered in concert, these facts clearly show that Plaintiff's renters are using the Property for "the most temporary convenience of shelter in the course of a brief stay in the area." *Id.* at *4 (quoting *Parks*, 567 S.W.2d at 469). Thus, based on the undisputed facts, we find no meaningful difference between Plaintiff's renters and those in *Teffeteller*.⁷

For completeness, it is significant to note that Plaintiff admitted his non-residential use of the Property was not incidental.⁸ This is significant because we have recognized the importance of intent in deciding whether a similar restrictive covenant prohibiting commercial use had been violated. In doing so, the court determined that there was a relevant distinction between the principal use of a property for non-residential purposes and "the incidental use of a dwelling for purposes ... from which the owner derives some income or profit but which may not ... be termed a business or trade." *Carr v. Trivett*, 143 S.W.2d 900, 903 (Tenn. Ct. App. 1940) (citation omitted). Here, Plaintiff's only use of the Property is for a business purpose, for short-term vacation rentals to third parties. Thus, Plaintiff's use of the Property as a vacation rental is not incidental. As a consequence, his non-residential

use of the Property is in violation of the restrictive covenants set forth in the 1984 Declaration.

For the reasons stated above, the trial court correctly found that the 1984 Declaration precludes Plaintiff from leasing the Property as a non-residential vacation rental and, based on the material facts, which are undisputed, FSD was entitled to summary judgment as a matter of law based on the restrictive covenants in the 1984 Declaration.

II. THE 2018 AMENDMENT

The 1984 Declaration established that its covenants and restrictions could be amended, and Section 2 of Article XIII of the 1984 Declaration specified the means by which Four Seasons property owners, also referred to as FSD "Stockholders," could enact amendments. Article I, Section 15 and Article III, Section 1 of the 1984 Declaration defined "Stockholders" as those record owners of lots subject to the Declaration who were issued one share of stock in FSD for each lot owned. Section 2 of Article XIII of the 1984 Declaration also provided that any amendment shall be effective when recorded in the Register's Office for DeKalb County.

During and prior to 2018, the stockholders discussed amending the 1984 Declaration to relax the residential use restriction.⁹ It is undisputed that a majority of the stockholders ultimately approved the 2018 Amendment, as is authorized by Section 2 of Article XIII of the 1984 Declaration. Moreover, it is undisputed that the 2018 Amendment was duly recorded with the DeKalb County Register of Deeds on July 24, 2018. Thus, the 2018 Amendment became effective on that day.

*8 In pertinent part, the 2018 Amendment states:

Leasing homes owned by FSDC shareholders shall be allowed with the following stipulations:

- i. **The length of the lease must be for a minimum of 30 consecutive days.**
- ii. At least 10 days in advance of the beginning date for the lease, the owner must provide the full legal name(s), date(s) of birth, driver's license number(s), and \$25.00 to Four Seasons Development Corporation for the purpose of FSDC[] conducting a background check(s) of the lessee(s).

iii. At or before the commencement of the lease period, the owner shall require the lessee(s) to sign a document that the lessee(s) has read and agrees to comply with all FSDC covenants, conditions, and restrictions, all bylaws as well as all rules and regulations of FSDC

...

vii. Leasing agencies may arrange leases between an owner and his lessee under the above provisions as long as all FSDC rules, regulations and other governing documents are followed. In all cases, subletting of the property(ies) is strictly prohibited.

...

ix. Any owner engaged in leasing or subleasing activities as of the date of this amendment shall be allowed to continue leasing or subleasing activities until the expiration of the term of said lease or said lot is sold or conveyed to a third party. No lease or sublease term extensions are permitted. In order to ascertain the expiration date of current leases, any owner who is leasing as of the date of this Third Amendment shall provide a copy of the lease to the FSDC Board's secretary within two weeks of the date this Third Amendment is filed with the DeKalb County Register of Deeds' office.

x. Owners shall remain responsible for all activities of their lessees.

(Emphasis added).

Acting on FSD's motion for summary judgment, the trial court determined that "the 2018 Amendment to the Declaration of Covenants, Conditions and Restrictions bars [Plaintiff] from short term leasing his property for less than thirty (30) days" and that Plaintiff was in violation of the 2018 Amendment "by short term renting/leasing his property for less than thirty days at a time."

Plaintiff challenges this ruling on three principal fronts. First, he contends the 1984 Declaration and the 2018 Amendment are unenforceable because the time-limited covenants in the 1967 and 1974 covenants had expired. Second, he contends the 2018 Amendment is unenforceable because Tennessee courts abhor the retroactive application of substantive restrictions on real property. Finally, he contends he is exempt from the thirty-day minimum leasing restriction

based on a grandfathering provision in subsection (ix.) of the 2018 Amendment. We will discuss each argument in turn.

Plaintiff contends that our Supreme Court's recent decision in *Phillips v. Hatfield*, 624 S.W.3d 464 (Tenn. 2021) "breathed new life into the issue of time-limited covenants, such as the 1967 and 1974 covenants at issue here." We find Plaintiff's reliance on *Phillips* in the context of this issue misplaced because the material facts in this case are readily distinguishable from those in *Phillips*.

*9 The issue in *Phillips* was whether restrictive covenants that were executed and recorded by the developers of a subdivision after the developers sold the lots at issue applied to the defendant's property. *Id.* at 468. The relevant facts as summarized in the Court in *Phillips* are as follows:

The developers platted a subdivision and sold the vast majority of lots with time-limited restrictions against non-residential use expressly stated in the deeds that conveyed the lots. *Thereafter*, the developers recorded a declaration of more fulsome, non-time-limited restrictive covenants—including a restriction against non-residential use—that purported to apply to all lots in the subdivision. Decades later, well after the expiration of the time-limited deed restrictions, the Defendant purchased lots and proposed to build a structure for the operation of a retail business. The Plaintiffs, who reside in a home on lots adjacent to the Defendant's property, brought a declaratory judgment action to enforce the non-time-limited restriction against non-residential use contained in the recorded declaration.

Id. (emphasis added). The Court held "that the developers lacked the authority to impose the declaration's restrictions upon the Defendant's property because they did not own those lots when they executed and recorded the declaration." *Id.*

By contrast, the restrictive conditions that give rise to the present dispute were duly recorded in 1984 after having

been approved by the current owner of Four Seasons, FSD. Moreover, the 1984 Declaration expressly provided that those restrictions would not expire unless terminated by a majority vote of the FSD stockholders, an event that has not occurred. Thus, the material facts in this case are readily distinguishable from those in *Phillips*.

As for his second issue, Plaintiff relies on *Phillips* to note that Tennessee law “abhors” retroactive application of substantive restrictions on real property. FSD counters this argument by noting that it is not attempting to apply the 2018 Amendment retrospectively. On the contrary, FSD insists that the amendment is being applied prospectively, and the undisputed facts established that Plaintiff has continuously been in violation of the 2018 Amendment since it went into effect. FSD also relies on the fact that the 1984 Declaration established a contract between the corporation and the owners of lots within Four Seasons. In this regard, FSD notes that the 1984 Declaration authorized the stockholders of FSD to amend the 1984 Declaration and provided that any such amendment would be binding on the existing stockholders and their lots. In making these arguments, FSD principally relies on this court’s ruling in *The Preserve at Forrest Crossing Townhome Ass’n, Inc. v. DeVaughn*, No. M2011-02755-COA-R3-CV, 2013 WL 396000 (Tenn. Ct. App. Jan. 30, 2013).

FSD contends the 2018 Amendment is valid and enforceable for three reasons, two of which we address below. First, FSD relies on the undisputed fact that Plaintiff had notice when he purchased his lot that the Property was subject to restrictive covenants that could be amended by a majority vote of the stockholders. Second, Plaintiff is bound by the contractual provisions in the 1984 Declaration, which includes collective decision making by the stockholders of FSD, also known as community association governance. See *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 476 (Tenn. 2012).

*10 As our Supreme Court noted in *Hughes v. New Life Development Corp.*, when courts interpret restrictive covenants pursuant to contract principles, we are careful to avoid “disregarding contractual provisions simply because a party later finds the contract to be unwise or unsatisfactory.” 387 S.W.3d at 476 (citations omitted). The Court reasoned:

These contract principles, applied in the context of a private residential development with covenants that are expressly subject to amendment without substantive limitation, yield the conclusion that a homeowner should not be heard to complain when, as anticipated by the recorded

declaration of covenants, the homeowners’ association amends the declaration. When a purchaser buys into such a community, the purchaser buys not only subject to the express covenants in the declaration, but also subject to the amendment provisions of the declaration. And, of course, a potential homeowner concerned about community association governance has the option to purchase a home not subject to association governance. *As one commentator has noted, people who live in private developments “are not just opting for private ordering in the form of covenants, but also are opting for a privatized form of collective decision making that can undo, replace, modify, or augment the private ordering already achieved.”*

Id. (emphasis added) (citations omitted) (quoting Lee Anne Fennell, *Contracting Communities*, 2004 U. Ill. L.Rev. 829, 848 (2004)).

For these reasons, as stated by FSD in its brief, “holding that no valid, amended restrictive covenants can be placed on a landowner’s property after the owner obtained the property would impermissibly require courts to interfere in the contracts and ‘affairs of a majoritarian association that parties freely choose to enter.’ ” (Quoting *Hughes*, 387 S.W.3d at 476).

As FSD correctly contends, and as this court has reasoned: “[n]otwithstanding the State’s preference for the freedom of private owners to use their land as they see fit, the courts will uphold covenants running with the land where the intent of the parties to bind their remote successors can be determined by the language of the covenant and the circumstances of its making.” *Hillis v. Powers*, 875 S.W.2d 273, 275 (Tenn. Ct. App. 1993) (citing *Ridley v. Haiman*, 47 S.W.2d 750 (Tenn. 1932); *Land Developers, Inc. v. Maxwell*, 537 S.W.2d 904 (Tenn. 1976); *Stracener v. Bailey*, 737 S.W.2d 536 (Tenn. Ct. App. 1986)).

Plaintiff purchased the Property subject to, and with notice of, the 1984 Declaration, which provided a mechanism by which FSD’s stockholders could enact amendments. The 1984 Declaration specifically provides that any such amendment will be binding on the existing stockholders and their lots. The 2018 Amendment was approved by a majority of the stockholders, and it was duly recorded with the Register of Deeds shortly thereafter. Accordingly, the Property, as well as Plaintiff’s use of the Property, is subject to the 2018 Amendment.

Nevertheless, we recognize that the right of an association to amend its restrictive covenants is not without limitations, and its subsequent decisions are not immune from judicial review. *See Hughes*, 387 S.W.3d at 476 (“We acknowledge that a homeowner’s Lockean exchange of personal rights for the advantages afforded by private residential communities does not operate to wholly preclude judicial review of the majority’s decision.”). However, “because of the respect Tennessee law affords private contracting parties, we are reticent to inject the courts too deeply into the affairs of a majoritarian association that parties freely choose to enter.” *Id.* After considering the standards of review adopted by several other jurisdictions and having rejected the “reasonableness standard,” our Supreme Court has concluded that amendments to a restrictive covenant declaration, once duly adopted by the members or stockholders, “are subject to judicial review principally under an arbitrary and capricious standard.” *Id.* at 478. Accordingly, we must examine the 2018 Amendment for any indication that its provisions are “arbitrary or capricious.” *See id.*

*11 As *Hughes* instructs, “the arbitrary and capricious standard requires the reviewing court to determine whether there has been a clear error in judgment.” *Id.* at 479 (citing *Jackson Mobilphone Co. v. Tennessee Pub. Serv. Comm’n*, 876 S.W.2d 106, 110–11 (Tenn. Ct. App. 1993)). “An arbitrary or capricious decision is one that is not based on any course of reasoning or exercise of judgment, or one that disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion.” *Id.* at 479–80 (citing *Miller v. Civ. Serv. Comm’n of Metro. Gov’t of Nashville & Davidson Cnty.*, 271 S.W.3d 659, 665 (Tenn. Ct. App. 2008)).

Here, the provisions in the 2018 Amendment are uniform and apply to all lots and owners within Four Seasons. Further, and contrary to Plaintiff’s contentions, there is no retrospective application of any provision in the 2018 Amendment. As a consequence, the 2018 Amendment may not be used to sanction or otherwise punish Plaintiff for his use of the Property prior to the 2018 Amendment going into effect on July 23, 2018. Based on the foregoing and other circumstances in the record, we find no basis on which to conclude that the enactment of the 2018 Amendment was arbitrary or capricious.

Lastly, we acknowledge Plaintiff’s alternative argument that he is exempt from the new restriction that “the length of the lease must be for a minimum of 30 consecutive days,” based

on a grandfathering provision in subsection (ix.) in the 2018 Amendment and the undisputed fact that Plaintiff has not sold the Property. The provision Plaintiff relies on reads in pertinent part:

xi. Any owner engaged in leasing or subleasing activities as of the date of this amendment shall be allowed to continue leasing or subleasing activities until the expiration of the term of said lease or said lot is sold or conveyed to a third party. No lease or sublease term extensions are permitted. In order to ascertain the expiration date of current leases, any owner who is leasing as of the date of this Third Amendment shall provide a copy of the lease to the FSDC Board’s secretary within two weeks of the date this Third Amendment is filed with the DeKalb County Register of Deeds’ office.

We find Plaintiff’s reliance on this provision misplaced, as did the trial court. In ruling on this issue, the trial court stated, “[T]he way I read it is it’s disjunctive rather than conjunctive ... so the way I look at it is apparently the leases end because it’s a short-term lease. So, it doesn’t say you can start a new lease; it just says the lease ends.”

FSD provides a thorough and well-reasoned analysis of this issue in its brief, an analysis we find persuasive, and for this reason we quote much of its argument below:

When considering this grandfathering language, a reviewing court must interpret it in the context of the amendment as a whole. The 2018 Amendment begins, with a broad authorization that “[l]easing homes by FSDC shareholders *shall be allowed with the following stipulations.*” In the context of the entire amendment, therefore, the remaining paragraphs act as requirements which, if met, allow Four Seasons properties to be leased.

Drilling down further, the context of the grandfathering provision must also be considered as a whole to interpret the parties[’] intent with the use of the conjunction “or”

within it. First, paragraph (ix) includes a time restriction after which a stockholder may be grandfathered in: “Any owner engaged in leasing or subleasing activities *as of the date of this amendment* ...” The protection under this section only attaches to those owners engaged in leasing activities as of July 24, 2018.

*12 Second, the phrase attached to the conjunction “until the expiration of the term of *said lease*” when considered in connection with the terms “leasing or subleasing activities” in the introductory sentence of paragraph (ix) logically requires that an identifiable lease must be in effect as of the date of the amendment rather than a more generalized practice of leasing. Otherwise, the modifier “*said*” in “*said lease*” would not be given its ordinary and usual meaning of “aforesaid” or “above-mentioned” to refer to the owner engaged in leasing when the amendment was passed.

Third, the amendment requires any owners under a current lease as of the date of the amendment to provide a copy to the Board so that the Board can determine the expiration date for any such current leases. This requirement would be rendered superfluous if the current owners could simply continue to engage in new and different leases until they sold or conveyed their property.

In the context of the 2018 Amendment as a whole, it is clear that the use of “or” in grandfathering provision can only reasonably be interpreted in the disjunctive. The two separate and independent clauses, “*until the expiration of the term of said lease*” and “*said lot is sold or conveyed to a third party*” are connected in paragraph (ix) by the disjunctive “or” which serves to create two triggering events, either of which would serve to extinguish the owner's authority to lease property unless or until the remaining requirements of the amendment are met. To replace “or” with “and” as Appellant argues would require that this Court ignore the ordinary and natural meaning of the terms and the context of the amendment as a whole. This strained construction of the language to create an ambiguity where one does not exist is impermissible under Tennessee law.

(Citations omitted).

Having construed the meaning of subsection (ix.), we agree with FSD's conclusion that subsection (ix.) has two triggering events. First, the expiration of the lease, “*said lease*,” in effect when the 2018 Amendment went into effect on July 24, 2018. Second, when the current owner of a lot sells or conveys his or her lot to another. Thus, the occurrence of either of these triggering events extinguishes the lot owner's authority to lease his or her property except as provided under the 2018 Amendment, including the provision that the length of future lease “must be for a minimum of 30 consecutive days.”

Because it is undisputed that Plaintiff rented his property for periods of no more than 28 days, Plaintiff's last lease would have expired, at the latest, within 28 days of the 2018 Amendment going into effect. Moreover, Plaintiff's reliance on the fact that he has not sold the Property is unavailing. Accordingly, Plaintiff is bound by the provision in the 2018 Amendment requiring that “the length of the lease must be for a minimum of 30 consecutive days.”

For the foregoing reasons, we affirm the trial court's determination that “the 2018 Amendment to the Declaration of Covenants, Conditions and Restrictions bars [Plaintiff] from short term leasing his property for less than thirty (30) days.”

IN CONCLUSION

The judgment of the trial court is affirmed in all respects, and this matter is remanded with costs of appeal assessed against Dr. Pratik Pandharipande.

All Citations

Slip Copy, 2022 WL 1280438

Footnotes

- 1 The land which comprises Four Seasons was previously owned by Four Seasons of Tennessee, Inc., which, in 1967, recorded certain restrictive covenants (the “1967 Declaration”) with the DeKalb County Register of

Deeds. Land Contract Acceptance Corporation subsequently acquired the development and, in May 1974, recorded amendments to the 1967 Declaration (the "1974 Amendments"). The 1974 Amendments provided for the same restrictions as those contained in the 1967 Declaration. Nevertheless, as Plaintiff states in his brief, "At the time [Plaintiff] purchased the Property the only applicable covenants, if any, ... were the 1984 [Declaration]," a legal conclusion with which we and FSD agree. This conclusion is consistent with the preamble to FSD's 1984 Declaration, which states in pertinent part: "Corporation acknowledges that the Properties that are to be subjected to this Declaration have previously been made subject to certain Restrictive Covenants of Four Seasons of Tennessee of record in ... [the] Register's Office for DeKalb County, Tennessee, as modified by that Waiver of Restrictive Covenant [also] of record ..., said Restrictive Covenants being only acknowledged hereby and expressly not extended, renewed, or incorporated herein by reference[.]" Thus, neither the 1967 Declaration nor the 1974 Amendments have any bearing on Plaintiff's property or the matters at issue in this appeal.

- 2 Article I, Section 15 and Article III, Section 1 of the 1984 Declaration defined "Stockholders" as those record owners of lots subject to the Declaration who were issued one share of stock in the corporation for each lot owned. Article 1, Section 7 defined "Lot" as "a portion or portions of the Properties made subject to the terms and conditions of this Declaration and intended for any type of independent ownership for construction and use as a residence by a single family."
- 3 As provided in the 1984 Declaration, the 2018 Amendment became effective on July 24, 2018, when it was duly recorded with the Office of the Register of Deeds for DeKalb County, Tennessee.
- 4 For the purpose of summary judgment, Plaintiff stipulated "to [his] knowledge of both the potential for amendment to the restrictive covenants and the amendment at issue."
- 5 Almost 80 years ago, Justice Felix Frankfurter observed that "[i]n law ... the right answer usually depends on putting the right question." *Rogers' Est. v. Helvering*, 320 U.S. 410, 413 (1943). "Thus, a properly framed issue may be the most important part of an appellate brief." *Hodge v. Craig*, 382 S.W.3d 325, 334 (Tenn. 2012).
- 6 As the Supreme Court explained in *TWB Architects, Inc. v. Braxton, LLC*, "[t]his is the standard Tennessee courts must apply when ruling on summary judgment motions regardless of which party bears the burden of proof at trial." 578 S.W.3d at 889.
- 7 We acknowledge Plaintiff's contention that he is not operating his rental business "like a motel," as discussed in *Teffeteller*, because he is only renting one unit, his lot and cabin, not several units. Based on this fact, he seeks to distinguish his business activities from those in *Teffeteller*. We, however, find this distinction inconsequential because Plaintiff is, in fact, engaged in the business of renting the Property, his cabin and lot, to third parties as a short-term vacation rental. Thus, he is not using the Property for residential purposes.
- 8 Plaintiff stipulated, for purposes of summary judgment, that "the rental use of [his] property is not merely incidental but, instead, the property is being rented as a business venture." The trial court found that the short-term rental business was prohibited by the restrictions in the 1984 Declaration.
- 9 For purposes of summary judgment, Plaintiff stipulated that he knew the 1984 Declaration could be amended by the stockholders when he purchased the Property in 2015. Moreover, a representative of Plaintiff attended the 2018 meetings during which the proposed 2018 Amendment was discussed and ultimately approved.

EXHIBIT H

2006 WL 7286063

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Court of Appeals of South Carolina.

Anna Belle WILLIAMSON, Appellant,
v.

BERMUDA RUN INVESTOR DEVELOPMENT
GROUP, INC.; Bermuda Run Horizontal Property
Regime, now or formerly; Richard S. Clayton, Treasurer
of the Board of Directors of Bermuda Run Horizontal
Property Regime, now or formerly; Darrel C. Myers,
President of the Board of Directors for Bermuda
Run Investor Development Group, Inc., now or
formerly; Alfred H. Agnew, Secretary/Treasurer of
the Board of Directors for Bermuda Run Investor
Development Group, Inc., now or formerly; O.D.
Murray, Jr., Richard S. Clayton, Darrell C. Myers,
and Alfred H. Agnew, individually, Defendants,
of whom Bermuda Run Investor Development
Group, Inc. and Bermuda Run Horizontal
Property Regime are, Respondents.

No. 2006-UP-279.

|
Heard May 9, 2006.|
Decided June 13, 2006Appeal from Horry County, J. Stanton Cross, Jr., Master in
Equity, Unpublished Opinion No.2006-UP-279.**Attorneys and Law Firms**Irby E. Walker, Jr., of Conway, and George Thomas Samaha,
III, of Little River, for Appellant.Michael S. Hopewell and C. Pierce Campbell, of Florence, for
Respondent Bermuda Run Horizontal Property Regime; and
Reynolds Williams, of Florence, for Respondents Bermuda
Run Investor Development Group, Inc. and Bermuda Run
Horizontal Property Regime.**Opinion**

PER CURIAM.

*1 Anna Belle Williamson, the owner of a condominium at Bermuda Run, brought this action alleging her homeowners' association, Bermuda Run Horizontal Property Regime ("Bermuda Run"), entered into an unauthorized transaction to transfer a common element to the Bermuda Run Investor Development Group ("BRIDG"). Bermuda Run and BRIDG (collectively, "Respondents") brought counterclaims against Williamson for, among other things, slander of title and tortious interference with economic relations. The master in equity ruled in favor of Respondents on all claims. Williamson appeals. We affirm in part and reverse in part.

FACTS

Bermuda Run is a condominium complex in Horry County consisting of common elements and forty-four separate units. Williamson is the owner of a condominium at Bermuda Run. She purchased her unit in August 1985.

At an annual meeting on May 16, 1998, the board of directors of Bermuda Run adopted a resolution authorizing Bermuda Run to execute the necessary documents to trade its existing driveway to BRIDG, a South Carolina corporation, in exchange for Bermuda Run receiving title to two tracts of property owned by BRIDG that were contiguous to Bermuda Run and obtaining a non-exclusive easement for purposes of ingress and egress. The resolution stated BRIDG and Bermuda Run also agreed that each would have the use of the other's amenities, such as parking areas and other common elements. Of the four directors of Bermuda Run, only one member, O.D. Murray, voted in favor of the resolution. The remaining three members, Alfred Agnew, Richard Clayton, and Larry Maust, abstained from voting.¹

On June 3, 1999, Bermuda Run recorded a deed transferring title to BRIDG for the driveway leading into Bermuda Run. Thereafter, on December 30, 1999, Williamson filed a lis pendens and a complaint seeking damages against Bermuda Run, BRIDG, and members and officers of each for allegedly conveying a common element, i.e., the driveway, without the approval of all the Bermuda Run homeowners.

On June 5, 2000, Williamson filed an amended complaint that included three causes of action: (1) negligence as to

Bermuda Run board members Murray and Clayton, (2) fraudulent conveyance as to all defendants, and (3) ultra vires acts as to Bermuda Run and to Murray and Clayton, individually and as members of the Bermuda Run board of directors. BRIDG, Agnew, and Myers asserted counterclaims for slander of title and tortious interference with economic relations. Bermuda Run asserted counterclaims for slander of title, tortious interference with economic relations, and abuse of process.

The defendants filed motions to dismiss Williamson's claims. By order dated January 19, 2001, the circuit court, Judge J. Michael Baxley presiding, dismissed the fraudulent conveyance claim as to all defendants, but allowed Williamson's claims based on negligence and ultra vires acts to survive. Judge Baxley apparently vacated the *lis pendens* on the property by order on February 5, 2001.²

*2 By order filed June 11, 2001, Judge B. Hicks Harwell of the circuit court ordered Williamson to pay BRIDG, Myers (President of BRIDG), and Agnew (Secretary/Treasurer of BRIDG) attorney fees, costs, and expenses in the amount of \$25,000. Judge Harwell granted the fees "pursuant to the South Carolina Frivolous Proceedings Sanctions Act and Rule 11 SCRPC." He further stated he was granting "BRIDG's Motion for Partial Summary Judgment upon liability and for an entitlement to attorney[] fees under its slander of title counterclaim." Judge Harwell referred to a master in equity the other issues raised in the motion submitted by BRIDG, Agnew, and Myers, including: (1) whether BRIDG was entitled to partial summary judgment as to liability on its counterclaim for tortious interference with economic relations and (2) whether BRIDG suffered additional damage above its attorney fees for slander of title and, if so, the extent thereof.

Williamson immediately appealed only the award of attorney fees. We affirmed on the ground that the issue she raised regarding the fees was not preserved because it was not argued at trial. *See Williamson v. Bermuda Run*, 2002-UP-594 (S.C. Ct.App. filed Sept. 26, 2002).

Williamson, through her attorney, abandoned her negligence claim at the beginning of the proceeding before Master in Equity J. Stanton Cross, Jr. in December 2004. The master noted that Williamson was proceeding solely on her ultra vires claim and the only other issues before the court were the counterclaims of Respondents.

At the conclusion of the hearing, the master found Williamson had not established her claim regarding ultra vires acts and had not proved damages. As to BRIDG's counterclaims, the master applied the law of the case doctrine and found Judge Harwell's order precluded Williamson's defense of the slander of title counterclaim. The master further found BRIDG had proved each element its counterclaim for tortious interference with economic relations, but "such finding [was] not necessary to [his] decision because the damage[s] arising from the tortious interference with BRIDG's economic relations are identical to the damages [caused] by [Williamson's] slander of BRIDG's title." The master awarded BRIDG a judgment of \$70,185.24 for the slander of title and tortious interference claims, plus \$17,500 in attorney fees and costs.

As to Bermuda Run's counterclaims for slander of title, tortious interference, and abuse of process, the master granted Bermuda Run a judgment of \$445,000. In finding for Bermuda Run, the master did not specify which cause of action he was basing the award on, but stated, "I found the testimony of Dr. Kenneth Eugene Lehrer to have been well-considered, authoritative, probative, and convincing. Bermuda Run was damaged by the Plaintiff and those damages equal \$445,000."³ This appeal followed.

STANDARD OF REVIEW

Under the South Carolina Rules of Civil Procedure, summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; *see also Standard Fire Ins. Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 421, 392 S.E.2d 460, 462 (1990).

*3 When reviewing the grant of a motion for summary judgment, an appellate court applies the same standard applied by the trial court under Rule 56(c), SCRPC. *Fleming v. Rose*, 350 S.C. 488, 567 S.E.2d 857 (2002); *Ferguson v. Charleston Lincoln Mercury, Inc.*, 349 S.C. 558, 564 S.E.2d 94 (2002); *see also Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999) ("Summary judgment is appropriate when it is clear that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law.").

"In determining whether any triable issue of fact exists, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party." *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997).

LAW/ANALYSIS

I. Ultra Vires Acts

Williamson contends the master erred in finding her allegation of ultra vires acts was not properly brought as a derivative action as required by section 33–31–304 of the South Carolina Code. We disagree.

Bermuda Run was formed as a South Carolina nonprofit corporation.⁴ Article II of its Articles of Incorporation clearly states "the Corporation shall be conducted as a non-profit organization for the benefit of its members." Article III of the Articles of Incorporation goes on to state "[t]he Corporation shall have all of the powers and privileges granted to corporations not for profit under the law pursuant to which this Corporation is chartered."

Section 33–31–304 of the South Carolina Nonprofit Corporation Act specifically governs ultra vires actions. *See* S.C.Code Ann. § 33–31–304 (2006). It generally provides that a nonprofit corporation's power to act may not be challenged as ultra vires unless brought in a specific manner as follows:

(a) Except as provided in subsection (b), the validity of corporate action may not be challenged on the ground that the corporation lacks or lacked power to act.

(b) A corporation's power to act may be challenged in a proceeding against the corporation to enjoin an act where a third party has not acquired rights. The proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding.

(c) A corporation's power to act may be challenged in a proceeding against an incumbent or former director, officer, employee, or agent of the corporation. The proceeding may be brought by a director, the corporation, directly, derivatively, or through a receiver, a trustee, or other legal representative, or in the case of a public benefit corporation, by the Attorney General.

Although subsection (b) states the "proceeding may be brought by the Attorney General, a director, or by a member or members in a derivative proceeding," the way in which Williamson brought this action does not satisfy any of these options. It is clear neither the Attorney General nor a director brought the action; therefore, as noted by the master, the only available alternative was for a member or members to bring the action in a derivative proceeding. Williamson failed, however, to comply with the requirements for bringing a derivative action.

*4 Rule 23 of the South Carolina Rules of Civil Procedure outlines the requirements for bringing a derivative action as follows:

(b)(1) Derivative Actions by Shareholders. In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Rule 23, SCRPC.

A derivative action that does not meet the pleading requirements of Rule 23(b)(1), SCRPC, is properly dismissed pursuant to Rule 12(b)(6), SCRPC. *See generally Carolina First Corp. v. Whittle*, 343 S.C. 176, 539 S.E.2d 402 (Ct.App.2000). Williamson did not plead the necessary information in her complaint to bring a derivative action. A reading of Williamson's complaint and her testimony at trial shows that she did not bring the action on behalf of the corporation, a group of shareholders, or anyone other than

herself. When specifically asked for whom the lawsuit speaks, Williamson answered she did not speak for any of the other Bermuda Run homeowners. Williamson did not allege in her complaint that it is a derivative action, and she asked for personal damages in excess of \$1.5 million dollars. She also did not allege in the complaint that a demand was made on the board as required by Rule 23, SCRCP. Williamson failed to properly plead her derivative claims. Consequently, she failed to state a claim for ultra vires acts and the master did not err by denying relief on this basis.

II. Slander of Title

Williamson next contends the master erred in ruling slander of title was the “law of the case” as to BRIDG and in finding for both BRIDG and Bermuda Run on their counterclaims for slander of title.

A. Law of the Case

In considering BRIDG's counterclaim for slander of title, the master stated BRIDG “has been granted judgment on its counterclaim for slander of title” based on Judge Harwell's order of June 11, 2001 and “[t]hat is the law of this case.” Williamson contends this was error as Judge Harwell's ruling on this point was not the “law of the case.”

*5 “That a decree from which no appeal is taken becomes the law of the case in all subsequent proceedings involving the same parties and the same subject matter is the well-settled law in this state....” *Matheson v. McCormac*, 187 S.C. 260, 263, 196 S.E. 883, 884 (1938). “Law of the case,” as a term of art, technically was not the correct term to be used here, as the master's comments could be taken to indicate Judge Harwell's order could no longer be appealed. In *Link v. School District of Pickens County*, 302 S.C. 1, 6, 393 S.E.2d 176, 179 (1990), however, our supreme court held that when a trial court declares summary judgment on one of several issues in a case, a party can wait to appeal from the final judgment disposing of all issues. Accordingly, an appeal of the issue of slander of title as it pertains to BRIDG is timely.

What the master probably intended to convey is that he was not at liberty to reconsider Judge Harwell's 2001 ruling as to summary judgment because his mandate as to BRIDG was to consider damages only.⁵ See, e.g., *Binkley v. Burry*, 352 S.C. 286, 295, 573 S.E.2d 838, 843 (Ct.App.2002) (“Generally, one circuit court judge may not reverse or modify the order of another circuit court judge.”). Any challenge to the grant of summary judgment to BRIDG was properly to be made via an

appeal. We note, however, that to the extent Judge Harwell's order awarded \$25,000 in attorney fees to BRIDG, the ruling is final because that issue was immediately appealed by Williamson in a prior proceeding and we affirmed the award solely on error preservation grounds.

B. Merits

The case of *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 18–19, 567 S.E.2d 881, 890 (Ct.App.2002) defines slander of title as follows:

“The term ‘slander of title’ is defined as a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, causing him injury.” 50 Am.Jur.2d *Libel & Slander* § 548 (1995). Generally, an action under slander of title may only be maintained by one who possesses an estate or interest in the affected property. See generally Jeffrey F. Ghent, *Slander of Title: Sufficiency of Plaintiff's Interest in Real Property to Maintain Action*, 86 A.L.R. 4th 738 (1991). “The tort of slander of title is almost identical to the tort of product disparagement, the only difference being that the former tort involves aspersing the quality of one's title to property and the latter tort involves aspersing the quality of one's property.” *Wendy's of South Jersey, Inc. v. Blanchard Mgmt. Corp. of N.J.*, 170 N.J.Super. 491, 406 A.2d 1337, 1338 (Ch.Div.1979).

In *Huff v. Jennings*, 319 S.C. 142, 459 S.E.2d 886 (Ct.App.1995), we set forth for the first time in South Carolina a six-point test that a plaintiff must satisfy to maintain an action for slander of title:

- (1) the publication (2) with malice
- (3) of a false statement (4) that is derogatory to plaintiff's title and (5) causes special damages (6) as a result of diminished value of the property in the eyes of third parties.

*6 *Id.* at 149, 459 S.E.2d at 891.

Though the master found Williamson was liable for slander of title, this was predicated on his determination that Bermuda Run was authorized to enter into the transaction to convey a common element and thus had not committed an ultra vires

act. Williamson purportedly committed slander of title by alleging the transaction was unauthorized.

“[A] corporation may exercise only those powers which are granted to it by law, by its charter or articles of incorporation, and by any bylaws made pursuant thereto; acts beyond the scope of the powers so granted are *ultra vires*.” *Seabrook Island Property Owners Ass'n v. Pelzer*, 292 S.C. 343, 347, 356 S.E.2d 411, 414 (Ct.App.1987).

The master found Respondents did not act beyond the powers granted to them by law and the governing documents of Bermuda Run because the sale of property was an authorized transaction. In so doing, the master relied upon section 33–3–102 of the South Carolina Code, which states in pertinent part: “Unless its Articles of Incorporation provide otherwise, every corporation ... has the same powers as an individual to do all things necessary or convenient to carry out its business and affairs, including without limitation the power to ... sell, convey, mortgage, pledge, lease, exchange, and otherwise dispose of all or any part of its property...” S.C.Code Ann. § 33–3–102 (2006). The master also relied upon the Articles of Incorporation, finding Article 3 expressly allowed Bermuda Run to have all the powers and privileges granted to non-profit corporations.

Although these provisions generally authorize Bermuda Run to buy, sell, or transfer its land, these provisions do not expressly authorize Bermuda Run to sell property that it does not own. Both the express language of the Master Deed and the South Carolina Horizontal Property Act, in fact, appear to preclude the actions taken by the board.

Under the Master Deed, the property at issue is a common element owned solely by the condominium owners. Any transfer of that property requires the approval of all of the homeowners.

Paragraph V of the Master Deed for Bermuda Run expressly states: “The percentage of undivided interest in the COMMON ELEMENTS assigned to each UNIT shall not be changed except with the unanimous consent of all the owners of all the units.”

Paragraph VI of the Master Deed prohibits the separate conveyance of the common elements: “The undivided interest in the COMMON ELEMENTS declared to be an appurtenance to each UNIT shall not be conveyed, devised, encumbered or otherwise dealt with separately from

said UNIT....” See also 4 S.C. Juris. *Condominiums* § 18 (1991) (“Common elements may neither be conveyed nor encumbered except as an appurtenance to an apartment.... The apartment owners hold title to the regime common elements under a unique arrangement of concurrent ownership, which is neither a simple joint tenancy, since survivorship provisions are absent, nor a tenancy in common, since partition is prohibited.”).

*7 Paragraph X of the Master Deed further provides: “Recognizing that the proper use of a UNIT by any owner or owners is dependent upon the use and enjoyment of the common elements ... and that it is in the interest of all owners of UNITS that the ownership of the COMMON ELEMENTS be retained in common by the owners of UNITS in the CONDOMINIUM, it is declared that the percentage of the undivided interest in the COMMON ELEMENTS appurtenant to each UNIT shall remain undivided....”

Moreover, the South Carolina Horizontal Property Regime Act states the common elements shall not be divided. See S.C.Code Ann. § 27–31–70 (1976) (“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.”). It is undisputed that the resolution adopted by Bermuda Run purported to transfer a portion of the common elements to BRIDG without the consent of the owners. Neither the master nor Respondents cite to any authority expressly authorizing a homeowners' association to transfer title to the common elements without the consent of the owners.

Based on the foregoing, we find the element which requires a false statement cannot be satisfied because Williamson never made false statements concerning the actions of Bermuda Run or BRIDG. Bermuda Run's transaction was contrary to the provisions of the Master Deed and the Horizontal Property Act. Thus, we hold the master erred in finding Williamson liable for slander of title and reverse that finding as to both BRIDG and Bermuda Run.

III. Tortious Interference with Economic Relations and Abuse of Process

Williamson also contends the master erred in finding her liable on Respondents' counterclaims for tortious interference with economic relations and abuse of process. We agree.

A. Tortious Interference

Randy Drew entered into an option agreement to purchase property from BRIDG and purportedly signed a Joint Use Agreement with Bermuda Run in 1999. Later that year, Drew terminated his option, stating he had only recently become aware that some of the residents objected to the transaction. Drew was given copies of legal opinions obtained by BRIDG concluding there would be problems in enforcing the agreement in light of the failure to obtain the consent of all of the homeowners. Drew's decision to not exercise his option to purchase was the basis for the counterclaims alleging tortious interference with economic relations.

As to BRIDG's claim, the master found "that BRIDG has proven each element of this cause of action" because BRIDG's sale of its property to Drew for \$595,000 "was [] cancelled as a direct and proximate result of [Williamson's] conduct." The master found the sale probably would have closed on August 1, 2000, but BRIDG had mitigated its damages and sold the property on October 21, 2002 for a net price of \$642,100.⁶ The master ultimately concluded BRIDG was entitled to statutory interest of 8.75% from August 1, 2000 to October 21, 2002 for the loss of the use of its \$595,000, but this amount was mitigated by the more favorable sales price, for net damages of \$70,185.24, plus attorney fees.

*8 In finding for Bermuda Run, the master did not specify which cause of action he was basing the award on, but summarily stated, "I found the testimony of Dr. Kenneth Eugene Lehrer to have been well-considered, authoritative, probative, and convincing. Bermuda Run was damaged by the Plaintiff and those damages equal \$445,000."⁷

"The elements of a cause of action for tortious interference with contract are: (1) existence of a valid contract; (2) the wrongdoer's knowledge thereof; (3) his intentional procurement of its breach; (4) the absence of justification; and (5) resulting damages." *Camp v. Springs Mortgage Corp.*, 310 S.C. 514, 517, 426 S.E.2d 304, 305 (1993). Again, although the master found Williamson liable for tortious interference with economic relations, this conclusion was predicated on his finding that Bermuda Run had not committed an ultra vires act. The first element of the claim for tortious interference with economic relations is missing here. As has been demonstrated above, Bermuda Run did not have the ability to enter into the contract with BRIDG because both the Master Deed and the Horizontal Property Act prohibited it. Furthermore, for reasons similar to those in deciding the issue of slander of title, the master erred in finding Williamson

is liable for tortious interference with economic relations because Williamson's assertion of an ultra vires act has merit and the requisite element of "absence of justification" is not present. Drew's business decision to terminate the transaction because of the uncertainty as to ownership does not support the claim alleged here for tortious interference.

B. Abuse of Process

"There are two essential elements required for an abuse of process action: (1) an ulterior purpose, and (2) a willful act in the use of the process not proper in the regular conduct of the proceedings." *Broadmoor Apartments of Charleston v. Horvitz*, 306 S.C. 482, 486, 413 S.E.2d 9, 11 (1991). "[T]he issuance of the process may be justified in itself; it is the malicious misuse or perversion of the process for an end not lawfully warranted by it that constitutes the tort known as abuse of process." *Huggins v. Winn-Dixie Greenville, Inc.*, 249 S.C. 206, 209, 153 S.E.2d 693, 695 (1967). " '[A]n abuse of process is the employment of legal process for some purpose other than that which it was intended by the law to effect-the improper use of a regularly issued process.' " *Id.* at 210, 153 S.E.2d at 695 (citation omitted).

Some definite act or threat is required; there is no liability where the party has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. *Id.* at 208, S.E.2d at 694. The improper purpose usually takes the form of coercion; there is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance of the process itself, which constitutes the tort. *Id.* In the current appeal, Williamson could not be found liable for abuse of process when her actions were legitimate. Though she pled her action incorrectly, the fact that she filed suit cannot support an abuse of process claim.

IV. Attorney Fees and Costs

*9 Williamson lastly contends the master erred in awarding BRIDG \$17,500 in attorney fees and costs. We agree.

The master found BRIDG was entitled to a total award of attorney fees and costs in the amount of \$17,500. An award of attorney fees will be reversed when the substantive results achieved by counsel are reversed on appeal. *Camburn v. Smith*, 355 S.C. 574, 581, 586 S.E.2d 565, 568 (2003); see also *Sexton v. Sexton*, 310 S.C. 501, 503, 427 S.E.2d 665, 666 (1993). Accordingly, because we are reversing the award to

BRIDG on its counterclaims, we likewise reverse the master's award of \$17,500 for attorney fees and costs.

We reverse the judgments in favor of Respondents on all counterclaims.

AFFIRMED IN PART, REVERSED IN PART.

CONCLUSION

Based on the foregoing, we affirm the master's decision to deny Williamson's claim alleging an ultra vires act due to her failure to properly plead the claim as a derivative one.

HEARN, C.J., and GOOLSBY and ANDERSON, JJ., concur.

All Citations

Not Reported in S.E.2d, 2006 WL 7286063.

Footnotes

- 1 Agnew was also an officer of BRIDG.
- 2 This order is referred to, but not included, in the record on appeal.
- 3 Lehrer submitted an affidavit setting forth an "Economy Summary" dated December 2, 2004, showing a total of \$445,986 in damages. It included line items for a loss on a purchase option and construction losses. The largest component in the total was \$240,700 for the net present value of future losses from 2003/04 to 2038/39.
- 4 The record contains a master deed establishing The Bermuda Run Horizontal Property Regime in August 1985. In addition, the record contains the Articles of Incorporation for the Bermuda Run Property Owners Association, Inc. creating a nonprofit corporation in August 1986. The parties refer to these organizations interchangeably as "Bermuda Run" in their briefs.
- 5 In her brief, Williamson also contends the master erred in finding his mandate was to determine whether BRIDG suffered any damages above and beyond its expenses and attorney fees from her slander of BRIDG's title. The trial court's June 11, 2001 order clearly mandated that one of the issues to be addressed by the master was "[w]hether BRIDG has suffered additional damage, above and beyond its expenses and attorney[] fees, for the Plaintiff's slander of its title...."
- 6 The master refers to both October 1, 2002 and October 21, 2002; the date of sale appears to be October 21, 2002. The master further indicated his finding as to tortious interference was "not necessary to [his] decision ... because the damage arising from the tortious interference [action is] identical to the damages [from slander of title]."
- 7 In their briefs the parties seem to assume the master awarded damages to Bermuda Run based on all of the claims. Since the parties read the order as being based on all three claims and we find, in any event, that all of the claims fail on their merits, we address them all here.