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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas
The Honorable Robert J. Bonds
Circuit Court Judge

Appellate Case No. 2025-000030
Civil Action No. 2021-CP-07-01655

Stanley S. Stroup, as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; Peter Trager, and Vacation Inn, LLC, each both individually and derivatively,

RESPONDENTS,

versus

Sea Pines South Beach Owners' Association, Inc.,

APPELLANT.

RESPONDENTS' INITIAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court correctly find that this property owners association lacks authority under these governing documents to assess its members for the dredging of a State-owned public waterway, Braddock Cove?

II. Under the governing documents at issue here, did the trial court correctly find that this property owners association—which owns no real property whatsoever—may not collect annual assessments unless and until it has "Common Properties" to maintain?

III. Is the trial court's ruling on the Association's counterclaims an independent ground for affirming its decision?

STATEMENT OF THE CASE

Respondents agree with the Appellant's description of the procedural history of this case. In the description of the nature of the action, Respondents note that they requested a declaratory judgment only as to the lawfulness of assessments going forward from the date of filing of the Complaint, and they did not seek reimbursement of previously paid assessments, if any. (R. pp. ___: Compl.).

BACKGROUND

This is an unusual case about an unusual property owners' association that owns no real property. Appellant Sea Pines South Beach Owners' Association, Inc., (the "Association") was formed back in 1969 with the idea that it would one day own and maintain common properties, such as parks and roadways. Oddly, however, the developer's plans changed, and the developer never conveyed any property to the Association. Instead, there is no dispute that the developer went bankrupt, and all infrastructure in the community was conveyed to and is owned by a different entity, Community Services Associates ("CSA").[1] Thus, the Association has never owned real property and, since its formation in 1969, the Association has existed just to exist. It pays no real estate taxes. It maintains no property. It operates no amenities. Its only expenses

[1] CSA was formed for the purpose of owning and maintaining the common properties within the massive Sea Pines development, of which South Beach is just one of many neighborhoods. (R. p. ___: CSA Declar. of Covenants). All members of Appellant Sea Pines South Beach Owners' Association also are members of CSA and are obligated to pay maintenance assessments to CSA to support common properties. CSA takes care of all traditional property owners association matters in all areas of Sea Pines—including contributing money to dredge Braddock Cove. (R. p. ___: CSA Declar. of Covenants, p. 1; R. p. ___: SPSBOA Meeting Minutes 7/8/2017, p. 1 ("CSA and the town have agreed to assist in the funding . . ."); R. p. ___: Newsletter Fall 2023 at p. 3).

are its own administration. Despite never having owned or managed any property, the Association levied annual assessments on its members until it was enjoined from doing so by the trial court. (R. p. __, Trial Order). And, although the Association's governing declaration requires that assessments be used "exclusively for the improvement, maintenance, and operation" of common property, the Association used annual assessments exclusively to pay its own administrative expenses. (R. p. __, Assoc. Financial Statements).

The core question before the trial court was whether, under South Carolina law and the specific governing documents at issue, this property owners' association may lawfully assess its members to maintain property that is not owned by the Association or its members. Specifically at issue is the Association's levy of assessments (and its power of lien and foreclosure for failure to pay) for the dredging of Braddock Cove: a navigable, tidal, and public waterway owned not by the Association but by the State of South Carolina.

Respondents are members of the Association and assert that the Association's governing documents allow assessments only for the maintenance of common properties owned by the Association and dedicated to the exclusive use of its members. In contrast, the Association asserts that it may assess its members to maintain any property, including navigable waterways owned by the State of South Carolina.

Four documents form the basis for this case:

1. *The Declaration of Covenants and Restrictions for Sea Pines South Beach, Hilton Head Island, South Carolina, and Provisions for the Sea Pines South Beach Owners'*

Association, Inc. (R. p. ___: Exhibit 1) (the "Declaration").

2. Quit-Claim Deed, recorded with the Beaufort County Register of Deeds in Book 435 at Page 529. (R. p. ___: Exhibit 2).
3. 1985 Modification of Covenants. (R. p. ___: Exhibit 3) (the "1985 Modification").
4. Certificate of Incorporation for South Beach Homeowners' Association, Inc. (R. p. ___: Exhibit 4).

The question in this case is a legal question, and its answer hinges on the effect of a purported amendment in 1985 to the Association's governing Declaration and the interpretation of these provisions of its Declaration:

> Section 2. Purpose of Assessments. The assessments levied by the Association shall be used exclusively for the improvement, maintenance, and operation of the Common Properties, including, but not limited to, the payment of taxes and insurance thereon and repair, replacement, and additions thereto, and for the cost of labor, equipment, materials, management and supervision thereof.
>
> . . .
>
> (c) "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties". The term "Common Properties" shall include any personal property acquired by the Association if said property is designated as "Common Property". All Common Properties are to be devoted to and intended for the common use and enjoyment of the owners of the Properties, subject to the fee schedules and operating rules adopted by the Association.

(R. p. ___: Dec. Art. 1, Art. V) (highlighting added). Respondents' position is that if the Braddock Cove waterways are not common properties, and the Association owns no real property whatsoever, then the Association has no authority to levy assessments. The trial

court, after hearing arguments and considering the evidence, agreed. (R. pp. ___, Final orders).

In the Complaint, Respondents asserted two causes of action:

1. Breach of covenants in the nature of contract—Declaratory Judgment;
2. *Ultra vires* action—Injunction and Declaratory Relief.

(R. p. ___: Compl. ¶¶ 46–55). Because this is largely a matter of legal interpretation, the parties stipulated to certain facts and exhibits, which were filed with trial court. (R. p. ___: Stip. of Facts).

Importantly, the Association acknowledges that it has no obligation to dredge Braddock Cove. Dredging is conducted (regardless of the Association's participation) by a separate entity (SIDA), which conducts fundraising in advance of dredging events. The Association's decision to contribute funds to the dredging organization depends on the board's pleasure in a given year. For example, the Association's board chose not to participate in the 2023 dredge—and it did not put the question to a vote of members. Even without the Association's participation, the 2023 dredge of portions of Braddock Cove proceeded, as it has at other times when the Association's board refused to participate. (R. p. ___: Jt. Stip. ¶ 23; R. p. ___: Ex. 33).

The issues determined at trial were (1) whether Braddock Cove's boat channels, waterways and salt marsh open space areas are the Association's "common properties" that the Association's members may be assessed to support, (2) whether the Association may assess its members to pay dredging expenses for property it does not own, and (3)

whether the Association may use its assessment power at all when it has no "common properties" to manage.

The Association's dramatic, low-tide photos notwithstanding, it is the actual facts that matter here. Those facts are discussed next.

FACTS

Appellant Association was formed in 1969 for the single corporate purpose of "improving, maintaining and operating the common properties of the association" for the benefit of its members, property owners in the South Beach development. (R. p. ___: p. 1, Art. Fourth, Certificate of Incorporation).

The authority and obligations of the Association and the rights and obligations of owners with respect to property in the South Beach development are stated in the Sea Pines Land Use Covenants filed in 1970 by the developer of South Beach, Lighthouse Beach Company (the "Declaration"). (R. p.___: Stip. ¶¶ 2-4). Respondents are South Beach property owners and as such are automatically members of the Association. (R. p. ___: Stip. ¶¶ 2-4; R. p. ___: Stip. ¶ 14; R. p. ___: Exhibit 1, Art. III, Sec. 1).

The Declaration assigns to the Association the duty to manage "Common Properties" and the authority to levy assessments on Owners and their property to pay the costs of this management. (R. p. ___: Exhibit 1, Third recital; *id.* Art. V, Sec. 2). In return, the Declaration grants Owners an easement of enjoyment in the Common Properties that is appurtenant to their land[2] and the Association's commitment to use

[2] R. p. ___: Exhibit 1, Art. IV, Sec. 1.

assessments "exclusively for the improvement, maintenance, and operation of the Common Properties" for their benefit. (R. p. ___: Exhibit 1, Art. V, Sec. 2; Art. I, Sec. 1(c)).

The Declaration defines "Common Properties" specifically:

> "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties" . . . All Common Properties are to be devoted to and intended for the common use and enjoyment of the owners of the Properties, (subject to the fee schedules and operating rules adopted by the Association).

(R. p. ___: Exhibit 1, Art. I, Sec. 1(c) (emphasis added)). Under this provision, there are at least three elements to qualify as "Common Property" for this Association: (1) *deeded* to the Association; (2) *designated* in the deed as Common Properties; and (3) *devoted* to and *intended* for the common use and enjoyment of the owners of the Properties for which the Association may enforce *fees and rules*.

The Declaration contemplated that the developer would someday deed certain properties to the Association as "Common Properties." But as it turned out, no properties were deeded to the Association by the developer and no properties have ever been deeded to the Association by anyone. (R. p. ___, Stip. ¶ 18: "The Association has never paid property taxes, does not own and has never owned any real property.").

In 1985, the Association obtained a quitclaim deed from Sea Pines Plantation Company (the successor of Lighthouse Beach Company, the developer of South Beach) conveying any interest that Lighthouse Beach Company had in the "waterways, channel markers, salt marsh open space areas, and all of Grantor's right, title and interest, if any, in the navigable waterways of Braddock Cove" to the Association (the "1985 Quitclaim Deed"). (R. p. ___: Exhibit 2). Because the items described in the quitclaim deed are

public waters, submerged land, and tidal land, they belong to the State of South Carolina. Thus, the 1985 Quitclaim deed conveyed no property at all—a legal reality which the Association does not dispute. (R. p. ___, Stip. ¶¶ 18, 26-27).

The Declaration further provides that the owner of any property other than the developer who desires to add it to the plan of the covenants and to subject it to the jurisdiction of the Association, may file of record a Supplementary Declaration of Covenants and Restrictions which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property. (R. p. ___: Exhibit 1).

But no such property owner has filed a Supplementary Declaration adding its property to the jurisdiction of the Association. Certainly, the State of South Carolina has not—not for Braddock Cove or any other public property. However, at the time the Association obtained the 1985 Quitclaim Deed, it filed a modification to the Declaration (the "1985 Modification") purporting to broaden the definition of "Common Properties" in the Declaration "to include all boat channels, waterways, channel markers and salt marsh open space areas of Braddock Cove, Sea Pines Plantation, Hilton Head Island, South Carolina." (R. p. ___: Exhibit 3 at p. 1). The Association nonetheless admits that it owns no channel markers and that the Braddock Cove boat channels, waterways, and salt marsh open space areas are owned by the State of South Carolina. (R. p. ___: Stip. ¶¶ 26, 27).

After it obtained the 1985 Quitclaim Deed and recorded the 1985 Modification, the Association joined the South Island Dredging Association ("SIDA"), a voluntary association of Sea Pines property owners that organizes and contracts for dredging in the

southern part of Sea Pines Plantation. (R. p. ___: Stip. ¶¶ 19, 21; R. p. ___: Exhibit 6 (SIDA Agreement)). At times, the Association levied special assessments on its members to pay dredging costs to remove sediment from Braddock Cove in 1999, 2013, and 2018, and committed to pay a share of those dredging costs. Certain areas of Braddock Cove, which were dredged in the past, are shown on the 2013 dredging permit materials issued by the Army Corps of Engineers. (R. p. ___: Exhibit 7).

Still, the Association admits that it has no obligation to participate in dredging of Braddock Cove, and it has refused to do so at times. For example, portions of Braddock Cove were dredged in 2023, but the Association refused to participate in that dredging. (R. p. ___: Jt. Stip. ¶ 23; R. p. ___: Exhibit 33).

In this lawsuit, Respondents contended (*inter alia*) that the Association has no authority to impose special dredging assessments on them, because the Braddock Cove waterways were not deeded to the Association and therefore are not "Common Properties" as the term is used in the Association's certificate of incorporation and as it is defined in the Declaration. Further, the Braddock Cove waterways (including its boat channels, waterways, and salt marsh open space areas) were not added to the jurisdiction of the Association by a Supplementary Declaration by their owner, the State of South Carolina, as required by the Declaration. Respondents contend that for these reasons the Braddock Cove waterways are not "Common Properties" that they may be assessed to support.

In addition, Respondents contended that the Association had no authority to amend the definition of "Common Properties" in the Declaration, that the Declaration

does not authorize special assessments for dredging, that the 1985 Modification did not become effective because the conditions precedent for the effectiveness of amendments were not satisfied, and that the 1985 Modification is unenforceable under South Carolina law because it is unreasonable, indefinite, and against public policy.

The Association admits that does not and has never owned real property. (R. p. ___: Stip. ¶ 18). So if, as Respondents contend, the Braddock Cove boat channels, waterways and abutting salt marsh open space areas are not "Common Properties," the Association has no "Common Properties" to manage. Without properties to manage, the Association has no authority to levy annual or other assessments. Respondents do not seek any remedy with respect to their past transactions with the Association, but only to prevent unauthorized assessments in the future.

After extensive briefing and a bench trial, the trial court agreed with Respondents and issued a thoughtful 30-page opinion setting forth its findings and holdings, including a holding dismissing the Association's counterclaims against Respondents for unpaid assessments. (R. p. ___). The Association then filed a motion to alter or amend the judgment on which the trial court held another hearing. After due consideration, the trial court issued a 38-page opinion modifying its judgment and again holding in favor of Respondents and against the Association. (R. p. ___). This appeal ensued.

STANDARD OF REVIEW

The main purpose of this lawsuit is the construction of contracts, including the Declaration of Covenants and the 1985 Modification. An action to construe a contract is an action at law. *Duncan v. Little*, 384 S.C. 420, 424, 682 S.E.2d. 788, 790 (2009). On appeal from an action at law tried by a judge without a jury, as this one was, "the findings of fact of the trial judge will not be disturbed . . . unless found to be without evidence which reasonably supports the judge's findings." *Alexander's Land Co. v. M & M & K Corp.*, 390 S.C. 582, 703 S.E.2d 207, 212 (2011).

The trial court's order is based on its evaluation of the specific facts after a trial of this case: "The Court's Order is based on the specific facts and evidence presented at trial, the Court's assessment of the evidence and arguments, and the applicable law." (R. p. ___: Am. Order p. 2). This included the trial court's evaluation of the Association's affirmative defenses: "The Court has carefully considered each such defense, and finds them unavailing in the specific factual circumstances presented at trial." (R. p. ___: Am. Order p. 32). In its conclusion, the trial court reemphasized that its opinion is based on its evaluation of the facts as presented at trial: "After careful consideration, based on the specific factual context presented at trial, the Court denies Defendant's motion and finds [summarizing holding]." (R. p. ___: Am. Order p. 38). As such, those findings are reviewed under the "any evidence" standard:

> An action for breach of contract is an action at law. In an action at law, on appeal of a case tried without a jury, the appellate court's standard of review extends only to the correction of errors of law. The trial judge's findings of fact will not be disturbed upon appeal unless found to be without evidence which reasonably supports the judge's findings.

Electro Lab of Aiken v. Sharp Const., 357 S.C. 363, 593 S.E.2d 170 (Ct. App. 2004) (cleaned up).

ARGUMENT

In this case, a property owners association ("POA") argues that it can legally assess its homeowner members to maintain navigable waterways owned by the State of South Carolina.[3] This is an untenable claim under any theory. The only corporate purpose of this owners' association is to own and maintain the "common properties" of the association. Common properties are things that a POA owns on behalf of the property owners it represents. The very term "common properties," like the terms "common elements" and "tenants in common," embodies the property law principle of shared ownership—something that no POA or its members can ***ever*** have in publicly owned navigable waterways.

I. The trial court correctly ruled that the Association lacks authority to levy assessments against the real property belonging to its members for the dredging of Braddock Cove, a public waterway.

As a matter of law, neither the Association's original Declaration of Covenants ("Declaration") nor the purported 1985 Modification permit the Association to assess Respondents for the dredging of Braddock Cove, and principles of equity may not be invoked to assist the Association in a breach of its unambiguous contract with its

[3] The Association wrongly suggests that its only feasible method of getting money to contribute to the dredging of public waterways is to employ its assessment power to force its dissenting members to pay. But certainly Appellant Association could lawfully solicit *voluntary* contributions from its members. This case is not so much about dredging as it is about whether a POA can use its assessment power to compel *all* of its members to cough up several thousand dollars every few years, under the threat of a lien on their homes, to maintain public property.

members.

The trial court correctly found that the plain language of the Declaration of Covenants limits the Association's assessment power, inextricably binding it to its purpose of maintaining property that the Association *owns* in which its members have a dedicated easement of use and enjoyment that is permanently attached to their land. There is no question that the Respondent Members have standing to challenge these assessments, which burden their property and purport to bind their successors in perpetuity.

A. As a matter of law, the Association may not levy assessments against the real property of Respondents to pay for dredging the State's navigable waterways.

The dramatic, low-tide photographs in Association's brief may show muddy water, but the law and the documents governing this case are clear: the Association can levy assessments against the real property of its members *only if* those assessments are used to support property owned by the Association in which its members have a real property interest.

The Association's first argument asks this Court to construe a contract (*i.e.*, the Declaration, as purportedly amended by the 1985 Modification) which the trial court correctly found to fail as a matter of law. (R. pp. ___: Order and Judgment from Trial at pp. 17–27; Order Denying Rule 59 Motion at pp. 20–29). The trial court was right that the 1985 Modification's effort to draw public property into the purview of the Association was invalid, unenforceable, and contrary to law and public policy. Rather than wading

into contract construction for an unlawful contract, this Court's analysis should begin and end with affirmance of the trial court's decision invalidating the 1985 Modification.[4]

However, ignoring that the 1985 Modification is unlawful, the Association begins its brief by assuming that the modification is effective and by giving lip service to the well-established principle that the words used in a restrictive covenant must be given their ordinary meaning; it then states its conclusion that "[t]he plain language of the Covenants and the 1985 Modification authorize the levy of special assessments by the Association for the dredging of Braddock Cove." (App. Br. p. 18). This argument involves separate issues: First, whether dredging is an activity that may be supported by special assessments, and second, whether the Braddock Cove waterways are "Common Properties" that may be supported by assessments at all. Article V of the Declaration states that special assessments may be levied for "construction." The Association argues that "construction **is** dredging," (App. Br. p. 20) and that the 1985 Modification amended the Declaration to delete the requirement that "Common Properties" must be properties deeded to the Association. The trial court correctly ruled against the Association on both points.

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[4] Please see Respondents' argument on the invalidity of the 1985 Modification *infra* at Section I.D.

(1) Assuming, *arguendo*, that the 1985 Modification is lawful, "dredging" is not "construction" and is not an authorized purpose for which assessments may be levied.

The Declaration is clear that special assessments may be levied "for the purpose of defraying, in whole or in part, the cost of any *construction* or *reconstruction*, *unexpected repair* or *replacement* of a described capital improvement upon the *Common Properties* . . . or *addition* to the *Common Properties.*" (R. p. __: Declaration Art. V, Sec. 4) (emphasis added). The 1985 Modification did not alter this assessment provision of the Declaration in any way. The Declaration's itemized list of purposes for which special assessments may be imposed must be strictly construed, and it prohibits the Association from specially assessing for any other purpose. *Evins v. Richland County Historic Preservation Com'n,* 341 S.C. 15, 532 S.E.2d 876 (2000), *quoting Little v. Town of Conway*, 171 S.C. 27, 171 S.E. 447, 448 (1933) ("[T]he maxim 'Expressio unius alterius' applies here: 'When certain things are specified in law, contract, or will, an intention to exclude all others from its operation may be inferred.'").

The Declaration allows assessments for construction or unexpected repair or replacement of capital improvements on the Common Properties[5], only. "When the language of a contract is clear, explicit, and unambiguous, the language of the contract alone determines the contract's force and effect and the court must construe it according to its plain, ordinary, and popular meaning." *Cmty. Servs. Assocs., Inc. v. Wall*, 421 S.C.

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[5] This argument assumes that the Braddock Cove waterways are "Common Properties," as that term is defined by the Declaration—which they are not, as discussed next.

575, 808 S.E.2d 831 (S.C. App. 2017). "Dredging" is "the removal of sediments and debris from the bottom of lakes, rivers, harbors, and other water bodies."[6] The Association argues that dredging is construction. But "construction" means "the process, art, or manner of building something."[7] Building something is not the removal of something. "Replacement" in the context of the Declaration means "to put something new in the place of."[8] Dredging removes something. It does not replace anything. Moreover, maintenance dredging does not fit with the plain meaning of "unexpected repairs," because the Association purports to plan for them routinely, in advance.[9]

To support its argument that "construction is dredging" the Association improperly cites the South Carolina Contractor's Licensing Act of 1999 (the "Licensing Act") and the North American Industry Classification System codes (the "NAICS codes").[10] The Association states, "[t]he DHEC permit for the subject dredging indicated

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6 NOAA, *What is Dredging?,* National Ocean Service Website https://oceanservice.noaa.gov/facts/dredging.html,03/07/2021.

7 "Construction," *Merriam-Webster.com Dictionary,*02/21/2022. To support this argument the Association refers to state and federal regulations and dredging permits issued by the Army Corps of Engineers (the "Corps of Engineers") and the South Carolina Department of Health and Environmental Control ("DHEC") that use the word "construction" and its derivatives. But the references cited by the Association do not actually refer to "dredging." When referring to the activity of dredging the South Carolina permit uses the terms "permitted activity," "work," "dredging event", "dredging operations", "dredge and disposal activities" and "dredging activities"—not "construction." (R. p. __, Dredging Permit).

8 "Replacement," *Merriam-Webster.com Dictionary,* 02/21/2022.

9 *See* R. p. __, Fall 2021 Newsletter ("To maintain adequate depths for boat navigability in Braddock Creek and its marinas they must be dredged periodically to remove pluff mud . . .").

10 The NAICS classification system lumps all contractors supporting major civil engineering projects together, and it does not override the plain meaning of the words used in the Declaration's itemized list of purposes for which members may be specially assessed, which does not include "dredging."

dredging falls within marine class construction." This statement is wrong. The Licensing Act defines "marine class construction" to include "all water activities to construct sea walls, bulk heads, docks, piers, wharves, and other structures, including but not limited to, pile drivings, boat slips, and board walks. Licensees under this classification may perform ancillary work including full grading, and foundations including pilings."[11] None of the activities requiring a marine construction license is dredging. The Licensing Act does not mention "dredging" at all.

In sum, the trial court correctly held that "dredging" is not "construction," and the Association's argument fails under a plain reading of the Declaration. (R. pp. __, Trial Order; Order on Rule 59 Motion pp. 12-15). This Court should affirm.

(2) The State's navigable waterways are not "Common Properties" for which members may be assessed.

Respondents bought their homes in Sea Pines South Beach subject to the Declaration's plan of development, which dictates their rights and obligations, and which delineates specific instances in which they may be compelled to pay assessments. The Declaration states that assessments levied by the Association "shall be used exclusively for the improvement, maintenance, and operation of Common Properties . . . ." (R. p. __: Exhibit 1, Art. V, Sec. 2). "Common Properties" is a defined term within the Declaration meaning:

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[11] S.C. Code § 40-11-410(4)(d).

(c) "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties". The term "Common Properties" shall include any personal property acquired by the Association if said property is designated as "Common Property". All Common Properties are to be devoted to and intended for the common use and enjoyment of the owners of the Properties, subject to the fee schedules and operating rules adopted by the Association.

(R. p. __: Exhibit 1, Art. I, Sec. 1(c)).

The Association argues that the 1985 Modification altered the Declaration to eliminate the "deeded to" requirement—daring the Respondents to show otherwise: "There is no rule or requirement, and Plaintiff Members cannot cite one, which mandates that the definition of 'Common Property' be limited to deeded property." (App. Br. p. 21). Respondents will accept this dare: (1) first, the words "deeded to" were never removed from the Declaration's definition and absolutely remain a rule and a requirement for "Common Properties" under Declaration; (2) second, beyond the definition section, the requirement of ownership by the Association of the Common Properties is repeated throughout, and required by, the entire Declaration; (3) and third, as discussed below, the Association's authority to levy assessments to dredge publicly owned navigable waterways would not touch and concern the property bound by the Declaration and would violate the law and public policy.

(3) The 1985 Modification did not eliminate the requirement that "Common Properties" must be properties deeded to the Association nor the rule that "Common Properties" must be "devoted to and intended for the common use and enjoyment of" the homeowners.

First, the 1985 Modification states that it amends the Declaration's definition of "Common Properties" to include "boat channels, waterways, channel markers, and salt marsh open space areas of Braddock Cove." (R. p. ___, 1985 Mod.). It does not purport to delete any words from the definition. The amended definition of "Common Properties" after giving effect to the words used in the 1985 Modification, would read:

> (c) "Common Properties" shall mean and refer to those areas of land with any improvements thereon which are deeded to the Association and designated in said deed as "Common Properties," to include boat channels, waterways, channel markers, and salt marsh open spaces of Braddock Cove.

Further, the Declaration as it would be amended by the 1985 Modification goes on to specify:

> All Common Properties are to be ***devoted to and intended for the common use and enjoyment of the owners*** of the Properties (subject to the fee schedules and operating rules adopted by the Association).

(R. p. __: Exhibit 1, Art. I, Sec. 1(c)) (emphasis added). The Braddock Cove waterways and the salt marsh open space areas adjacent to Braddock Cove have not been "deeded to the Association" by their owner (the State of South Carolina), nor have they been "devoted to and intended for the common use and enjoyment" of members of the Association.[12] And nor are the public waterways "subject to" fee schedules or rules of

[12] Although the 1985 Quitclaim Deed purported to convey these properties to the Association, it conveyed *nothing* because it was executed by the developer's successor, not by the owner of the properties. Nonetheless, the fact that the Association solicited the Quitclaim Deed in conjunction with

the Association. In other words, the Braddock Cove waterways can *never* meet the requirements for Common Properties as set forth in the definition section of the Declaration, even if the amendment purportedly made by the 1985 Modification were valid.

The Braddock Cove waterways are public waters owned by the State of South Carolina, and they are dedicated by the State to the use and enjoyment of the public, free of charge. The Braddock Cove waterways are not "Common Properties" of the Association, as that term is defined—in detail—by the Declaration. As a matter of law, the Association's ownership of Common Properties for the benefit of its members is required, if the corresponding obligation of its members to pay assessments for their maintenance is to touch and concern their land. *Epting v. Lexington Water Owner Co.*, 177 S.C. 308, 181 S.E. 66 (1935) ("The covenant must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed.").

(4) That "Common Properties" must be properties deeded to the Association is confirmed by the other terms in the Declaration that refer to "Common Properties".

The Declaration indicates its intent that its assessment covenants are to run with the land. (R. p. __, Decl. Art. V). As established in *Epting*, and as discussed in detail below, in order to be a "real covenant" which runs with the land, the covenant must touch and concern the land. *Epting*, 177 S.C. 308. The Declaration follows this established rule of law by establishing a real property relationship between residential owners' property

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the 1985 Modification indicates that the Association itself believed at the time that the "deeded to" requirement remained a fundamental component of the definition of "Common Properties."

and (anticipated)[13] Association Common Properties. For example, members of the Association are granted appurtenant real property interests in the "Common Properties": the Declaration's Article IV is entitled "PROPERTY RIGHTS IN THE COMMON PROPERTIES," and the Declaration goes on to itemize a myriad of real property rights and interests—none of which could possibly pertain to the State's navigable waterways and marshlands. (R. p. __, Exhibit 1).[14] For example, there is no question that Respondents do not have an appurtenant easement in the State's boat channels; similarly, the Association does not have the right to penalize members by suspending their right to use the public waterway. (R. p. __, Exhibit 1).

The developer's original intent and plan as set forth in the Declaration was to create real covenants which were to run with the land. Thus, the Declaration contemplates that the developer was to convey amenities to the Association to hold as common property on behalf of all owners. But the developer[15] went through bankruptcy, and during that time of financial hardship the planned community property was conveyed to an entirely different entity called Community Services Associates, Inc.

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[13] Again, although the Declaration sets up the framework for it, the developer here never actually conveyed any common properties to the Association, at all.

[14] Article IV of the Declaration grants members an appurtenant easement in the Common Properties, which runs with their title; it requires the Developer to convey legal title to the Common Properties to the Association (as does Article II); it permits the Association to mortgage the Common Properties; it permits the Association to grant utility easements over the Common Properties; and it subjects the Member's easements to the Association's rights as the owner of the Common Properties. (R. pp. ___, Tr. Ex. 1).

[15] The original developer of Sea Pines was Lighthouse Beach Company; it subsequently assigned its interest to the Sea Pines Plantation Company. Both entities were owned and controlled by Charles Fraser, the master developer of the entire Sea Pines Plantation community.

(CSA).[16] To this day, CSA owns the community infrastructure and common properties within the Sea Pines Plantation and Sea Pines South Beach development, and it assesses its members to maintain them. Respondents (and all members of the Association) are also members of CSA, and they all pay assessments to CSA to maintain the common properties in the community. Meanwhile, **the Association owns no real property—and has *never* owned any real property whatsoever—a fact which it admits,** and therefore there is no common property interest for its members' assessment obligation to touch or concern.[17]

Moreover, as discussed next, the "rule or requirement which mandates that the definition of 'Common Property' be limited to deeded property"[18] is further found in the Declaration's Article II, including Section 2(b).

> **(5) Property may be added to the plan of the Declaration only by the owner of the added property. The Association has no authority to add property it does not own to its jurisdiction.[19]**

Article II of the Declaration sets forth the property that is to be subject to the Declaration and under the jurisdiction of the Association. At the outset, it states that,

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16 *See, e.g.,* R. p. ____: Exhibit 36, Declaration of Covenants for the Transfer of Properties, Reserved Rights, and Obligations to Community Services Associates, Inc., pp. 1-5 ("Whereas . . . Lighthouse Beach Company . . . recorded certain declarations, restrictions and covenants. . . .Whereas in accordance with that certain Second Amended Joint Plan of Reorganization . . . [developer] has agreed to convey certain categories of property within the Sea Pines Plantation referred to therein as "Community Properties" . . . Whereas, the [Developer] is the record title owner of roadways, bike paths, streets, open spaces, lagoons, ditches, and other properties, all as more particularly described in Exhibit C ("Community Properties") . . . Whereas [Developer] . . . assigns . . . ownership of all real property listed in Exhibit C to [Community Services Associates, Inc.]." and Exhibit C: Identifying the plat for South Beach.

17 R. p. __: Stip. ¶ 18.

18 App. Br. p. 21.

19 This Argument also addresses the Appellant's Brief, Sec. I.A.2, pp. 22–23.

insofar as the developer owns the common properties, "the [Developer] will convey the common Properties shown on the Master Plan to the Association as provided in Article IV, Sec. 2." (R. p. __).

The Association could not unilaterally (without the State's consent) subject Braddock Cove waterways to its jurisdiction as "Common Properties," and the trial court correctly held that the 1985 Modification's attempt to do so was invalid. The Declaration is clear that only an ***owner*** can add property to the plan of the Declaration. This requirement is set forth in Article II, Section 2(b) of the Declaration:

> the *owner* of any property other than the [developer] who desires to add it to the plan of these covenants and to subject it to the jurisdiction of the Association, may file of record a Supplementary Declaration of Covenants and Restrictions with respect to the additional property which shall extend the operation and effect of the covenants and restrictions of the Declaration to such additional property.

(R. p. __) (emphasis added). In other words, if an owner of property wants it to become a part of the South Beach development, subject to "the jurisdiction of the Association," then the owner needs to manifest that intent in a recorded instrument, such as a deed or declaration. The State of South Carolina, the owner of Braddock Cove, did not record the 1985 Modification, which purports to add the State of South Carolina's boat channels, waterways, and the salt marsh open space areas to the jurisdiction of the Association. The Association argues that this provision only applies to member-owned property. (App. Br. at p. 22–23). This is wrong under the plain language of the Declaration and the law. The Declaration is a reciprocal, mutual, contractual agreement between the Association, and the property owners within the development—with privity between

them based on property ownership. Pursuant to the Declaration, the Association cannot levy assessments in a vacuum—it must do so for specific purposes, pertaining to common property in which both the Association and the members have a real property interest. Among other things, this requirement satisfies the rule of South Carolina law that to run with the land a covenant must be a real covenant enforceable by the owner of the dominant estate.[20] In exchange for the burden of assessments on members' property for the benefit of common property, the Association must own the common property in order to provide the appurtenant easements of use and enjoyment the Declaration grants to Association members.

Article II, Section 2(b) and other terms in the Declaration are safeguards that prohibit amendments to the Declaration that would authorize assessments to support property in which the Association and its members have no property interest. Indeed,

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[20] *Epting v. Lexington Water Power Co*, 177 S.C. 308, 181 S.E. 66 (1935), *quoting Spencer's Case* (cleaned up) ("The two principles thus settled have always been acknowledged as law; that the assignee, when not named, is not bound by a covenant, except it relates to a thing in esse at the time; and that when named, he is not bound by a covenant collateral to the land, but only for things to be done on or concerning the land."). A covenant to pay assessments to support property in which the covenantor has no property interest is not a covenant about a thing to be done on or concerning the use of the covenantor's land. Two Court of Appeals opinions provide summaries of this very old and established common law, stemming from the rules in Spencer's Case from English common law in 1583. Because the summaries are given within dissenting opinions, Respondents are citing them as instructive only. *See, e.g., Cedar Cove Homeowners Ass'n v. DiPietro*, 368 S.C. 254 at 270-271, 628 S.E.2d 284 (Ct. App. 2006), *Anderson, J., dissenting* ("Restrictive covenants often authorize the creation of a homeowners' association, usually in the form of a not-for-profit corporation, and grant it authority to manage common areas, make regulations, levy assessments, and other similar privileges. Homeowners' associations are contractually limited by the restrictive covenants establishing them. While homeowners' associations typically have the power to regulate the use of common areas, their regulations cannot prohibit a usage contrary to any restrictions creating easements or rights of use of property in owners."); *Marathon Finance Co. v. HHC Liquidation Corp.*, 325 S.C. 589 483 S.E.2d 757, at 765-766, (Ct. App. 1996) ("the 'touch and concern requirement is applied separately to the burden and the benefit of a covenant.'"), *quoting* 5 R. Powell & P. Rohan, *Powell on Real Property* p. 673, at 60-49 (rev. ed. 1996).

the Declaration itself provides that rights granted to Association members in the "Common Properties" and the requirements for adding additional property to the plan of the Declaration cannot be eliminated by the vote of a super majority of its members.[21]

Moreover, Article II, Section 2(b) itself makes no distinction between member property and common property—it simply requires a supplemental declaration in order to "add [property] ***to the plan of these covenants***." (R. p. __). Significantly, Article V, Section 11 of the Declaration, which exempts "Common Properties" from the Article's assessment and lien obligations, undermines Appellant's argument by showing that common properties are indeed intended to be subject to the plan of the covenants.

Instead of complying with Article II, Section 2(b), the Association improperly purported to subject State-owned properties to its own jurisdiction simply by declaring the public waters to be "Common Properties" in an agreement that it made with itself. The Association's theory—that it could unilaterally subject a stranger's property to its jurisdiction and assess Association members to support that property simply by declaring it to be "common property"—does not hold water.[22] Under the Association's

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[21] The Declaration provides that only "covenants" may be amended and defines "the covenants" to mean the restrictions and burdens imposed on property by the Declaration. (Ex. 1, paragraph preceding Art. I), Terms, including the definition of "Common Properties" (Ex.1, Article I, Section 1(c)) and the requirements to bring additional properties under the plan of the Declaration, are not "covenants". They are in place to protect the dissenting owners from changes to the fundamental property law rights granted to owners by the Declaration. They may not be amended by super majority member votes.

The Association attempts to avoid this conclusion by purporting to change the Declaration's definition of "the covenants." In its brief the Association defines "Covenants" to mean the entire Declaration and concludes based on its own definition that the vote of a super majority of Owners can amend any term in the Declaration. But the only definition of "covenants" that counts is the definition in the Declaration. The Association cannot change the meaning of a term defined in the Declaration by defining it differently in a brief.

[22] Pun intended.

incorrect theory, a majority of Association members could force a dissenting minority to pay assessments to support any property that a three-quarters majority chose to support—Fort Sumter, the Brooklyn Bridge, the Atlantic Ocean—simply by declaring it to be one of the Association's "Common Properties."

Under the Declaration and the law, only the *owner* is authorized to add property to the jurisdiction of the Association. As the trial court correctly found, the Association's unilateral attempt to do so through the 1985 Modification did not comply with the requirements of Article II, Section 2(b) of the Declaration and was ineffective. The Braddock Cove boat channels, waterways and salt marsh open space areas are not "Common Properties," and the Association cannot assess its members to maintain them.

(6) The Nonprofit Corporation Act does not override the express terms of the governing documents or South Carolina law.

Perhaps recognizing that it has no contractual right to assess its members to dredge the State's waterways, the Association pivots to a truly frightening (and truly wrong) argument, which the trial court properly rejected: it claims that because it is a nonprofit company, it has "unbridled power" under the Nonprofit Corporation Act "to further the activities and affairs of the corporation." (App. Br. pp. 21–22). The Association claims that this "unbridled power" gives it the authority to levy dredging assessments no matter what its governing documents say and no matter what its certificate of incorporation and applicable South Carolina law require. But the corporate power "to do all things necessary or convenient to further the affairs of the corporation" does not authorize a corporation to breach the contracts it actually makes.

In making this argument, the Association omits key words from the section of the Nonprofit Corporation Act it cites. The omitted words show that the Act limits a Corporation's power to serving its authorized purpose and states explicitly that nonprofit corporations are as bound by the obligations of the contracts they make to the same extent any individual would be. In full, the provision states:

> **Unless its articles of incorporation provide otherwise**, every corporation has perpetual duration and succession in its corporate name and **has the same powers as an individual** to do all things necessary or convenient to carry out its affairs including . . . all things necessary or convenient, **not inconsistent with law**, to further the activities and affairs of the corporation.

S.C. Code § 33-31-302(18) (emphasis added). The Association's certificate of incorporation states that its only corporate purpose is to own and maintain "the common properties of the association." The Association's power is obviously not unfettered—it is subject to the limitations set forth in its certificate of incorporation, the Declaration, and to the requirements of South Carolina law that amendments to restrictive covenants must strictly comply the amendment requirements imposed by the Declaration. Corporate powers do not authorize a corporation to violate with impunity the contracts it makes and by which it is bound. The Association cannot contravene the express provisions of its governing Declaration, and the requirements of laws applicable to it, simply because it is a nonprofit company.

* * *

The arguments in Section I, B–E of Appellant's Brief focus on the Association's affirmative defenses, which the trial court properly rejected. Until the trial court's decision in this case, the Association's assessment authority had never been considered

by a court. The Association and all current Owners are subject to the terms of the same recorded documents and the meaning of those documents is the same for all of them. The lapse of time and the Association's past dealings with any Owner are irrelevant to the *current* meaning of these documents. No course of conduct by the Association or any Owner can change the legal meaning and effect of unambiguous recorded documents applicable to more than 400 properties.

Respondents are current members of the Association and seek prospective relief only. For the reasons set forth below, none of the Association's affirmative defenses bar Owners from exercising their right under Article VIII, Section 1 of the Declaration to obtain a definitive judicial determination of their rights and obligations under the Association's governing documents as those documents exist today. (R. p. ___: Declaration p. 14, § 1: Declaration may be enforced by the owner of any land subject to the Declaration). The Association's affirmative defenses are addressed below.

B. As owners of property in South Beach, Respondents have standing to obtain a judicial determination of their rights and obligations under the Association's governing documents.

The Association argues that Respondent lack standing to assert their challenges to its actions because the Respondents had notice of the 1985 Modification. Respondents are parties to the Declaration—the contract at issue here. Any party to a contract has standing to assert breaches of that contract against the other party and to obtain a declaration of its rights and obligations under that contract, pursuant to the Declaratory Judgment Act. S.C. Code § 15-30-20 ("Courts of record may declare rights, status and other legal relations"). The Declaration itself gives Respondents the right to enforce it:

> The covenants and restrictions of this Declaration . . . shall inure to the benefit of and be enforceable by the Association, the Developer, and the Owner of any land subject to this Declaration.

(R. p. ___: Exhibit 1, Art. VIII, § 1). Moreover, the challenges to the Modification, which the Association mischaracterizes as "procedural," are actually substantive. Respondents' challenges are to conditions precedent to the effectiveness of amendments. The amendment terms in community declarations must be strictly complied with. If conditions precedent to effectiveness were not satisfied, there is no contract.

Similarly, the fact that Respondents bought their property with actual or constructive notice of the existence of the Declaration does not strip them of their standing to challenge the meaning of its terms. The issue is not whether Members had notice of the Declaration. Instead, the issue properly before the trial court was what the Declaration authorizes.

The Association's argument makes the fallacious jump in logic that knowledge of the existence of documents means that the Association's subjective interpretation of the meaning and legal effect of those documents is correct. Of course, knowledge of the existence of recorded documents tells nothing about what they mean. Respondents have standing and the right to seek a determination of whether the Association has the authority to assess them to maintain the State's waterways.

In short, this case involves questions of Respondents' obligations under the Declaration, not whether they have notice of its existence. As discussed next, the Respondents are not barred by law or equity to challenge the Association's claimed present and future authority to levy assessments.

C. Respondents' lawsuit seeking a declaration of the proper interpretation of the Association's governing documents is not barred by the statute of limitations.

The Association argues[23] that Respondents' claims are barred by the statute of limitations. As an initial matter, Respondents' claims are not based on the dates the documents were recorded. The Association's governing declaration, as modified, is a living document. When this lawsuit was filed, Respondents sought a declaratory judgment and injunction as to the Association's *interpretation* of the documents and the Association's authority to take *future actions* under its current interpretation—that the Association continued to levy annual assessments and claimed it has the authority to levy dredging assessments in the future. Respondents seek prospective relief only, not to invalidate past actions.

The trial court correctly reasoned that,

> If the Association's theory of standing and statutes of limitation were correct, arguably no one who currently owns property in South Beach would be able to contest the authorization for any future assessment levied by the Association. Statutes of limitation begin to run when actions are taken under documents, not simply when the documents were signed. Plaintiffs have standing and their action for prospective declaratory and injunctive relief is not time barred.

(R. p. ___: Am. Order pp. 33–34 (internal citations omitted)).

The Court's reasoning is correct and makes sense—in contract cases and declaratory judgment cases the statute of limitations begins to run when *action* is taken

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[23] The Association cites Florida case law in support of this argument, which is neither binding nor analogous. Similarly, the Association's statements about other property owners' supposed beliefs, and reasons for the Association's past actions, are without citation, irrelevant, and unsupported in the Record.

under the contract, not when the original contract was made. *Cf. Poly-Med, Inc. v. Novus Scientific Pte. Ltd.*, 437 S.C. 343, 354, 878 S.E.2d 896, 902 (S.C. 2022) ("We acknowledge the obvious—an executory contract with continuing rights and obligations may result in separate breaches and give rise to separate causes of action for breach of contract subject to a new statute of limitations period."). As stated above, Respondents seek no remedy for past breaches. They seek only prospective declaratory and injunctive relief with respect to the Association's current right to collect assessments under the Association's governing documents as those documents exist today.

The Association's line of reasoning would foreclose innumerable rights of property owners across our State. Instead, South Carolina courts regularly rule on the meaning of community documents that were put in place decades ago. *See, e.g., Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 821 S.E.2d 667 (S.C. 2018) (ruling on the interpretation of documents going back to the 1990s). In sum, the statute of limitations is not implicated by Respondents' claims for prospective relief.

D. The Association had no authority to ratify its own unauthorized acts. The 1985 Modification was unauthorized by the Declaration and applicable law and did not become effective.

The Association next argues that Braddock Cove is "Common Property" of the Association because members subsequently voted to levy special dredging assessments based on the authority of the 1985 Modification. This argument misunderstands the doctrine of ratification. Ratification is an agency law doctrine. However, agency law has no application to this case. A vote of Owners approving the 1985 Modification and each

vote approving dredging assessments were acts of the Association itself as principal.[24] A principal cannot ratify its own unauthorized acts.

As the trial court explained, ratification is an agency law doctrine that allows a principal with authority to act to approve the act of an agent who did not have authority. *See Lincoln v. Aetna Cas. & Sur. Co.*, 386 S.E. 2d 801, 803 (1989) ("[r]atification . . . means the express or implied adoption and confirmation by one person of any act or contract performed or entered into in his behalf by another who at the time assumed to act as his agent.") (emphasis added). The trial court correctly held that:

> In these specific factual circumstances as presented at trial, there is no principal-agent relationship between the Association and its members. The member vote purportedly approving the 1985 Modification would have been the act of the Association itself, not the act of an agent who needed the blessing of the principal.

(R. p. ___: Am. Op. p. 36).

The 1985 Modification was ineffective because the amendment approved by the Owners' vote was not authorized by the Association's governing documents and applicable South Carolina law. No number of Owner votes—be it one vote or a hundred votes—can convert an unauthorized act of the Association into an authorized act of the Association. And no number of Owner votes can make public property (Braddock Cove) the "Common Property" of this private Association, "subject to the fee schedules and operating rules adopted by the Association." (R. p. ___: Exhibit 1, Art. I, Sec. 1(c)).

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[24] Declaration, Article VIII, Section 1 states, "The covenants may be amended at any time if three-fourths (3/4) of the vote at a duly called meeting of the Association approves the change." Amendments of the covenants are acts of the Association. (R. p. ___: Declaration p. 14, art. VIII, § 1).

Accepting the Association's argument would allow a majority of the Association's members to authorize transactions that the Declaration and South Carolina law say majorities cannot authorize. The Association's authority to ratify cannot exceed its authority to act in the first instance.

The Association also argues that Owners' actual or constructive notice of the terms of the 1985 Modification[25] support its ratification argument. (App. Br. p. 30). Ratification is a legal principle based on authority, not constructive knowledge. As the trial court found, ratification is not a defense applicable to the facts of this case.

E. The trial court correctly ruled on the Association's equitable arguments on laches, waiver, and equitable estoppel.

The Association next argues that this Court should reverse the trial court's ruling as to the equitable doctrines of laches, waiver, and equitable estoppel. In doing so, the Association demands not only that this Court correct a supposed error of law, but also that this Court substitute its impression of the facts for those made by the trial court at trial. In its order, the trial court specified that its ruling on those equitable doctrines was based on "the facts in this case as presented at trial." (R. p. ___: Am. Order p. 34).

The Declaration itself provides that delay does not estop or waive a party's right to enforce the Declaration. Article VII, Section 3, states,

> Failure by the Association or <u>any Owner</u> or the Company to enforce any covenant or restriction herein contained <u>for any period of time</u> <u>shall in no event be deemed a waiver or estoppel</u> of the right to enforce same thereafter.

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[25] The parties have stipulated that Trager bought in 1983, before the 1985 modification. (R. p. ___: Stip. ¶ 3).

(R. p. ___: Exhibit 1 at p. 14, art. VII, sec. 3) (emphasis added). The trial court noted that such non-waiver provisions are enforceable in South Carolina. (R. p. ___: Am. Order at p. 34, *citing Tilley v. Pacesetter Corp.*, 333 S.C. 33, 508 S.E.2d 16 (S.C. 1998)).

In addition, the Association's invocation of equitable doctrines to override the clear language of the governing documents is fundamentally incorrect. Waiver requires proof of the intentional relinquishment of a known right. *Provident Life and Acc. Ins. Co. v. Driver*, 451 S.E.2d 924, 317 S.C. 471 (S.C. App. 1994). Here, there is no evidence that Respondents intended to relinquish their right to question the Association's right to levy future assessments.

Further, laches, waiver and equitable estoppel are equitable defenses that are only available to a party that detrimentally changes its position based on unreasonable conduct of the other party and without knowledge of the underlying facts. Here, the Association claims that it detrimentally relied on Respondents' delay in bringing this action because their delay supposedly induced the Association to continue to collect assessments under the mistaken belief that they were authorized. However, at trial Respondents argued, and the trial court agreed, that the Association has no legally recognized reliance interest that would allow it to continue collecting unauthorized assessments. (R. p. ___: Am. Order, p. 35). Moreover, the Association's arguments do not apply to the claims for prospective relief. *See, e.g., Queen's Grant II Horizontal Property Regime v. Greenwood Development Corp.,* 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006) (finding developer had not shown that the defenses of laches and estoppel applied to claims against it for prospective relief).

Further, equitable defenses such as laches and equitable estoppel that require a showing of detrimental reliance are not available in cases involving the interpretation of an unambiguous contract. As the South Carolina Supreme Court stated in *Rodarte v. Univ. of S.C.*,

> Indeed, an unambiguous, written contract is inherently incompatible with the doctrine of equitable estoppel. To succeed on a claim for equitable estoppel, a party must prove "lack of knowledge, and the means of knowledge, of the truth as to the facts in question." . . . However, an unambiguous contract is by definition capable of only one reasonable interpretation.

799 S.E.2d 912, 419 S.C. 592 (S.C. 2017) (internal citations omitted). Detrimental reliance requires that the party asserting it had no knowledge of the true facts. The practical effect of accepting the Association's equitable defenses would be to amend the Declaration to adopt the Association's interpretation of the 1985 Modification instead of deciding Respondents' claims on the merits. A contract involving the owners of more than 400 properties cannot be amended by equitable estoppel.

The Association's governing documents are unambiguous and do not authorize the Association to collect assessments until it owns Common Properties. The Association is charged as a matter of law with knowledge of the meaning and the legal effect of its own governing documents, and the trial court correctly rejected the Association's attempt to avoid that responsibility by invoking equitable doctrines.

F. The trial court correctly ruled that the conditions precedent to the effectiveness of the 1985 Modification were not satisfied. The 1985 Modification did not become effective.

The Declaration has two specific, mandatory conditions precedent for amendments: (1) amendments do not become effective "unless made and recorded sixty

(60) days in advance of the effective date of such change" and (2) amendments do not become effective "unless written notice of the proposed agreement is sent to every Owner of a Lot or Dwelling Unit and the Company at least thirty (30) days in advance of any action taken." (R. p. ___). The Association argues that the trial court erred in ruling that the unambiguous conditions precedent to the effectiveness of amendments required by the Declaration were not satisfied.[26]

South Carolina law is clear: to amend restrictive covenants running with the land, a developer "must strictly comply with the amendment procedure as set forth in the declaration of covenants…." *Queens Grant II*, 368 S.C. at 342, 628 S.E. 2d at 902 (emphasis added). That mandatory "strict compliance" with "amendment procedure[s]" is where the Association failed here.

Conditions precedent imposed by contract are substantive requirements and the trial court correctly held that they must be satisfied before amendments become effective. (R. p. ___: Exhibit 1, art. VII, § 1 (mandatory amendment requirements). As this Court stated in *Coastal Seafood Co., Inc. v. Alcoa South Carolina, Inc.*, 381 S.E.2d 502, 298 S.C. 466, 468 (Ct. App. 1989), "Moreover, the contract expressly requires strict performance. Where a contract, by its express provisions, makes strict compliance essential, substantial performance is not sufficient. . . . The word 'all,' as used in the contract, obviously does

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[26] Again, the Association reaches to law outside of South Carolina—this time to Tennessee—to try to support its argument. Not only is Tennessee law not applicable here, but the Association misstates the holding of that case—it does not deal with conditions precedent stated in the document (as here) but instead discusses the "arbitrary and capricious" standard for such documents that apparently is the law in Tennessee (but not South Carolina). *See Pandharipande v. FSD Corp.*, 679 S.W.3d 610, 630 (Tenn. 2023) ("Amendments to restrictive covenants are subject to review under the arbitrary-and-capricious standard."). That invalid legal premise is the foundation of the Association's argument as to conditions precedent, and it fails.

not mean 'some of,' or even 'the great majority of.' '[T]he doctrine of substantial performance does not apply to express conditions.'" (internal citations omitted)). There was sufficient evidence in the record to support the trial court's decision:

(1) The sixty-day "made and recorded" condition was not satisfied.

The 1985 Modification did not comply with the condition precedent that amendments do not become effective "unless made and recorded sixty (60) days in advance of the effective date of such change." (R. p. ___: Exhibit 1, p. 14, art. VIII, § 1). The 1985 Modification was signed on October 18, 1985, and recorded on October 22, 1985. Its first sentence states that it was "made" October 18, 1985. Both the recitals and the text of the modification say that the Declaration is "herewith amended." (R. p. ___: Exhibit 3). The words "herewith amended" without qualification are words of immediate effect.

Compliance with this condition would have been as easy as it was necessary. In 1971, the Declaration was correctly amended by the developer. The 1971 amendment satisfied the condition with a single sentence: "Said amendments shall become effective sixty (60) days from the date this Declaration of Amendment is recorded in the Office of the Clerk of Court for Beaufort County, South Carolina." (R. p. ___: Exhibit 10). The 1971 Amendment became effective. The 1985 Modification did not.

(2) The thirty-day notice condition was not met.

The 1985 Modification also did not comply with the second condition precedent imposed by the Declaration that amendments do not become effective "unless written notice of the proposed agreement is sent to every Owner of a Lot or Dwelling Unit and the Company at least thirty (30) days in advance of any action taken." (R. p. ___: Exhibit

1, p. 14, art. VII, § 1). The text of the 1985 Modification itself shows that this mandatory condition precedent to effectiveness was not satisfied. The language purportedly added to the Declaration by the 1985 Modification to show and describe the Braddock Cove properties is incorporated by reference from the 1985 Quitclaim Deed. The 1985 Modification purports to amend the Declaration to state:

> Such addition to the Common Properties of the Association is further shown and described in a Quit-Claim Deed from Sea Pines Plantation Company to the Association conveying certain "Common Properties," said Deed dated the 15th day of July, 1985 . . . .

(R. p. ___: Exhibit 3, p. 1). The language purportedly incorporated in the Declaration was incorporated by reference from a quitclaim deed executed July 15, 1985. The quitclaim deed was executed 19 days before Association members voted on August 3, 1985, to incorporate its language in the 1985 Modification. (R. p. ___: Exhibit 2). It is not possible to give 30 days' advance notice of a meeting to approve an amendment that incorporates a document that did not exist until 19 days before the meeting was held. In sum, the trial court had ample evidence supporting its ruling the 1985 Modification did not become effective because the Association did not satisfy Declaration's mandatory conditions precedent.

G. The trial court correctly ruled that the 1985 Modification is invalid and unenforceable as unreasonable, indefinite, and in contravention of public policy, as a matter of law.

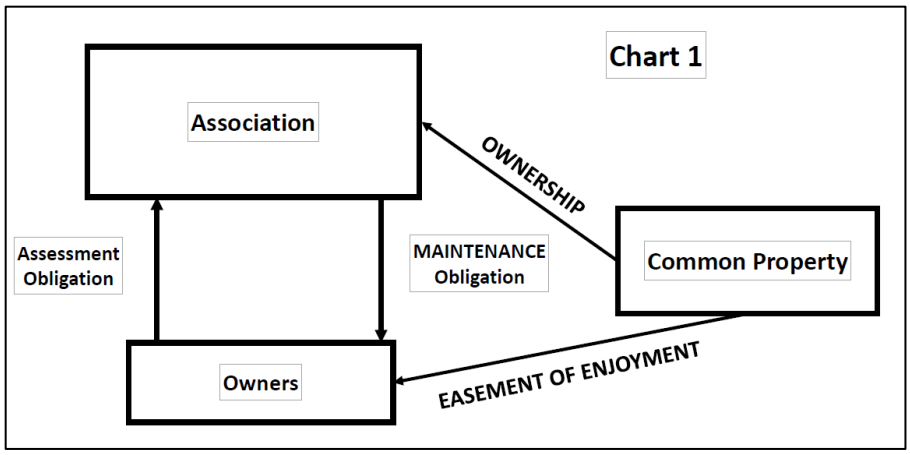
In this section of its Brief, Appellant challenges the trial court's ruling that a covenant requiring uncertain, infrequent, unpredictable future assessments, in undefined amounts, to support property in which the Association has no property interest and no ownership or control, is an indefinite covenant in violation of public policy. The trial

court correctly applied South Carolina law; amendments to restrictive covenants are unenforceable if they are "unreasonable, indefinite, or contravene public policy." *Queen's Grant II*, 628 S.E.2d at 907.

(1) An amendment to the Declaration that would eliminate the requirement that Owners have a property interest in Common Properties violates the structural plan of the Declaration and is ineffective because it is unreasonable.

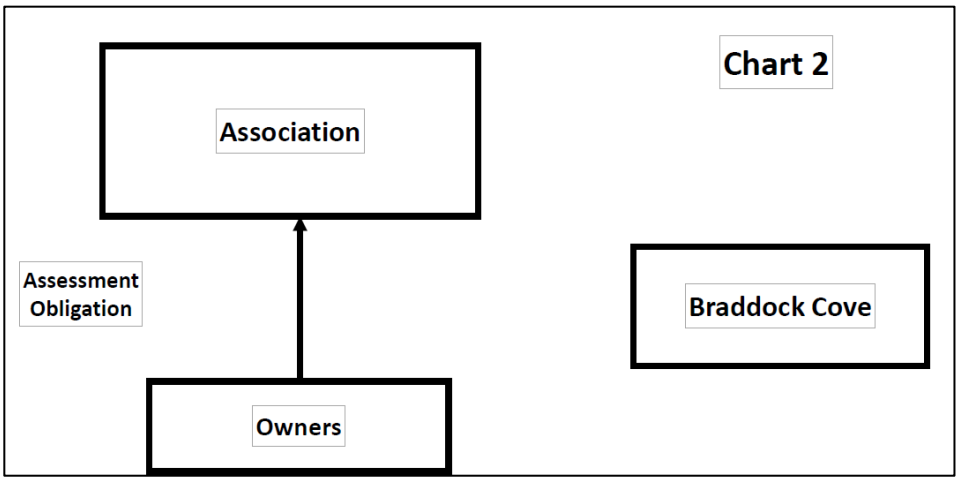
The 1985 Modification is unreasonable because it is inconsistent with the plan of administration established by the Declaration, reaching far beyond the reasonable expectations of homeowners by subjecting private property owners in South Beach to assessments to maintain public navigable waters in which they have no property interest. The Declaration established a plan based on reciprocal contractual and property law rights and obligations between the Association and Owners with respect to the Common Properties. The Declaration provided that the Association would own and operate the Common Properties "for the common use and enjoyment of the owners of the Properties" and authorized the Association to assess Owners to pay the expenses of operating these properties. (R. pp. __, Ex. 1). In return, Owners were granted easements of enjoyment in the Common Properties that were appurtenant to their land and the Association's commitment to operate the Common Properties for their benefit. (R. pp. ___).

The reciprocal contract and property law rights and obligations of the Association and Owners established by the Declaration are shown on Chart 1 below:



But the reciprocal property and contract law relationships between the Association and Owners established by the Declaration with respect to Common Properties (as depicted in Chart 1) disappear under the Association's interpretation of the 1985 Modification, which would authorize the Association to levy assessments to pay for dredging on property it does not own, property it has no obligation to dredge except the obligation it voluntarily assumes from time to time by participating in another entity's dredging projects, and property that is not devoted to the "common use and enjoyment" of Owners as required by the Declaration. Yet, the Association asserts that the 1985 Modification authorizes it to assess all of its members to dredge Braddock Cove as long as at least three quarters of a quorum of its members approve the project.

Under the Association's interpretation of the 1985 Modification, the contractual and property law rights and obligations of the Association and Owners with respect to the Braddock Cove waterways are as depicted on Chart 2 below:



The Association's reading of the 1985 Modification would wrongly eliminate with respect to Braddock Cove all contractual and property law connections the Declaration establishes between the land burdened and the land benefitted by assessments, except the Owners' obligation to pay assessments. There is no privity of estate between property of the members and Braddock Cove's boat channels and waterways.

The covenant to pay assessments established by the Declaration is not a "real covenant" because it is not an agreement between landowners with respect to the use of their land. Only real covenants run with the land.

Epting v. Lexington Water Power Co., 177 S.C. 308, 181 S.E. 66, involved a transaction between landowners. The agreement required the owner of the land sold to furnish electricity to land retained by the seller. The court held that the covenant to furnish electricity was personal to the seller because it did not relate to the use and enjoyment of the land he retained. Here, the obligation to pay dredging assessments does not involve any transaction with the State of South Carolina, the owner of the land benefitted by dredging assessments and does not give the owner of the benefitted land any enforcement rights. And, as in *Epting*, if effective, the covenant to pay dredging

assessments has no effect on the use and enjoyment of Respondents' property. It does not touch and concern their land and therefore does not run with the land. *See also Runyon v. Paley,* 331 N.C. 293, 416 S.E.2d 177, *citing* 5 Powell on Real Property p 673 (N.C. 1992).

The covenant to pay dredging assessments purportedly created by the 1985 Modification does not touch and concern Owners' land for the additional reason that Owners have no property interest in Braddock Cove. The Declaration satisfied the touch and concern requirement by granting Owners an appurtenant easement of enjoyment in the Common Properties. An obligation to pay assessments to support land in which Owners have no property interest does not touch and concern their land and for that reason too does not run with their land.

The Association argues that assessments "that have a beneficial effect on the value of owners' property are deemed to touch and concern and therefore run with owners' land." (Assn. Br. p. 39). To support this argument the Association cites *Queens Grant II* which in turn cites *Harbison Community Ass'n v. Mueller*, 319 S.C. 99, 459 S.E.2d 860 (Ct. App. 1995). In *Harbison* the land supported by assessments was common property of an association that the Association was obligated to maintain for the benefit of the property owners whose land was assessed. The property law structure in *Harbison* was like the property law structure established by the Declaration in this case. Whether the covenants at issue in *Queens Grant II* ran with the land was not a litigated issue in that case and the decision in *Queens Grant II* provides no authority for the proposition the Association cites it for.

There is no suggestion in *Queens Grant II, Harbison,* or any case cited by the

Association that a covenant to pay assessments to maintain land of a stranger in which owners of the assessed land have no special rights satisfies the touch and concern requirement simply because spending the assessment may enhance the market value of the burdened land. The open-ended rule suggested by the Association would authorize an owners' association to maintain nearby shopping centers, stadiums, and anything else a super-majority of its members thought might enhance their property values. To satisfy the touch and concern requirement a covenant must directly affect the use and enjoyment of the burdened property as land, not just have an assumed beneficial effect on its value to a purchaser in an ever-changing real estate market.[27]

Amendment provisions must be reasonable "in light of the contracting parties' original intent." *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 633 S.E.2d 78, 87, 360 N.C. 547 (N.C. 2006), *cited with approval by Gates at Williams-Brice Condo. Ass'n v. DDC Constr., Inc.*, 418 S.C. 282, 298, 792S.E.2d 240, 249 (Ct. App. 2016). The trial court correctly found that an amendment that eviscerates the rights of homeowners in Common Properties, as established by the Declaration, is unreasonable.

Here, the original intent was to create a plan of real covenants under which South Beach property owners shared the responsibility to pay to maintain common properties in which they shared ownership. The Association's interpretation of the 1985 Modification would eliminate the shared-ownership requirement but extend the shared-obligation requirement by allowing the Association to force dissenting Owners to pay to support the property of a stranger. The 1985 Modification as interpreted by the

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[27] See cases cited in note 20, *supra*.

Association drastically changes the original deal and is unreasonable and unenforceable. Indeed, the Declaration itself prohibits unreasonable amendments to its covenants. Article II, Sections 2(a) and (b) both state that a Supplementary Declaration adding property to the plan of the Declaration may modify covenants, but only "as are not inconsistent with the Plan of this Declaration." (R. p. ___, Ex. 1, Art. II § 2) (*see supra*, Section I.A).

(2) The 1985 Modification sets no measurable standard regarding the Association's rights and obligations with respect to Braddock Cove and is therefore indefinite and unenforceable.

In addition to finding it unreasonable, the trial court found that the 1985 Modification was indefinite. The 1985 Modification purported to amend the definition of "Common Properties" to include the Braddock Cove waterways. But it did not add anything to the assessment terms of the Declaration to state the Association's rights and obligations with respect to the waterways. As interpreted by the Association, the 1985 Modification imposed no obligation to maintain Braddock Cove, but nonetheless authorized it to assess its members for any amount, allocated in any way it chose, to help pay for dredging. In the Association's view, the amendment of a definition eliminated the requirements that "Common Properties" must be properties deeded to the Association and had the additional effect of authorizing the Association to levy assessments to dredge Braddock Cove at its option, for any amount, and on any basis three quarters of its members approved. The Association's rights and obligations with respect to Braddock Cove are unstated and consequently, its assessments for

maintenance dredging are unenforceable. The arrangement contradicts this Court's instruction:

> In order to constitute an enforceable power of assessment in the Association, an assessment provision must: (1) express a sufficiently definite standard by which to measure liability for the assessment; (2) describe with particularity the property to be maintained; and (3) provide an ascertainable standard by which the purpose for which the assessment is levied can be objectively determined. . . . A standard such as "any other thing necessary or desirable in the opinion of the Board of Directors" is too vague to be enforceable.

Lovering v. Seabrook Island Property Owners' Association, 344 S.E.2d 862, 866, 289 S.C. 77 (Ct. App. 1986), *aff'd as modified*, 352 S.E.2d 707, 352 S.E.2d 707, 291 S.C. 201 (1987). The Association has no obligations to Owners or third parties with respect to the Braddock Cove unless it chooses from time to time to assume them. The Association has no right to regulate the use of Braddock Cove unless it is granted rights by the State of South Carolina. The 1985 Modification gives no guidance as to obligations the Association may assume or the rights it may seek with respect to the Braddock Cove waterways.

The trial court correctly found it to be factually significant that although the property of some Members borders Braddock Cove, most members of the Association do not have residences near the waterway. (R. p. __, Order). The 1985 Modification provides no objective standard for allocating the burden of dredging assessments among members and, indeed, provides no objective standard for determining whether the Association will participate in maintenance dredging at all. For example, in 2023 the Association's board decided not to participate in the dredging of Braddock Cove *for purely subjective reasons*. It said in its Fall 2022 Newsletter:

> This Board did not feel that residential members should be required to contribute the same percentages as the commercial members which obtain significantly greater financial benefit from the navigable waterway of Braddock Cove. While we certainly recognize that the dredge of Braddock Cove is a benefit to all of South Beach, and indeed to all of Sea Pines and the Town of Hilton Head, we felt that the residential members were being asked to pay a disproportionate amount, relative to the benefit received. As a result, Braddock Cove will largely be dredged but, as noted, the Upper Creek will not be included. . . .

(R. p. __, Exhibit 35, p. 4, South Beach Newsletter, Fall 2022). Decisions based on feelings are not decisions based on an ascertainable standard. *See Beech Mountain Property Owners' Ass'n v. Seifert,* 269 S.E.2d 178, 183,48 N.C. App. 286, 294 (N.C. 1980) ("Obviously, a covenant which purports to bind the grantee of land to pay future assessments in whatever amount to be used for whatever purpose the assessing entity might from time to time deem desirable would fail to provide the court with a sufficient standard.").

The Association further argues that the terms of its dredging assessment levies are not indefinite because the details of each assessment must be approved by at least 75% of a quorum of members. (Ass'n Br. p. 39). But the determination of whether the terms of assessment are indefinite must be determined by language in the association's governing documents, not by the vote of a majority of association members who favor a particular assessment. *Queens Grant II.*

The trial court correctly found the 1985 Modification to be unenforceable for the additional reason that it is indefinite. *Queen's Grant II*, 628 S.E.2d at 907 ("the amended or new covenants must not be unreasonable, indefinite, or contravene public policy.")

(3) The 1985 Modification violates public policy.

Lastly, the trial court correctly found that the 1985 Modification violates public policy of South Carolina because it fails to touch and concern the property it purports to burden (residential property), as well as the property it purports to benefit (navigable waters); it is therefore not a real covenant running with the land. Moreover, private taxation of dissenting private property owners to maintain State-owned waterways is also contrary to public policy.

The Legislature has codified the public policy of South Carolina concerning restrictions on real property:

> the public policy of this State favors the transferability of interests in real property free from unreasonable restraints on alienation and covenants or servitudes that do not touch and concern the property . . . .

S.C. Code § 27-1-70(B)(1). The assessment obligation to dredge Braddock Cove that the Association contends is imposed by the 1985 Modification does not touch and concern Members' land because the owners have no legal real property interest at all in Braddock Cove—the property benefitted by the assessment. As discussed above, although the Declaration grants homeowners appurtenant easements in "Common Properties," neither they nor the Association have any property interest in the State-owned navigable waters. Burdens that do not touch and concern the burdened land are against the public policy of South Carolina.

The Braddock Cove waterways are public property. *See McQueen v. South Carolina Coastal Council,* 354 S.C. 142, 149, 580 S.E.2d 116 (2003) ("Historically, the State holds presumptive title to land below the high water mark . . . in trust for the benefit of all the

citizens of this State."); S.C. Const. art. XIV § 4 ("All navigable waters shall forever remain public highways free to the citizens of the State and the United States without tax, impost or toll imposed . . . . "). All members of the public are entitled to use and enjoy public waters. Members of the Association have no special rights to use Braddock Cove. The rights they have with respect to Braddock Cove are derived from the State of South Carolina, not the Association. The Association has no obligation to dredge Braddock Cove. Its occasional decisions to dredge are gratuitous.

Under the Association's improper argument, it could assess dissenting Owner's to pay to support public schools, public highways, post offices, and other public property within or without the borders of its community. The Association is a private organization, established for the private purpose of managing private property for the benefit of private property owners. Its claim that it can amend a definition in the Declaration to tax dissenting members to maintain public property—property in which it has no legal interest, property which it has no obligation to support, and property in which its members have no special rights is unreasonable, against public policy, and unenforceable. *Queen's Grant II*, 628 S.E.2d at 907 ("the amended or new covenants must not be unreasonable, indefinite, or contravene public policy.").

For each of the reasons discussed above, this Court should affirm the trial court's decision that the Association may not levy assessments to dredge the navigable waterways of the State of South Carolina.

II. The Trial Court correctly found that this Association, which owns no real property whatsoever, may not collect annual assessments unless and until it has "Common Properties" to maintain.

The Association is wrong that the trial court's decision—that this Association cannot collect assessments unless and until such time as it owns "Common Properties"—is an "absurd result." What is actually absurd is the notion of a property owners' association that admits it owns no real property but nonetheless assesses its members in an endless administrative cycle of existing just to exist. (R. p. __: Stip. ¶¶ 18, 26). Appellant Association has no pools to clean, no property taxes to pay, no landscaping to maintain, no streets to sweep, and no real property at all to maintain for the benefit of its members. The funds that it collects from its annual assessments are used by the Association to hire a management company to collect more assessments, and to retain an attorney to pursue those who have not paid assessments. Occasionally, the Association might splurge on office supplies. (R. p. __: Exhibit 34, Association financials).

The Association argues that it is authorized to levy and collect annual assessments, even though the public waterways are not "Common Properties," because "[t]he right of the Association to collect annual assessments is unqualified under the express language of the Covenants." (App. Br. at p. 41). This argument wrongly asks the Court to construe a single sentence of a lengthy Declaration of Covenants in a vacuum. Article V of the Declaration sets forth the Association's rights and obligations with respect to assessments. Section 1 of Article V states the Association's authority to levy annual assessments. The next section, Section 2, of the same Article states

> The assessments levied by the Association shall be used exclusively for the improvement, maintenance, and operation of the Common Properties, including the payment of taxes and insurance thereon and repair, replacement, and additions thereto, and for the cost of labor, equipment, materials, management and supervision thereof.

(R. p. ___). The Association claims that provisions in successive sections of Article V that deal with the same subject operate independently and concludes that the Association is authorized to collect assessments it has no authority to spend. The Association endorses the principle of contract construction applicable here: "A construction leading to an absurd result should be avoided." (Ass'n Br. p. 43).

The Association was not formed to collect assessments to stay in business in hope that someday it might be able to serve its only corporate purpose. It was formed solely to manage "Common Properties. ***In its more than 50 years of existence it has not had any.*** Further, annual assessments without common properties to manage are *ultra vires* under the Association's certificate of incorporation, which restricts its corporate power to "improving, maintaining and operating the common properties of the association." (R. p. __: Exhibit 4).

The trial court got it right: the Association may not levy assessments just for the sake of raising money to pay the expenses of levying more assessments. This Court should affirm.

III. The trial court's ruling on the Association's counterclaims is an independent ground for affirming its decision.

In this case the Association counterclaimed for judgments against Members for unpaid assessments. (R. p. ___: 2nd Am. Answer & Counterclaims, pp. 12–14). The

Association's counterclaims are independent of Respondents' claim for declaratory relief. Here, the Association had the burden proving its counterclaims, and the trial court's decision on the Association's counterclaims resolved the underlying contractual dispute.

Based on the evidence, the trial court decided the Association's counterclaims on the merits, holding that the Association is not authorized to levy assessments until it owns "Common Properties." (R. p. ___: Order denying R. 59(e) Motion, p. 38). This holding necessarily required a legal conclusion that the Braddock Cove waterways are not "Common Properties."

Irrespective of the merits of the Association's affirmative defenses, the trial court's order dismissing the Association's counterclaims is a final judgment on the merits of the substantive claims made in both the Members' declaratory judgment action and the Association's counterclaims. For the reasons set forth in this brief, and irrespective of the merit of the Association's affirmative defenses, this Court should affirm the trial court's orders.

CONCLUSION

For the reasons set forth in this brief, as well as those set forth in the trial court's well-reasoned orders, the Respondents respectfully request that this Court affirm the trial court's judgments.

Respectfully submitted,

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Dated August 27, 2025

Attorneys for Respondents STANLEY S. STROUP as Trustee of the Stanley S. Stroup Revocable Trust dated November 10, 2003; PETER TRAGER; and VACATION INN, LLC, each both individually and derivatively