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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Mikell R. Scarborough,
Master in Equity

———

Opinion No. 6131 (S.C. Ct. App. filed Jan.14, 2026)

Appellate Case No. 2026-000773

———

Elizabeth Heatley, Neil B. McCann, Jr., David Neil Monk, Thomas V. Bessent, and Mariner's Cay Marina Council of Co-Owners, Inc.……Respondents,

vs.

Mariner's Cay Marina Condo, LLC, Mariner's Cay Fuel Dock, LLC, George A. Farmer, Jr., and South Atlantic Bank, Defendants

Of which Mariner's Cay Marina Condo, LLC, Mariner's Cay Fuel Dock, LLC and George A. Farmer, Jr., are the ……. Petitioners.

RETURN IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

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April 27, 2026

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COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Are the Petitioners' arguments moot in accordance with the "two issue" rule?

II. Did the Petitioners abandon issues on appeal by failing to properly raise them in the Petition for Rehearing?

III. Did the Court of Appeals correctly determine that a Declarant in a horizontal property regime may not unilaterally remove or divest vested common elements of the regime without the consent of the unit owners?

IV. Did the Court of Appeals properly rule that the Respondents' claims are not barred by the doctrine of judicial estoppel?

COUNTER STATEMENT OF THE CASE

Mariner's Cay Marina was constructed on the west bank of the Folly River in Charleston County in the 1980's, offering boat slips for lease ("Marina"). In 2006, the Marina was converted to a Horizontal Property Regime (HPR) or "condominium" under the South Carolina Horizontal Property Act, S.C. Code Ann. § 27-31-10 *et seq*, in which boat slips are the equivalent of "apartments" in a residential context.

The Master Deed for Mariner's Cay Marina was recorded May 18, 2006. (R. pp. 5337-5518). It describes 90 boat slips, 88 of which were offered for sale as individual units. The remaining two boat slips were designated as a Common Element, the "Fuel Docks", which also includes as a component an adjacent pump-out station used for the purpose of pumping wastewater from the bilges of boats to a storage tank on high land. (R. pp 5353-5354). A second Common Element is identified as the "Ship's Store Building" located on the high land of the Marina property, consisting of two elevated floors on pilings and containing, among other components, onshore bathroom facilities for men and women, which are required by the Office of Coastal Resource Management ("OCRM") as a condition of the Marina's permit. (R. p. 5351, p. 5354.). At ground level below the Ship's Store Building is the pump system and wastewater storage tank connected by piping to the wastewater pump-out station on the Fuel Docks.

Before the Marina's conversion to an HPR, and continuing until his ouster by Petitioners in 2016, the Marina Dockmaster maintained his office in the Ship's Store Building, where he kept the Marina records required by OCRM regulations, and where a VHF radio was located for communications with boaters, as well as electronic controls to activate the locking and security systems on the gates controlling access to the boat docks. (R. p. 4977, line 21 -- p. 4978, line 25). Notably, both the 2006 Master Deed and the 2007 Amended Master Deed provide that the books, records and papers of the Marina shall be maintained in the "Facility Office." (R. p. 5424, p. 5626). There is no structure on the property capable of housing a "Facility Office" other than the Ship's Store Building. (R. p. 4960, lines 4-10.)

As noted above, marinas are permitted activities in South Carolina by OCRM. OCRM promulgates regulations that describe the necessary conditions and components required for the issuance and maintenance of a marina permit. (R. p. 5442). For a marina the size of Mariners Cay, OCRM regulations require the wastewater pump-out capability described above, as well as on-shore, separate bathroom facilities for men and women described above. (R. p. 5446). The Regulations further require that the marina provide oversight by an "experienced manager" or "Dockmaster." (R. p. 5445). The 2007 amended Master Deed provision is identical to the 2006 Master Deed in this respect. (R. p. 5445). OCRM Regulations also require that the Mariner's Cay Marina maintain, on-site at all times, certain safety equipment to protect against fuel spills.

The 2006 Master Deed also contains a provision whereby the original "Declarant" who created the HPR maintained control of board of director appointments on the Council of Co-Owners. Subject to a critical proviso, the Declarant could unilaterally amend the Master Deed, without notice to owners, for 18 months, or until 90% of the units had been sold. (R. pp. 5364-5365.). However, the authority of the Declarant to unilaterally amend the 2006 Master Deed is not

absolute. (R. p. 5369). Article XVI, Section 16.1.(b) provides*: "However, any such amendment shall not adversely affect the title to any Unit unless the Owner shall consent in writing*." (R. p. 5369).

Between the recording of the Master Deed on May 18, 2006, and March 19, 2007, when the Amended Master Deed was recorded, 39 boat slips were sold thereby vesting in those 39 boat slip owners undivided title interests as tenants in common to the common elements of the HPR; and more specifically to the Ship's Store Building and the Fuel Docks. (R. pp. 5725-5726, pp. 5727-6042; p. 5341). The four individual Respondents purchased their boat slips under the 2006 Master Deed, and prior to the recording of the 2007 Amended Master Deed. Accordingly, each of the individual Respondents was vested with an undivided interest as tenant in common (together with the owners of 35 other boatslips), to the common elements, including the Ship's Store Building and the Fuel Docks.

Notwithstanding these vested title interests; and the clear and unambiguous proviso of the 2006 Master Deed that it could not be unilaterally amended to "adversely affect the title to any Unit unless the Owner shall consent in writing"; and the unambiguous provisions of S.C. Code Ann. § 27-31-70; the Declarant unilaterally -- without notice to or the vote or written consent of any boat slip unit owner -- recorded an Amended Master Deed on March 19, 2007, that purported to convert and eliminate the entire Ship's Store Building and the Fuel Docks from vested common elements into individual units. (R. p. 5534, p. 5538). The Declarant thereafter mortgaged the former common elements and defaulted on the mortgage, which was foreclosed in 2013. Petitioners are successor grantees from the buyer at foreclosure sale of the disputed common element properties, the Ship's Store Building and the Fuel Docks. Notably, none of the individual Respondents or any other individual unit owners were parties to the foreclosure suit.

Between the original recording of the Master Deed on March 18, 2006, and October of 2016, when the Respondents were ousted from the Ship's Store Building and the Fuel Docks, nothing changed on the ground: the Ship's Store Building remained as the location of the Dockmaster's office, under his exclusive lock and key control, and remained the social heart of the marina. (R. p. 4975, line 15 -- p. 4980, line 2). The onshore restrooms in the Ship's Store remained open 24 hours a day, 7 days a week for all slip owners and users. (R. p. 4974, line 19 -- p. 4975, line 2). The Fuel Docks were available for use by all slip owners for wastewater pump-out. Both the Fuel Docks and the Ship's Store Building continued to be used as common elements by all slip owners until October of 2016. In addition, from at least 2000 until October 2016, the Dockmaster's office was located in the Ship's Store Building, where he also maintained a VHF radio for communication with boaters. The Dockmaster also controlled the Ship's Store Building and had the keys to the building. (R. p. 4977, line 21 -- p. 4978, line 19.)

However, the use of the Ship's Store Building and Fuel Docks began to change in October of 2016 when Mr. Farmer, owner and single member of the Petitioner LLC's, required the Dockmaster to vacate. (R. p. 4978, lines 16-22.). This case was filed on July 16, 2017, nine months after Petitioners ousted Respondents from the Ship's Store Building and the Fuel Docks.

Following a hearing on March 22 and 23, 2022, the trial court correctly concluded by its dispositive Order filed May 16, 2022, that:

> "[t]he individual Plaintiffs in this case learned over time, and to different extents, that the 2006 Master Deed had been amended by the 2007 Master Deed. Because conditions on the ground remained unchanged from 2007 to 2016, none of them appeared to appreciate or understand that the Common Elements to which they held undivided title interests had been alienated, contrary to those title interests, until they were displaced on or about October of 2016…" (R. p. 117.)

After rejecting the Petitioners' estoppel argument because "[n]one of the five elements of judicial estoppel ... are found in this case," (R. p.126), the trial court ultimately held that "[t]wo unambiguous legal principles guide the Court's ultimate conclusions in this case." (R. p.126). The trial court explained that,

> "[t]he first principle is expressed in the 2006 Master Deed, which was amended in contravention of its own terms. The 2006 Master Deed plainly states in Article XII, Section 16.1 that, whereas Declarant could unilaterally amend it, he was prohibited from amending it to 'adversely affect the title to any Unit unless the Owner shall consent in writing.' ... It is clear that the 2007 Master Deed's conversion of the Ship's Store Building and the Fuel Docks to private units adversely affected the title interests of the four individual Plaintiffs. None of them were aware of the amendment ... nor did they ... consent to it in writing. The unambiguous terms of the 2006 Master Deed expressly forbade the Declarant from doing what he did." (R. pp.126—127).

The May 16, 2022 dispositive Order continues: the "second principle is statutory: the 2007 Master Deed was executed and recorded in direct contravention of Code Section 27-31-70, which provides 'The common elements…shall remain undivided and shall not be the object of an action for partition or division. Any covenant to the contrary shall be void." (R. p.127).

Petitioners filed a Notice of Appeal to the Court of Appeals on October 19, 2022. Notably, Petitioners limited their appeal to the two issues raised in their Brief to the Court of Appeals: The first appellate issue was statutory, arguing that Code Section 27-31-60's "acquiescence" provision should be applied to eliminate the common elements from the HPR, as addressed in Argument III, below. Their second appellate issue was the same judicial estoppel argument they assert in their present Petition to this Court. Importantly, Petitioners did not address the trial court's alternative basis for its ruling, that the terms of the 2006 Master Deed expressly rendered void a unilateral amendment by Declarant that "…adversely affected the title to any unit unless the Owner shall consent in writing". Article XII, Section 16.1 (R. p. 122, p. 5369).

Accordingly, Respondents specifically raised the preclusive effect of the "two issue" rule in their Brief to the Court of Appeals (at Section V, pp.32--26). Nevertheless, Petitioners did not respond to this argument, or file a Reply Brief.

Following oral arguments on October 8, 2024, the Court of Appeals filed its Opinion on January 14, 2026, concluding that

> "…the issue here is not one of percentage ownership interests. Rather, the issue here is that the unit owners were wholly divested of their vested ownership interests in the marina common elements in contravention of the 2006 Master Deed and Section 27-31-70. Section 27-31-60 governs a unit owner's relative proportional ownership of common elements; it does not serve to allow unit owners to silently 'acquiesce' to the unilateral divestment of that interest."

Moreover, the Court of Appeals noted "[b]ecause each unit owner had a vested property interest in the Ship's Store and the Fuel Docks as common elements, the Declarant was prohibited from making unilateral changes that would deprive Respondents of this property [and] even if the 2006 Master Deed allowed for a unilateral change in the common elements, such would be void under § 27-31-70[.]"

Petitioners requested rehearing before the Court of Appeals on January 26, 2026. Their Petition for Rehearing again makes no mention of the unambiguous constraints contained in the 2006 Master Deed at Art. XII, Sec. 16.1 that it could not be unilaterally amended to adversely affect title interests of Unit Owners without their written consent; nor does it contain any argument regarding the trial court's ruling that the 2007 Master Deed "is void as it did not obtain the individual Respondents' written consent as required by 2006 Master Deed Art. XII, Sec. 16.1;" nor does it argue that the Court of Appeals reconsider its conclusion that the Respondents were improperly "divested of their vested ownership interests in the marina common elements in contravention of the 2006 Master Deed." Similarly, the Petitioners' Petition for a Writ of

Certiorari here before this Court fails to raise any argument regarding these dispositive conclusions; or otherwise explain why the Petitioners are not bound by the "two issue" rule.

ARGUMENTS

As a threshold matter, this Court should deny the Petition for Writ of *Certiorari* because the petition has not shown "special and important reasons" that this matter is appropriate for this Court's discretionary review. There are no novel questions of law, dissent in the unanimous decision of the Court of Appeals, conflict with prior decisions, nor substantial constitutional issues or federal questions involved. See S.C.A.C.R., Rule 226(b). The Court of Appeals' affirmation of the trial court did not change any existing legal doctrines, resolve any open legal questions, or concern any contested legal issues of substantial public importance. Instead, Petitioner merely alleges that the trial court and Court of Appeals misapplied unambiguous provisions of the Horizontal Property Act and failed to invoke judicial estoppel to bar relief for parties that did not appear in or take a position concerning a prior foreclosure action. Moreover, Petitioners failed to preserve for review alternative grounds that both the trial court and Court of Appeals determined were dispositive.

I. THE TRIAL COURT'S ALTERNATIVE RULING WAS NOT APPEALED AND IS THE LAW OF THE CASE, RENDERING THE PETITIONERS' ARGUMENTS MOOT UNDER THE "TWO ISSUE" RULE.

As noted above, the trial court's decision is expressly based upon "two unambiguous legal principles" that formed the basis of two separate, yet equally dispositive, legal rulings. (R. p. 126). The first ruling applies Code Section 27-31-70's constraint on the division or partition of common elements, "…any covenant to the contrary" to be void. The second ruling applies the provision of the 2006 Master Deed in Article XII Section 16.1, that prohibited Declarant from unilaterally amending the Master Deed in a manner that would "adversely affect the title to any Unit unless

the Owner shall consent in writing." In support of the second ruling, the trial court expressly concluded that:

> "[t]he 2007 Master Deed, to the extent that it divests the individual Plaintiffs of their vested title rights in the Ship's Store Building and the Fuel Docks, is void as it did not obtain their written consent as required by the terms of the 2006 Master Deed at Art. XII, Sec. 16.1." (R. p. 122, p. 5369).[1]

Petitioners, however, did not address in their Brief to the Court of Appeals, at all, the trial court's second ruling..[2] As this Court has consistently held, "an unappealed ruling, right or wrong, is the law of the case." Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970). Moreover, "[u]nder the two issue rule, where a decision is based on more than one ground, the Appellate Court will affirm unless the Appellant appeals all grounds, because the unappealed ground will become the law of the case." Atlantic Coast Builders and Contractors v. Lewis, 398 S.C. 323, 730 S.E.2d 282 (2012), *citing* Jones v. Lott 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010). Accordingly, although Respondents specifically raised the preclusive effect of the "two issue" rule in their Brief to the Court of Appeals (at Section V, pp.32--26), Petitioners did not respond to this argument and did not file a Reply Brief to the Court of Appeals, at all, thereby abandoning their right to challenge to the ruling.

Following oral arguments on October 8, 2024, the Court of Appeals filed its Opinion on January 14, 2026, similarly concluding that:

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[1] The trial court further held that the 2007 Master Deed was void pursuant to S.C. Code Ann. § 27-31-70 because the terms of the 2007 Master Deed were a "covenant to the contrary," in conflict with the clear provisions of the 2006 Master Deed, proscribed under § 27-31-70.

[2] In their appeal to the Court of Appeals, Petitioners argued only estoppel and that S.C. Code Ann. § 27-31-60's statutory "acquiescence" clause prevails over § 27-31-70's provision that common elements shall remain undivided. Petitioners did not address, at all, the trial court's alternative basis for granting relief, that the 2007 Master Deed was amended in contravention of the express 2006 Master Deed provisions.

> "…the issue here is not one of percentage ownership interests. Rather, the issue here is that the unit owners were wholly divested of their vested ownership interests in the marina common elements **in contravention of the 2006 Master Deed** and Section 27-31-70. Section 27-31-60 governs a unit owner's relative proportional ownership of common elements; it does not serve to allow unit owners to silently 'acquiesce' to the unilateral divestment of that interest." (emphasis added).

While the Court of Appeals did not squarely address the application of the two issue rule,[3] the Court made clear that the 2006 Master Deed provisions were dispositive.

Despite the dispositive rulings of both the trial court and the Court of Appeals regarding the 2006 Master Deed provision, the Petition for Rehearing again makes no mention of Art. XII, Sec. 16.1 of the 2006 Master Deed; contains no argument regarding the trial court's ruling that the 2007 Master Deed "is void as it did not obtain [the individual Respondents'] written consent as required by the terms of the 2006 Master Deed at Art. XII, Sec. 16.1;" and otherwise does not request that the Court of Appeals reconsider its conclusion that the Respondents were improperly "divested of their vested ownership interests in the marina common elements in contravention of the 2006 Master Deed." Similarly, the Petition for a Writ of *Certiorari* dated March 30, 2026, fails to raise any argument regarding this dispositive conclusion or otherwise explain why the Petitioners are not bound by the "two issue" rule.

As a result, the Petition for Writ of *Certiorari* should be denied in accordance with the two-issue rule because Petitioners' present arguments are simply of no consequence where the 2006 Master Deed, on its face, prohibited the Declarant from unilaterally divesting the Respondents of their vested ownership interests in the common elements without express written

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3 Footnote 6 suggests that the Court of Appeals declined to address the Respondents' additional sustaining ground, as their "findings here are dispositive."

consent; and the trial court's ruling based upon the clear language of the 2006 Master Deed is the law of the case.

II. PETITIONERS' CLAIMS ARE NOT PRESERVED FOR APPEAL BECAUSE THEY WERE NOT PROPERLY RAISED IN THE PETITION FOR REHEARING.

"A petition for rehearing . . . shall state with particularity the points supposed to have been overlooked or misapprehended by the court." Rule 221(a), S.C.A.C.R. In accordance with Rule 242(d)(1), S.C.A.C.R., "[o]nly those questions raised in the Court of Appeals **and** in the petition for rehearing shall be included in the petition for writ of certiorari as a question presented to the Supreme Court." (emphasis added.) Here, the Petition for Writ of Certiorari includes two "questions presented," neither of which were properly raised in the Petition for Rehearing. As a result, these questions are not preserved for the Court's discretionary review.

The first question presented appears to concern the appropriate interpretation of S.C. Code § 27-31-60 in accordance with S.C. Code § 27-31-70., The Petition for Rehearing, however, does not raise any such issue and contains only passing references to factual support in the record for "acquiescence" under S.C. Code 27-31-60. (See Petition for Rehearing, paragraphs 4, 8, 9, 12, 15, 18). There is no citation of any legal authority. In fact, the Petition for Rehearing is entirely devoid of any arguments regarding the misinterpretation, interplay, and/or application of S.C. Code § 27-31-60 and S.C. Code § 27-31-70.

The second question presented concerns estoppel, but again, the Petition for Rehearing does not contain anything more than the summary, conclusory statement that "[j]udicial estoppel should apply due to the position taken by the Council of Co-Owners in the foreclosure case[.]" Again this reference lacks any citation of any authority in support of Petitioners' position in this regard. (Petition for Rehearing, paragraph 19). Moreover, the Petition does not reference any individual Respondent or the Court of Appeals' Opinion that the elements of judicial estoppel have

not been met, *inter alia*, because the individual Respondents did not appear or participate in the foreclosure case.

Accordingly, Petitioners' arguments now before this Court are not preserved for review as required by Rule 242(d)(1), or in accordance with well-established case law by which "short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for ... review." Eaddy v. Smurfit–Stone Container Corp., 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct.App.2003); *see also* Transportation Ins. Co. & Flagstar Corp. v. S.C. Second Inj. Fund, 389 S.C. 422, 432, 699 S.E.2d 687, 692 (2010) (citing First Sav. Bank v. McLean, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (holding issue deemed abandoned where appellant failed to provide supporting authority for his assertion).

III. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT A DECLARANT IN A HORIZONTAL PROPERTY REGIME MAY NOT UNILATERALLY REMOVE OR DIVEST VESTED COMMON ELEMENTS OF THE REGIME WITHOUT THE CONSENT OF THE UNIT OWNERS.

Petitioner alleges that the trial court and Court of Appeals interpretation and application of the unambiguous language of the Horizontal Property Act creates a novel question of law worthy of discretionary review by this Court. However, both the trial court and Court of Appeals applied these statutes in accordance with their plain meanings and their prior application in Vista Del Mar Condo. Ass'n v. Vista Del Mar Condos., LLC, 441 S.C. 223, 235, 892 S.E.2d 532, 539 (Ct. App. 2023).

A. S.C. Code Ann. § 27-31-60

Petitioner's argument that S.C. Code Ann. § 27-31-60, "deals with the procedure for amending a master deed in order to remove or add common elements" must fail when the words of the statute are accorded their plain and ordinary meaning. Section 27-31-60 is in fact entitled "Property rights of apartment owner" and provides, in pertinent part:

> An apartment owner shall have the exclusive ownership of his apartment and shall have a common right to share, with the other co-owners, in the common elements of the property, equivalent to the percentage representing the value of the individual apartment, with relation to the value of the whole property. This percentage shall be computed by taking as a basis the value of the individual apartment in relation to the value of the property as a whole. The **percentage** shall be expressed at the time the horizontal property regime is constituted, shall have a permanent character, and **shall not be altered without the acquiescence of the co-owners representing all the apartments of the property**. (emphasis added).

As both the trial court and Court of Appeals held, the statute does not speak to removing or divesting individual owner interests in common elements at all, but only to "altering" a co-owner's percentage ownership; and the courts cannot properly impose another meaning. *See* Consumer Advoc. for State v. S.C. Dep't of Ins., 397 S.C. 599, 602, 725 S.E.2d 708, 710 (Ct. App. 2012) ("The court has no right to add the words [the legislature] omitted, nor to interpolate them on conceits of symmetry and policy." (alteration in original) (quoting Kinard v. Moore, 220 S.C. 376, 388, 68 S.E.2d 321, 325 (1951)).

Moreover, the plain language of § 27-31-60 does not support Petitioners' argument that under § 27-31-60, the percentage interest of a unit owner may be "altered" out of existence by a unit owners' mere "acquiescence." Although Section 27-31-60 does not define the verb "altered", it is clear that "alteration" and "removal" are not synonymous. Where, as is the case here, a word is not defined in a statute, our appellate courts have looked to common dictionary definitions to supply its meaning. *See e.g.* Gulf Oil Corp. v. S.C. Tax Comm'n, 248 S.C. 267, 270, 149 S.E.2d 642, 643 (1966) (citing Webster's New International Dictionary); State v. Dickinson, 339 S.C. 194, 199, 528 S.E.2d 675, 677 (Ct. App. 2000) (citing Black's Law Dictionary); *see also* State v. Estridge, 320 S.C. 288, 291, 465 S.E.2d 91, 93 (Ct. App. 1995); Lee v. Thermal Engineering Corp., 352 S.C. 81, 91, 572 S.E.2d 298, 303 (2002).

Merriam Webster defines "alter" to mean "to make different without changing into something else." (*Webster New Collegiate Dictionary*, copyright 1981; *Merriam Webster Online* 2023.) *Black's Law Dictionary* defines "alter" as "to make a change in; to modify; to vary in some degree; to change some of the elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing altered". *Black's Law Dictionary*, 4th Edition, 1957.

Because the plain language of the statute provides only that percentage interests may be "altered," *i.e.* "changed" or "modified," by acquiescence, it would require an improperly forced construction, contrary to the plain meaning of the word, to suggest that "altered" reasonably includes the wholesale destruction of "the identity of the thing altered," such as the elimination of common elements in the case *sub judice*. *See* Hitachi Data Sys. Corp. v. Leatherman, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (holding that words of a statute "must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand its operation").

Therefore, although the vested percentage interests of boat slip owners in the common elements of Mariners Cay Marina may be "altered" by acquiescence (for example by the creation of additional phases of boat slips, thereby affecting the mathematical calculation of relative percentage interests in the common elements), their vested interests cannot be eliminated or extinguished by acquiescence, as argued by Petitioners. This is the linchpin premise of the Petitioner's argument to this Court, as it was, unsuccessfully, in the trial court and to the Court of Appeals. Yet even on this third attempt, Petitioners still fail to cite to authority, or offer any logical syllogism, to support their contention that § 27-31-60 provides for the total elimination of a common element.

The trial court properly rejected Petitioner's argument based on the plain meaning of S.C. Code § 27-31-60:

> "... the import of Section 27-31-60 is to define the relative property interests of apartment owners with respect to each other, and with respect to the common elements of a Horizontal Property Regime, as a percentage value, and nothing more. There is no language in 27-31-60 that could reasonably be construed to support the argument that an apartment owner might forfeit the entirety of his or her property interests by 'acquiescence'. Rather, the term, 'acquiescence' modifies only the phrase 'The percentage… shall not be altered without the acquiescence of the co-owners representing all the apartments of the property'. No reasonable construction of the emphasized terms, above, could substitute the term 'forfeited' for the term 'altered'. Yet that is the conclusion urged by [Petitioners]." (R. p. 123.) (emphasis original).

As did the Court of Appeals in their affirmation of the Trial Court, as follows:

> "…the issue here is not one of percentage ownership interests. Rather, the issue here is that the unit owners were wholly divested of their vested ownership interests in the marina common elements in contravention of the 2006 Master Deed and Section 27-31-70. Section 27-31-60 governs a unit owner's relative proportional ownership of common elements; it does not serve to allow unit owners to silently "acquiesce" to the unilateral divestment of that interest." (emphasis added).

Respectfully, the Court of Appeals correctly affirmed the Trial Court in his regard; and the Petition for Writ of Certiorari should be denied.

B. S.C. Code Ann. § 27-31-70

"The cardinal rule of statutory construction is that (our courts) are to ascertain and effectuate the actual intent of the legislature." Burns v. State Farm Mut. Auto. Ins. Co., 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). While the plain language of a statute is the best indicia of the legislature's intent, "[t]he language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Id.* Accordingly, S.C. Code Ann. § 21-27-60 must be read *in pari materia* with S.C. Code Ann. § 27-31-70. *See* CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (stating that, when construing

language in a statute, "'the statute must be read as a whole and sections which are part of the same general statutory law must be construed together and each one given effect'" (quoting S.C. State Ports Auth. v. Jasper County, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)); *see also* Joiner ex rel. Rivas v. Rivas, 342 S.C. 102, 109, 536 S.E.2d 372, 375 (2000) (holding that "[i]t is well settled that statutes dealing with the same subject matter are *in pari materia* and must be construed together, if possible, to produce a single, harmonious result."). However, instead of promoting harmony between § 31-27-60 and § 31-27-70, the argument advanced by Petitioners actually creates a conflict between the two statutes where none exists if reasonably construed.

S.C. Code Ann. § 27-31-70, is entitled "Common elements shall not be divided," and unambiguously provides:

> "The common elements, both general and limited, shall remain undivided and shall not be the object of an action for partition or division of the co-ownership. Any covenant to the contrary shall be void." (emphasis added).

Resorting, once again, to common dictionary definitions, the term "covenant" is defined as "a formal, solemn and binding agreement" by *Merriam Webster*, *supra*; and from *Black's*: a "covenant" is "an agreement, convention, or promise of two or more parties, by deed in writing, signed, sealed and delivered, by which either of the parties pledges himself to the other that something is either done or shall be done, or that stipulates for the truth of certain facts." *Black's Law Dictionary*, *supra*; *accord* Corbett v. Lucas & Dotterer, 15 S.C.L. 323, 327 (S.C. App. L. & Eq. 1827) (defining a covenant to be "the consent of two or more persons, to enter into some engagement among themselves").

Therefore, § 27-31-70 unambiguously provides that not even a "covenant," or "a formal, solemn and binding agreement," may extinguish a boat slip owner's vested, undivided title interests in the common elements. This mandatory language simply cannot be reconciled with

Petitioners' argument that the same vested title interests of those boat slip owners may be lost by mere passive "acquiescence" under § 27-31-60. Our appellate courts have consistently held that they will not construe a statute in a way that creates an absurd result. There could be no better example of an absurd result than the one argued by Petitioners in this instance. *See* State v. County of Florence, 406 S.C. 169, 174, 749 S.E.2d 516 (2013), *citing* Florence County Democratic Party v. Florence County Republican Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420. In addition, "[i]n seeking the intention of the legislature, [the Courts] must presume that it intended by its action to accomplish something and not to do a futile thing." State ex rel. McLeod v. Montgomery, 244 S.C. 308, 314, 136 S.E.2d 778, 782 (1964). Yet Petitioners' argument would do just that – render § 27-31-70's expressed provisions that common elements shall remain undivided and that "any covenant to the contrary shall be void", as meaningless words, no more than a futile nullity. Just as did the Trial Court and the Court of Appeals, this Court should reject Petitioners' meritless and unsupported Petition.

Sections 27-31-60 and 27-31-70 can be harmonized and reconciled by construing them according to their plain meanings. The percentage interest in common elements may be *altered* by acquiescence in accordance with 27-31-60, but the percentage interests cannot be *eliminated* because *altered* and *eliminated* are not synonymous terms, and because § 27-31-70 plainly states that an amendment to the Master Deed cannot "adversely affect title without the consent of the owner."[4] As the trial court correctly held in its order, the term "acquiescence" in § 27-31-60

[4] In addition, the 2006 Master Deed, Article XVI, Section 16.1.(b) provides that any "amendment shall not adversely affect the title to any Unit unless the Owner shall consent in writing." (R. p. 5369). The dispositive nature of this provision is the law of the case, as the Petitioners did not appeal the trial court's ruling that the "unambiguous terms of the 2006 Master Deed expressly forbade" the conversion of the Ship's Store Building and the Fuel Docks to private units because the Respondents did not consent writing." (R. p.122, pp.126—127).

modifies only the phrase, "[t]he percentage…shall not be altered without the acquiescence of the co-owners representing all the (boat slips) of the property…" (emphasis original). Secondly, under § 27-31-70, the phrase "common elements shall remain undivided" refers to the underlying existence of a co-owner's undivided title interest in the common elements. Because the Court of Appeals committed no legal error in affirming the trial court's rulings, the Petition for Writ of Certiorari should be denied.

C. Acquiescence

Even if title interests could be extinguished by "acquiescence" under S.C. Code Ann. § 27-31-60 as Petitioners suggest, that statute specifically requires the "acquiescence of the co-owners representing all of the apartments of the property." (emphasis added). Here, there is no evidence that any of the four individual Respondents "acquiesced" to the extinguishment of their vested title interests in the Ship's Store Building or Fuel Docks, much less that there was acquiescence of the co-owners representing all of the boat slips of Mariner's Cay Marina. In fact, the trial court order specifically rules that:

> "not only was there no evidence that the four individual Plaintiffs had "acquiesced," nor was there any evidence that "all" co-owners had acquiesced." (R. p.124).

Because the Petitioners did not appeal this ruling, it is the binding law of the case. *See* Buckner v. Preferred Mut. Ins. Co., 255 S.C. 159, 177 S.E.2d 544 (1970) (holding that "an unappealed ruling, right or wrong, is the law of the case").

In general, the reference in § 27-31-60 to "acquiescence" as a basis to alter the percentage interest held by a boat slip owner contemplates cases in which a master deed provides for

development in phases where -- upon the introduction of a subsequent phase adding additional units, but encompassing most or all of the same common elements -- a unit owner in the first phase is deemed to have "acquiesced" to the alteration of his relative *percentage interests* in the property and its common elements by virtue of the Master Deed provision contemplating subsequent phases. Such an interpretation is further supported by § 27-31-60(b), which specifically contemplates "phased," or "staged," condominium development by its reference to the ability of a unit holder to enforce by specific performance any recreational elements set out in the master deed "which are included *in the next stage* of the development."

For example, the 2006 Master Deed (R. pp. 5351--5353) in this case provides for a subsequent phase of boat slips to be constructed at Mariners Cay, which upon construction could invoke the "acquiescence" provisions of § 27-31-60, so as to alter the relative percentage ownership interests of all boat slip owners in the common elements.[5] Therefore, it is the potential *diminution in voting interests* to which unit owners might "acquiesce" under § 27-31-60.[6] But this

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[5] Section 5.1 of the 2006 Master Deed describing "Marina Docks and Commercial Units," begins with the conditional term, "[i]nitially," thus setting the tone for additional stages; and Section 5.2 is entitled "Subsequent Stages," providing that "Declarant proposes to develop the Regime in two stages, with the first stage being set forth in Section 5.1…." The Master Deed continues by expressing the Declarant's intent to construct an additional 20 boat slips in a subsequent stage; and, in Section 5.2(d) (R. p. 5352), provides for such additional stage, "without the necessity of consent of the Council of Co-Owners," to record a Supplemental Master Deed to bring the additional Units into the Horizontal Property Regime. To date, no such additional boat slip phase has been constructed.

[6] Further confirming that § 27-31-60's "acquiescence" refers to the addition of "phases" or "stages" of a Horizontal Property Regime, Master Deed Section 5.4 provides: "Effect of Annexation on Percentage Interest", "… and if Declarant elects to subject an additional 20 units to the Master Deed, thereby increasing the total Percentage Interests, the voting power of each Co-Owner will be affected…." (emphasis added). Section 5.4 therefore further provides that the Master Deed Exhibit "D" (R. p. 5353) reports the effect on a Unit Owner's voting power if 20 Units were added to the Regime; and it further provides that, if fewer than 20 Units are added, a new Exhibit "D"

could never extend to the complete elimination of either the unit owner's voting rights or, more importantly, their total vested title interests in the common elements, as are established by the provisions of § 27-31-70.

Because the Court of Appeal's ruling is consistent with both the evidence and the applicable law, the Petition for Writ of *Certiorari* should be denied.

IV. THE COURT OF APPEALS PROPERLY RULED THAT RESPONDENTS' CLAIMS ARE NOT BARRED BY THE DOCTRINE OF JUDICIAL ESTOPEL.

The Court of Appeals properly ruled against Petitioners' judicial estoppel argument based upon the facts and the law. In Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004), this Court adopted the elements necessary for the doctrine of judicial estoppel to apply: (1) two inconsistent positions taken by the same party or parties in privity with one another; (2) the positions must be taken in the same or related proceedings involving the same party or parties in privity with each other; (3) the party taking the position must have been successful in maintaining that position and have received some benefit; (4) the inconsistency must be part of an intentional effort to mislead the court; and (5) the two positions must be totally inconsistent.

Here, Petitioners assert that, because the Mariners Cay Council of Co-Owners was joined as a party defendant in the mortgage foreclosure case of *Emerald Road Portfolio, LLC v. Tiger River Capital, LLC*, and because the Council of Co-Owners "made no attempt to intervene in any way or object to the sale of any units subject to lawsuit," that "the Plaintiffs" should be estopped from "asserting a position inconsistent or in direct conflict with that position it took in the Foreclosure Case [sic]…" (Petition for Writ of Certiorari, p.20). However, Petitioners do not

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will be attached to a "Supplemental Master Deed" showing the Percentage Voting interests based on the actual number of new Units added.

suggest, must less argue with any authority, that the individual Respondents are barred by judicial estoppel; although they apparently attempt to throw the Council of Co-Owners and the Individual Respondents into the same bucket with repeated references to "the Plaintiffs." In their brief argument, Petitioners make no attempt to argue that a position taken by the Council of Co-Owners in the foreclosure case should be binding on the individual Respondents, none of whom were parties to the foreclosure case. More importantly, the trial court properly concluded, "…as a matter of law, that a homeowners association may not commit or bind the individual title rights and interests held by an individual unit owner," citing Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime, 329 S.C. 206, 494 S.E.2d 465 (Ct. App. 1997). (R. p. 121). Petitioners did not challenge or appeal the trial court's legal conclusion that the Council of Co-Owners cannot commit or bind title interests of unit owners, rendering it the law of this case. *See* Charleston Lumber Co. v. Miller Housing Corp., 338 S.C. 171, 525 S.E.2d 869 (2000) (holding that an unchallenged ruling, "right or wrong," is the law of the case and requires affirmance). Therefore, the first element of judicial estoppel cannot be met with respect to the individual Respondents, as a matter of law.

In fact, none of the five elements of judicial estoppel are established by the evidence in this case. There was no "position" for the individual Respondents to take in the foreclosure case, and it cannot be said that they were "successful" in that case. Moreover, there is no evidence Respondents sought to mislead the court at any time. In addition, there is no inconsistency of positions. Rather, as properly found by the trial court,

> "the 'position' taken by the individual Plaintiffs in this case is that their vested title interests were wrongfully and unlawfully divested of them by the unilateral actions of the Declarant in amending the Master Deed, thereby attempting to convert common elements to individual units in contravention of the statute, the case law, and the terms of the 2006 Master Deed." (R. p. 125.)

Neither can it be said that the Council of Co-Owners took an inconsistent position in the foreclosure case. At most, they simply failed to raise the fundamental title issue that is joined in this case; but that title issue was not a "position" asserted in the foreclosure case by the Respondents in any way.

CONCLUSION

By every measure, the trial court was correct in its conclusion that "two unambiguous legal principles" guide the outcome of this case. The provisions of the 2006 Master Deed could be no clearer. The Master Deed is a matter of public record, and unambiguously provides that the Declarant could not unilaterally amend it to "adversely affect the title interests of a unit owner." Yet, that is exactly what the Declarant unilaterally did in this case. Petitioners did not challenge the decision of the trial court grounded upon this Master Deed proscription on appeal. Accordingly, under the "two issue" rule, the Petition for Writ of *Certiorari* should be denied, as the issues raised therein are moot.

To the extent that the Petitioners argue for a contorted construction of § 27-31-60 that brings it into direct conflict with § 27-31-70's vested rights protections, this argument was also properly rejected by the Court of Appeals. These statutes are unambiguous. Section 27-31-70 could no more clearly state that common elements "shall remain undivided," that common elements shall not be the object of partition or division of co-ownership, and that "any covenant to the contrary shall be void." Petitioners' arguments only create conflict between the two code sections, where none exists, in contravention of well settled canons of statutory construction.

Moreover, even if the Petitioners are correct that S.C. Code Ann. § 27-31-60's "acquiescence" is invoked in this case, there is no evidence that the four individual Respondents acquiesced, much less that "all" slip owners acquiesced, to the 2007 Amendment, as § 27-31-60

requires. In fact, the trial court's ruling that "not only was there no evidence that the four individual Plaintiffs had "acquiesced," nor was there any evidence that "all" co-owners had acquiesced" is the binding law of the case. (R. p.124).

Because the statute and the Master Deed vested irrevocable title interests in the individual Respondents, Beth Heatley, Neil McCann, David Neil Monk, and Tom Bessent, the Declarant's improper and unlawful attempt to extinguish those title interests must be rejected as "void" by this Court, as it was by the trial court and the Court of Appeals; and as is required by the clear provisions of Code Section 27-31-70.

Neither can Petitioners' negligence be sanctioned. As clearly laid out in the trial record of this case, the defects in the Petitioners' title claims were open and obvious matters of public record. It is no excuse that they, or their representatives, failed to read what was plainly written in the recorded documents. Because the defects in Petitioners' title claims are clear, open, and obvious matters of public record, the Petition to this Court should be denied.

Respectfully submitted,

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