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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Mikell R. Scarborough
Master in Equity

Case No. 2017-CP-10-03099

Appellate Case No. 2022-001479

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

v.

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.

PETITIONERS' REPLY TO RESPONDENTS' RETURN TO PETITIONERS' PETITION FOR A WRIT OF *CERTIORARI*

BUIST, BYARS & TAYLOR, LLC

G. Hamlin O'Kelley,
SC Bar No. 15491
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464
(843) 856-4488
Hamlin.okelley@buistbyars.com

AND

LUZURIAGA MIMS, LLP

Kevin W. Mims.
SC Bar No. 69418
Whidbee S. Perrin
SC Bar No. 100396
50 Immigration St, Suite 200
Charleston, SC 29403
(843) 410-4713
kmims@lmlawllp.com
wperrin@lmlawlip.com
ATTORNEYS FOR PETITIONERS

OTHER COUNSEL OF RECORD

Capers G. Barr, III
Barr, Unger & McIntosh, LLC
11 Broad St.
P.O. Box 1037
Charleston, SC 29402
cgb@barrungermcinotsh.com

David C. Cleveland
Clawson & Staubes, LLC
126 Seven Farms Dr., Suite 200
Charleston, SC 29492
dcleveland@clawsonandstaubes.com

Justin P. Novak
Barnwell Whaley Patterson & Helms, LLC
P.O. Drawer H
Charleston, SC 29402

Attorneys for Respondents

REPLY OF THE PETITIONERS

I. **THE RESPONDENTS HAVE MISCONTRUTED THE FACTS OF THIS CASE IN AN ATTEMPT TO IGNORE THE HISTORY OF THE DEALINGS OF THE PARTIES AND THE ISSUES RAISED BEFORE THE COURT OF APPEALS**

II. **THE PETITIONERS HAVE PRESERVED ALL ISSUES FOR APPEAL AND THERE WAS NO ABANDONMENT OF ANY ISSUES REGARDING THE PETITION FOR REHEARING OR UNDER THE TWO ISSUE RULE AND THE CODE SECTIONS AT ISSUE CAN AND SHOULD BE READ TOGETHER AND HARMONIZED UNDER THEIR PLAIN MEANING**

III. **JUDICIAL ESTOPPEL SHOULD HAVE APPLIED TO THE PARTIES IN THIS CASE**

FACTS OF THE CASE

Due to the misconstruction of the facts as presented in the Respondents' Counter Statement of the Case, the Petitioners must present the true facts of the underlying matter:

The Plaintiffs in this matter brought this case seeking declaratory relief pursuant to S. C. Code Ann §15-53-10, *et seq.*, to determine the status of title to Units in the Mariner's Cay Marina Horizontal Property Regime, which Units this Court had previously sold as part of a foreclosure case. *See First South Bank v. Tiger River Capital, LLC, et. al.,* C/A No. 2013-CP-10-0850. The Defendants Mariner's Cay Marina Condo, LLC, and Mariner's Cay Fuel Dock, LLC, purchased the Units as a result of those foreclosures after sale by the trial court in this case. (R. pp. 6334-6358)

Formerly, these Units were Common Elements of the Mariner's Cay Marina Horizontal Property Regime pursuant to the Master Deed recorded on May 18, 2006, in Book V583 at Page 584. (R. 5337-5518) The Master Deed provided that the Declarant had the unilateral right to amend the Master Deed during its control period. (*Id.*) The early deeds for these Units provided a power of

attorney from the Unit owner to the Declarant for those purposes. (*Id.*) There was a clear power of attorney in that Master Deed given by Unit owners to the Declarant. (*Id.*)

The Common Elements were made Units and not Common Elements pursuant to the Amended and Restated Master Deed recorded March 19, 2007, in Book X618 at Page 603. (R. 5519-5713) The Declarant still controlled the Horizontal Property Regime at the time of the amendment. (*Id.*)(R. 4828). The Declarant retained control until ninety percent of the Units were sold. (R. 5519-5713). The Amended and Restated Master Deed was recorded less than a year after the original Master Deed.

Everyone who has owned a Unit at the Marina has been operating under the Amended Master Deed since March of 2007. The lawsuit giving rise to this matter was filed ten (10) years after that amendment was of record. (R. 1017-1027)

There was no evidence presented that there were actual signatures from Unit Owners approving the changes to the Master Deed. (R. 4810-5299) There was language in the original Master Deed, in communications from Ms. Sutton, and in the deeds to owners setting forth procedures and approval of the Declarant to amend the Master Deed. *Id.* The original deeds to Unit owners referenced the lack of merger of the purchase and sale agreement providing for amendment.

For those changes to be valid, the "acquiescence" of the Co-owners had to be shown and or demonstrated according to the applicable statute which reads as follow as relates to Common Elements and percentages in those Common Elements of the owners:

> [t]he 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 apartments of the property**.

S.C. Code Ann. §27-31-60 (emphasis added).

There was evidence of such acquiescence from the time of the Amended and Restated Master Deed until the suit was brought some ten (10) years after the amendment as set forth herein.

The course of conduct of the Plaintiffs, individually, and by the Mariner's Cary Marina Council of Co-Owners, Inc., which is the Unit Owners association, demonstrated a course of acquiescence over the years since the filing of the Amended Master Deed as will be set forth herein and as was proven at trial.

Mariner's Cay Marina consists of ninety (90) boat slips located on the Folly River as well as a two-story building containing storage space and two Units, Unit 1A and 1B. Unit 1A was used as a "ship store" as well as a Fuel Dock (the "Fuel Dock"). (R. 1030-1043) All parties admit that there are only ninety boat slips at the Mariner's Cay Marina. *Id.* The ship store building is actually Units 1A and 1B, Unit 1A being formerly commercial and Unit 1B, being formerly and currently residential.

The Defendant Mariners Cay Marina Condo, LLC, owns the area called the Units 1A and Unit 1B and the Defendant Mariners Cay Fuel Dock, LLC, owns the Fuel Docks as described herein as a result of obtaining title after the Master in Equity for Charleston County who sold them at a foreclosure sale, the Master in Equity being the trial court in this matter. *See First South Bank v. Tiger River Capital, LLC, et. al.,* C/A No. 2013-CP-10-0850. (R. 6264-6270)

Contrary to the implication of the Respondents, neither the marina nor the ship store were ever cited by the formerly named South Carolina Office of Coastal Resource Management for violation of any rule, regulation, or law. (R. 4810-5299). Bathrooms were never in danger of being shut down or closed nor was the marina going to lose a permit to operate. *Id.* Further, none of the Plaintiffs ever contributed one red cent to the maintenance, repair, or upkeep of the Units at issue here. *Id.*

Contrary to the assertion of the Respondents, the ship store at Units 1A and 1B and dockmaster's "office" were not in operation at the Units well before the Respondents took title. There was always an office at the marina and, again, there was never an assertion by any governmental or regulatory agency that the marina was in danger of being closed. This is a complete red herring. Ed

Geiger formerly leased these properties; he would later become the dockmaster but was not from the beginning of the Marina.

The Defendants Mariners Cay Marina Condo, LLC, and the Defendant Mariners Cay Fuel Dock, LLC, obtained title to their respective properties as a result of a foreclosure action in which the Mariner's Cay Marina Council of Co-Owners, Inc., appeared. (R. 6264-6270) *See First South Bank v. Tiger River Capital, LLC, et. al.,* C/A No. 2013-CP-10-0850. The Court issued its Master's Deed pursuant to that foreclosure. *Id.* That deed transferred the ship store and the Fuel Docks to Emerald Portfolio on October 14, 2015, with the recording of that deed in Book 0510 at Page 674 in the Office of the Register of Deeds for Charleston County. (R. 6578-6583)

Throughout the Respondents' ownership of the Units, there were numerous discussions had and offers made by the Board at Mariner's Cay Marina including during the foreclosure. They even had discussions about purchasing these Units, too, as part of the foreclosure during the pendency of that case. (R. 4546)

The Association appeared in that case, having filed an Answer which Answer did not object to any sale of the property at issue in this case and which did not assert any claims to the property. (R. 6271-6277; 6278-6333; 6547-6548)

There was no appeal by any party in that case.

The Defendants Mariners Cay Marina Condo, LLC and the Defendant Mariners Cay Fuel Dock, LLC received title to both units at Mariner's Cay in May, 2016. The Units 1A and 1B and the Fuel Dock have been owned by the Defendants (the "Property") since that time.

The Petitioners made repairs to the Units, moved into the upstairs Unit, and were approached by the Board to purchase the Units after repairs were made.

This matter began as a suit to determine ownership of Units 1A and 1B and the Fuel Dock within Mariner's Cay Marina by other named individual Plaintiffs Alben D. Neighbors and Dan G Nekola, neither of whom are Plaintiffs in this matter any longer, along with the Mariner's Cay Marina Council of Co-Owners, Inc. (R. 1017-1027) The case began as a class action, which was never certified. (R. 39-43)

The original Plaintiffs alleged that the Amended and Restated Master Deed for Mariner's Cay Marina Horizontal Property Regime recorded March 19, 2007, in the RMC Office for Charleston County in Book X618, Page 603 (the "Amended Master Deed") is invalid and that the Defendants' Property is a common element of the Mariner's Cay Marina Horizontal Property Regime (the "HPR") and should be forfeited to the Plaintiffs. Basically, the Plaintiffs were seeking to make the Farmer family homeless.

The Defendants counterclaimed alleging that they rightfully and legally purchased the disputed Property, that the Amended Master Deed is valid and enforceable due to the provisions of the South Carolina Horizontal Property Act, S.C. Code Ann. §27-31-60, regarding the acquiescence of Unit owners to changes to Common Elements in a Horizontal Property Regime.

This dispute centers on the fact that the Defendants purchased Units at the Marina that the Plaintiffs wish to own but are unwilling to pay fair market value to obtain, and, instead, are attempting to claim the property as a common area belonging to the these Plaintiffs and/or the Council of Co-owners despite deeds, notice, and agreements to the contrary.

The Defendants contend that the Mariners Cay Marina Condo, LLC, and Mariners Cay Fuel Dock, LLC, have good title to these Units as the Plaintiffs acquiesced in the changes to the Master Deed that made these Units no longer common elements under the revised and amended Master Deed.

The Horizontal Property Act states that for common elements

> [t]he 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 apartments of the property**.

S.C. Code Ann. §27-31-60 (emphasis added).

The General Assembly has not defined "acquiescence" and there is no case interpreting this Code section, hence the need for this Court's review.

The only mention of this Code Section is in an unpublished opinion from the Court of Appeals affirming a ruling by Judge Scarborough in an earlier case. *See Rivers Point Row Horizontal Property Regime v. Palms Properties, LLC.,* Up. Op. No. 2013-UP-458 (Ct. App. 2013).

However, "Acquiescence" has been defined as follows:

> Conduct recognizing the existence of a transaction, and intended, in some extent at least, to carry the transaction, or permit it to be carried into effect.

Black's Law Dictionary (6th ed.)(1990)

The Plaintiffs have acquiesced by not objecting to the sale of the Units by this Court, by accepting dues and payments from the owners, by offering to purchase the Units, by not blocking the Farmers from moving into the Units, and by their course of conduct since acquiring their Units and for the ten (10) years everyone recognized the Units as being just that: Units.

The Plaintiffs have clearly acquiesced to the changes to the Master Deed for Mariner's Cay Marina Horizontal Property Regime, recorded March 19, 2007, in Book X618 at Page 603, in the Office of the Register of Deed for Charleston County. *See* S.C. Code Ann. §§27-31-60, 27-31-70. Those changes were put into effect in 2007, some ten years prior to this lawsuit being filed. No one objected in those ten years. The Plaintiffs recognized the existence of the transaction. Interestingly, the Plaintiffs failed to cite the acquiescence portion of the Horizontal Property Act in their motion and brief. Motion

and Memorandum, March 12, 2021. They do not cite that portion of the statute as they know they have acquiesced. The testimony as to acquiescence is clear.

In taking title to their dockominium slips, the Plaintiffs knew that the Master Deed would most likely be amended, and they consented as per the communications from the Board and the language of the deeds into the original purchasers.

At trial, the Plaintiff David Neil Monk testified that in his own deed for a dockominium at Mariner's Cay contained specific language advising that the Mater Deed may be amended from time to time together with the undivided interest in the Common Elements. (R. 4870-4871; R. 5896-5902) He further testified that he did not read the Master Deed when he took title to his Unit. (R. 4885).

Another named Plaintiff, Neal McCann also testified at trial. He, too, acknowledged that that the deed to his dockominium unit contained language that states the "master deed may thereafter be amended from time to time." (R. 4902; R. 5748-5791; R. 6137-6144) All of the Plaintiffs took title with that amendment language being part and parcel of their deeds.

Elizabeth Heatley, also a named Plaintiff, learned of the Master Deed Amendment in 2010. (R. 4927) She did nothing about it. She knew that the Appellants purchased their Units in 2016. (R. 4933) Her husband, Jeff Heatley, has served on the Board of the Council of Co-Owners almost continuously since 2010. (R. 4948) He also served on the Board in 2013. (*Id.*) She also knew that there were negotiations between the association and the foreclosing bank about purchasing these Units, too. (r. 4949). How could this not be acquiescence? At the time of the amendment to the Master Deed, Ms. Heatley assumed it was done legally. (R. 4950)

The Council of Co-Owners has assessed these Units with separate dues owed and paid. In fact, the Units which are the subject of this action have been assessed dues as separate Units and not as

Common Elements from 2007 onward. As testified to by Ronald McGuire, a former Board member, they charged these Units monthly assessments.

Q. From 2007 forward, the ship store and dock units were regularly assessed general association dues; is that correct?

A. Yes.

(R. 3181)

Tom Bessent, the President of the Board, and the Rule 30(b)(6) representative of the Mariners Cay Marina Council of Co-Owners, later-named Plaintiff, and witness at trial, also testified similarly:

Q. Mr. Bessent, we're back on the record after a break. Do you know if the Mariner's Cay Council of Co-Owners, the marina, has accepted payments from Mr. Farmer's entity for their pro rata share of maintenance? In other words, quarterly dues.

A. Yes.

Q. And do you know if the Mariner's Cay Marina Council of Co-Owners has ever filed a lien against Mr. Farmer's entities for nonpayment?

A. We've either filed a lien or we've sent a notice that a lien is forthcoming. I'm not really sure how far that went.

(R. 3769)

The record clearly shows that they have filed liens for non-payment of dues consistently since the title was transferred in 2016, including in 2025 for nonpayment.

Even while claiming that the Units are Common Elements, the Board has no plans to refund the assessments paid by Mr. Farmer on behalf of his entities. (*Id.*) The Board cannot have it both ways.

Mr. Bessent stated that these funds were not returned and there are not necessarily plans to refund them, which continue to be billed. (30(b)(6) Depo, p. 41) Again, this is further evidence of acquiescence and acknowledgment of ownership. To say that none of the named Plaintiffs acquiesced is false.

In addition to his deposition as the Rule 30(b)(6) representative, Mr. Bessent also testified at trial. He formerly owned two dock slips at Mariner's Cay. (R. 5994-6001; R. 6153-6161; R. 4968-4969) He continues to own a slip at the marina. (R. 4970) Mr. Bessent knew of the amendment to the Master Deed in 2010 or 2011. (R. 4975) He did not go to an attorney or take any action at that time. (R. 5041) Mr. Bessent served on the Board starting in 2016, soon after Mr. Farmer's entities closed on the Units through 2021. (R. 5004-5005)

Mr. Bessent acknowledged that during his time on the Board, the Board made an offer purchase the Unit 1A (R. 5006) The Board even had an appraisal completed to determine the value of the Unit 1A. (R. 5012). At the time their appraiser valued the first floor Unit 1A at $140,000.00. (R. 5013). They later offered $80,000.00 for that purchase. (R. 5014) There was clear acknowledgment and acquiescence as to the Units being owned by the Appellants where a Notice of Lien were filed on the Units. (R. 5041-5042)(R. 6464-6469) Soon after the purchase, the dockmaster asked when he would required to move while they negotiated the purchase from the Petitioners.

At one point, the Board even discussed purchasing the Units, as confirmed in deposition testimony:

Q. And are you aware there were offers made to purchase; correct?

A. Yes.

....

Q. That's Exhibit 21 asking about revising the joint offer, and again, I think your testimony as earlier that the offer was not made because y'all just didn't have the money; correct?

A. The best I can remember, but, yeah, I hope I'm remembering accurately.

(R. 2983)(R. 3038)

One of the former owners and a former named Plaintiff, Danny G. Nekola, even testified that Mr. Farmer was an actual owner of the Units.

Q. Well, it's a yes-or-no question. Is he an owner or is he not?

A. I guess the deed says that he is, yes.

(R. 957)

The Board filed liens against the Units for non-payment of dues, which is further evidence of acquiescence and acknowledgment of ownership by the Defendants Mariners Cay Marina Condo, LLC, and Mariners Cay Fuel Dock, LLC.

The testimony is as follows:

Q. You are aware, I'm sure -- maybe you are not aware. You are aware the board did file a lien against these entities at one point for nonpayment?

A. Yes.

Q. And then Mr. Farmer's entities caught those payments up and was the lien released?

A. Yes.

(R. 2982)

Amanda Barnes served as the property manager for the Marina who confirmed that liens were placed on the Unit. (R. 4456) The Board also authorized the liens to be satisfied as well. (*Id.*) She, too, was aware that there were discussions by the Board about a potential sale by Mr. Farmer's entities of the Unit and dock slips. (*Id.*)

The Co-owners even had appraisals completed to determine the value of the property in an attempt to purchase the Units. (R. 3852) The Board had a directive from the membership to pursue purchase of the Units. (R. 3924) There were discussions with Mr. Farmer about such a purchase. (R. 4546) They made him an offer of $100,000.00 which was not accepted. (*Id.* at 85-86)

Laurie Hull, a former Board member, remembered being the person who made the offer to purchase to Mr. Farmer. (R. 4688). She also remembered a counteroffer from Mr. Farmer for $500,000.00 which was not accepted. *Id.* It was she who ordered an appraisal of the Unit in July of 2016. (*Id.* at 82) She also testified to the same at trial. (R. 5125-5131)

Why would they offer to purchase something they already own? Again, this more evidence of their understanding that Mr. Farmer and his entities owned what they thought they owned.

According to Ed Geiger, the dockmaster at Mariner's Cay, and contrary to the Plaintiffs' assertions, the Unit on high ground has not been in continuous operation as ship store or place of business until Mr. Farmer's entities purchased them. (R. 4202) It closed in 2011. *Id.* It has not been operational since that time. *Id.* Nobody has operated the ship store from 2011 to the present. *Id.* He, too, was aware the Units and the fuel docks were sold at foreclosure. *Id.* Mr. Geiger even showed Mr. Farmer the Units and the fuel docks prior to purchase. *Id.* There were discussions by and between Mr. Geiger and Mr. Farmer of having Folly Beach condemn the property due to the condition of the property at the time he showed them due to their condition.

At trial, the testimony was clear that the individuals knew of the amendment to the Master Deed for years but did nothing about it, thinking and knowing that these Units were no longer Common Elements. Mrs. Heatley testified she knew of the amendment in 2010 but did nothing, and knew, too, of the foreclosure case, but, similarly, did nothing.

At trial, none of the individual Plaintiffs testified that they had ever been in possession of these Units nor had they ever claimed an interest in the Units until such time as their lawyer determined that the Master Deed had been amended without having signatures from every Unit owner.

Further, all testified that there were pump out stations, booms, places for the dockmaster to use the property, and no fines, notices, or correspondences from SC DHEC OCRM advising that the Marina

was ever in danger of shutting down or being closed due to some violations of regulations. (R. 4810-5299). This was the literal and proverbial red herring at trial as it is in the Respondents' Return. There were no fines or fees paid to DHEC OCRM at any time by the Respondents.

At trial, Donald Furtado also testified. (R. 5132) Mr. Furtado practiced law in Charleston from 1992 until 2014. (R. 5133) He was responsible for amending the Master Deed on the part of the original developer. (R. 5136)

At trial, Mr. Farmer, the member of Mariner's Cay Marina Condo, LLC, and Mariner's Cay Fuel Dock, LLC, testified as to his negotiations and purchase of the Units. (R. 5197-5198) He also testified as to the work he put into the Units to deal with the deferred maintenance, which none of the Plaintiffs or their predecessors ever maintained. (R. 5198-5200) Mr. Farmer has paid the insurance and taxes on the Units since closing. (R. 5205) He further testified as to fines levied against him and his family by the Council of Co-owners for alleged violations of rules and regulations at Mariner's Cay. (R. 5209-5210) Mr. Farmer had read the Amended Master Deed prior to closing knowing that these Units had been converted from common elements to Units. (R. 5229) Mr. Farmer testified that he and his wife are using one Unit as their residence. (R. 5272). The trial court's ruling and Court of Appeals' opinion render them homeless.

The Plaintiffs have acquiesced by not objecting to the sale of the Units by this Court, by accepting dues and payments from the owners, by offering to purchase the Units, by not blocking the Farmers from moving into the Units, and by their course of conduct.

ARGUMENTS

II. THE RESPONDENTS HAVE MISCONTRUTED THE FACTS OF THIS CASE IN AN ATTEMPT TO IGNORE THE HISTORY OF THE DEALINGS OF THE PARTIES AND THE ISSUES RAISED BEFORE THE COURT OF APPEALS

In their concerted effort to change the underlying facts of this matter, the Respondents are ignoring the clear history and course of conduct in this matter by themselves and their predecessors in interest, which matters were clearly raised in front of the Court of Appeals and which constitute a basis for the Petitioner's request for relief from this Court.

The retelling of the Counter Statement of the Case by the Respondents relies on innuendo and assumptions and not the actual course of dealings among the parties. For example, there was never any issue with DHEC OCRM ever shutting down the Marina. There was never any time there was not an office for the Marina. There was never any time there were not bathrooms and pump out stations and the ability for the Unit owners to use the Marina. There are hints at that throughout the Return (Return pp. 2-3) As set forth above, that never happened.

There are also claims of "ouster" set forth in the Return. (Return pp. 3-4) There were absolutely no claims for relief for "ouster" before the trial court or the Court of Appeals. There was no ouster committed where the Petitioners took title by way of an arms' length closing with recorded deeds. There was no ouster committed at the Ship's Store Unit where there had not been a store or any commercial activity for well over five years prior to the Petitioners ownership of their Units. There can be no ouster when there was no occupation by the Respondents.

There continued to be an office run by Mr. Geiger, the dockmaster, at a different location at Mariner's Cay. He leased the Unit 1A and leased dockominium units, too, to third parties. In fact, as stated above, Mr. Geiger showed Mr. Farmer the Units 1A and 1B prior to his purchase. Contrary to

the alluded to inference that there was no facility office, there was always such an office with the Marina never being in danger of being closed. The Respondents' Return spends pages in trying to convince this Court that somehow the Petitioners' ownership of the Units jeopardized the entirety of the Marina. That is patently false.

Also as set forth above, the Petitioners have been the sole parties paying for the taxes, upkeep, maintenance, insurance, and utilities of the Units, without any protest or objection from the Respondents. In fact, the Respondents have benefited from and continue to benefit from that grace and favor of the Petitioners. The Respondents admitted that at trial, just as they admitted they had no plans to repay the Petitioners at any time for such grace and favor or for the monies levied against them which were paid as dues owed by any Unit owner to the Mariner's Cay Council of Co-Owners, Inc. Mr. Bessent specifically stated there were no plans ever to refund those payments. In fact, they benefited from the grace and favor of the foreclosed upon former owners.

The Master Deed, in its original form, did indeed contain the ability to amend, which the Declarant did less than a year after filing the original as did the original deeds to dockominium owners prior to the amendment. The Declarant amended to remove the Units at issue from being Common Elements, without any objection for almost ten (10) years, including appearances in the underlying foreclosure action and offering to purchase based upon appraisals obtained. The original deeds to the Units referenced the language allowing the amendments and the changes to be made by the Declarant. Another slippery allusion contained in the Return is that the amendments were allowed as long as they did not affect title to any Unit. Well, the amendment did not affect any title as it was not until 2017 that the Respondents claim to have learned of the amendment and the changes to the master deed "affecting title", title which they had never claimed to have or own or to have one stick or twig in the bundle of rights of ownership. For ten years, the Respondents and their predecessors acquiesced to the

amendment by not asserting any claim, by seeking to own, by taking money from, by not spending one red cent as to the taxes, maintenance, upkeep, and insurance.

There were no objections to the state of the title from the time of the amendment of the Master Deed to the filing of the underlying lawsuit including the appearance of the Respondent Council of Co-owners in the foreclosure matter. No one objected to the underlying foreclosure suit and the mortgaging of the Units. There can be no mortgaging of Common Elements, so why didn't the Respondents or the Council of Co-owners object to the relief sought and granted by the Master in Equity in that case? For one reason only: they knew these were separate Units. The Council of Co-owners was a party to that matter, appeared, discussed bidding at the foreclosure sale, and took no actions.

The Respondents make much of a phased development in this matter, which is not applicable in this case. There was no phased or staged development here, but, instead, a marina "dockominiumed" its slips and common elements to sell to third parties. There are not stages of development here as hinted at by the Respondents. This is yet another factual red herring and shiny object by which the Respondents seek to distract this Court.

III. THE PETITIONERS HAVE PRESERVED ALL ISSUES FOR APPEAL AND THERE WAS NO ABANDONMENT OF ANY ISSUES REGARDING THE PETITION FOR REHEARING OR UNDER THE TWO ISSUE RULE AND THE CODE SECTIONS AT ISSUE CAN AND SHOULD BE READ TOGETHER AND HARMONIZED UNDER THEIR PLAIN MEANING

In their Petition, the Petitioners set forth the issues from the Court of Appeals to be ruled upon and reviewed which relate specifically to their Order of January 14, 2026, and their denial of rehearing dated March 17, 2026. Both Judge Scarborough and Court of Appeals ignored the "acquiescence of the co-owners" and the reconciliation of the S.C. Code Ann. §§ 27-31-60 and -70. That was the basis

for Judge Scarborough's ruling and the Court of Appeals' affirmation. The comment by Respondents that the trial court's ruling as to the lack of written consent by the owners was a statement of fact, not the basis for its ruling or the ruling of the Court of Appeals. Again, this overlooks the clear language of S.C. Code Section 27-31-60 stating that common elements and percentages may be obtained with the acquiescence of the Unit owners, a term which the General Assembly did not define in the Horizontal Property Act and a novel issue before this Court. Once again, the Respondents point to a matter that they hope will entice this Court to deny the Petition but, which, frankly, was not the basis for the ruling of Judge Scarborough or the Court of Appeals as the 2006 Master Deed has already been amended and to which there was more than silent acquiescence for almost a decade. The voiding of the 2007 Master Deed was not the issue before the lower court or the Court of Appeals. The issue is one of statutory construction, which the Respondents are now trying to have this Court ignore. Judge Scarborough's ruling actually gives title to four (4) owners and does not restore any Common Elements. That cannot be squared with the Horizontal Property Act.

There is really no case law on Code Section 27-31-60. The Court of Appeals mentioned that Code Section in *Rivers Point Row HPR, LLC v. Palms Properties, LLC,* Unpublished Op. No. 2013-Up-458 (Ct. App. 2013). Also an appeal from Judge Scarborough, that case centered around the determination of the validity of a deed which the property owners association alleged was invalid due to the property being subject to a master deed. *Id.* Judge Scarborough ruled that the property at issue had become subject to a master deed so that it could not be transferred. *Id.* There is an oblique reference to Code Section 27-31-60 stating that the percentages in common elements "shall have a permanent character and shall not be altered without the acquiescence of the co-owners representing all the apartments of the property." *Id.* There is no other explanation of that Section. Further, any reliance is misplaced. Rule 268(d)(2), SCACR. Unpublished orders have no precedential value and should not

be cited except in proceedings in which they are directly involved. *Id.* This case does not directly involve the parties or the land or the horizontal property regime described in *Rivers Point.*

The arguments are preserved as they are based on the request that this Court give its ruling as to the interpretation of the Horizontal Property Act and the dearth of case law regarding that Act. As stated in the Petition, without guidance from this Court, parties and practitioners are left unsure as to what would constitute acquiescence other than explicit written consent by all Unit owners should any change be made regarding Common Elements in a Master Deed in South Carolina. The urging of the Respondents is that there can be no such changes due to the language of S.C. Code Ann. §27-31-70 with a strict reading thereof. That there is no ruling on this issue from this Court makes it inherently reviewable and determinable as a novel question of law as the General Assembly left it open in terms of definitional ambiguity in the statute itself, and not as a result of a tortured interpretation as urged by the Respondents.

The words of the statute itself are not defined. What is the plain meaning, then, of acquiescence? It is as Black's Law Dictionary would urge: conduct recognizing the existence of a transaction and to carry that transaction into effect. Black's Law Dictionary (6th ed.)(1990). Almost a decade of acquiescence was demonstrated by the Respondents and the Council of Co-owners and heir predecessors in interest.

How then, is this reconciled with Section 70 of the Horizontal Property Act? The Petitioners would urge this to be read in conjunction that altering or amending common elements is not a "covenant to the contrary" as described in Section 70, which "covenant to the contrary" is also not defined. The removal of a Common Element to becoming subject to "partition or division of the co-ownership." That is the "covenant to the contrary": a partition or division of ownership and not the removal of a Common Element or an addition of a Common Element. In refuting the Respondents, there are no

formal, solemn, or binding agreements at issue in this case as there are no claims for partition or division of the co-ownership. Again, to accept the interpretation of the Respondents, there can never be a change to the Common Elements after they are created by the execution and recording of a Master Deed. That cannot be the intent of the General Assembly when the Section immediately prior has language regarding the addition or subtraction of Common Elements. To urge otherwise creates an absurd result when the very language of Section 60 gives a mechanism to alter the percentage ownership in the Common Elements. This is the harmonization of the plain meaning, not the *reductio ad absurdum* urged by the Respondents, which they have been arguing since 2017.

Further, the Plaintiffs' own deeds took into account that the Master Deed would be amended and could be amended from time to time. As set forth in the testimony above, the deeds into these Plaintiff state that the "master deed may thereafter be amended from time to time." (ROA 5725-6042) (ROA 6128-6161) (ROA 4870-4871) (ROA 4902) They also gave a Power of Attorney to that end. *Id.* (ROA 5725-6042) (ROA 6128-6161) They cannot now complain of the amendment after taking title with the reservation of the amendment being clearly on the face of their deeds.

IV. JUDICIAL ESTOPPEL SHOULD HAVE APPLIED TO THE PARTIES IN THIS CASE

The Court of Appeals should have applied the doctrine of judicial estoppel and denied the relief sought by the Plaintiffs due to their inconsistent positions taken in this matter and in the earlier case also decided by Judge Scarborough. The Petitioner Mariner's Cay Council of Co-owners certainly appeared in the underlying foreclosure case. That entity represents all owners at Mariners' Cay Marina. Therefore, the Respondents should be judicially estopped due to those matters heard by Judge Scarborough in the case of *Emerald Road Portfolio, LLC v. Tiger River Capital, LLC*, Case No. 2013-

CP-10-0850 (the "Foreclosure Case"). The Mariner's Cay Council of Co-Owners, Inc., appeared, filed an answer, and made no attempt to intervene in any way or object to any sale of the Units subject to this lawsuit. (R. 6271-6277) The ultimate result of that case being Judge Scarborough issuing his Master's Deed recorded in Register of Deeds Office in Book 0510 at Page 674 on October 14, 2015. (R. 6264-6270). By bringing this very case, the Mariner's Cay Marina Council of Co-Owners, Inc., is asserting a position inconsistent or in direct conflict with that position it took in the Foreclosure Case and should be judicially estopped form doing so. *Cothran v. Brown*, 357 S.C. 210, 592 S.E.2d 629 (2004); *Federal Credit Union v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997). The purpose of the doctrine of judicial estoppel is to ensure the integrity of the legal system. *Id.* To apply, there must be 1) two inconsistent position taken by the same party or parties in privity with one other 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. *Id.* Here, all the elements are met. By appearing in the Foreclosure Case and allowing the Units to be sold, by being in two matters with parties who are in privity by virtue of actions of this Court, by appearing and saying that it had an interest and now saying it owns the Units, by allowing the sale to go through, by accepting dues, by allowing the Defendants to improve the properties, by placing liens on the property, by not refunding dues, and by now claiming they own the Units, all five elements are met. This is an equitable doctrine best applied by this court sitting in equity. *Id.* Judicial estoppel generally applies to inconsistent statements of fact, such as those before this Court by the Mariners Cay Marina Council of Co-Owners, Inc. *Hayne Federal Credit Unition v. Bailey*, 327 S.C. 242, 489 S.E.2d 472 (1997). The inconsistency

by the Plaintiffs should have stopped them asserting their claims in opposition to the position taken by the Mariner's Cay Marina Council of Co-Owners, Inc., in the earlier foreclosure action.

CONCLUSION

This Court should grant the Petition for a Writ of Certiorari where there is a novel question of law and an unsettled practice are regarding the two Sections at issue in the South Carolina Horizontal Property Act where the course of dealings between the parties was such that there was no "affect to title" of the Respondents where they had no knowledge of any alleged title, no claim to any alleged title, and agreed for years that the title to the Units in question belonged to the Petitioners and their predecessors in interest. This is especially true where the Master Deed from 2006 provided for language of amendment including the Power of Attorney there in and in the original deeds to the Respondents and their predecessors in interest so that the Amended Master Deed filed less than year had no effect on their title to their Units.

The Petitioners reconciliation of Sections 27-31-60 and 27-31-70 should be adopted by this Court as the Respondents' interpretation along with that of the trial court and the Court of Appeals would effectively render impossible any amendments to master deeds changing Common Elements by either addition or subtraction. Section 60 allows for alteration with acquiescence. Section 70 prohibits alterations regarding the division of Common Elements not being divided, which they were not divided in this case, as relates to an action for partition or division of ownership and not the amending of a master deed. That is the plain language of both of these applicable Code Sections.

There is no claim for negligence in this matter obliquely referenced by the Respondents in the conclusion of their Return. Red herrings abound

For the foregoing reasons, the Petitioners respectfully request that their Petition be granted.

BUIST, BYARS & TAYLOR, LLC

G. Hamlin O'Kelley,
SC Bar No. 15491
652 Coleman Blvd., Suite 200
Mt. Pleasant, SC 29464
(843) 856-4488
Hamlin.okelley@buistbyars.com

May 7, 2026

AND

LUZURIAGA MIMS, LLP

Kevin W. Mims.
SC Bar No. 69418
Whidbee S. Perrin
SC Bar No. 100396
50 Immigration St, Suite 200
Charleston, SC 29403
(843) 410-4713
kmims@lmlawllp.com
wperrin@lmlawlip.com