THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Court of Common Pleas
For Charleston County
Civil Action No.: 2009-CP-10-6746
Appellate Case No.: 2012-213584

Long Grove at Seaside Farms, LLC; The Beach Company; and Gulfstream Construction Company, Inc., Respondents,

v.

Long Grove Property Owners' Association, Inc.; Vista Realty Partners, LLC; and Long Grove Vista, LLC;

Of Whom Long Grove Property Owners' Association, Inc. is Appellant.

Long Grove Property Owners' Association, Inc., Third-Party Plaintiffs,

v.

James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C.; Sam Mayo, d/b/a SCM Construction, Inc.; and Essex Engineering Corporation, Third-Party Defendants,

Of Whom James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C. is Respondent.

FINAL BRIEF OF RESPONDENTS

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FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE CASE

Plaintiffs-Respondents Long Grove at Seaside Farms, LLC ("LSFSF"), The Beach Company, and Gulfstream Construction Company, Inc. ("Gulfstream") (collectively, "Plaintiffs"), filed this action for a declaratory judgment to determine a controversy and to obtain a declaration of the legal rights between the Plaintiffs and Defendant-Appellant Long Grove Property Owners' Association, Inc. (the "POA)" concerning the legal effect and enforceability of disclaimers and releases arising from the sale and subsequent conversion of a rental apartment complex to condominiums.

In response to the Plaintiffs' declaratory judgment Complaint, the POA filed counterclaims and third-party claims asserting various causes of action against the Plaintiffs, the architect of the apartments (James, Harwick & Partners, Inc. ("JHP")), the condominium converter (Long Grove Property Owners' Association, Inc. and Long Grove Vista, LLC (collectively, "Vista")), and against the building inspector (Essex Engineering Corporation, ("Essex")) and contractor (Sam Mayo) used by the converter, asserting claims for alleged construction defects in the condominiums. The Plaintiffs and JHP (collectively the "Respondents") filed motions to dismiss the POA's counterclaims pursuant to Rule 12(b)(6), SCRCP, or in the alternative, for a judgment on the pleadings pursuant to Rule 12(c), SCRCP.

By agreement of the parties, while Respondents' motions to dismiss were pending the POA obtained documents and took depositions concerning the transactional aspects of the sale of the property from the rental apartment owner to the condominium converter-developer.

The trial judge held two separate and extended hearings on the matter, and the trial judge requested and received extensive briefing from the parties addressing the issues presented.

Thereafter, the trial judge issued an order[1] dismissing the POA's claims against Respondents (the "Order"). The POA filed an appeal from that Order.

FACTS

This is an alleged construction defects case arising from the conversion of a rental apartment complex to a condominium development. Emphasis is placed on the concept of "alleged" construction defects because this case is before this Court on the basis of the legal effect presented by the disclaimers and notices at issue, the facts and circumstance of which are not in dispute, while assuming, without admitting, for purposes of the legal analysis that the alleged construction defects exist.

This lawsuit concerns the Long Grove Condominiums located in the Seaside Farm Development in Mount Pleasant (Charleston County), South Carolina. The Long Grove Condominiums were formerly the Long Grove Apartments, which was a rental apartment complex.

LGSF was the owner of the apartments. Gulfstream was the general contractor that constructed the apartments for LGSF. The Beach Company was the manager of the entity that in turn was the managing member of LGSF, and Beach Company acted as the property manager for the apartment complex. JHP was the architect that designed the apartments for LGSF.

The Long Grove Apartments were designed and constructed in or around 1999 for use as a rental apartment complex.[2] LGSF owned and operated the property solely as a rental

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[1] R. p. 1.

[2] R. p. 986, lines 5-7.

apartment complex in which apartment units were leased to tenants. LGSF never owned or operated the property as a condominium development.

In 2004 LGSF considered selling the apartment complex. LGSF hired L.J. Melody & Company ("L.J. Melody") as its exclusive marketing advisor to market the property nationwide. The offering materials described the property as being suitable for continued use as rental apartments (i.e., for "income investors") or for conversion to condominiums (i.e., "converters").**3** A set price was not specified for the property; instead the offering materials invited qualified buyers to bid on the property pursuant to certain defined parameters. The offering materials indicated that the property was being offered on an "as is, where is" basis,**4** which is an important fact the POA fails to mention in its Brief. The POA also fails to mention that none of its representatives or members even knew those materials existed until they were first discovered by the POA's counsel during discovery in this case.

As described by LGSF's representative, John Darby of the Beach Company, from the beginning LGSF made it clear that if any buyer intended to convert the property to condominiums, LGSF and its affiliates must be released from all such liability:

> Q: When you went to L.J. Melody to market the property, did you give them any terms for what would be in the sales contract, your requirements?
>
> A: Yeah. . . . We made it clear in the beginning that if the intentions were to convert the apartments to condominiums, that we wanted to be indemnified [sic] of any liability. At that particular time, there were a lot of conversions going on throughout the country.
>
> Q: Right. And the fact that there were conversions going on throughout the country, how did that affect what you were doing?
>
> A: What do you mean?

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3 R. pp. 1062-1063.

4 R. p. 1061 (first paragraph in "Introduction" section).

> Q: Well, you mentioned that, which means to me that it must have some importance that there were conversions sort of going on around the country.
>
> A: Well, we had never done a conversion. And the apartments were built to be apartments, to be managed as apartments and occupied as apartments. And if someone wanted to change that use, such as converting them into individual ownership condominiums, there's risk involved in that and we didn't want to share the risk.
>
> . . .
>
> Q: Now, was that requirement for indemnification a non-negotiable term?
>
> A: Yes.**5**

LGSF received bids for the property from both income investors and converters. Ultimately Defendant Vista Realty Partners, LLC ("Vista") was the high bidder. Vista is a Georgia limited liability company owned by Eduard de Guardiola, who has a law degree and is an experienced real estate developer and condominium converter.**6** Vista was an independent, arms-length buyer that has no direct or indirect relationship with LGSF.

Upon receipt of Vista's high bid, Vista and LGSF began to negotiate the terms of the sale of the apartments. The initial term sheet signed by Vista and LGSF stated in pertinent part:

> **LONG GROVE at SEASIDE FARM**
> **INITIAL TERM SHEET**
>
> . . . .
>
> **As-Is** The Property will be sold and purchased "as-is, where-is, and with all faults"; Seller will be released from all liabilities except those arising under the purchase and sale agreement.**7**

Similarly, Beach Company's cover letter forwarding the signed term sheet to Mr. de Guardiola states in pertinent part:

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5 R. p. 987, line 24-p.989, line 18.

6 R. p. 1048, line 3-p. 1051, line 3; p. 1052, line 24-p. 1055, line 7.

7 R. p. 1065 at p.1067.

> The indemnification language will include a release of all claims related to the development, design, construction, maintenance, alteration, and repair of the property. We propose that the release of claim will not only be in the Sales Contract but also in the deed of conveyance at closing and will survive the closing of this transaction.**8**

Vista and LGSF then began negotiating the terms of a written sales contract. Vista was represented by an Atlanta law firm and LGSF was represented by South Carolina counsel in the negotiations and preparation of a contract for the sale.

Following the negotiations concerning the terms of the contract, LGSF, as the Seller, and Vista,**9** as the Purchaser, entered into a Sales Contract for the apartment complex dated January 18, 2005, that states in pertinent part:

> 14. **Condition of Property.** Except as otherwise provided specifically in this Sales Contract, specifically including but not limited to the representations and warranties contained in Section 6 hereof, Purchaser acknowledges that neither Seller nor anyone acting for or on behalf of Seller has made any representation, statement, warranty, or promise to Purchaser with respect to the Property. Purchaser shall immediately examine the Property, and become familiar with the physical condition thereof. The Property shall be sold and conveyed strictly on an "as is", "where is", "without recourse" and "with all defects" basis, as it exists on the last day of the Inspection Period, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or otherwise), past or present use, construction, development, lease performance, investment potential, tax ramifications or consequences, income, compliance with law, habitability, tenancies, merchantability or fitness or suitability for any purpose, all of which are hereby expressly disclaimed except as contained in this Agreement. Without limiting the generality of the foregoing, Purchaser acknowledges that Seller has made no representations, warranties or covenants (except as otherwise provided specifically in this Sales Contract, specifically including but not limited to the representations and warranties contained in paragraph 6 hereof) as to the compliance of the Property with any federal, state, municipal or local statutes, laws, rules, regulations or ordinances, including, without limitation, those pertaining to construction, rent control, building and health codes, land use (or permits issued in connection therewith), zoning, lead paint, urea formaldehyde foam insulation, asbestos, hazardous or toxic wastes or substances, pollutants, contaminants or other environmental matters. Purchaser knowingly and fully assumes the entire risk as to all such matters. Purchaser shall confirm the aforesaid acknowledgments in writing as of

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8 R. p.1064.

9 Prior to closing Vista Realty Partners, LLC assigned its rights under the Sales Contract to Long Grove Vista, LLC, which is an entity established by Eduard de Guardiola to take title to the property. Vista Realty Partners, LLC and Long Grove Vista, LLC are collectively referred to as "Vista" for brevity and ease of reference.

the Closing Date. The provisions of this Section shall survive the closing and the delivery of the deed or any expiration or termination of this Agreement. **10**

The Sales Contract also stated:

> 15. **Assumption of Liability and Release of Claims.**
>
> a) Purchaser acknowledges that the Property was originally developed and constructed by Seller and its Affiliates (as herein defined). Purchaser represents that it is purchasing the Property for the purpose of converting the Property into condominiums which will be sold to the public. Purchaser assumes all responsibility for identifying and correcting all defects or problems, if any, that may exist, to ensure that the Property is properly constructed and suitable for use as condominiums in accordance with all applicable building regulations, codes, standards, and other applicable laws and requirements.
>
> b) Accordingly, as part of the valuable consideration being exchanged in this sale transaction, the receipt of which is hereby acknowledged, Purchaser on behalf of itself and its heirs, representatives, successors, and assigns, agrees to never sue and completely releases Seller, The Beach Co., Gulfstream Construction Company, Seller's other affiliates, agents, officers, directors, employees, insurers, representatives, successors, assigns, and all other companies, partnerships, entities, or persons involved in the design, development and/or construction of the apartment buildings and apartments therein and all other improvements prior to the Closing Date of this sale transaction (collectively, the "Affiliates"), for and from any and all claims of every kind whatsoever arising from or related to the development, design, construction, maintenance, alteration, or repair of the Property, including unknown and unforeseen claims that may now exist or that may arise in the future. . . . [emphasis added]**11**

The above assumption of liability, disclaimers, and releases in Paragraphs 14 and 15 of the Sales Contract were a key part of the negotiations between LGSF and Vista concerning the terms of the Sales Contract. LGSF's representative, John Darby of the Beach Company, testified that those terms were non-negotiable fundamental terms of the contract:

> Q: Mr. Darby, was the release and indemnification language in the sales contract and in the letter of intent, was that a core or fundamental term of the bargain with Vista?
>
> A: Yes.
>
> Q: Would [LGSF] have sold this property to Vista if Vista had not agreed to that language regarding the release and indemnification?

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10 R. p. 60 at pp. 70-71.

11 R. p. 71.

A: No.**12**

Vista's owner, Eduard de Guardiola, similarly testified that it would have been a "deal breaker" for LGSF if Vista had refused to agree to the provisions in Paragraphs 14 and 15 of the Sales Contract:

> Q: [Mr. de Guardiola] you told [the POA's counsel] that it was a quote deal breaker end quote for John Darby that these terms of paragraphs 14 and 15 be contained in the contract?
>
> A: Yes.
>
> Q: And tell me what you meant by deal breaker?
>
> A: John told me that he had to have these provisions in the contract in order for him to accept our offer.
>
> Q: In other words, if you didn't agree to it he wasn't going to sell the property to you.
>
> A: That's correct.**13**

Vista's acquisitions and development consultant on the project described these requirements as being a "contentious issue" between Vista and LGSF.**14**

In an effort to ensure that Vista would provide future condominium buyers with notice that Respondents had no role in the conversion and would not be responsible for any claimed construction defects in the condominiums, LGSF insisted that the Sales Contract include a provision requiring that the Master Deed for any condominium regime that was prepared and recorded by Vista after it purchased the property include a notice of the assumption of liability, disclaimers, and releases of all claims against LGSF related to the construction and condition of

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12 R. 1000, line 22-p.1001, line 7.

13 R. p. 1056, line 16-p. 1057, line 3.

14 R. p. 1097, lines 11-20.

the property. That requirement is set forth in Paragraph 16 in the Sales Contract, which states in pertinent part:

> 16. **Condominium Regime Documents**.
>
> Purchaser [i.e., Vista] acknowledges and agrees that the Assumption of Liability and Release of Claims in Section 15 above is intended to be binding on all subsequent purchasers of the Property or any condominiums or other subdivisions of the Property. In order to give effect to this intention, the provision set forth in Exhibit I [emphasis added], attached hereto and incorporated herein, will be included in the Master Deed (as herein defined) establishing any condominium regime, and in any and all deeds or any other conveyances of all or part of the Property (except for conveyances of condominium units by Purchaser), including, but not limited to, a sale of a company (or corporate stock or partnership interest) interest.**15**

Exhibit I to the Sales Contract, as referred to in the above-quoted portion of Paragraph 16, specifies that the following notice language be included in the Master Deed recorded by Vista:

> **EXHIBIT I [to Sales Contract]**
> **Disclosure Language**
>
> Save and excepting only the limited warranty of title hereinafter set forth and herein contained, the Property is being conveyed strictly on an "as is", "where is" and "with all defects" basis, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or otherwise), past or present use, construction, development, lease performance, investment potential, tax ramifications or consequences, income, compliance with law, habitability, tenancies, merchantability or fitness or suitability for any purpose, all of which are hereby expressly disclaimed. Without limiting the generality of the foregoing, Grantee [i.e., the POA] acknowledges that Grantor's [i.e., Vista's] predecessor in title, Long Grove at Seaside Farms, LLC ("Long Grove") and its Affiliates (as herein defined) have made no representations, warranties or covenants as to the compliance of the Property with any federal, state, municipal or local statutes, laws, rules, regulations or ordinances, including, without limitation, those pertaining to construction, rent control, building and health codes, land use (or permits issued in connection therewith), zoning, lead paint, urea formaldehyde foam insulation, asbestos, hazardous or toxic wastes or substances, pollutants, contaminants or other environmental matters.
>
> Grantee acknowledges that the Property was originally developed and constructed by Long Grove and its Affiliates (as herein defined). Grantor purchased the Property for the purpose of converting the Property into condominiums which it is selling to the public. Grantor assumed all responsibility for identifying and correcting all defects or problems, if any, that existed, to ensure that the Property is properly constructed and suitable for use as condominiums in accordance with all applicable building regulations, codes, standards, and other applicable laws and requirements.

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15 R. p. 72.

> Accordingly, as part of the valuable consideration being exchanged in this sale transaction, the receipt and sufficiency of which are hereby acknowledged, Grantor on behalf of itself and its heirs, representatives, successors, and assigns (including Grantee and all other successors-in-title to all or a portion of the Property), agrees to never sue and completely releases Long Grove at Seaside Farms, LLC, The Beach Co., Gulfstream Construction Company, its affiliates, agents, officers, directors, employees, insurers, representatives, successors, assigns, and all other companies, partnerships, entities, or persons (collectively, the "Affiliates") involved in the design, development and/or construction of the apartment buildings and apartments therein and all other improvements prior to March ___, [sic] 2005, for and from any and all claims of every kind whatsoever arising from or related to the development, design, construction, maintenance, alteration, or repair of the Property, including unknown and unforeseen claims that may now exist or that may arise in the future.
>
> Grantor and Grantee acknowledge and agree that the assumption of liability and release of claims above is intended to be binding on all subsequent grantees of the Property or any condominiums or other subdivisions of the Property. In order to give effect to this intention, these provisions are included in this Master Deed, and will also be included in any other conveyances outside the coverage of this Master Deed. [emphasis added]**16**

Following discussions between the parties and their counsel concerning LGSF's requirement that Vista provide notice of the disclaimers and releases as reflected Paragraphs 14, 15 and 16 in the Sales Contract, Vista accepted LGSF demands and signed the Sales Contract containing those terms.

The Sales Contract provided Vista with a due diligence period under which it could inspect the condition of the property prior to closing. Vista hired an engineering company, Essex, to inspect the property. Essex issued a property condition report that identified defects in the buildings, including water damage on the exterior balconies.**17** Vista also received a report issued by a local engineer, Russell T. Wallace, P.E., that identified water damage on the exterior balconies of the units.**18** Prior to closing, Vista required LGSF to escrow $200,000 of the sales

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16 R. p. 135.

17 R. pp. 1100.

18 R. pp. 1178.

proceeds to cover Vista's future cost of the balcony repairs.**19** Vista then closed on the Sales Contract and purchased the apartment complex from LGSF.

The closing of the sale of LGSF's apartment complex to Vista occurred on March 7, 2005. The deed from LGSF to Vista, which was recorded in the Charleston County RMC Office and appears in the chain of title to the property, states in pertinent part:

> . . . the Property is being conveyed strictly on an "as is", "where is" and "with all defects" basis, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or otherwise), past or present use, construction, development, lease performance, investment potential, tax ramifications or consequences, income, compliance with law, habitability, tenancies, merchantability or fitness or suitability for any purpose, all of which are hereby expressly disclaimed. Without limiting the generality of the foregoing, Grantee acknowledges that Grantor and its affiliates (The Beach Co. and Gulfstream Construction Company) have made no representations, warranties or covenants as to the compliance of the Property with any federal, state, municipal or local statutes, laws, rules, regulations or ordinances, including, without limitation, those pertaining to construction, rent control, building and health codes, land use (or permits issued in connection therewith), zoning, lead paint, urea formaldehyde foam insulation, asbestos, hazardous or toxic wastes or substances, pollutants, contaminants or other environmental matters. [emphasis added]**20**

After closing on the property, Vista began converting the rental apartments to condominiums. Vista hired its own contractors to repair the balconies and perform other work on the buildings.**21** Vista then requested and received the $200,000 in funds that were escrowed at closing to cover the costs of the balcony repairs. Vista also prepared and recorded a Master Deed that created the Long Grove Horizontal Property Regime and the POA. The Master Deed was prepared and recorded by Vista's legal counsel. **22**

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19 R. pp. 1187.

20 R. pp. 143 at p. 144 (first paragraph).

21 R. p. 1099, lines 3-16.

22 R. p. 1098, lines 2-9.

As required in Paragraph 16 of the Sales Contract between LGSF and Vista, the Master Deed prepared and recorded by Vista contained notice that LGSF had sold the property on an "as-is" and "with all defects" basis and had disclaimed and been released from all warranties and liabilities associated with the condition of the property. The notice, which is set forth in Paragraph 24 in the Master Deed prepared and recorded by Vista, states:

MASTER DEED FOR LONG GROVE
HORIZONTAL PROPERTY REGIME

24. RELEASE.

Declarant [i.e., Vista] purchased the property comprising the Regime from Long Grove at Seaside Farms, LLC ("Long Grove") on March 7, 2005. In the Sales Contract between Long Grove [i.e., LGSF] and Declarant, dated January 18, 2005, to convey the property comprising the Regime to Declarant, Declarant agreed to include the following provision regarding release in this Master Deed:

> Save and excepting only the limited warranty of title hereinafter set forth and herein contained, the Property comprising the Regime was conveyed to Declarant in the sales on March 7, 2005 noted above strictly on an "as is", "where is" and "with all defects" basis, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or otherwise), past or present use, construction, development, lease performance, investment potential, tax ramifications or consequences, income, compliance with law, habitability, tenancies, merchantability or fitness or suitability for any purpose, all of which are hereby expressly disclaimed. Without limiting the generality of the foregoing, the Owners acknowledge that Declarant's predecessor in title, Long Grove and its Affiliates (as herein defined) have made no representations, warranties or covenants as to the compliance of the property compromising the Regime with any federal, state, municipal or local statutes, laws, rules, regulations or ordinances, including, without limitation, those pertaining to construction, rent control, building and health codes, land use (or permits issued in connection therewith), zoning, lead paint, urea formaldehyde foam insulation, asbestos, hazardous or toxic wastes or substances, pollutants, contaminants or other environmental matters.

> The Owners acknowledge that the property comprising the Regime was originally developed and constructed by Long Grove and its Affiliates (as herein defined). Declarant purchased the property compromising the Regime for the purpose of converting such property into condominiums which it is or will sell to the public. Declarant assumed all responsibility for identifying and correcting all defects or problems, if any, that existed, to ensure that the property comprising the Regime is properly constructed and suitable for use as condominiums in accordance with all applicable building regulations, codes, standards, and other applicable laws and requirements.
>
> Accordingly, as part of the valuable consideration being exchanged in the sale transaction on Marcy 7, 2005 note above, the receipt and sufficiency of which are hereby acknowledged, Declarant on behalf of itself and its heirs, representatives, successors, and assigns (including the Owners and all other successors-in-title to all or a portion of the property comprising the Regime), agreed to never sue and completely released Long Grove, The Beach Company, Gulfstream Construction, its affiliates, agents, officers, directors, employees, insurers, representatives, successors, assigns, and all other companies, partnerships, entities, or Persons (collectively, the "Affiliates") involved in the design, development and/or construction of the apartment buildings and apartments therein and all other improvements prior to March 7, 2005, for and from any and all claims of every kind whatsoever arising from or related to the development, design, construction, maintenance, alteration, or repair of the property comprising the Regime, including unknown and unforeseen claims that may now exist or that may arise in the future.
>
> Declarant and Owners acknowledge and agree that the assumption of liability and release of claims above is intended to be binding on all subsequent grantees of the property comprising the Regime, the grantees of any condominiums or other subdivisions of the property compromising the Regime, and the Owners. In order to give effect to this intention, these provisions are included in this Master Deed, and will also be included in any other conveyances outside the coverage of this Master Deed. [emphasis added]**23**

Following its recording of the Master Deed that created the POA, Vista controlled the POA by appointing its board of directors.**24**

When Vista purchased the apartment complex from LGSF, the rental apartments were occupied by rental tenants. Beach Company's property management division had been

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23 R. pp. 151 at pp. 197-198.

24 R. p. 1058, line 8-p. 1059, line 3.

managing the rental apartments for LGSF, and when Vista purchased the property from LGSF it entered into an apartment management agreement with Beach Company under which Beach Company continued to manage the rental apartments for Vista.**25** That management agreement was for management of the rental units during the conversion process and specifically excluded management of units once Vista had converted them to condominiums:

> 2.11 Horizontal Property Regime. The parties agree and acknowledge that Owner [i.e., Vista] intend to convert the Property to a horizontal property regime by recording a Master Deed in the Office of the RMC for Charleston County, South Carolina (the "Conversion"). On or before the date of the closing of the sale of the first unit, such date to be determined by Owner, the condominium association for said horizontal property regime may assume responsibility for certain maintenance, management and repair of portions of the Property deeded "Common Elements" and at Owner's discretion and direction Management [i.e., the Beach Company] shall be deemed released from the perform [sic] of such responsibilities under this Agreement. Unless the condominium association and Manager agree otherwise, Manager shall not receive any compensation for the management of the condominium association.**26**

Beach Company and Vista also discussed the possibility of entering into an agreement for Beach Company to manage the condominium association as the apartment units were converted to condominiums, but they could not agree on terms and Beach Company never operated or managed the POA in any form or fashion.**27**

As such, for a brief period of time after Vista purchased the apartment complex from LGSF, Beach Company continued to manage the rental units pursuant to its apartment management agreement with Vista, while Vista operated and managed the POA as Vista converted and sold units as condominiums. During that period, Beach Company sent Vista a letter stating its concerns regarding the scope of the apartment management services that Vista

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25 R. p. 1193.

26 R. p. 1193 at p. 1198.

27 R. p. 1175, line 21-p. 1176, line 10.

was requesting from Beach Company. That letter, dated August 5, 2005, states in pertinent part:

> During the last few months, Vista Realty Partners has requested that the Beach Company assist it in activities related to the construction, repairs, and remodeling work associated with the conversion of Long Grove from apartments to condominiums. For example, Vista has requested that the Beach Company's managers and staff handle apartment-to-condominium renovations such as vinyl and carpet replacement and painting. Such work might be included in a standard "turn" of rental units in a completed apartment. However, at this stage of the project, this type of work is related to the construction, repairs, and remodeling work involved in the conversion of the project to condominiums, and the requested work exceeds the scope of The Beach Company's management agreement.
>
> Accordingly, the purpose of this letter is to confirm and document that The Beach Company is acting only as the leasing/rental manager. The Beach Company is not responsible for managing or handling any of the construction and remodeling work associated with Vista Realty Partner's conversion of the project from apartments to condominiums.
>
> Vista Realty Partners agrees that it is solely responsible for the coordination and supervision of all design, development, construction, and remodeling activities related to conversion of the project from apartments to condominiums. This coordination and supervision includes a turn-key process that follows through with the completion of any and all punch list items. The Beach Company shall have no requirement or responsibility for such improvements under its management agreement.
>
> To the fullest extent permitted by law, Vista Realty Partners, on behalf of itself and its successors and assigns, agrees to hold release, harmless, defend, and indemnify The Beach Company . . . of and from any and all claims, lawsuits, demands, losses, damages, and all other expenses of any kind whatsoever (including without limitation attorney's fees and costs) arising out of or in any way related to Vista Realty Property's development, design, construction, repairs, and remodeling work associated with the conversion of Long Grove from apartments to condominiums; . . . .
>
> Please acknowledge Vista Realty Partner's receipt, understanding, acceptance, and acknowledgment of this notice and agreement by signing and returning a copy of this letter to my attention no later than August 11, 2005.**28**

Vista refused to sign the letter, and in a follow up letter dated September 12, 2005, the Beach Company notified Vista that it was terminating its management services of the property.**29** Vista then hired other company, Ravenel Associates, to manage the property, and Ravenel continues to manage the property for the POA today.

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28 R. pp. 1204-1205.

29 R. p. 1177.

In addition to a property management division, Beach Company has a residential real estate sales division (Beach Residential). After it purchased the property, Vista entered into an agreement with the Beach Company for Beach Company to provide marketing services and sales support to Vista in connection with Vista's sale of its condominium units. Vista prepared and provided Beach Company with a form Purchase Agreement that Vista used to sign contracts with condominium buyers. The Purchase Agreement used by Vista to sell the condominium units contains several provisions that are pertinent to Beach Company's role as the broker-in-charge in light of several improper statements made by the POA in its Brief:

> LONG GROVE HORIZONTAL PROPERTY REGIME
>
> PURCHASE AGREEMENT [for individual condominium units]
>
> THIS AGREEMENT is made and entered into this ____ day of ____, 200__, by and between Long Grove Vista, LLC, a Georgia limited liability company (hereinafter referred to as the "Seller"), and _____ (hereinafter referred to as the "Purchaser").
>
> . . . .
>
> 7. DISCLAIMER. Purchaser and Seller acknowledge that they have not relied upon any advice, representations or statements of Brokers [i.e., Beach Company] and waive and shall not assert any claims against Brokers involving the same. . . . Purchaser and Seller agree that Brokers shall not be responsible to advise Purchaser and Seller on any matter, including but not limited to the following: . . . the condition of the Unit, any portion thereof, or any item therein; . . .
>
> . . . .
>
> 10. LONG GROVE PROPERTY OWNERS ASSOCIATION, INC.
>
> (a) Governing Documents. Purchaser acknowledges that the Unit being purchased is a portion of the [Long Grove Horizontal Property] Regime and improvements that have been or will be made subject to the Master Deed referred to in Paragraph 1. The nature and extent of the rights and obligations of the Purchaser in acquiring and owning the Unit will be controlled by and subject to the Master Deed, as well as the Articles of Incorporation, the Bylaws, and the rules and regulations of the Association. Purchaser agrees to comply with all of the terms, conditions and obligations set forth therein.
>
> (b) Membership in Association. Upon conveyance of title to the Unit to Purchaser, Purchaser shall automatically become a member of the Association and shall be subject to the assessment obligations and other provisions set forth in the Master

> Deed, including the obligation of the Purchaser to pay a contribution to the working capital of the Association referred to in Paragraph 5(b) above.
>
> (c) Disclosure Package. Purchaser hereby acknowledges that he/she has received a copy of the property condition report required under Section §27-31-430 of the South Carolina horizontal Property Act, a copy of the Master Deed, a copy of the Bylaws of the Association, a copy of the Articles of Incorporation of the Association, a copy of the estimated budget of the Association (the "Disclosure Package").
>
> . . . .
>
> 24. ENTIRE AGREEMENT. This Agreement contains the entire agreement between the parties hereto. No agent, representative, salesman or officer of the parties hereto has authority to make, or has made, any statements, agreements, or representations, either oral or in writing, in connection herewith, modifying, adding to, or changing the terms and conditions hereof and neither party has relied upon any representation or warranty not set forth in this Agreement. No dealings between the parties or customs shall be permitted to contradict, vary, add to, or modify the terms hereof.**30**

The "Disclosure Package" referenced in Paragraph 10(c) in the above quoted form Purchase Agreement included a copy of the Master Deed that contains notice that LGSF had sold the property to Vista on an "as is", "where is", and "with all defects" basis and had specifically disclaimed and been released from all warranties and liabilities related to the condition of the property.**31**

In addition to the notices in the Master Deed and unit sales contracts, when Vista sold its newly developed condominiums to individual condominium unit buyers, the deeds from Vista to the buyers contained following provision providing the buyers with notice that Vista had converted the apartments to condominiums:

> WHEREAS, Long Grove Vista, LLC has converted the rental units at Long Grove Apartments to condominium ownership pursuant to S.C. Code of Laws, Section 27-31-410, et seq., and has complied with the disclosure, notice and offer requirements, set forth therein, including but not limited to compliance with Section 27-31-420(B) **32**

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30 R. p. 1015 at pp. 1018-1019, 1023.

31 R. p. 1212 at pp. 1213, 1260-1261 (paragraph 24).

32 R. p. 242 (second "Whereas" paragraph).

The deeds from Vista to the individual condominium buyers also contained the following notice that the conveyance of the units from Vista to the buyers was subject to the terms of the Master Deed for the POA:

> Said property subject to the following:
>
> 1. Master Deed for Long Grove Horizontal Property Regime, as more specifically identified in the Master Deed and the exhibits thereto (together, the "Master Deed") dated April 13, 2005 and recorded April 18, 2005, in Book H533 at Page 15 et seq., as amended by First Amendment to Master Deed for Long Grove Horizontal Property Regime dated April 26, 2005 and recorded on May 5, 2005 in Book U535 at Page 435 in the RMC Office for Charleston County, South Carolina, and exhibits and further amendments thereto; **33**

By 2006 Vista had sold all of the units and turned over control of the POA to a board of directors elected by the condominium unit owners pursuant to the terms of the POA's Master Deed and Bylaws.

Respondents had no involvement or communications with the POA until 2009, when the POA, through its attorney, sent demand letters to LGSF, Gulfstream, and The Beach Company stating that the POA "is asserting a construction defects claim" against them and demanding a response "in accordance with the Notice and Opportunity to Cure Construction Dwelling Defects Act."**34**

Thereafter, Plaintiffs filed this declaratory judgment lawsuit seeking a declaration concerning the validity of the POA's claims against them in light of LGSF having sold the property to Vista on an "as is", "where is", and "with all defects" basis and having specifically disclaimed and been released from all warranties and liabilities related to the condition of the property behalf of itself and on behalf of its "affiliates."

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33 R. p. 242 at p. 244 (paragraph "1").

34 R. pp. 248, 250, 252.

Upon Plaintiffs' filing of this declaratory judgment action, the POA filed counterclaims, cross-claims, and third-party claims against JHP and the other parties in this case alleging joint and several liability for construction defects in the condominium buildings based on breach of the implied warranties of habitability and workmanlike service, breach of express warranties, and negligence. The defects alleged by the POA include leaks and water damage at the balconies—the same balconies that Vista hired its own contractors to repair after it purchased the property from LGSF and for which Vista received the $200,000 in escrowed funds that were set aside at closing to cover Vista's cost of those repairs.**35**

In response to the POA's counterclaims and third-party claims, Respondents filed motions to dismiss the POA's claims pursuant to Rule 12(b)(6), SCRP, or for a judgment on a pleadings pursuant to Rule 12(c), SCRP, on the grounds that: (i) Respondents owe no legal duty to the POA; (ii) Respondents did not extend any warranties to the POA; and (iii) the POA is bound by the assumption of liability, disclaimers, releases, in the instruments of record (i.e., the POA's Master Deed) and is estopped as a matter of law from disclaiming or collaterally attacking those instruments of record.**36** JHP also moved on the additional ground that the POA did not state a proper third-party complaint under SCRCP 14(a), SCRCP.**37**

Following several extended hearings and extensive consideration of the issues, the trial judge issued an order dismissing the POA's claims against LGSF, Beach Company, Gulfstream

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35 R. p. 271 at p. 281 (POA's Counterclaim at ¶¶ 59(a), (b), (f), and (i)). See also R. p. 346 (POA's Memorandum in Opposition to LGSF's Motion to Dismiss, which lists the alleged defects in the buildings).

36 R. pp. 299 and 302.

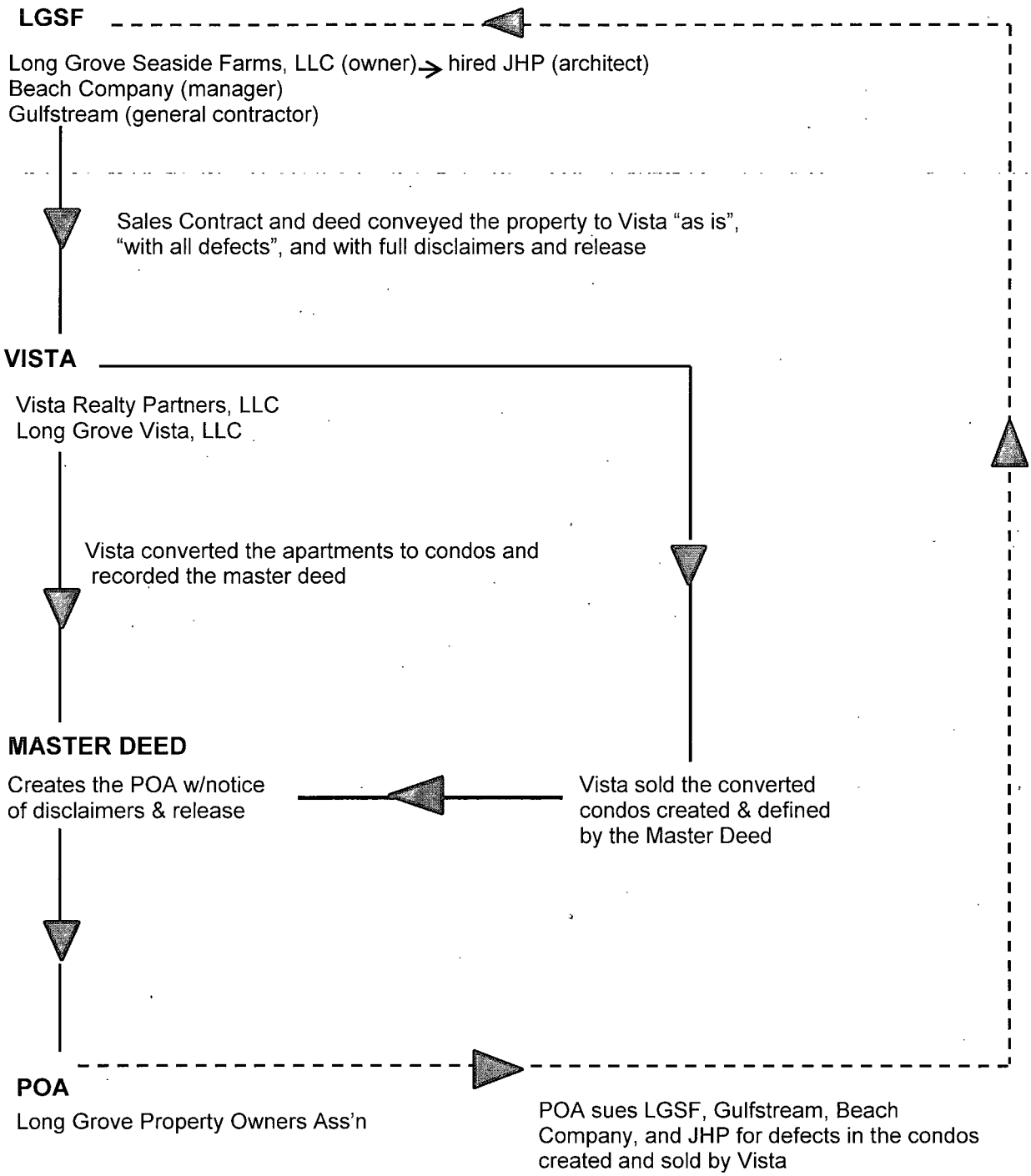
37 R. p. 780.

and JHP, who are now the Respondents in this appeal. The POA's claims against Vista and the other third-party defendants were unaffected by the order and are pending in the circuit court.

Summary of the Facts

In summary, LGSF designed and built an apartment complex for its own purpose and proceeded to utilize the property for that specific purpose (i.e., rental apartments) for a number of years. Respondents did not design or build condominiums. LGSF later sold the used apartment complex to a sophisticated third-party (Vista) in an arms-length transaction. When Vista converted the apartments to condominiums, Vista changed the use of the property and changed the type of ownership from that of a single owner-landlord to individual ownership of individual units. The Master Deed prepared and recorded by Vista contains clear notice that LGSF sold the property on an "as is", "where is", "without recourse" and "with all defects" basis and that Respondents would not be responsible for any defects in the condominiums that were created and sold by Vista. Those disclaimers and release arose from extensive arm's-length negotiations between sophisticated entities that enjoyed equal bargaining power. The POA was created by Vista and for a period of time was controlled by Vista. This not a situation in which a homebuyer with no bargaining rights relied on Respondents to design or construct them a condominium. Respondents did not design or build any condominiums, and they did not sell any condominiums to anyone.

The following flow chart depicts the POA's hierarchy in the chain of events leading up to its creation and filing of this lawsuit:



ARGUMENT

"[I]t would be inappropriate to allow the purchaser of Long Grove (Vista) to waive all warranties and rights of action as part of a purchase bargain, but then create an entity (the POA) that would somehow revive those rights and warranties."

(Judge Baxley's Order ¶ 86)**38**

All of the POA's arguments underlying its appeal can be boiled down and summarized as follows: A builder/developer/architect can never end responsibility for the condition of the property upon its sale and instead after the sale remain strictly liable to future downstream purchasers for any defects in the condition of the property, regardless of any notices and disclaimer given to the buyer and regardless of whether the buyer subsequently converts the form of use of the property. That is not the law or policy—and it should not be the law or policy—in the State of South Carolina. All of the arguments raised by the POA were meticulously considered and thoroughly addressed by the trial court in the order dismissing the POA's claims against Respondents, and the Respondents fully adopt and incorporate that order as a response to the POA's appeal.**39**

1. THE NOTICE OF DISCLAIMER AND RELEASE IN THE POA'S MASTER DEED "CUT THE STRING" BETWEEN ANY WARRANTIES AND DUTIES ARISING FROM THE ORIGINAL CONSTRUCTION OF THE APARTMENTS AND THOSE ARISING AFTER VISTA CHANGED THE LEGAL CHARACTER AND USE OF THE PROPERTY TO CONDOMINIUMS.

The POA argues that the releases and disclaimers in its Master Deed are an invalid "exculpatory contract" because they release Respondents from "non-delegable duties" arising

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38 R. p. 1 at p. 27.

39 Judge Baxley's Order is so detailed and so thoroughly analyzes and addresses the issues on appeal that Respondents' counsel struggled to avoid having this Brief essentially duplicate the contents of that Order.

under building codes and statutes in violation of public policy. The POA's arguments are misplaced.

a. There is no "exculpatory "contract"—or any other contract—between the POA and Respondents.

As a threshold issue, it is important to recognize that there is no "contract" of any kind between the POA and Respondents. The POA's arguments regarding it being bound to a "contract" are based on the POA's subtle attempt to step into Vista's shoes and retroactively argue against the fairness and enforceability of the terms of the Sales Contract under which LGSF sold the used apartment complex to Vista. That Sales Contract was extensively negotiated, executed, and closed before the POA even existed. The POA was not a party to the Sales Contract or to any of the discussions leading up to the Sales Contract. Similarly, the POA and subsequent condominium unit buyers never saw the LJ Melody marketing materials for the sale of the apartment complex which the POA repeatedly and disingenuously references in its Brief. The POA did not even exist at that time and the POA did not know those marketing materials existed until the materials were produced years later during discovery in this case. The POA also ignores the fact that those marketing materials state that the property would be sold "as is."**40**

There is no contract between the POA and any of the Respondents. In fact, there could not be any contract between them because the POA did not even exist when LGSF sold the apartment complex to Vista. Likewise no condominium units or condominium buyer/owners existed when LGSF sold the property to Vista. The condominiums were created after Vista purchased the property and subsequently converted it to condominiums, and the owners were

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40 R. p. 1061 (first paragraph in "Introduction" section).

"created" when Vista subsequently sold the converted condominiums to buyers. As such, it was physically and legally impossible for any of the Respondents to enter into any contract with a POA or condominium owners that did not exist at the time of sale.

LGSF sold the property to Vista on an "as-is" and "with all defects" basis and Respondents specifically disclaimed and were released from all warranties and liabilities associated with the condition of the property. There was no "contract" between LGSF and the POA, and the purpose and effect of LGSF requiring Vista to include notice of those terms in the Master Deed was to ensure that subsequent buyers had a means to receive notice that Respondents had no responsibility or liability for anything that Vista did with the property after Vista purchased the property from LGSF. It is easy to lose sight of this important distinction between "contract" and "notice" given that all of the POA's arguments are premised on attacking the terms and validity of the contract between LGSF and Vista.

Moreover, even if the notice in the Master Deed is improperly viewed as an exculpatory contract, the South Carolina Supreme Court routinely upholds exculpatory contracts in recognition of the freedom of private parties to contract as they choose. *Huckaby v. Confederate Motor Speedway*, Inc., 276 S.C. 629, 281 S.E.2d 223 (1981); *Pride v. Southern Bell Tel. & Tel. Co.*, 244 S.C. 615, 138 S.E.2d 155 (1964); *South Carolina Elec. & Gas Co. v. Combustion Engineering, Inc.,* 283 S.C. 182, 322 S.E.2d 453, 459 (Ct. App.1984). As recently observed by the South Carolina Supreme Court, "[l]imitation of liability and exculpation clauses are routinely entered into." *Gladden v. Boykin*, 402 S.C. 140, 145, 739 S.E.2d 882, 884 (2013). None of the cases from other states cited in the POA's Brief contain the detailed and explicit notice of disclaimers and release like the notice contained in the POA's Master Deed. The trial court

carefully considered the issue and properly concluded that the notice of disclaimers and release contained in the Master Deed are not unconscionable and do not violate public policy. As stated by the trial judge: "[T]this Court does not perceive that it is the public policy of this state that no selling party can enter into a contract as to real property that would disclaim responsibility when the purchasing party intends to alter the use and legal nature of the property."[41]

Accordingly, the fundamental issue presented in this appeal is not whether the POA is bound to the terms of the contract between LGSF and VISTA; rather, the issue is whether the POA is legally bound by the "notice" of the disclaimers and release contained in the Master Deed under which the POA was subsequently created and exists, and under which the units that were created by Vista and are governed by the POA were created, sold, and conveyed.

b. Respondents did not place the condominiums in the stream of commerce, and they did not extend any warranties to the POA and owe no duty of care to the POA.

The POA argues that South Carolina public policy imposes "non-delegable" duties on Respondents under building and design codes and statutes that prohibit a builder, developer, owner, or architect from disclaiming liability for the condition of a property when it is sold. The POA also argues that Respondents remain liable to future downstream purchasers regardless of whether the buyer subsequently changes the use or condition of the property. In essence, the POA argues that a builder, architect, owner, and developer remains strictly liable for the condition of the property after it is sold, regardless of the terms of the sale and regardless of what the buyer does with the property after it is purchased. Contrary to the POA's arguments, the

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41 Judge Baxley's Order ¶ 112; R p. 37.

laws and statutes of the State of South Carolina do not impose non-disclaimable and never-ending liability on builders, architects, and owners.

South Carolina law applicable to construction defects is an entirely judicially crafted framework of common law that has evolved in a somewhat convoluted fashion over the years as the appellate courts struggled to deal with the fact that the builder and seller of a new home might not be the same person or entity. The common law evolved to impose three theories of liability—the implied warranty of habitability, the implied warranty of workmanlike service and negligence—based on the Court's concern to protect home buyers, especially new home buyers, against builders that place defective construction into the "stream of commerce." *See Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989) ("We have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce."); *Kirkman v. Parex, Inc.*, 369 S.C. 477, 483, 632 S.E.2d 854, 857 (2006) (stating that the determining factor for imposing the implied warranty of a new house's habitability, is whether the defendant "places it, by the initial sale, into the stream of commerce.") (quoting *Arvai v. Shaw*, 289 S.C. 161, 164, 345 S.E.2d 715, 717 (1986)). The duties and obligations of architects and builders arising under the codes and statutes that govern builders and architect are embodied in the framework of common law pertaining to residential construction defects law in this State. *See, e.g., Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. at 347, 384 S.E.2d at 738 (holding a builder may be liable to a home buyer when the builder has violated an applicable building code).

The rationale of the Court's rejection of the doctrine of caveat emptor (buyer beware) was its concern with the unequal bargaining power between the new home buyer and seller, the

new home buyer's reliance on the skills of the builder, and the inability of the new home buyer to inspect a new house for latent defects prior to purchase. *See Kennedy v. Columbia Lumber and Mfg. Co., Inc.*, 299 S.C. at 343, 384 S.E.2d at 735-36; *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 500, 229 S.E.2d 728, 729 (1976) (citing *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970)); *Sapp v. Ford Motor Co.*, 386 S.C. 143, 147-48, 687 S.E.2d 47, 49 (2009). Here, however, the property at issue was used and not new, the arms-length transaction took place between two sophisticated parties represented by counsel, and Vista had an opportunity to and did inspect the property for defects prior to purchase.

South Carolina has never gone so far as to state or suggest that builders, sellers, and designers can never disclaim liability for construction defects and must remain strictly liable under all circumstances. To the contrary, the South Carolina Supreme Court has recognized limits on the liability imposed on builders and sellers. For example, in *Kirkman v. Parex* the Court pronounced that "the principle of freedom of contract permits a party to effectively disclaim the implied warranty of habitability" in a contract for the sale of a new home. *Id.*, 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006). Thereafter, in *Smith v. Breedlove*, 377 S.C. 415, 661 S.E.2d 67 (2008), the Court held that the implied warranty of workmanlike service, which arises from the construction of home, did not apply to an owner who sold his home that he built as his own general contractor and he owed no duty of care in construction of the house to the subsequent purchaser, despite the argument that he placed the home in the stream of commerce when he sold it. *Cf. Gladden v. Boykin*, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013) ("It is one thing to impose greater demands on the builder of a <u>new</u> home, who is in a position to know of the home's defects . . . .") [emphasis added].

Arguably the implied warranty of habitability, which springs from the sale of a new home, is the strongest or most important of the three theories of liability for construction defects claims (the other two theories of being the implied warranty of workmanlike service and negligence), because that warranty arises when new construction is knowingly placed into the stream of commerce and directly into the hands of a buyer. If under South Carolina law the implied warranty of habitability, which arises from the sale of a new home, can be disclaimed by the seller as stated in *Kirkman v. Parex*, then it must logically follow that liability based on negligence and on the implied warranty of workmanlike service, which arise from the construction (as opposed to the sale) of a new home, can also be disclaimed. Under the POA's argument, the supposed non-delegable duties imposed by the building and design codes would prohibit the right of disclaimer recognized in *Kirkman v. Parex* and would have required imposition of liability on the builder-seller in *Smith v. Breedlove*.

Respondents did not design, build, or sell condominiums and they did not place any condominiums in the "stream of commerce." To the contrary, the notice contained in the POA's Master Deed clearly indicates that the Respondents had disclaimed that the property was suitable for condominium use and had disavowed and been released from liability for any such use.

c. Vista changed the use and legal nature of the property when it converted it to condominiums.

There is a significant difference between rental apartments and condominiums for purposes of applying residential construction defects law. An apartment renter (i.e., a tenant) does not own anything and merely rents use of an apartment, typically on short term basis (i.e., on a month-to-month or yearly rental basis). Unlike an owner that has purchased a home, a renter has no investment in a rental apartment. *Cf. Sapp v. Ford Motor Co.*, 386 S.C. 143, 148,

687 S.E.2d 47, 49 (2009) ("A home is typically an individual's single largest investment). A renter that is not satisfied with the condition of an apartment can simply walk away from the property. Conversely, renters have no right to continued occupancy of an apartment at the end of a lease. As such, rental apartments are more akin in nature to one-owner commercial office building that is leased to office tenants, rather than of a residential character existing in a condominium building sharing common ownership among multiple residential owners.

When Vista converted the apartments to condominiums, Vista changed the use of the property from commercial to residential and changed the type of ownership from that of a single owner-landlord to individual ownership of individual units. The Respondents did not design, build, own, or sell condominiums, and the property was sold with clear notice that the respondents were disavowing the condition of the buildings and disavowing whether they property was suitable for condominium use.

LGSF construed the apartments as a rental property. When Vista converted the apartments to condominiums, Vista changed the use of the property from commercial-type use (i.e., rental for profit) to a residential use, and Vista changed the type of ownership from that of a single owner-landlord to individual ownership of individual units. Under the terms of the Sales Contract, LGSF clearly and unequivocally sold the property to Vista on an "as-is" and "with all defects" basis and Respondents disclaimed and were released from all warranties and liabilities associated with the condition of the property. Those releases and disclaimers arose from extensive arm's-length negotiations between sophisticated entities that enjoyed equal bargaining power. The POA was created by Vista and for a period of time was operated and controlled by Vista, and the POA is the successor in interest to Vista.

Here, Respondents did not design, build or sell a new condo, a used condo—or anything else—to the POA. LGSF sold a used rental apartment complex to Vista, and after the sale Respondents had no control over Vista's subsequent use, conversion, and sale of the property. LGSF sold the property to Vista on an "as-is" and "with all defects" basis and with a full disclaimer and release of Respondents from all warranties and liabilities associated with the condition of the property. LGSF took the extraordinary step of requiring that Vista provide notice of those disclaimers and releases to future buyers if Vista converted the property to condominiums. Any warranties or duties that arose during the construction of the rental apartments were clearly and unequivocally extinguished ("cut") with the consent of the buyer (Vista) under the terms of the contract by which Vista purchased the property from LGSF.

d. If adopted, the POA's arguments will that mean the only practical or feasible way that an owner can ever avoid future liability is to not sell any property that might be used for residential purposes, and the POA's arguments will vitiate and effectively void the disclaimers and releases that are contained in every settlement of a construction defects lawsuit.

Adoption of the POA's position in this appeal would mean that a designer, builder, and owner can never disclaim or be released from responsibility for the condition of the property and instead remain strictly liable for any defects in the condition of the property after it is sold and regardless of whether the buyer subsequently converts the nature and use of the property. Such a result, if adopted, logically leads to two troubling results:

1. The only practical or feasible way that an owner can ever avoid future liability is to not sell any property that might be used for residential purposes. This is contrary to basic principles of law that discourage parties from sitting on their property rights. Respondents did not have any ownership interest or right of control over the property when Vista converted the

property to condominiums and then sold the converted units. When pressed by the trial judge on this topic, the POA's counsel could not articulate any feasible or practical way that LGSF could have cut the liability "string" when it conveyed the property to Vista other than not to sell it.**42**

2. If adopted, the POA's arguments would vitiate and effectively void the disclaimers and releases that are contained in every settlement of a construction defects lawsuit. Despite the dismissal of the POA's claims against the Respondents, the claims asserted by the POA and the unit owners are still pending and will go forward. If Vista subsequently enters into a settlement agreement with the POA and owners, that agreement will include standard release language discharging Vista from future claims related to its development and sale of the condominium project. Under the POA's arguments asserted in this appeal, however, future buyers would not be bound to the terms of the release because they could claim that is was an "exculpatory contract" because it released Vista from "non-delegable duties" in violation of public policy. The arguments advanced by the POA create a conflict with the common law in this State.

Looking at the issue another way, if after purchasing the property would Vista had been able to come back and assert claims against the Respondents for construction defects and/or building code violations? Given that the answer to that question should unequivocally and unhesitatingly be "No" in light of the disclaimers and releases in the sales contract between LGSF and Vista, then why should the POA or subsequent unit buyers be entitled to a different result? As observed by the trial judge: "[It] would be inappropriate to allow the purchaser of Long Grove (Vista) to waive all warranties and rights of action as part of a purchase bargain, but

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42 Judge Baxley's Order ¶ 107; R p. 35.

then create an entity (the POA) that would somehow revive those rights and warranties."**43** It is axiomatic that an assignee's rights can be no greater than those of his assignor. *Dixie Wood Preserving Co. v. Albert Gersten & Associates*, 244 S.C. 57, 135 S.E.2d 368 (1964); *Rosemond v. Campbell*, 288 S.C. 516, 522-23, 343 S.E.2d 641, 645 (Ct. App. 1986). Moreover, as Vista's assignee, the POA's rights are subject to all equities and defenses which Respondents could have asserted against Vista at the time of the assignment, including the disclaimers and releases. *Chet Adams Co. v. James F. Pedersen Co.*, 308 S.C. 410, 413, 418 S.E.2d 337, 338 (Ct. App. 1992).

Contrary to the POA's contention, the release does not "interfere with the ability of the POA to fulfill its fiduciary duties" or leave the POA or the condominium owners without a remedy. Instead, the disclaimers and releases merely require the POA to look to Vista to remedy any problems with the condominiums that were created and sold by Vista. The notice contained in the POA's Master Deed provides clear and explicit notice that the Respondents were not responsible for the condition of the property or for what Vista intended to do with it. Accordingly, the notice in the Master Deed operates to cut the string on the POA's attempt to tie the Respondents to liability after Vista fully discharged them from all liability and then proceed to change the legal character and use of the property.

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43 Judge Baxley's Order ¶ 86; R p. 27.

2. **THE POA'S "NON-DELEGABLE DUTIES" ARGUMENTS IMPROPERLY FUSE (AND CONFUSE) THE CONCEPT OF DUTIES AND RESPONSIBILITY ARISING AT THE TIME OF INITIAL CONSTRUCTION WITH THE CONCEPT, AS PRESENTED HERE, OF THE EFFECT OF DISCLAIMERS AND RELEASES PERTAINING TO THE CONDITION OF USED PROPERTY WHEN YEARS LATER IT WAS SOLD TO A PURCHASER WHO ALTERED THE USE AND LEGAL NATURE OF THE PROPERTY.**

The POA "non-delegable duties" arguments improperly attempt to fuse (and confuse) the separate concepts of civil liability imposed by common law for defective construction or design and the private professional responsibility arising from the licensing requirements imposed by licensing boards that govern contractors and architects. *See 16 Jade Street, LLC v. R. Design Const. Co., LLC.*, 405 S.C. 384, 390 747 S.E.2d 770, 773 (2013) ("[W]e disagree with the court's conclusion that professional responsibility is tantamount to civil liability. The only consequences imposed by virtue of an individual's license are to be meted out specifically by the appropriate licensing board, not a civil court."). South Carolina Code Ann. §§ 40-3-5 et seq., S.C. Code of Regulations R.11-1 et seq., and the other licensing statutes cited by the POA in its Brief do not contain any language evidencing a legislative intent to create such a legal duty, nor is there any evidence that the legislature enacted the statutes for the benefit of the POA or any other private party. Thus, the licensing statutes cited by the POA are not sufficient to create an independent duty or private right of action against JHP or Gulfstream.

The POA's arguments also improperly attempt to fuse (and confuse) the concepts of duties and responsibility arising at the time of initial construction with, as presented here, the effect of disclaimers and releases pertaining to the condition of the property when years after construction it was sold to a purchaser that altered the use and legal nature of the property. Respondents performed their duties with respect to the design and construction of property when

it was built in and around 1999, and the intent of the Sales Contract was not to *delegate* those duties to Vista in 2005. Rather, Vista knowingly and intentionally *released* Respondents from any duties they owed with respect to the property for valuable consideration after it had an opportunity to inspect the property.**44** None of the authorities cited by the POA prohibit parties from *releasing* their claims for negligence, breach of warranty, or other causes of action. In fact, as stated above, if this were the case, it would prevent settlement of any construction defect lawsuit and effectively void the releases of any individuals or entities involved in construction upon subsequent sale of the property.

a. The South Carolina General Assembly has spoken on the issue and provided specific protection for the consumer risks associated with undisclosed defects in conversation of apartments to condominiums.

The South Carolina General Assembly has not enacted any statutes that define the extent of duties and warranties arising in the residential construction context. The General Assembly has, however, spoken on the issue of undisclosed defects existing in the conversion of rental apartments to condominiums. Under S.C. Code Ann. § 27-31-430, if an owner of a building undertakes to convert rental apartment units to condominium ownership by recording a master deed, the owner must obtain and provide to all prospective purchasers, including tenants in possession, a written report disclosing the "physical condition of the building" prepared by an independent registered architect or engineer licensed to practice his profession in this State,

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44 The bargained-for price paid and negotiated exchanged between LGSF and Vista is sufficient consideration to support the release. See *Furse v. Timber Acquisition*, 303 S.C. 388, 390, 401 S.E.2d 155, 156 (1991) ("Generally, no special consideration need be singled out or apportioned for each separate provision in a contract, and a number of agreements covering more than one subject may be founded on one consideration."); see also 17 CJS *Contracts* § 71 (1963). However, the record suggests that Vista received specific consideration after opportunity for inspection. (See Escrow Agreement, R. p. 1187).

describing the present condition of all general common elements." The General Assembly enacted Section 27-31-430 in order to protect condominium buyers from the potential problems inherent when converting "used" and aged rental apartment buildings into new condominiums. Consistent with the South Carolina Supreme Court's recent observations in *Gladden v. Boykin*, 402 S.C. 140, 144, 739 S.E.2d 882, 884 (2013), which involved the issue of liability of a home inspector for failing to discover undisclosed defects,**45** by adopting Section 27-31-430 the South Carolina General Assembly has spoken on the issue and provided specific protection for the consumer risks associated with undisclosed defects in conversation of apartments to condominiums.

Here the POA focuses solely on the original construction of the apartment buildings and completely disregards the fact that Vista purchased and then altered the use and legal nature of the property by creating condominiums and selling the condominiums as new units. Contrary to the POA's arguments, licensing statutes and codes applicable at the time of the initial construction of the apartments do not prohibit Respondents from disclaiming and being released from liability for the condition of the property when years later the used apartments were sold to a purchaser (Vista) that altered the use and legal nature of the property.

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45 Regarding the concept of "undisclosed defects" that permeates South Carolina construction defects common law, here the POA's Master Deed clearly indicates that the property as conveyed to Vista with "all defects" and Vista was responsible for ensuring that the property was "suitable for use as condominiums." Moreover, alleged defects claimed by the POA were identified in Essex's property inspection report dated March 1, 2005 (R. p. 1100), and issued before Vista purchased the property.

3. THE TRIAL JUDGE PROPERLY CONCLUDED THAT THE DISCLAIMERS AND RELEASE APPLY TO LGSF'S ARCHITECT AND OTHER "AFFILIATES" AND BIND THE POA.

The arguments in Section 3 of the POA's Brief essentially repeat the arguments contained in Sections 1 and 2 of its Brief. Accordingly, for brevity and to avoid duplication, Respondents incorporate their responses in Sections 1 and 2 of this Brief above by reference.

Section 3 of the POA's Brief contains the following two-sentence statement: "The only named third-parties beneficiaries [to the disclaimers and release] are the Beach Company and Gulfstream. JHP [the architect] was not specifically identified." (POA's Brief p. 26). The scope of the disclaimer and release language in the Master Deed includes LGSF's "affiliates."**46** To the extent that the foregoing are intended to argue that the JHP is not entitled to the benefit of the release, Section VIII (paragraphs 109 through 112) of trial judge's order**47** specifically considers and soundly rejects that argument.

The trial court's determination that the releases and disclaimers apply to JHP is well-supported by the record. Specifically, the terms of the Sales Contract release and disclaim liability of "companies...involved in the design, development and/or construction buildings" for and from "any and all claims of every kind whatsoever arising from or relating to the development, design, construction, maintenance, alteration or repair of the property, including unknown and unforeseen claims that may not exist or that may arise in the future."**48** Moreover,

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46 The notice of disclaimers and release in paragraph 24 (at R. p. 198) in the Master Deed specially defines the term "affiliates" to as being "[t]he Beach Company, Gulfstream Construction, . . . and all other companies, partnerships, entities, or Persons (collectively, the "Affiliates") involved in the design, development and/or construction of the apartment buildings and apartments therein and all other improvements prior to March 7, 2005[.]"

47 R. pp. 36-37.

48 R. p. 71 at ¶ 15(b).

testimony in the record indicates that the parties intended for JHP to be protected by the assumption of liability, releases and disclaimers in the Sales Contract.**49** LGSF's interest in including JHP as an affiliate in order to avoid the potential for derivative liability through subrogation, contribution, indemnification, or other theory of joint responsibility was not lost on the lower court.**50** Accordingly, the trial court properly held that Plaintiffs and JHP are entitled to the same benefit from the disclaimers and releases included in the Sales Contract. Respondents fully adopt and incorporate the trial judge's analysis by reference.

Section 3 of the POA's brief also contains the one-sentence statement that: "More importantly, the POA is not identified in the agreement [i.e., Sales Agreement] or the Master Deed as being bound by the agreement." (POA's Brief p. 26). The POA was created and exists solely by virtue of the Master Deed, so it is difficult to conceive how the POA is not subject to releases and disclaimers contained in its own Master Deed. Moreover, the trial judge hit the nail squarely on the head by observing that: "It would be inappropriate to allow the purchaser of Long Grove (Vista) to waive all warranties and rights of action as part of a purchase bargain, but then create an entity (the POA) that would somehow revive those rights and warranties."**51** As a result, the trial judge properly determined that the fact that the POA had not been created at the time Vista executed the Sales Contract did not invalidate Vista's release of Respondents or excuse the POA and individual unit owners from the terms of the Master Deed.

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49 K. Johnson Dep. p. 97 line 5-p. 98 line 10; proposed Supplemental Record on Appeal pp. S002, line 5-p. S003, line 10.

50 Judge Baxley's Order R. p. P. 37 at ¶ 112.

51 Judge Baxley's Order R. p. 27 at ¶ 86.

4. THE TRIAL COURT PROPERLY CONCLUDED THAT THE NOTICE OF DISCLAIMERS AND RELEASE CONTAINED IN THE MASTER DEED ARE NOT UNCONSCIONABLE AND DO NOT VIOLATE PUBLIC POLICY.

In Section 4 of its Brief the POA's Brief argues that the disclaimers and release in the Master Deed are unconscionable and violate public policy. The judge carefully considered and properly rejected that argument.

a. Vista—not LGSF—created and recorded the Master Deed after it purchased the property, and Vista—not LGSF—determined the placement of the notice in the Master Deed.

As a threshold issue, in its Brief the POA disingenuously alleges that LSGF (specifically, The Beach Company) "buried the notice of this release of all liabilities in the Master Deed." (POA's Brief p. 29). The trial judge quickly jumped on this flagrant misrepresentation by observing that the Master Deed was prepared and recorded by Vista after it purchased and controlled the property.**52** LGSF took the extraordinary step of including a provision in the Sales Contract requiring that Vista provide notice of those disclaimers and releases to future buyers if Vista converted the property to condominiums; however, Vista was solely responsible for the placement of the notice in the Master Deed it created and recorded after it purchased the property.

Similarly, the POA's Brief disingenuously states the "The Beach Company and Long Grove Vista agreed that the conveyances of the condominium units by Long Grove Vista would not contain the disclosures found in the Master Deed." (POA's Brief p. 30). Respondents had no right to dictate the terms of the contracts used by Vista to sell the condominiums created and

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52 Judge Baxley's Order ¶ 102; R. p. 33.

owned by Vista. Moreover, Section 10 in those contracts contains the following specific notices that the condominium being sold by Vista would be subject to and controlled by a Master Deed:

> (a) Governing Documents. Purchaser acknowledges that the Unit being purchased is a portion of the [Long Grove Horizontal Property] Regime and improvements that have been or will be made subject to the Master Deed referred to in Paragraph 1. The nature and extent of the rights and obligations of the Purchaser in acquiring and owning the Unit will be controlled by and subject to the Master Deed, as well as the Articles of Incorporation, the Bylaws, and the rules and regulations of the Association. Purchaser agrees to comply with all of the terms, conditions and obligations set forth therein.
>
> . . . .
>
> (c) Disclosure Package. Purchaser hereby acknowledges that he/she has received a copy of the property condition report required under Section §27-31-430 of the South Carolina horizontal Property Act, a copy of the Master Deed, a copy of the Bylaws of the Association, a copy of the Articles of Incorporation of the Association, a copy of the estimated budget of the Association (the "Disclosure Package").**53**

Accordingly, and contrary to the POA's assertion, Respondents did not own the property, did not sell the condominiums, and had no right to dictate the terms of the contracts used by Vista to sell the condominiums created and owned by Vista. The contracts by which Vista sold condominiums included notice that each condominium would be governed and controlled by a Master Deed; and each Contract included a "Disclosure Package" that included a copy of the Master Deed.

b. Even a cursory review of the Master Deed and the deeds of conveyance appearing in the chain of title for each condominium would have readily provided notice of the disclaimers and release of liability.

The South Carolina Supreme recently stated that, when examining whether a limitation of liability clause in a contract is conspicuous, "the proper test is whether an important clause was particularly inconspicuous, as if the drafter intended to obscure the term." *Gladden v. Boykin*, 402 S.C. 140, 146, 739 S.E.2d 882, 885 (2013) (emphasis added) (citing *Simpson v. MSA of*

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53 R. p. 1019.

Myrtle Beach, Inc., 373 S.C. 14, 27-28, 644 S.E.2d 663, 670 (2007), and *Williams v. Walker–Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)). Here, the notice of disclaimers and releases are clearly stated in the Master Deed, which was referenced and provided with the contract of sale for each condominium unit sold by Vista. That notice in the Master Deed is not merely some boiler plate language buried in form contract. Instead, that notice spans two pages of the Master Deed and is set forth together with many other important requirements and restrictions in the Master Deed governing the use and ownership of the property (e.g., the Master Deed defines what portion of the space is owned by individual owners versus being common elements; requires payment of assessments for maintenance and repairs; and contains ARB restrictions on how owners can use and occupy their units). Under the POA's argument, the POA and its members could chose to ignore any of the other provisions in the Master Deed because they "had no meaningful choice" in accepting those provisions. Again note too that Vista—not Respondents—created and recorded the Master Deed after it purchased the property.

The logical result of the POA's position, if adopted, would be a complete nullification of any and all provisions in the Master Deed that the POA or unit owners deem unacceptable. The POA was created and exists solely by virtue of the Master Deed, and the individual unit owners were on record notice of all the terms in the Master Deed and when they purchased a unit, and they could have and should have readily ascertained their legal rights by simply reading the terms of the Master Deed that governs their use and ownership of the property. *See Evins v. Richland County Historic Preservation Commission*, 341 S.C. 15, 20, 532 S.E.2d 876, 878 (2000); *Regions Bank v. Schmauch*, 354 S.C. 648, 663-664, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person who signs a contract or other written document cannot avoid the effect of the

document by claiming he did not read it. One entering into a written contract should read it and avail himself of every reasonable opportunity to understand its content and meaning. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it.") (internal quotations and citations omitted)

The POA also skips over the fact that, in addition to the Master Deed, the deed conveying the property from LGSF to Vista contains the following notice of the disclaimers and releases at issue here:

> Save and excepting only the limited warranty of title hereinafter set forth and herein contained, the Property is being conveyed strictly on an "as is", "where is" and "with all defects" basis, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or otherwise), past or present use, construction, development, lease performance, investment potential, tax ramifications or consequences, income, compliance with law, habitability, tenancies, merchantability or fitness or suitability for any purpose, all of which are hereby expressly disclaimed. Without limiting the generality of the foregoing, Grantee acknowledges that Grantor and its affiliates (The Beach Co. and Gulfstream Construction Company) have made no representations, warranties or covenants as to the compliance of the Property with any federal, state, municipal or local statutes, laws, rules, regulations or ordinances, including, without limitation, those pertaining to construction, rent control, building and health codes, land use (or permits issued in connection therewith), zoning, lead paint, urea formaldehyde foam insulation, asbestos, hazardous or toxic wastes or substances, pollutants, contaminants or other environmental matters. [emphasis added]**54**

That deed—and the notices contained therein—appeared in the immediate chain of title for each of the newly created condominium units sold by Vista. Further, when Vista sold its newly developed condominiums to individual condominium unit buyers, the deeds from Vista to the buyers included the following provision notifying the buyers that Vista had converted apartments to condominiums:

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54 R. p. 143 at p. 144 (first paragraph).

> WHEREAS, Long Grove Vista, LLC has converted the rental units at Long Grove Apartments to condominium ownership pursuant to S.C. Code of Laws, Section 27-31-410, et seq., and has complied with the disclosure, notice and offer requirements, set forth therein, including but not limited to compliance with Section 27-31-420(B) **55**

Short of erecting a billboard outside the entrance to the project, it is difficult to conceive what other reasonable measures that Respondents could have reasonably taken to ensure that Vista's future buyers would have notice of the disclaimers and releases of Respondents, especially when considering that Respondents did not own or control the property after it was purchased by Vista. Even a cursory review of the Master Deed and the deeds conveying title to the property appearing in the chain of title for each condominium would have readily provided notice of the disclaimers and release of liability applicable to the Respondents.

Accordingly, the trial judge properly concluded that the notice of disclaimers and release contained in the Master Deed was not inconspicuous, unconscionable, or contrary to public policy. Again, as concluded by the trial judge, "this Court does not perceive that it is the public policy of this state that no selling party can enter into a contract as to real property that would disclaim responsibility when the purchasing party intends to alter the use and legal nature of the property."**56**

5. AFFIRMANCE IS PROPER ON ANY GROUND(S) APPEARING IN THE RECORD.

In accordance with Rules 208(b)(2) and 220(c), SCACR, Respondents request that this Court affirm the lower court's decision on any grounds appearing in the record.

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55 R. p. 242 at p. 242 (second "Whereas" paragraph).

56 Judge Baxley's Order ¶ 112; R. p. 37.

CONCLUSION

The fundamental issue presented in this appeal is whether the POA is legally bound by the notice of the disclaimers and release contained in the Master Deed under which the POA was created and exists, and under which the units the POA governs were sold and conveyed. In light of the disclaimers and releases contained in Sales Contract between LGSF and Vista and the notice in the POA's Master Deed, the net effect of the POA's argument is that the individuals involved in the design, construction, and sale of an existing building must continue to incur unlimited liability to future owners after the building is sold to a third-party who releases the individuals from liability as part of the sales transaction and then converts the building to a different use. That is not the law in South Carolina. The trial judge's order dismissing the POA's claims against Respondents does not leave the POA without a remedy and instead merely requires the POA to look to Vista to remedy any problems with the condominiums that were created, developed, and sold by Vista. The learned trial judge carefully considered, analyzed, and properly rejected each the arguments raised by the POA on appeal, and this Court should affirm the order and judgment of the trial judge.

CERTIFICATE OF COUNSEL

The undersigned counsel certifies that this Final Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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December 30, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

Appeal from the Court of Common Pleas
For Charleston County
Civil Action No.: 2009-CP-10-6746
Appellate Case No.: 2012-213584

Long Grove at Seaside Farms, LLC; The Beach Company; and Gulfstream Construction Company, Inc., Respondents,

v.

Long Grove Property Owners' Association, Inc.; Vista Realty Partners, LLC; and Long Grove Vista, LLC;

Of Whom Long Grove Property Owners' Association, Inc. is Appellant.

Long Grove Property Owners' Association, Inc., Third-Party Plaintiff,

v.

James Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design P.C.; Sam Mayo, d/b/a SCM Construction, Inc.; Essex Engineering Corporation, Third-Party Defendants,

Of Whom James Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C. is Respondent.

PROOF OF SERVICE FOR RESPONDENTS' FINAL BRIEF, RESPONDENTS' MOTION TO SUPPLEMENT RECORD ON APPEAL, AND RESPONDENTS' PROPOSED SUPPLEMENTAL RECORD ON APPEAL

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I, hereby certify that on December 30, 2013, I served a copy of the ***Respondents' Final Brief, Respondents' Motion to Supplement the Record on Appeal, and Respondents' proposed Supplemental Record on Appeal*** on counsel for the parties of record in this case via United States Mail, postage pre-paid, as addressed shown below.

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