THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable D. Garrison Hill, Circuit Judge

Case No. 2011-CP-23-03200
Case Tracking Number 201220686

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100 Court Street Property Owners Association, Inc. ..... Appellant,

v.

Court Street, LLC and Grace Community
Church of South Carolina ..... Respondents.

FINAL BRIEF OF RESPONDENTS

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the circuit court apply the appropriate standard for a Motion to Dismiss and properly dismiss three of the Association's causes of action in its Amended Complaint for substantive deficiencies and violation of the statute of limitations?

STATEMENT OF THE CASE

Court Street, LLC ("Developer") and Grace Community Church of South Carolina ("Church" or "Grace") generally agree with the Statement of the Case by 100 Court Street Property Owners Association, Inc., ("Association"). On or about June 2, 2011, Association filed an Amended Complaint that included the following causes of action: (1) Declaratory Judgment; (2) Reformation of Master Deed; (3) Collection; (4) Unjust Enrichment; and (5) Nuisance. (R. pp. 12-22). The Church and Developer timely filed separate motions to dismiss on August 25, 2011 and September 6, 2011.

A hearing was conducted before the Honorable D. Garrison Hill regarding the motions to dismiss on October 28, 2011. On November 23, 2011, Judge Hill issued a lengthy, scholarly opinion dismissing Association's causes of action for a Declaratory Judgment, Reformation of the Master Deed, and Collection on the various grounds stated in the Order (*hereinafter* the Order). (R. pp. 2-9). The Order also dismissed Association's claims for punitive damages. (R. p. 8). On or about December 14, 2011, Association filed a motion to alter or amend the November 23 Order, which Judge Hill subsequently denied. (R. p. 10). This Appeal was filed by the Association.

STATEMENT OF THE FACTS

This case involves the historic, iconic Church property formerly known as and occupied by Greenville First Baptist Church and Downtown Baptist Church in downtown Greenville, South Carolina. As a result of relocations and mergers, the congregation is now known as Grace. This iconic Church building and property served as a hub of downtown Greenville renewal in the late 1990s when it acted as a launching pad for downtown Greenville residential unit availability. By the late 1990's, the Church had more educational space than it needed for ministry purposes. As a result of a lack of downtown residential unit availability, a unique plan was put in place with assistance from the City of Greenville to redevelop unused areas of the Church's educational building into downtown residential units. The plan was basically to redevelop unused educational building space at Downtown Baptist Church into a mixed use redevelopment of the educational building wings transforming them into residential units in the portions of the educational building that the Church was not utilizing for ministry. This well-publicized, high demand redevelopment served as a unique situation in which residential units would populate areas that were formerly educational space for the Church, while also providing renovations to the areas reserved by the Church, including the historic sanctuary, that were in need of repair and renovation for its continued operation as a congregation. This development of a historic Church property has contributed greatly to the uniqueness that is the rejuvenation of downtown Greenville where citizens literally live and coexist within the walls of the Church. The uniqueness of this project cannot be understated and has served as the genesis of the renewed emphasis of residential units in downtown Greenville.

This project, however, would never have existed without the Church's cooperation, Developer's promises to the Church, and the Church's ability to continue to function as a congregation for the areas that were required to be carved out, reserved, and maintained for Church operations in portions of the multi-floor educational space. To meet these divergent interests of the Developer's desire to maximize residential space and the Church's desire to maintain as much space for Church operations, discipleship areas, and ministry needs, space was reserved by the Church (i.e., specifically excluded by the transaction documents) in the education building for these core activities. (R. pp. 259-398). The spaces reserved and continually used for these Church activities were the kitchen, fellowship hall, day care area, areas ancillary to the main sanctuary, and Sunday school rooms and teaching areas. In summary, the entire educational building space was not dedicated to the redevelopment for residential space. Instead, the Church reserved and maintained a portion of these buildings for its continued operation as a Church and the character of this space remained the same. This space has never been used for residential units but has continually been utilized for Church ministry purposes.

The following is a summary of the transactional documents approved by the Developer and Church that were to effectuate the intent of the parties to allow a portion of the educational building to be redeveloped into residential units while maintaining space for ministry and Church operations:

- As part of this agreement, Developer purchased but agreed to lease back a portion of the educational building property to Church so that Church would continue its Church activities in a portion of the educational space that was not subject to redevelopment. The result of this agreement was that Church and Developer's residential units would cohabitate one building with certain demarcation lines setting forth Developer and Church Property. On April 29, 1999, Church executed a deed of conveyance effectuating the transfer and above reservation and intent said

deed being recorded in the Office of the Register of Deeds for Greenville County, South Carolina in Book 1835 at Page 534 (the "Closing"). A copy of this deed was attached to Plaintiff's Complaint as Exhibit "A". (R. pp. 23-26)

- A Memorandum of Lease was recorded on April 29, 1999 in Book 1835 at Page 557. The Memorandum of Lease is attached to Plaintiff's Complaint as Exhibit "C." (R. pp. 46-53). The property leased from Court Street to DBC is the same property subsequently identified in the Master Deed (hereinafter defined) as Phase II (*hereinafter* the "Leased Property" or "Phase II Property").

- A Reciprocal Easement Agreement and Declaration of Covenants and Restrictions (the "Easement Agreement") was also recorded on April 29, 1999 in Book 1835 at Page 538. A copy of the Easement Agreement is attached as Exhibit "D" to Plaintiff's Complaint. (R. pp. 54-97).

- On September 22, 2000, almost a year and a half following the initial filings, Developer recorded a Declaration (Master Deed) Establishing 100 Court Street Horizontal Property Regime ("Master Deed"), dated September 19, 2000, and recorded in Book 1925 at Page 1537. A copy of the Master Deed is attached to Plaintiff's Amended Complaint as Exhibit "E". (R. pp. 98-212).

- Article I of the Master Deed establishes the 100 Court Street Horizontal Property Regime ("Regime") and sets forth on Exhibit B the real property to be governed by the Master Deed.

- Article II of the Master Deed identifies the Leased Property by reference to Exhibit C. The Leased Property was not made subject to and submitted to the Regime.

- On March 4, 2011, Developer conveyed the Leased Property to the successor in interest to Downtown Baptist Church, Grace Community Church of South Carolina ("Grace"). Grace owns the space and conducts church related activities in the space that was reserved in the original documents. Developer sold this lease space back to the Church (the original owner of the property) as the Church made substantial investments into renovating and modernizing the space for ministry purposes.

Regarding the space reserved for the Church, this space was reserved and leased to the Church for a term of 99 years with options to extend for additional 20 year terms.

(R. pp. 251-52). When Developer sold this property back to Church in March 2011, Developer retained a right of first refusal on the space so that in the event that the Church no longer needed the space, Developer could then redevelop the space into residential units that could then be placed into the Regime if that option ever occurred. To date, the Church has invested substantial monies in its own renovations of the reserved space and does not intend to sell. It is undisputed that there are no residential units in this area that was reserved for Church use and excluded from the Master Deed.

Plaintiff's Complaint in this matter makes the following undisputed admissions:

- "The Phase II space has been specifically excluded from the Master Deed and the Regime." (R. p. 14).
- Grace had a lease on the property where it ran its Christian education programs. (R. p. 13).
- The original parties to the transaction (Developer and Church) specifically excluded the Phase II (Church ministry space) property from the Regime. (R. pp. 13-14-p. 17).
- Association or Regime did not exist at the time of the original transaction documents. (R. p. 14).

ARGUMENTS AND AUTHORITIES

I. THE TRIAL COURT APPLIED THE APPROPRIATE STANDARD FOR A MOTION TO DISMISS AND PROPERLY DISMISSED THREE OF THE ASSOCIATION'S CAUSES OF ACTION IN ITS AMENDED COMPLAINT FOR SUBSTANTIVE DEFICIENCIES AND VIOLATION OF THE STATUTE OF LIMITATIONS.[1]

A. Standard of Review

The appellate court reviews a trial court's ruling on a motion to dismiss pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure *de novo*. *Doe v. Marion*, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007)(In reviewing a trial court's grant of a motion to dismiss pursuant to Rule 12(b)(6), the appellate court applies the same standard of review as the court below.). The standard for a motion to dismiss is well recognized in South Carolina. A court's review of a motion to dismiss is based solely upon the allegations set forth on the face of the complaint. *Hill v. Watford,* 276 S.C. 344, 278 S.E.2d 347 (1981). The question to be considered by this Court is whether in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief. *See Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987); *McCormick v. England,* 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997). A Court may also consider matters attached to or included by reference to the Complaint on a motion to dismiss pursuant to Rule 12(b)(6) without converting the motion into one for summary judgment. *Brazell v. Windsor,* 384 S.C. 512, 515, 682 S.E.2d 824, 826 (2009).

The appellate court's consideration of an issue requires it to be properly preserved in the proceedings below. It is a "long-established preservation requirement that the losing party generally must both present his issues and arguments to the lower court and

1 A basis for the dismissal of all three claims was that they violated the statute of limitations. As addressed above, Association appears to abandon this issue on appeal. This abandonment is dispositive of the issues and the appeal by Association should be dismissed. (R. pp. 5-6-p. 8).

obtain a ruling before an appellate court will review those issues and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000); *E.g., Smith v. Phillips,* 318 S.C. 453, 458 S.E.2d 427 (1995) (appellate court generally will not address an issue unless the issue was raised to and ruled upon by the trial court).

In absence of a ruling on the issue it is not properly reserved for appeal and may not be grounds for reversal. *I'On, L.L.C.* at 422, 724. "If the losing party has raised an issue in the lower court, but the court fails to rule upon it, the party must file a motion to alter or amend the judgment in order to preserve the issue for appellate review." *Id.*; *E.g., Pelican Bldg. Centers of Horry-Georgetown, Inc. v. Dutton,* 311 S.C. 56, 427 S.E.2d 673 (1993); *see also* Rules 52(b) and 59(e), SCRCP.

Issues not addressed on appeal are abandoned. "This court has noted that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not preserved for our review." *Eaddy v. Smurfit-Stone Container Corp.*, 355 S.C. 154, 164, 584 S.E.2d 390, 396 (Ct. App. 2003); *See also Glasscock, Inc. v. United States Fid. & Guar. Co.,* 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001); *R & G Constr., Inc. v. Lowcountry Reg'l Transp. Auth.,* 343 S.C. 424, 437, 540 S.E.2d 113, 120 (Ct. App. 2000)(Where no authority is cited and argument in brief is conclusory, the issue is deemed abandoned.); *First Sav. Bank v. McLean,* 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994)(Appellant was deemed to have abandoned issue where he failed to provide any argument or supporting authority.).

Judge Hill, confronted with an abnormally large record due to the attachments to the Amended Complaint, properly considered Association's allegations and admissions as well as the attached documents to the Amended Complaint to dismiss the causes of

action for Declaratory Judgment, Reformation, and Collection. On Brief, Association spends much of its Argument on an exposé on the Horizontal Property Act (*hereinafter* "HPA"). In addressing these issues, it is not necessary for Church or Developer to restate Judge Hill's lengthy Order nor do Church or Developer desire to do so. However, there is a fundamental gap in Association's arguments and the actual facts of the case. Basically, the Phase II (*also referred* to *herein as* "ministry space" or "Leased Property") was never made into residential units nor made part of the condominium regime.

In *Harrington v. Blackston*, the Court stated that "[w]hen a controversy regarding the rights of condominium unit owners arises, the court must examine all relevant provisions of the Horizontal Property Act, the master deed and allied documents. These sources of rights and obligations of the condominium owners must be read together, in relation to each other, and harmonized, if possible." 319 S.C. 1, 459 S.E.2d 309 (S.C. App. 1995), rehearing denied, vacated 322 S.C. 470, 473 S.E.2d 47[2](internal citations omitted); *See also Roundtree Villas Ass'n, Inc. v. 4701 Kings Corp.*, 282 S.C. 415, 321 S.E.2d 46 (1984) (regime's authority must be gleaned from Act and master deed). Upon application of this principle of law, Judge Hill was correct to dismiss the claims of Association.

B. Strict Compliance with the Horizontal Property Act was Required to Subject the Leased Property to the Act.

S.C. Code Ann. § 27-31-30 states in pertinent part that a horizontal property regime is established when "an owner...expressly declare[s] their desire to submit their property to the regime." Indeed, this Court has determined that because a condominium is a creature of statute, strict compliance with the Horizontal Property Act, §§ 27-31-10 *et*

2 This case was vacated due to a settlement reached between the parties.

seq. is required to create a horizontal property regime. *Harrington*, 459 S.E.2d at 312 (internal citations omitted)("Because a condominium is a creature of statute, strict compliance with the Horizontal Property Act, is required to create a horizontal property regime."). Here, Developer expressly withheld the Leased Property from the Regime, and, thus, the provisions of S.C. Code Ann. § 27-31-30 were not satisfied. (R. p. 287-p. 319-21). Accordingly, based upon Association's argument, there is a major, substantive question as to whether the transaction documents from 1999 and 2000, with the reservation of the property for the Church, even creates a horizontal property regime. Indeed, as Association on brief concedes that there was not strict compliance, then it is the position of Developer and Church that the Horizontal Property Act ("HPA") does not apply to this case and all of Association's arguments and reliance upon the HPA should be disregarded by this Court. (App. Br. at 13).

This Court's *Harrington* opinion is instructive for the pending matter. In *Harrington*, the Court held that 30.93 acres of a 43.75-acre tract of land could not be considered part of the horizontal property regime because the master deed did not meet the requirements of the Horizontal Property Act.[3] *Harrington*, 319 S.C. 1, 459 S.E.2d 309. Similarly, in *Heritage Federal Sav. and Loan v. Eagle Lake and Golf Condominiums*, a master deed and its amendments did not comply with the requirements of the Horizontal Property Act, and the property was therefore not subject to the HPA. 318 S.C. 535, 458 S.E.2d 561 (S.C.App. 1995), rehearing denied. Accordingly, the educational buildings of the Church that were partially developed for condominium use with the Church reserving areas for ministry use (as reflected by the transactional

3 The master deed did not contain a general description of the plan of development as to this acreage which was a violation of S.C. Code Ann. § 27-31-100.

documents and master deed) do not comply with the requirements of the HPA and this Court should affirm Judge Hill's Order. (R. pp. 284-398).

C. The Clear and Unambiguous Master Deed Specifically Excludes the Leased Property from the Regime.

Restrictive covenants, including master deeds, must be interpreted under contract law. 17 S.C. JUR. COVENANTS § 82 (2010); *Seabrook Island Property Owners' Association v. Pelzer*, 292 S.C. 343, 356 S.E. 2d 411 (Ct. App. 1987); *Palmetto Dunes Resort, Div of Greenwood Dev. Corp v. Brown*, 287 S.C. 1, 336 S.E. 2d 15 (Ct. App. 1985). South Carolina law is legion that if the language of the contract is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect. *See e.g., C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Commission*, 296 S.C. 373, 373 S.E.2d 584 (1988); *Warner v. Weader,* 280 S.C. 81, 83, 311 S.E.2d 78, 79 (1983); *Silver v. Abstract Pools & Spas, Inc.*, 376 S.C. 585, 658 S.E.2d 539 (S.C. App. 2008); *Taylor v. Lindsey*, 332 S.C. 1, 498 S.E. 2d 862 (1998) ("Words of a restrictive covenant will be given the common, ordinary meaning attributed to them at the time of their execution.").

Here, the Master Deed is clear and unambiguous as to the exclusion of Leased Property from the Regime. Article II states as follows:

> The Property described in **Exhibit B** constitutes the property being hereby made subject to and submitted to the Act. By appropriate amendment, the Property subject to this Declaration may be expanded to include the Phase II Property [i.e., the Leased Property] . . .

(R. p. 288). Article XXVI, Paragraph D states in pertinent part that Developer "hereby reserves the right, privilege and option to submit the [Leased Property] to become and be

a part of the Regime." (R. p. 319). Paragraph J further states that Developer "shall be under no obligation to construct or submit [the Leased Property], the construction and submission of [the Leased Property] being at the sole option of [Developer]." (R. p. 321).

Further, Association admits in its Amended Complaint that the Leased Property was specifically excluded from the Regime:

> 15. The Phase II Space has been specifically excluded from the Master Deed and the Regime; however, the LLC, in the Master Deed reserves the right to submit the Phase II Space to the Regime.

(R. p. 14). Therefore, the Leased Property was never submitted to the Regime and is therefore not governed by the Act.

D. The Master Deed Specifically Excludes the Leased Property from the Same Covenants and Restrictions Affecting Phase I.

The Master Deed is clear and unambiguous that the Leased Property is not subject to the same covenants and restrictions that encumber Phase I. (R. p. 287-pp. 319-21). Association argues that ownership of the Leased Property is equivalent to the ownership of a Unit. The Master Deed defines the terms "owner" and "unit" as follows:

> (1) "Owner" means the record owner, whether one or more persons, of fee simple or leasehold estate in and to any Unit. . . . "Owner" shall also mean "Unit Owner."
>
> (2) "Unit" means any one of those parts of the **Building** which is subject to individual ownership. . . . (emphasis added)

The Master Deed further defines "Building" as follows:

> "Building" means the entire structure located on the Property and which is shown on **Exhibit D** attached hereto. For purposes of this Declaration, *the Building does not include the area identified as "Phase II" on* ***Exhibit D*** *attached hereto.*

(R. pp. 289-91)(emphasis added). Therefore, it is clear and unambiguous from the terms of the Master Deed that the term "Building" does not include the Leased Property, and therefore, the term "Unit" also does not include the Leased Property. Thus, any obligation of a Unit Owner under the Master Deed would not be applicable to the owner of the Leased Property.

E. Case Law Supports the Free Use of Property.

Additionally, it is important to note that the Courts of South Carolina have repeatedly held that any restrictions affecting the use of property "will be strictly construed *with all doubts resolved in favor of free use of the property.*" *Seabrook Island Property Owners Association v. Marshland Trust, Inc.*, 358 S.C. 655, 662, 596 S.E.2d 380, 383 (Ct. App. 2004)(emphasis added); *Taylor v. Lindsey*, 332 S.C. 1, 4, 498 S.E. 2d 862, 863 (1998); *Butler v. Sea Pines Plantation Company*, 282 S.C. 113, 317 S.E. 2d 464 (S.C. App. 1984). Here, Association is trying to place a restriction on the use of the Leased Property. Thus, even if this Court concludes that there is some ambiguity in the Master Deed, it must be construed in favor of free use, and Association's claim still fails as a matter of law.

F. Association's Position Leads to an Absurd Result.

Assuming that this Court were to analyze the arguments of Association notwithstanding the admission that the HPA was not strictly complied with and that a horizontal property regime does not exist with respect to the Church space, the Association's position would create an absurd result. Association requests that this Court, contrary to the intent of the original parties, rewrite and reform the transaction documents such that Christian education and worship space excepted from the

development space (i.e. the Leased Property) be determined to be an "apartment" or "condominium." (App. Br. at 6-13). This would be a ridiculous interpretation of a statute and would lead to an absolutely absurd result. It is axiomatic that "[c]ourts will reject an interpretation leading to an absurd result clearly unintended by the legislature." *Original Blue Ribbon Taxi Corp. v. S. Carolina Dept. of Motor Vehicles*, 380 S.C. 600, 608-09, 670 S.E.2d 674, 678 (Ct. App. 2008); *see also Ray Bell Constr. Co. v. Sch. Dist. of Greenville County,* 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) ("However plain the ordinary meaning of the words used in the statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature...."). "In this situation, the true purpose and intentions of the legislature will prevail over the literal import of the words." *Id.* at 608-09(internal citations omitted). From a statutory construction standpoint, it is this Court's responsibility to apply "[t]he cardinal rule of statutory construction . . . to ascertain and effectuate the intent of the legislature." *Charleston County Sch. Dist. v. State Budget and Control Bd.,* 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and unambiguous statute. *In re Vincent J.,* 333 S.C. 233, 509 S.E.2d 261 (1998) (internal citations omitted).

Association urges this Court to determine that Church ministry space where Sunday School and other activities are conducted somehow should be a condominium. (App. Br. at 6-13). This Court should not allow such an absurd result. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S. Ct. 3245, 3252, 73 L. Ed. 2d 973 (1982) ("It is true that interpretations of a statute which would produce absurd results are

to be avoided if alternative interpretations consistent with the legislative purpose are available."). When put to the test in this case, while the HPA may have been enacted with good intention, there are no circumstances present in South Carolina, in case law or otherwise, that would support the mischievous, absurd or otherwise objectionable interpretation and application of the HPA promoted by the Association in this case. A Church, as the original property owner, has the right and ability to operate its ministry free of the strictures of a condominium property owners association that does not share the same ministry goals. The Church space is not a condominium or an apartment. For Association to suggest that the Church space is subject to the HPA is absurd.

G. The Trial Court Properly Denied the Remedy of Declaratory Judgment and Reformation and Rightly Dismissed the Collection Action.

1. The Declaratory Judgment request was properly denied.

Association's first cause of action sought a declaratory judgment action under S.C. Code Ann. § 15-53-10 *et seq.* seeking the Court to declare (1) that the Leased Property is subject to the Master Deed and the Horizontal Property Act, and (2) that Court Street and Grace are subject to the Master Deed by and through their ownership, during their respective periods, of the Leased Property. (R. pp. 16-17). As the above arguments exhibit, these matters were addressed by Judge Hill and denied. Judge Hill opined in pertinent part:

> The Amended Complaint requests this Court to declare Grace and [Developer] members of the condo association by virtue of its ownership of the Sunday school area, kids worship area, and child care areas (the areas described by the Association as the Phase II space). Basically, the allegations requests that this Court declare that Sunday school area, kids worship area, and child care areas are "apartments" or condominiums under the law. Association, however, may not escape from the fact that the documents that created the transfer of the property and the Association

> specifically exclude this area from space subject to the Association. Indeed, the space was under a lease separate and apart from any property under the Association. (Am Compl. ¶ 9.) Paragraph 15 of the Amended Complaint states as follows: "**The Phase II space has been specifically excluded from the Master Deed and the Regime**[.]" (*emphasis added.*) Plaintiff's own allegations admit that the Master Deed excluded the Sunday school area, kids worship area, and child care areas from the property subject to the condo association. This space was excluded from the Association by the Master Deed. *See* Am. Compl. ¶ 8, 9, 14, 15. Association admits on the face of the Amended Complaint that the original parties to the transaction (Defendants in this action) specifically excluded the Phase II property from the Association. Likewise, Association admits that the cause of action arose in 2000. Therefore, the statute of limitations bars Association's claims. Alternatively, with every doubt resolved in Association's behalf, there is no valid claim for relief asserted as Association admits that the space was excluded by the Master Deed. The First Cause of Action for Declaratory Judgment is consequently DISMISSED.

(R. pp. 5-6). The Declaratory Judgment request was properly denied and dismissed.

2. The Reformation claim was properly dismissed.

The remedy of reformation is not a remedy that is freely granted and a court may not make a new agreement for the parties if they did not intend to enter into such an agreement. *Hooters of America, Inc., v. Phillips*, 39 F. Supp. 2d 582, 624 (D.S.C. 1988) *aff'd and remanded*, 173 F.3d 933 (4th Cir. 1999); *See also Poynter Investments, Inc., v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 588, 694 S.E.2d 15, 18 (2010)(South Carolina Supreme Court held lower court erred in rewriting territorial restriction in noncompete "since such an extension would essentially rewrite the parties' contract, a service the courts of South Carolina do not perform.").

a. The Master Deed is examined under the laws of contracts.

As cited above, the South Carolina Court of Appeals in *Harrington*, examined the effect of a Master Deed and stated that the "rules applicable to the construction of

contracts are applicable to the construction of covenants in deeds." 459 S.E.2d 309 (S.C. App. 1995); *See also*, 17 S.C. JUR. COVENANTS § 82 (2010); *Seabrook Island Property Owners' Association v. Pelzer*, 292 S.C. 343, 356 S.E. 2d 411 (Ct. App. 1987); *Palmetto Dunes Resort, Div of Greenwood Dev. Corp v. Brown*, 287 S.C. 1, 336 S.E. 2d 15 (Ct. App. 1985); *Taylor v. Lindsey*, 332 S.C. 1, 498 S.E. 2d 862 (1998)("Restrictive covenants are contractual in nature, so that the paramount rule of construction is to ascertain and give effect to the intent of the parties as determined from the whole document.") "[R]estrictive covenants will be enforced unless they are indefinite or contravene public policy." *Id.* In this case, Association wishes to circumvent the intention of the parties, the established precedent of South Carolina courts in interpreting contracts, and rely on other jurisdictions interpretation or application of a horizontal property act—one in which should not even apply in this case because the HPA in South Carolina requires strict compliance with the statute or condominiums do not exist.

b. Reformation of a contract requires the mutual mistake of the parties.

Under contract law, reformation is an equitable remedy which the Courts have used to correct mistakes. In *Timms v. Timms*, the Court of Appeals stated that "[b]efore equity will reform an instrument, it must be shown by clear and convincing evidence not simply that there was a mistake on the part of one of the parties, but that there was a mutual mistake." 290 S.C. 133, 136, 348 S.E.2d 386, 389 (Ct. App. 1986). It is an absolute impossibility for Association, under any circumstance, to allege that there was a mutual mistake between the parties, when the original parties to the agreements are adverse to them in this litigation.

Here, Association could not allege that there was any mistake, much less a mutual mistake between the parties to the Master Deed. In fact, there was no mistake at all because Developer specifically intended to omit the Leased Property from the Regime while retaining the right to include the Leased Property within the Regime at a future time if the Church no longer needed the ministry space and residential development became possible. (R. p. 287-pp. 319-21). The Leased Property could not be developed as residential units, much less a condominium, due to Developer's lease with DBC for the Church's continued utilization of its ministry space excepted from the residential development.

Judge Hill correctly stated:

> Under South Carolina law, the remedy of reformation of contract is appropriate only upon ground of mistake, and a Court may not make new agreement for the parties into which they did not enter. *Hooters of Am., Inc. v. Phillips,* 39 F. Supp. 2d 582, 624 (D.S.C. 1998) *aff'd and remanded*, 173 F.3d 933 (4th Cir. 1999). In the absence of fraud, accident, or mistake, a Court cannot change the terms of a contract. As noted above, Association admits that the space was excluded by the Master Deed. *See* Am. Compl. ¶ 8, 9, 14, 15. The Amended Complaint does not allege mistake. Therefore, any claim of reformation must fail. Similarly, the statute of limitations would bar this claim. Therefore, the Second Cause of Action for Reformation of Master Deed is DISMISSED.

(R. p. 6). The Reformation cause of action was properly denied and dismissed.

3. The Collection claim was properly dismissed.

The Collection cause of action was generally a derivative claim that alleged that because Developer and Church were the owners of the Leased Property, Developer and Church are responsible for its "pro-rata share of the Common Expenses (as that term is defined in the Master Deed), as well as all other assessment (special or otherwise) assessed against the Owners (as that term is defined in the Master Deed) from and after

the date of the recording of the Master Deed." (R. pp. 18-19). What Association assumes is that its argument that ownership of the Leased Property is equivalent to ownership of a Unit subject to the HPA. This is a false premise as noted extensively above. Judge Hill recognized the reliance upon the reformation and declaratory judgment actions for the collection allegations, and properly dismissed the collection cause of action. (R. p. 6). In addition, Judge Hill stated that the cause of action violated the statute of limitations because if it were a viable claim, it would have accrued in 1999 or 2000 and Association should not be allowed to wait eleven (11) years before it brought such an action. (R. p. 6). Therefore, the collection action was properly dismissed.

H. There are Additional Sustaining Grounds to Affirm the Trial Court.

Developer and Church contend that there are additional sustaining grounds for upholding the lower court's action. *I'On* at 418("Under the present rules, a respondent-the 'winner' in the lower court-may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court."); *See* Rules 220(c) and 208(b)(2) SCACR. As noted above, and recognized by the trial court, additional sustaining grounds exist that warrant dismissal of Association's claims and causes of action in its Amended Complaint.

CONCLUSION

The trial court applied the appropriate standard of review for a Rule 12 motion to dismiss and properly dismissed three of the Association's causes of action for substantive deficiencies and violation of the statute of limitations.

The HPA is not equipped nor intended to handle a mixed use development such as the one at issue in the present case. This case involves a development undertaken on a preexisting building with preexisting uses – namely Church worship activities. Such mixed use and the Developer's express exclusion of the Leased Property from the Regime make application of the HPA inappropriate under the circumstances.

Pursuant to S.C. Code Ann. § 27-31-30 and applicable case law, strict compliance with the HPA is required to subject a property to the Act. The Leased Property at issue was never made into residential units nor made a part of the condominium regime. In fact, it is undisputed that the Developer expressly withheld the Leased Property from the regime. Therefore, the provisions of S.C. Code Ann. § 27-31-30 were not satisfied, rendering the HPA inapplicable. Furthermore, application of the Act as advocated by the Association would necessarily lead to an absurd result – one that is not in accord with the plain, unambiguous meaning of the statute and the legislative intent behind it. Long-established rules and maxims of statutory construction call for a rejection of the Association's position and support a finding that the HPA does not apply under the circumstances. Therefore, the trial court properly dismissed Association's Declaratory Judgment cause of action.

The trial court properly dismissed Association's Reformation cause of action, as the equitable remedy requires the existence of a mutual mistake. Association, has not and cannot allege, much less establish, that such mutual mistake occurred in this instance. Therefore, its Reformation cause of action must fail as a matter of law.

Association's Collection cause of action, as properly determined by the trial court to be a mere derivative of its Declaratory Judgment and Reformation claims, must likewise fail as it is dependent upon the propriety and existence of these causes of action.

Finally, additional sustaining grounds exist to support affirmation of the trial court's ruling.

Respectfully submitted,

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January 2, 2013
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable D. Garrison Hill, Circuit Judge

Case No. 2011-CP-23-03200
Case Tracking Number 201220686

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100 Court Street Property Owners Association, Inc. ..... Appellant,

v.

Court Street, LLC and Grace Community
Church of South Carolina ..... Respondents.

CERTIFICATE OF COUNSEL

The undersigned certify that the Respondents' Final Brief complies with Rule 211(b), SCACR.

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January 2, 2013
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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Judge

Case No. 2011-CP-23-3200

100 Court Street Property Owners Association, Inc.,
Appellant,

v.

Court Street LLC and Grace Community Church of South Carolina
Respondents.

PROOF OF SERVICE

I, D. Randle Moody II, attorney for the Respondent Grace Community Church of south Carolina, hereby certify that I have served a copy of the foregoing Joint Final Brief of Respondents upon the below named individuals and/or counsel this the 3rd day of January 2013 via U.S. Mail, postage prepaid and addressed as follows:

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