THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Marvin H. Dukes, III, Master in Equity

Appellate Case No. 2016-001769

The Edgewater on Broad Creek Owners Association, Inc., and the Council of Co-owners of the Edgewater on Broad Creek Horizontal Property Regime Phase I, . . . Plaintiffs,

Of which The Edgewater on Broad Creek Owners Association, Inc., is . . . . . Respondent,

v.

Ephesian Ventures, LLC, ... Appellant.

FINAL BRIEF OF RESPONDENT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

I.

Where the condominium regime was built out and sold out years earlier, and management passed to the homeowners' association, does the bankrupt developer's assignee retain the right to control the common elements exclusively, in perpetuity, so as to benefit the assignee's own property?

II.

Is a justiciable controversy presented by appellant's request for an adjudication of the accuracy of *obiter dicta* in the appealed order, unnecessary to the judgment under appeal?

STATEMENT OF FACTS

Edgewater on Broad Creek Horizontal Property Regime ("Edgewater"), a condominium regime on Hilton Head, began with the usual developer's recordation of a Master Deed in 2002. Twenty-three units were constructed in a single building on the seven-acre tract, together with the usual sub-surface and surface utilities and amenities. All units were sold out by 2006. By order of the court of common pleas entered October 31, 2006 [R. 125], the incorporated homeowners' association was confirmed in control of the regime. The developer's role in the life of Edgewater ended with build-out, sell-out, and management transition to the homeowners' association.

After its role was over, the developer later went bankrupt. The Nevada appellant is the bankrupt developer's assignee's assignee's assignee. In a bankruptcy sale, the appellant bought the developer's sixteen-acre tract adjacent to Edgewater's seven acres, together with any lingering rights the developer might still have in Edgewater. Years after the sale, the appellant first claimed a perpetual right to control the common elements of Edgewater for the benefit of the appellant's adjacent tract.

The appellant's sixteen-acre tract could have been added to the Edgewater regime but was not. The time limit for such an addition came and went on December 31, 2010. If the sixteen-acre tract had been added to the regime, the added tract would have become the site of as many as 28 first-class units [R. 233, ¶ 9.04], identical to those of the initial (and only) phase of Edgewater. The time for that having passed, the appellant now intends a different use of the adjacent tract, and the right to use Edgewater's common elements in aid of that different use.

The appellant persuaded the Town of Hilton Head to stop Edgewater from building a swimming pool and walkway on Edgewater's common elements. The appellant told the Town [R. 131, ¶ 1; & R. 464, ¶ 1] that "restrictive covenants" on Edgewater's property gave the appellant a right to veto any construction by Edgewater

on its common elements.[1] The Town accepted this misrepresentation, and informed Edgewater that it would allow the construction of the swimming pool and walkway only if a court were to confirm Edgewater's right to do so.

There are no such "restrictive covenants". The court of common pleas provided the needed declaration, and the appellant appealed. The appellant has successfully prevented construction of the swimming pool and walkway for five years at this writing.

ARGUMENT

I.

Where the condominium regime was built out and sold out years earlier, and management passed to the homeowners' association, the developer's assignee had no authority to continue control of the regime's common elements.

A. The phases of Edgewater's development ended twelve years ago, when control of the regime passed to the homeowners' association.

The appellant is the bankrupt developer's assignee's assignee's assignee. As such, it stands in the shoes of the developer. It claims all the residual rights allegedly retained by the developer after the condominium regime built out and sold out twelve years ago. In furtherance of its own interests, the appellant falsely claimed to the Town of Hilton Head that Edgewater HOA was subject to "restrictive covenants" which prevent it from doing anything on the common elements without the appellant's consent. No such "restrictive covenants" exist, but the Town insisted upon a judicial declaration to that effect before granting Edgewater the necessary permits for construction of a swimming pool and a walkway.

Not until the appellant's Rule 59 motion to reconsider [R. 529] did the appellant

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[1] Appellant got this idea from S.C. Code Ann. § 6-29-1145(B), which provides: "If a [municipality] has actual notice of a **restrictive covenant** * * * that * * * prohibits the permitted activity * * * , the [municipality] must not issue the permit unless the [municipality] receives confirmation * * * that the restrictive covenant has been released * * * by court order." (Emphasis added.)

make clear the extent of its contention. The appellant claims a perpetual right to control construction upon Edgewater's common elements. The appellant claims the right in its sole discretion to construct what it wants to construct on Edgewater's common elements and to block amenities construction by Edgewater, forever.

* * * * *

An examination of how a condominium regime is created and matures provides the context for judging the appellant's astonishing claim.

Condominium-style development, called in South Carolina and some other jurisdictions a "horizontal property regime," is not a single event but a process. The process usually proceeds in three broad phases, which are overlapping. The developer begins by submitting its real estate to the condominium development by recording a Declaration or, as it is called in South Carolina, a Master Deed, which describes the property. The developer constructs residential units—often but not always multi-family—and the supporting infrastructure and amenities. The units are marketed until all have been sold.

At some point during the sales process, management of the regime and control of its common elements passes from developer to homeowners' association. This transition is governed by statute in most jurisdictions, or by Master Deed or other regime documents elsewhere. In South Carolina, however, the Horizontal Property Act says nothing specific about the transition of control,[2] nor is there a specific provision in Edgewater's Master Deed definitively answering the transition question.

The appellant claims that no transition has occurred or ever will. The appellant claims the right in perpetuity to control the common elements of Edgewater in its sole discretion. It claims the right to exercise in perpetuity all the privileges allotted to the developer during the construction phase, while preventing the Homeowners from

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[2] Neither does the model act upon which ours is based, the Federal Housing Authority Model Act. *See* 4 SOUTH CAROLINA JURISPRUDENCE *Condominiums* § 6 (1991); 15A AM.JUR.2D *Condominiums and Cooperative Apartments* § 10 (1976).

making any improvements disallowed by the appellant.

This claim is refuted by every resource to which the Court may look for an answer to this nationally unprecedented contention:

- the overall plan of the Horizontal Property Act;
- parts of the regime papers which touch upon the specific question at bar;
- South Carolina caselaw, and cases from other jurisdictions;
- the nature of the duty owed by the developer to the homeowners and to the regime;
- public policy;
- general principles of law and equity; and, most importantly,
- justice and common sense.

The respondent believes that nothing the Court may find in any of these places lends any support to the oppressive contention of the appellant.

As will be shown, the transition from developer control to homeowners' control was fully complete by December 31, 2010, at the latest. The developer and its successors had no further role to play at Edgewater after that.

B. The developer's authority to construct infrastructure and amenities by virtue of the "SAVE AND EXCEPT" clauses of the property description ended when Edgewater was completed.

Master Deeds under the HPA are neither fish nor fowl. They are hybrid creations, unknown to the common law. They partake of elements both of contract and of property. "Master Deed" is not an apt description since a master deed is not a conveyance. There is no grantee, no granting clause, no habendum. The role of this document is to establish a constitution for a new horizontal property regime.[3]

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[3] "The declaration * * * , as a covenant running with the land, is effectively a constitution establishing a regime to govern property held and enjoyed in common." Wayne S. Hyatt, *Condominium and Home Owner Associations: Formation and Development,* 24 EMORY L.J. 977, 990 (1975). *See also:* Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations,* 12 WAKE FOREST L.REV. 915, 965 n.205 (1976).

The chief basis for the appellant's claim to a perpetual right is language found in the fourth and fifth "SAVE AND EXCEPT" clauses in an appendix to the Master Deed called Exhibit "A", "DESCRIPTION OF LAND". [R. 247-48.] In these two clauses the developer assigned to itself the authority

> to improve [Edgewater's common elements] by clearing, tree pruning, constructing additional parking and common facilities; including, but not necessarily limited to recreational facilities, drainage facilities, lagoons, and the like * * * [and] to install lines, equipment and facilities for utility and drainage purposes and to grant easements over the property for the installation of additional lines, equipment or facilities for utility and drainage purposes from time to time.

The function of a reservation in an ordinary deed is to identify a portion of the tract being withheld from the grant. The fourth and fifth SAVE AND EXCEPT clauses, by contrast, have nothing whatever to do with what Exhibit "A" purports to provide: a "DESCRIPTION OF LAND" submitted to the Horizontal Property Act. These clauses purport to grant positive rights to the developer. They should have been placed in the ***text*** of the Master Deed, where they would have been seen. Instead, they are buried in a document misleadingly labeled "DESCRIPTION OF LAND" so that no one—not even lawyers at closing—would be likely to discover them.[4]

These mislabeled clauses, if construed to grant perpetual rights to the developer, would conflict with other provisions of the Master Deed and with the overall plan of the Horizontal Property Act.

> When a controversy regarding the rights of condominium unit owners arises, the court must examine all relevant provisions of the Horizontal Property Act, 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

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[4] *Cf. Heritage Fed. Savings and Loan Ass'n v. Eagle Lake and Golf Condominiums,* 318 S.C. 535, 458 S.E.2d 561, 564 (Ct. App. 1995) ("The shortcomings of the master deed are at the core of much of the litigation that has plagued this project from early on.").

> possible. *Mountain View Condominiums Homeowners Ass'n, Inc. v. Scott,* 180 Ariz. 216, 883 P.2d 453 (1994); *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).

Harrington v. Blackston, 319 S.C. 1, 459 S.E.2d 309, 311 (Ct. App. 1995). The Horizontal Property Act, the Master Deed, and the association by-laws incorporated therein all contemplate the homeowners' association, not the developer, as the repository of the permanent right and duty to maintain and control the common elements.

A Master Deed, the same as a deed of conveyance, "must be construed as a whole and effect given to every part if it can be done consistently with the law." *Gardner v. Mozingo*, 293 S.C. 23, 358 S.E.2d 390, 391-92 (1987). A Master Deed must be construed "against its drafter, the developer * * * ." *Heritage Fed. Savings and Loan Ass'n v. Eagle Lake and Golf Condominiums,* 318 S.C. 535, 458 S.E.2d 561, 565 (Ct. App. 1995). The SAVE AND EXCEPT clauses authorize the developer to do some of the things which are necessary to the construction of a condominium regime. Those things were done by 2006, when the regime was built out and sold out. Even if those rights persisted to the time when additional property might have been committed to the regime, that window closed on December 31, 2010. [R. 225, ¶ 6(b)(2).]

Other provisions of Edgewater's Master Deed point to that conclusion. Section 12.01 of the Master Deed provides that "[s]o long as the Declarant owns one or more of the Units, it shall be subject to the provisions of this Master Deed and the Exhibits * * * ." Conversely, when the regime has sold out and the Declarant owns nothing, the Declarant is *no longer subject to the provisions of "this Master Deed and the Exhibits*," including Exhibit "A", which contains the fourth and fifth SAVE AND EXCEPT clauses. With the sale of the last unit by the developer, those two clauses were history.

Harmony among the provisions of the Master Deed is easily achieved by holding that the SAVE AND EXCEPT authority of the developer expired when construction was

completed and all the units sold, and the duty of maintenance and the right of control passed exclusively to the homeowners.

The overall plan of the Horizontal Property Act compels the same conclusion. The plan of the Act is for the developer to build upon, then the homeowners to maintain and control, the common elements. The HPA defines the common elements of a condominium and specifies who owns and controls them. The common elements include the land itself and "[a]ll other elements of the property, in existence or to be constructed or installed, rationally of common use or necessary to [the property's] existence, upkeep, and safety * * * ." S.C. Code Ann. §§ 27-31-20(f)(1) & (7). The "common use" in question is the use of the property in common by the homeowners, not the developer. Each homeowner, not the developer, enjoys "a common right to a share, with the other co-owners, in the common elements of the property * * * ." S.C. Code Ann. § 27-31-60(a). The common elements are property of "the co-ownership", S.C. Code Ann. § 27-31-70, and shall not be partitioned. From the beginning, the homeowners, not the developer, own the common elements.[5] "Any conveyance * * * of an individual apartment is deemed to also convey * * * the undivided interest of the owner in the common elements * * * ." S.C. Code Ann. § 27-31-120. Not the developer but rather "[e]ach co-owner may use the elements held in common in accordance with the purpose for which they are intended, without hindering or encroaching upon the lawful rights of the other co-owners." S.C. Code Ann.

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> The apartment owners hold title to the regime common elements under a unique arrangement of concurrent ownership, which is neither a simple joint tenancy, since survivorship provisions are absent, nor a tenancy in common, since partition is prohibited. The undivided, concurrent ownership of common elements is coupled with a mutual covenant among the apartment owners providing for reasonable and appropriate use thereof, so that the nonexclusive use rights of apartment owners are not impaired.

4 SOUTH CAROLINA JURISPRUDENCE *Condominiums* § 18 (1991) (footnotes omitted).

§ 27-31-80. A "council of co-owners" is established "for the purpose of the administration of the property constituted into a horizontal property regime." S.C. Code Ann. § 27-31-90. "The administration of the property constituted into horizontal property * * * shall be governed by bylaws [of the council of co-owners] * * * ." The bylaws must necessarily provide for "care, upkeep and surveillance of the property * * * ." S.C. Code Ann. § 27-31-160. "The co-owners * * * are bound to contribute pro rata * * * toward the * * * maintenance and repair of the general common elements * * * ." S.C. Code Ann. § 27-31-190.

The developer's SAVE AND EXCEPT rights expired. *Rights do expire.* Perpetual rights are as rare as hens' teeth in our jurisprudence. Perpetual rights must be explicitly intended and granted. *Dobyns v. South Carolina Dep't of Parks, Recreation and Tourism,* 317 S.C. 353, 357-58, 347 S.E.2d 350 (Ct. App. 1996); *Carolina Cable Network v. Alert Cable TV, Inc.*, 316 S.C. 98, 447 S.E.2d 199, 201 (1994). They are void if contrary to public policy. *Rico Industries, Inc. v. TLC Group, Inc.,* 379 Ill.Dec. 338, 6 N.E.3d 415, 419 (2014).

Our caselaw shows that public policy forbids perpetual control by a condominium developer, even if the Master Deed purports to grant such a thing, which this one does not. When the developer's role is done, its powers end. Closely in point is the case of *Queen's Grant II Horizontal Prop. Regime v. Greenwood Devel. Corp.,* 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006), where the developer claimed a perpetual right to amend a subdivision's restrictive covenants. Rejecting the claim, the Court of Appeals held that such a right expired when the developer no longer possessed a sufficient property interest in the development.

> [W]hen a subdivision developer is divested of all interest in the subdivision, a reserved right to amend restrictive covenants is extinguished. *Armstrong v. Roberts,* 254 Ga. 15, 325 S.E.2d 769, 770 (1985).

628 S.E.2d at 913-14. In the *Armstrong* case, cited in *Queen's Grant II*, the court held:

> A developer of a subdivision who reserved the authority to

> waive restrictions in covenants running with the land no longer possesses that authority after divesting himself of his interest in the subdivision.

254 Ga. at 16.

The same principle applies to the rights purportedly reserved in the SAVE AND EXCEPT clauses. The developer's rights ended when its job was done and the units sold out.

The Horizontal Property Act, the Master Deed read as a whole, caselaw here and elsewhere, public policy, and simple justice all point to the conclusion that the two SAVE AND EXCEPT clauses misleadingly appended to the property description in the Master Deed give the appellant no authority over the common elements of Edgewater on Broad Creek.

C. Paragraph 6(b)(9) gave the developer no right to do anything in the common elements of the original (and only) phase of Edgewater.

The appellant claims that a single line in a section of the Master Deed dealing with the addition of new phases to the regime gives it a perpetual right to control Edgewater's common elements. This is a sentence found in Paragraph 6(b), which is entitled: **"Incorporation of Additional Property."** In pertinent part, Paragraph 6(b)(9) reads:

> **(b) Incorporation of Additional Property.** * * * Declarant * * * reserves the right * * * to submit one or more parcels of Additional Property to the provisions of the Act by incorporating them within this Master Deed. * * * The maximum extent of additional land that the Declarant may submit to the provisions of this Master Deed is that property containing approximately 16.01acres of land, as described on Exhibit "A-1" * * * .
>
> A general description of the plan of development [of the Additional Land] follows:
>
> * * * * *
>
> (9) **Any additional amenities or recreational facilities, which may or may not be [constructed] in the additional Phases, are solely at the option of Declarant.** The description in any sales or promotion literature of the Declarant of any potential additional amenities or recreational facilities shall not, of itself, oblige the Declarant

to construct such or to convey them to the Regime as Common Elements. * * *

[R. 225-26. Second emphasis added.] The appellant claims that the first sentence of subparagraph 9, above, gives it the right to control the common elements of the original (and only) Edgewater Regime in perpetuity by constructing "additional amenities or recreational facilities" in those common elements and preventing Edgewater from constructing anything on its own common elements.

The court of common pleas gave this claim the short shrift which it deserves. *See:* Order at 12 [R. 18]. Paragraph 6(b)(9) is part of the "general description of the plan of development [of the Additional Land]" which could have been added to Edgewater but was not. Paragraph 6(b)(9) vaporized at midnight on December 31, 2010, with the rest of Paragraph 6. Paragraph 6 had nothing to do with the original (and only) phase of the regime, built out years before the right to add additional property ended.

Subparagraph 6(b)(9) of the Master Deed expired on December 31, 2010. While it lived, it had nothing to do with the original (and only) phase of Edgewater.

D. The appellant's conduct is in breach of the fiduciary duty which it owes to the homeowners of Edgewater.

The developer owes a fiduciary duty to the homeowners. *See, e.g., Walbeck v. The I'On Co.*, ___ S.C. ___, ___ S.E.2d ___ (Ct. App. 2018);[6] *Goddard v. Fairways Devel. Gen. Partnership,* 310 S.C. 408, 426 S.E.2d 828 (Ct. App. 1993); *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.,* 349 S.C. 251, 257, 562 S.E.2d 633 (2002) (approving *Goddard*); *Magnolia North Property Owners' Ass'n, Inc. v. Heritage Communities, Inc.,* 397 S.C. 348, 725 S.E.2d 112 (Ct. App. 2012); and *Maerker Point Villas Condominium Ass'n v. Szymski,* 275 Ill.App.3d 481, 655 N.E.2d 1192 (1995) (developer owes fiduciary duty to condominium association), cited with

[6] Petitions for rehearing were pending at this writing.

approval by our Supreme Court in *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 259, 562 S.E.2d 633 (2002). *Accord: Raven's Cove Townhomes, Inc. v. Knuppe Devel. Co.*, 114 Cal.App.3d 783, 171 Cal.Rptr. 334, 343 (1981) ("In most jurisdictions, the developer is a fiduciary acting on behalf of unknown persons who will purchase and become members of the association * * * . 25 U.FLA.L.REV. 350, 355."); *Reyhani v. Stone Creek Cove Condo. II Horizontal Prop. Regime,* 329 S.C. 206, 211, 494 S.E.2d 465, 468 (Ct. App. 1997) ("[O]nce common elements are set aside and vested in the co-owners, such co-owners may not be unilaterally deprived of their interests in the common elements by the actions of the developer.").

As the New Jersey Supreme Court said of its condominium statute:

> The Condominium Act contains no provision giving the developer the right to use the property interests of [the condominium] unit owners as a bargaining chip for the developer's own interests.

Fox v. Kings Grant Maintenance Ass'n, Inc., 167 N.J. 208, 770 A.2d 707, 717 (2001). *Accord: Pulliam v. Travelers Indem. Co.*, 403 S.C. 332, 743 S.E.2d 117, 123 (Ct. App. 2013) ("[T]he act of placing the developer's interests before the owners may constitute a breach of fiduciary duty * * * ."). Any provision of the master deed which "puts the developer's interests ahead of the unit owners' interests * * * violates the public policy set forth in the Act * * * ." *Brandon Farms Prop. Owners Ass'n, Inc. v. Brandon Farms Condominium Ass'n, Inc.*, 180 N.J. 361, 852 A.2d 132, 141 (2004).

> "'[A] developer * * * may not make decisions for the Association that benefit [its] own interest at the expense of the association and its members * * * ."

Orange Grove Terrace Owners Ass'n v. Bryant Properties, Inc., 176 Cal.App.3d 1217, 222 Cal.Rptr. 523, 526 (1986), quoted with approval by our Supreme Court in *Concerned Dunes West Residents, Inc. v. Georgia-Pacific Corp.*, 349 S.C. 251, 259,

562 S.E.2d 633 (2002).[7]

The developer of Edgewater recognized the fiduciary nature of its duty by embedding that duty in the Master Deed:

> **12. DECLARANT SUBJECT TO MASTER DEED; DECLARANT USE.**
>
> **12.01 DECLARANT USE; GENERAL.**
>
> So long as the Declarant owns one or more of the Units, it shall be subject to the provisions of this Master Deed and the Exhibits attached hereto and *the Declarant covenants to take no action which will adversely affect the rights of the Regime with respect to * * * rights assigned to the Regime by reason of the establishment of said Regime * * *.*

[R. 236. Emphasis added.]

The appellant owes the same fiduciary duty to the regime and to the homeowners as did the developer, in whose shoes it stands. The fact that the appellant has stopped the construction of a crushed shell walkway, of all things, shows the length to which it will go in crippling Edgewater's common elements as a bargaining chip, in violation of its continuing fiduciary duty.

The appellant's claim to perpetual control in its own interest, and its sabotage of Edgewater's attempt to construct amenities, breaches that fiduciary duty.

II.

Dicta in the appealed order are not part of the law of the case, and should not be addressed.

The portion of the judgment of the circuit court under appeal is confined to a narrow sphere. That court's judgment is that the appellant has no power to veto the construction of a swimming pool and walkway by the homeowners in the common elements.

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[7] *See generally:* Comment, *Areas of Dispute in Condominium Law,* 12 WAKE FOREST L.REV. 979, 981-90 (1976); Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations,* 12 WAKE FOREST L.REV. 915, 923 n.31 (1976).

The appellant is concerned that it may be bound by the law of the case doctrine unless it appeals every word spoken against it in the order. This concern is misplaced since the statements regarding which the appellant complains in its Argument II are unnecessary to the judgment and constitute *obiter dicta.*

"[T]he law of the case doctrine does not apply to mere *dicta.*" *Sloan Const. Co. v. Southco Grassing, Inc.,* 395 S.C. 164, 175, 717 S.E.2d 603, 609 (2011) (Pleicones, J., dissenting). *Accord: White's Mill Colony, Inc. v. Williams,* 363 S.C. 117, 123 n.1, 609 S.E.2d 811 (Ct. App. 2005). The appellant's request that the Court adjudicate the accuracy of *dicta* unnecessary to the judgment of the lower court presents no justiciable controversy.[8] Instead, it calls in effect for an advisory opinion, which the Court should decline to issue. *Crews v. W.R. Crews, Inc.,* 390 S.C. 15, 699 S.E.2d 189, 196 (Ct. App. 2010); *Hitter v. McLeod,* 274 S.C. 616, 619, 266 S.E.2d 418, 420 (1980).

The narrow judgment at issue in this appeal is the tip of an iceberg. Most of the

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[8] *See: In re Repository Technologies, Inc.,* 601 F.3d 710, 718 (7th Cir. 2010):

> [The appellant's] challenge to the bankruptcy court's dictum does not create a justiciable controversy because "dicta are not appealable rulings." *Chathas v. Local 134 IBEW,* 233 F.3d 508, 512 (2000); *see also Abbs v. Sullivan,* 963 F.2d 918, 924 (7th Cir.1992) ("There is no known basis for an appeal from a dictum." (quotation omitted)). We review judgments, not explanatory language in lower court opinions. *In re UAL Corp.,* 468 F.3d 444, 449 (7th Cir. 2006).

Accord: City of Bemidji v. Ervin, 204 Minn. 90, 282 N.W. 683, 685 (1938). As the Court noted in *Mead v. Beaufort County Assessor,* 419 S.C. 125,141, 796 S.E.2d 165, 174 (Ct. App. 2016):

> "In general, this court may only consider cases where a justiciable controversy exists. 'A justiciable controversy is a real and substantial controversy which is ripe and appropriate for judicial determination, as distinguished from a contingent, hypothetical or abstract dispute.'" *Sloan v. Greenville Cty.* , 356 S.C. 531, 552, 590 S.E.2d 338, 349 (Ct. App. 2003) (citation omitted) (quoting *Pee Dee Elec. Coop., Inc. v. Carolina Power & Light Co.*, 279 S.C. 64, 66, 301 S.E.2d 761, 762 (1983)).

issues in the case remain for resolution at trial on remand.[9]

The respondent believes that the *obiter dicta* of which the appellant complains are all correct, but they are unnecessary to the judgment; they are not ripe for decision; they do not constitute the law of the case; and they may be challenged anew on remand if the issues they concern arise again.

CONCLUSION

The appellant has no right to stop the respondent from constructing a swimming pool and walkway on its property.

The judgment should be affirmed.

Respectfully submitted,

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[9] For example, the appellant claims to own the regime's underground water and sewer lines! Apparently the appellant thinks it can withhold Edgewater's water and sewer service as a means of getting its way on its adjacent tract. The notion that a developer can submit its land to a condominium regime while withholding ownership of the water and sewer system is yet another new one. By statute, the regime's common elements include the "installations of central services such as * * * water * * * and the like, in existence or to be constructed * * * ." This includes "[a]ll other elements of the property, in existence or to be constructed or installed, rationally of common use or necessary to its existence, upkeep, and safety." S.C. Code Ann. § 27-31-20(f)(5) & (7). The Master Deed itself declares in ¶ 7.01(e) & (f) [R. 228] that the water and sewer pipes are part of the common elements. The homeowners, not the developer, own the common elements. Even in an ordinary conveyance of real estate—much less the dedication of property to the Horizontal Property Act—public policy will not allow a grantor to reserve ownership of subterranean fixtures essential to enjoyment of the fee.

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CERTIFICATE OF COUNSEL

I certify that respondent's final brief complies with Rule 211(b), SCACR.

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