STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Case No. 2017-CP-26-0424

Vista Del Mar Condominium Association; Dennis M. Merritt, Trustee of the Dennis M. Merritt Living Trust; John J. Hawkins; and Eleanor N. Hawkins,

Plaintiffs,

vs.

Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; John Doe, a nominal Defendant representing all persons or entities unknown who may claim an interest in the property that is the subject of this action,

Defendants.

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Atlantic Development Company, LLC and Atlantic Coast Funding, LLC,

Third-Party Plaintiffs,

vs.

Barbara P. Swartz; Nancy S. Case; Winston-Salem Daly Development, LLC; Charles F. Weber; Mark L. Skowron, as Trustee of Mark L. Skowron Revocable Trust dated April 24, 2002 and Gail L. Skowron, as Trustee of the Gail L. Skowron Revocable Trust dated 04/24/2002; Norman W. Taylor, Trustee of the Norman W. Taylor Revocable Living Trust dated April 28, 2008; Tim Mitchell Development, LLC; Eric R. Sklut and Lori Levine Sklut; Fred C. Warehime and Patricia F. Warehime; James W. Blackburn, III and Peggy S. Blackburn; Barbara I. Bowser; KHDH, LLC; Beth G.

**ORDER GRANTING DEFENDANTS ATLANTIC DEVELOPMENT COMPANY, LLC'S AND ATLANTIC COAST FUNDING, LLC'S MOTION TO RECONSIDER, VACATING THIS COURT'S PRIOR ORDER DENYING SUMMARY JUDGMENT, AND GRANTING SUMMARY JUDGMENT**

Bauknight; Roderick D. Sanders (or his successor), as Trustee of the Amended and Restated Revocable Declaration of Trust of Anne Mallard Sanders u/a/d January 16, 2015; GGK Properties, LLC; Leon Levine and Sandra Levine; Joseph Moglia and Amy H. Moglia; Angela M. Mason, as Trustee of the Angela Mason Revocable Trust dated June 9, 2003 and amended and restated May 27, 2007; Dexter R. Barbee, Sr.; Daniel M. Talbert, Sr.; Craig W. Lawton; Craig W. Lawton; David N. Dalton; Janet W. Weed, Trustee of the Janet W. Weed Revocable Trust under Trust Instrument dated April 17, 2013; Robert H. Messier, Jr. and Janice H. Messier; Jeffrey Schneider, Trustee for the Jeffrey Schneider Revocable Trust dated August 1, 2017; Phillip Kleinman and Charisse D. Kleinman; Stephen Gatto and Camille Gatto; Lutz Real Estate, LP; Astorg Imports, Inc.; ABLP Properties, LLC; Sutton Children, LLC; Daniel C. Schuster and Mardell J. Schuster; Roy C. Putrino and Eileen M. Putrino; Spencer Squier and Sherri Squier; VDM 1004, LLC; Roger B. Matherly and Bonnie V. Matherly; ITAC 203, LLC; Rebecca R. Shroff and Kersi S. Shroff; Sandra P. Levine and Lori Ann Sklut, Co-Trustees of the Irrevocable Trust F/B/O Amy Beth Levine dated September 18, 1986; David E. Lukowski; Richard B. Kline and Leslie Kline; James P. Aplington and Carol D. Aplington; Michael L. Van Glish and Judith K. Van Glish; Anna A. Olsen; Anne Marie Murray; William J. Pridemore and Irina V. Pridemore; William B. Davidson and Julia Davidson; Bruce Alexander Henderson and Valerie Sokolov; Mark W. Lee; Sue David Kline; Thomas Mckiernan and Anne Mckiernan; Philip H. Strobl and Amy Mott Strobl; James M. Faircloth and Sylvia Faircloth; Cheryl Jackson and Phillip H. Jackson; Weldon Riggs and Tiffiany Riggs; Janet

P. Merritt, Trustee of the Janet P. Merritt Living Trust U/A dated March 24, 2000; Melia Mooney Pavoris; William L. Mansfield and Patricia S. Mansfield; Stuart W. Gibbs and Helen R. Gibbs; Michael R. Blackburn and Pamela M. Blackburn; Jeffrey G. Edwards and Teresa T. Edwards; Michael J. Wilk,

Third-Party Defendants.

This matter is before the Court on a motion to reconsider this Court's order denying summary judgment on Plaintiffs' claims to the 2.58 Acre Tract[1] and a motion for partial summary judgment on Plaintiffs' claims to the Access Easement. Both motions were filed by Defendants/Third-Party Plaintiffs Atlantic Development Company, LLC and Atlantic Coast Funding, LLC ("ADC" and "ACF"). Both motions for partial summary judgment seek summary judgment for ADC and ACF on Plaintiffs' claims as well as summary judgment for ADC on its counterclaims and third-party claims for a declaratory judgment and to quiet title against Plaintiffs and Third-Party Defendants.

The Court initially heard the summary judgment motion for the 2.58 Acre Tract on August 13, 2019. Demetri K. Koutrakos, Esquire and Harry A. Dixon, Esquire appeared on behalf of ADC and ACF. Kenneth R. Moss, Esquire appeared on behalf of Plaintiffs and Third-Party Defendants. James Christopher Clark, Esquire appeared on behalf of Defendant Vista Del Mar Condominiums, LLC ("VDMC"). This Court denied ADC and ACF's motion by written order entered on November 8, 2019 ("November 8, 2019 Order").

[1] Plaintiffs' Amended Complaint describes the 2.58 Acre Tract as "Tract 1" and an Access Easement as "Tract 2."

ADC and ACF timely filed a motion to reconsider. This Court heard argument on the motion to reconsider on January 27, 2020 and again on February 18, 2020. Demetri K. Koutrakos, Esquire and Harry A. Dixon, Esquire appeared on behalf of ADC and ACF. Kenneth R. Moss, Esquire appeared on behalf of Plaintiffs and Third-Party Defendants. Monica W. Yates, Esquire appeared on behalf of VDMC. On February 18, 2020, the Court also heard argument on the motion for summary judgment on the Access Easement.

This matter is now ripe for decision. The Court finds that it improvidently entered the Order Denying ADC and ACF's motion for summary judgment on the 2.58 Acre Tract. Accordingly, ADC and ACF's motion to reconsider is granted, and the November 8, 2019 Order denying summary judgment is vacated. Moreover, both motions for partial summary judgment by ADC and ACF are granted for the reasons set forth below.

## I. FACTS

In December 2003, VDMC created the Vista Del Mar Horizontal Property Regime (the "Regime") by executing a Master Deed. At the same time, VDMC created Plaintiff Vista Del Mar Condominium Association (the "Association"). The Master Deed gave VDMC certain rights as "Developer," including the right to withdraw unimproved portions of property from the Regime[2] and the right to add property to the Regime. The Master Deed also provided for developing up to

[2] For example, the Master Deed provided:

> NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that the Developer hereby submits the Land more fully described in Exhibit "A" Attached Hereto And All Improvements Located Thereon . . . to the provisions of Sections 27-31-10 et seq. of the South Carolina Code Of Laws (1976), And Hereby Creates Thereon A Horizontal Property Regime (Sometimes Termed "Condominium Ownership") to be known as THE VISTA DEL MAR HORIZONTAL PROPERTY REGIME, subject to the following, **INCLUDING BUT NOT LIMITED TO, THE RIGHT TO WITHDRAW UNIMPROVED PORTIONS OF THE LAND PURSUANT TO SECTION 14.2(B).**

six total buildings with a maximum of 250 units subject to the Regime and limited the Developer's ability to withdraw property from the Regime to a defined "Transition Period":

> [T]he time period commencing on the date of recording of the Master Deed and ending on the earlier of:
>
> 1. December 31, 2017; or
>
> 2. Three (3) months after conveyance in the ordinary course of Developer's business of ninety-nine percent (99%) of the maximum number of Units to be contained in all phases of the Regime, rounded down to the next whole number, to persons other than the Developer; or
>
> 3. Three (3) months following the date the Developer surrenders its authority as a Class "B" Member of the Association to appoint and remove directors and officers of the Association by an express amendment to the Master Deed executed and filed of record by the Developer.

VDMC initially submitted 5.853 acres of land and improvements to the Regime with the Master Deed. In June 2006, VDMC conditionally submitted an additional 5.00 acres and improvements to the terms of the Master Deed by recording an amendment to the Master Deed. A portion of each of these property submissions became the disputed 2.58 Acre Tract.

In March 2009, VDMC removed the 2.58 Acre Tract from the Regime by recording another amendment ("Fourth Amendment") to the Master Deed. The Fourth Amendment referenced a plat ("243/275 Plat") describing the 2.58 Acre Tract and an Access Easement. VDMC subsequently conveyed the 2.58 Acre Tract to GDMB Ocean, LLC ("GDMB Ocean") and assigned its rights as "Developer" under the Master Deed to GDMB Operations, LLC ("GDMB Operations") (the "GDMB Assignment"). In December 2014, the Association and GDMB Ocean, LLC entered into an Amended and Restated Easement Agreement reiterating the easement over that area labeled "Access Easement" on the 243/275 Plat.

On November 7, 2014, GDMB Operations started the process to end the Transition Period by an amendment to the Master Deed that voluntarily surrendered its authority as a class "B"

member of the Association under the Master Deed. Under the Master Deed, this meant that the Transition Period would end on February 7, 2015. Daniel Charles Schuster, who served on the Association board in 2015, stated the Transition Period ended in February 2015,[3] and the Association's financial statements from 2015 stated that the Transition Period ended in February 2015. Although the Master Deed for the Regime planned for a total of six phases and a maximum of 250 units, it is undisputed that only two buildings and 66 units were ever completed.

On January 8, 2016, GDMB sold the 2.58 Acre Tract and other property to ADC. ADC then gave a mortgage on the 2.58 Acre Tract to ACF as security for a promissory note.

## II. RELEVANT PROCEDURAL HISTORY

In 2017, Plaintiffs filed this action asserting claims for 1) quiet title, 2) declaratory judgment, 3) equitable title, 4) equitable easement appurtenant, and 5) servitude appurtenant. ADC and ACF answered Plaintiffs' complaint in which ADC asserted counterclaims for a declaratory judgment and to quiet title. Additionally, ADC raised third-party claims for a declaratory judgment and to quiet title against each individual unit owner in the Regime (the Third-Party Defendants). ADC and ACF now seek summary judgment in their favor on each claim raised by Plaintiffs, and ADC seeks summary judgment in its favor on its counterclaim and third-party claim to quiet title.

## III. LEGAL STANDARD

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter

[3] In his deposition, Schuster stated everyone understood the Transition Period ended in 2015: "**Q.** Okay. So in February of 2015, everybody -- the Regime, the Association -- operated under the assumption that the Transition Period ended, and the Developer was ceding control of the board to the members of the Association? **A.** Yes."

of law." Rule 56(c), SCRCP. In determining whether any triable issue of fact exists so as to preclude summary judgment, the evidence and all inferences which can be reasonably drawn therefrom must be viewed in the light most favorable to the non-moving party. *Strother v. Lexington County Recreation Comm'n*, 332 S.C. 54, 504 S.E.2d 117 (1998).

The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder. *Dawkins v. Fields*, 354 S.C. 58, 580 S.E.2d 433 (2003). In that way, "[a] motion for summary judgment is akin to a motion for a directed verdict" because "[i]n each instance, one party must lose as a matter of law." *Main v. Corley*, 281 S.C. 525, 526, 316 S.E.2d 406, 407 (1984); *see also Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991) (standard for summary judgment "mirrors" standard for directed verdict).

## IV. ANALYSIS

### A. THE 2.58 ACRE TRACT

Plaintiffs assert the 2.58 Acre Tract is theirs because VDMC's removal was void. Specifically, Plaintiffs assert S.C. Code Ann. § 27-31-70 completely bars removing property subject to a horizontal property regime and the Transition Period had ended when VDMC attempted to remove the 2.58 Acre Tract.

In their motion for summary judgment, ADC and ACF assert Plaintiffs' claims to the 2.58 Acre Tract fail as a matter of law because VDMC properly removed the 2.58 Acre Tract. Specifically, ADC and ACF assert 1) § 27-31-70 does not bar a developer from removing property subject to a horizontal property regime where the master deed allows it and 2) the Transition Period had not ended when VDMC removed the 2.58 Acre Tract.

The parties do not dispute any material facts. Rather, the parties dispute how a statute applies to these facts and the meaning of language in a deed—both legal questions for the Court.

The Court must construe the Master Deed as a whole, and the Master Deed unambiguously provides that unimproved land submitted to the Regime could be removed by, or revert back to, the Developer, similar to a right of reversion. ADC and ACF describe this as a conditional submission, but the thought is the same. The Master Deed unambiguously provides the Developer had the right to add and remove unimproved property from the Regime. Per the terms of the Master Deed and general principles of law, each unit owner who purchased a unit in the Regime took title subject to these rights of the Developer.[4] These principles form the basis for some of the rulings set forth herein.

**1. S.C. Code Ann. § 27-31-70 Did Not Void the Removal of the 2.58 Acre Tract from the Regime.**

(a) *Reyhani v. Stone Creek Cove Condominium II Horizontal Property Regime* Recognized Property May Be Withdrawn from a Horizontal Property Regime Where the Master Deed Allows It.

ADC and ACF assert *Reyhani*[5] allowed VDMC to do exactly what it did—withdraw property from a horizontal property regime.

Conversely, Plaintiffs assert *Reyhani* supports their position that a developer may not remove property once the property becomes subject to a horizontal property regime.

After thoroughly analyzing *Reyhani*, the Court concludes *Reyhani* rejected Plaintiffs' interpretation of § 27-31-70. *Reyhani* addressed a title dispute over a roughly one-acre lot previously submitted to a horizontal property regime. *Reyhani*, 329 S.C. at 207–08, 494 S.E.2d at 466. The facts were complicated by a foreclosure on a large development where a small parcel was

[4] For example, Section 17.10 of the Master Deed provides that, "[i]n accepting a Deed to any unit, the Grantee will be deemed to have accepted and agreed to all terms and conditions contained in this Master Deed and the Exhibits, as amended . . . ."

[5] *Reyhani V. Stone Creek Cove Condominium II Horizontal Property Regime*, 329 S.C. 206, 494 S.E.2d 465 (1997).

subject to a horizontal property regime. *Id.* at 208–09, 494 S.E.2d at 466. The master deed, as amended as part of a court order resolving the foreclosure, allowed development of the regime property until a certain date. *Id.* at 208–09, 494 S.E.2d at 466–67. After that date passed, the plaintiff purchased the disputed lot, which had been part of the regime property. *Id.* at 210, 494 S.E.2d at 467. The unit owners and association then asserted title to the disputed lot and alleged the disputed lot was a general common element under the terms of the master deed. *Id.* The plaintiff disagreed and asserted that he owned the property in compliance with the master deed as amended. *Id.* The court ultimately held the plaintiff did not take title in compliance with the master deed and that the disputed lot had become a general common element of the horizontal property regime. *Id.* at 213–14, 494 S.E.2d at 469.

The court based its rulings on the language of the master deed to which all unit owners are bound. The court stated, "once 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" and cited § 27-31-70 without analysis. *Id.* at 211, 494 S.E.2d at 468. Importantly, the court then looked to the terms of the master deed to determine when the common elements became vested in the co-owners. *Id.* at 212, 494 S.E.2d at 468. Implicitly, the court rejected Plaintiffs' interpretation of § 27-31-70 and held that common element property may be removed from the regime or conveyed according to the terms of the applicable master deed. *Id.* The *Reyhani* master deed, as amended, allowed the undeveloped property of the horizontal property regime to be developed until a certain date, but after that date, it declared the land would become a general common element. *Id.*[6] That

[6] The *Reyhani* fact pattern addresses matters and concepts involved in this case—a conditional submission of property (or a right of reversion) and a Transition Period. The *Reyhani* master deed allowed regime property to be developed during a certain time frame (like the Transition Period here), and it appears Reyhani could have acquired title to the disputed property had he done so before the development deadline expired.

date had passed by the time the *Reyhani* plaintiff purchased the disputed lot, and the court held the plaintiff did not acquire title because his lot had become a general common element—title had vested in the unit owners in the regime. *Id.*

Although *Reyhani* did not elaborate on the application of § 27-31-70, the court was clear that the terms of the master deed determined the parties' rights when the disputed property was subject to a horizontal property regime. As such, *Reyhani* clearly did not apply § 27-31-70 as Plaintiffs would here—it did not interpret § 27-31-70 as a complete bar to the *Reyhani* plaintiff's claim to the property. Accordingly, the Court concludes *Reyhani* implicitly rejected Plaintiffs' interpretation of § 27-31-70 and that applying *Reyhani* in this case—where the parties do not dispute the Master Deed allowed the 2.58 Acre Tract to be removed—means VDMC properly removed the 2.58 Acre Tract.

(b) The Plain Language of § 27-31-70 Did Not Prevent Removing Property from the Regime.

Even if *Reyhani* were not dispositive, ADC and ACF assert that § 27-31-70 is unambiguous, and simply provides that apartment owners must hold title to the common elements in undivided interests and creates an exception to the general right to partition property held in common. Accordingly, ADC and ACF assert § 27-31-70 did not prevent VDMC from removing the 2.58 Acre Tract.

Conversely, Plaintiffs assert § 27-31-70 completely prevents any removal of horizontal regime property and therefore the removal of the 2.58 Acre Tract by VDMC was void.

S.C. Code Ann. § 27-31-70 provides:

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

"Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another

meaning." *State v. Ramsey*, 409 S.C. 206, 209, 762 S.E.2d 15, 17 (2014). Moreover, "words in a statute must be construed in context, and the meaning of particular terms in a statute may be ascertained by reference to words associated with them in the statute." *Eagle Container Co., LLC v. Cty. of Newberry*, 379 S.C. 564, 570, 666 S.E.2d 892, 895–96 (2008).

The Court concludes § 27-31-70 is unambiguous. The statute declares only how apartment owners must hold title to the common elements and creates an exception to the general right to partition property held in common. Other statutes in the Horizontal Property Act support this interpretation. The statute immediately preceding § 27-31-70 provides that "[a]n apartment owner shall have the exclusive ownership of his apartment and shall have 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) (emphasis added). Additionally, § 27-31-120 provides that "[a]ny conveyance or lease of an individual apartment is deemed to also convey or lease the *undivided interest of the owner in the common elements*, both general and limited, appertaining to the apartment without specifically or particularly referring to same." *Id.* at § 27-31-120 (emphasis added). Reading these statutes together clarifies what was intended: an ownership interest in a unit must include an undivided interest in the whole of a regime's common area, and unit owners may not convey some or all of the common area property tied to their units. Section 27-31-70 does not prevent changes in what property makes up the total common area.

Furthermore, the meaning of the first part of the statute is clarified by the second part's ban on partition or division of commonly held property. Ordinarily, "[a]ll joint tenants and tenants in common who hold, jointly or in common . . . shall be compellable to make severance and partition . . . ." *See* S.C. Code Ann. § 15-61-10. However, § 27-31-70 provides that, because apartment

owners hold title to the common elements as an undivided whole, those apartment owners may not invoke the statutory right to partition those common elements.

Finally, applying Plaintiffs' interpretation of S.C. Code Ann. § 27-31-70 would lead to an absurd result: no horizontal property regime common element could ever be conveyed—even if every unit owner agreed. *See generally Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016) (courts will not adopt an absurd interpretation of a statute that the General Assembly could not have intended). Taking Plaintiffs' theory one step further, undeveloped property, once submitted to a horizontal property regime, could not be developed into units because part of the property would be changed from common area to separately owned units. Accordingly, the Court concludes § 27-31-70 does not apply as Plaintiffs assert and did not void the removal of the 2.58 Acre Tract from the Regime.

(c) S.C. Code Ann. § 27-31-70 Did Not Apply to the 2.58 Acre Tract Because It Was Not a Statutory Common Element.

Finally, ADC and ACF assert that even if the Court were to assume § 27-31-70 applies as Plaintiffs suggest, the 2.58 Acre Tract was not a common element under the statute.

The Horizontal Property Act clearly defines "general common elements" and omits unimproved property from the definition:

> "General common elements" means and includes:
>
> (1) The land whether leased or in fee simple and whether or not submerged on which the apartment or building stands; provided, however, that submerged land developed or used under this chapter is subject to any law enacted relating to the leasing of submerged lands by the State for the benefit of the public;
>
> (2) The foundations, main walls, roofs, halls, lobbies, stairways, moorages, walkway docks, and entrance and exit or communication ways in existence or to be constructed or installed;
>
> (3) The basements, flat roofs, yards, and gardens, in existence or to be constructed or installed, except as otherwise provided or stipulated;

> (4) The premises for the lodging of janitors or persons in charge of the property, in existence or to be constructed or installed, except as otherwise provided or stipulated;
>
> (5) The compartments or installations of central services such as power, light, gas, cold and hot water, refrigeration, reservoirs, water tanks and pumps, and the like, in existence or to be constructed or installed;
>
> (6) The elevators, garbage incinerators, and, in general, all devices or installations existing or to be constructed or installed for common use;
>
> (7) All 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).[7]

The Court concludes § 27-31-70 does not apply to the 2.58 Acre Tract because it is not a common element as defined under the statute. The record reveals there is no genuine dispute that the 2.58 Acre Tract is entirely unimproved property, and the statutory definition does not include unimproved land as a common element subject to the Horizontal Property Act. The 2.58 Acre Tract is neither "[t]he land . . . on which the apartment or building stands"; "yards" or "gardens"; "necessary to [the property's] existence, upkeep, and safety"; or an element "rationally of common use."[8] No other enumerated item under the statute comes close to describing the 2.58 Acre Tract. Accordingly, § 27-31-70—which applies to "[t]he common elements, both general and limited,"—does not apply to the 2.58 Acre Tract.[9]

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[7] The parties do not dispute that the 2.58 Acre is not a limited common element.

[8] Plaintiffs and Third-Party Defendants claim there is an issue of fact on this issue, but the Court does not see one. There is no question the 2.58 Acre Tract is unimproved. Plaintiffs and Third-Party Defendants mentioned payment of property taxes at the hearing, but the Court does not find that to be relevant. They submitted no affidavits or evidence to show that the 2.58 Acre Tract is anything more than unimproved land.

[9] The Court also notes S.C. Code Ann. § 27-31-110 requires "[o]ther common elements, both general and limited, must be shown graphically in so far as possible and must be described in detail in words and figures" on plats or maps filed with a master deed. Indisputably, the 2.58 Acre was

**2. The Transition Period Ended in February 2015, and the Removal of the 2.58 Acre Tract Occurred within the Transition Period.**

ADC and ACF assert the Master Deed provided three ways for the Transition Period to end, and none of the triggering events occurred until GDMB Operations voluntarily ended the Transition Period in 2015—well after VDMC removed the 2.58 Acre Tract in 2009.

Conversely, Plaintiffs assert the Transition Period ended when 99.9% of the units actually built were sold in 2008.

"In construing a deed, the intention of the grantor must be ascertained and effectuated, unless that intention contravenes some well settled rule of law or public policy. In determining the grantor's intent, the deed must be construed as a whole and effect given to every part if it can be done consistently with the law. The intention of the grantor must be found within the four corners of the deed." *Windham v. Riddle*, 381 S.C. 192, 201, 672 S.E.2d 578, 582–83 (2009) (internal citations and punctuation omitted). "The interpretation of a deed is an equitable matter." *Heritage Fed. Sav. & Loan*, 318 S.C. at 539, 458 S.E.2d at 564. Moreover, "[t]he determination of the grantor's intent when reviewing a clear and unambiguous deed is a question of law for the court." *Hunt v. Forestry Comm'n*, 358 S.C. 564, 568, 595 S.E.2d 846, 848 (Ct. App. 2004).

The Court concludes the deed is unambiguous and the Transition Period ended in February 2015. The Master Deed provided that the Transition Period began "on the date of recording of the Master Deed" and "end[ed] on the earlier of":

1. December 31, 2017;[10] or
2. Three (3) months after conveyance in the ordinary course of Developer's business of **ninety-nine percent (99%) of the maximum number of Units**

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not shown as a common element on any of the plats or maps filed with the Master Deed. This is an additional reason why the 2.58 Acre Tract was not a common element.

[10] The parties agree that the Transition Period ended before December 31, 2017.

**to be contained in all phases of the Regime**, rounded down to the next whole number, to persons other than the Developer; or

3. Three (3) months following the date the Developer surrenders its authority as a Class "B" Member of the Association to appoint and remove directors and officers of the Association by an express amendment to the Master Deed executed and filed of record by the Developer.

Indisputably, VDMC removed the 2.58 Acre Tract in 2009. In December 2013, VDMC conveyed the 2.58 Acre Tract to GDMB Ocean and its rights as "Developer" under the Master Deed to GDMB Operations. In November 2014, GDMB Operations executed an amendment to the Master Deed that began the three-month process to end the Transition Period using the third method provided in the definition of Transition Period—by surrendering its rights. Accordingly, VDMC removed the 2.58 Acre Tract from the Regime well before the Transition Period ended.

In contrast, Plaintiffs' assertion that the Transition Period ended in March 2008 because the second method was triggered disregards the plain language of the Master Deed. In fact, the second method in the Master Deed specifically provided for the Transition Period to terminate if the Developer sold 99.9% of "the maximum number of Units to be contained in all phases of the Regime." Indisputably, the Master Deed provided for the possibility of six total phases, four of which never were built.

Moreover, the record reflects that the Association, the Unit Owners, and GDMB Operations (as the Developer under the Master Deed) understood that the Transition Period ended in 2015. Mr. Schuster testified that the Transition Period ended in 2015, and the Association's own 2015 financial statement stated the Transition Period ended in 2015. On these facts, there is no genuine dispute as to when the Transition Period ended: it ended in February 2015.

Accordingly, the Court concludes the Transition Period ended in 2015 when GDMB Operations voluntarily ended it because the plain language of the Master Deed shows the second

method of triggering the Transition Period could not have occurred in 2008 when nowhere near the 250 possible units had been built.

## II. THE ACCESS EASEMENT

The parties dispute whether the access easement exists, which is a question of fact in a law action. *See, e.g., Smith v. Commissioners of Pub. Works of City of Charleston*, 312 S.C. 460, 465, 441 S.E.2d 331, 334 (Ct. App. 1994). However, the parties do not dispute any relevant facts—only how the law applies to the undisputed facts. As explained below, ADC, as owner of the 2.58 Acre Tract, holds a valid easement that Plaintiffs/Third-Party Defendants may not deny, and summary judgment should be granted in favor of ADC and ACF on the easement issue.

### A. The Access Easement is a valid, express easement.[11]

Plaintiffs assert the Amended and Restated Easement Agreement is void because the Association agreed to the easement agreement after the developer started the end of the Transition Period, the Master Deed does not allow the Access Easement, and conveying the easement is an ultra vires act by the Association.

Conversely, ADC and ACF assert the Access Easement is valid because the developer validly controlled the Association until the end of the Transition Period, the Master Deed allows it, and the Association could grant the easement.

As stated above, GDMB Operations, who then held the developer's rights under the master deed, began the end of the Transition Period voluntarily in November of 2014. In December 2014, the Association and GDMB Ocean entered into the access agreement. While the end of the Transition Period meant the Association would no longer be under developer control, nothing in

[11] To be clear, S.C. Code § 27-31-70 also does not restrict easements for the same reasons explained in IV.A.1. above.

the master deed indicates that the Association would be restricted in any way during that period. Accordingly, the Court concludes the timing is irrelevant.

Moreover, the Master Deed does not bar the Association from conveying the access easement. In fact, the Master Deed specifically provides "the Board of Directors will be entitled to grant additional permits, licenses, and easements over the Common Area for utilities, roads and other purposes reasonably necessary or useful for the proper maintenance and operation of the Project." Nor is there any indication that granting the easement is an ultra vires act—the bylaws of the Association provide "[i]n addition to any other power contained herein or in the Master Deed, the Association may exercise the powers granted to a nonprofit mutual benefit corporation as enumerated in the Nonprofit Corporation Act."

Accordingly, ADC is clearly entitled to the Access Easement under the deeded Amended and Restated Easement Agreement.

**B. Even if the express Access Easement were void, ADC has an implied easement by plat.**

Plaintiffs assert no implied easement was created when VDMC conveyed its property to GDMB Ocean because VDMC did not own the parcel burdened by the Access Easement.

Conversely, ADC and ACF assert the easement arose when VDMC filed the Fourth Amendment to the Master Deed removing the 2.58 Acre Tract because the Fourth Amendment referenced the 243/275 Plat, which showed the Access Easement.

An easement arises by implication where property is conveyed and an adjoining street is referenced in a plat, even though the deed is silent. *See Gooldy v. The Storage Center-Platt Springs*, LLC, 422 S.C. 332, 811 S.E.2d 779 (2018). As between an owner who has conveyed lots according to a plat and the grantee, the dedication of a private easement is complete when the conveyance is made. *Carolina Land Co. v. Bland*, 265 S.C. 98, 217 S.E.2d 16 (1975); *see also Blue Ridge Realty*

*Co. v. Williamson*, 247 S.C. 112, 145 S.E.2d 922 (1965) (holding the purchaser of lots with reference to the plat of the subdivision acquired every easement, privilege and advantage shown upon said plat, including the right to the use of all the streets, near or remote, as laid down on the plat by which the lots were purchased and as between the owner, who has conveyed lots according to a plat, and his grantee or grantees, the dedication is complete when the conveyance is made, even though the street is not accepted by the public authorities.).

An easement arose as a matter of law where the amendment removing the 2.58 Acre Tract referenced the 243/275 Plat showing the Access Easement. It is immaterial whether VDMC did not own the burdened parcel when it conveyed the 2.58 Acre to GDMB Ocean. Accordingly, the Court finds an easement implied by plat arose as a matter of law even if the deeded easement were somehow invalid.

## V. CONCLUSION

The Court has carefully considered the pleadings in this case, the evidence in the record, the memoranda of law submitted by the parties, and the arguments from counsel at the hearing. For the reasons explained, the Court concludes unimproved property may be withdrawn from a horizontal property regime when the master deed allows it, S.C. Code § 27-31-70 did not prevent removal of the 2.58 Acre Tract from the Regime, and the Master Deed clearly allowed the 2.58 Acre Tract to be removed. Moreover, the Master Deed limited the time for removal to a defined Transition Period, which ended in February 2015 rather than March 2008. Finally, the deeded Access Easement is valid, and even if it were not, an easement implied by plat arose as a matter of law. Accordingly, the removal of the 2.58 Acre Tract was valid and so are the subsequent conveyances of the 2.58 Acre Tract and Access Easement.

**IT IS THEREFORE HEREBY ORDERED** that ADC and ACF's motion to reconsider is **GRANTED**, the November 8, 2019 Order is **VACATED**, and summary judgment is **GRANTED** in favor of ADC and ACF on all of Plaintiffs' claims. Furthermore, summary judgment is **GRANTED** on ADC's counterclaim and third-party claims to quiet title in favor of ADC against Plaintiffs and the Third-Party Defendants.

Accordingly, the Court further orders that ADC owns the 2.58 Acre Tract free and clear of any right, title, claim, lien, or interests of Plaintiffs, Third-Party Defendants, and anyone claiming under them, but subject to the mortgage given by ADC to ACF. The Court further orders that the access easement described herein is valid, it benefits ADC, and runs with the title to 2.58 Acre Tract.

The Court further orders that a certified copy of this Order be recorded with the Horry County Register of Deeds in the grantor index under the names of Plaintiffs and the Third-Party Defendants and in the grantee index under Atlantic Development Company, LLC.

This Order resolves all pending claims in this case other than the crossclaim by ADC against VDMC.

IT IS SO ORDERED.

[Judge's Signature Page Follows]

Horry Common Pleas

**Case Caption:** Vista Del Mar Condominium Association , plaintiff, et al VS Vista Del Mar Condominiums LLC , defendant, et al

**Case Number:** 2017CP2600424

**Type:** Order/Other

So Ordered

s/ Larry B. Hyman 2152