THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2020-000528

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

v.

Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; and 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,

And

Atlantic Development Company, LLC and Atlantic Coast Funding, LLC; .....Third-Party Plaintiffs,

v.

Barbara P. Swartz; Nancy S. Case; Winston-Salem Daly Development, LLC; Charles F. Webber; 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. 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; and Michael J. Wilk, ...Third-Party Defendants,

Of which Vista Del Mar Condominium Association; Dennis M. Merritt, Trustee of the Dennis M. Merritt Living Trust; John J. Hawkins; Eleanor N. Hawkins; 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. 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 PhillipH. 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; and Michael J. Wilk, are the .....Appellants,

And

Of which Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; and 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 are the.....Respondents.

FINAL BRIEF OF APPELLANTS

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II. STATEMENT OF THE CASE

This case involves Plaintiffs and Third-Party Defendants (hereinafter "Appellants") assertion that an unlawful partition, division and retaking of a condominium association's common elements real property. On January 25, 2017, Plaintiff, Vista Del Mar Condominium Association filed a Lis Pendens encumbering the 2.58 acres of real property, which is a subject of this action, and a Summons & Complaint. (R. p. 291). Vista Del Mar Condominium Association's Complaint was asserted on behalf of the owners within the Vista Del Mar horizontal property regime ("The Regime"). On April 05, 2017, an Amended Complaint was filed to include, as Plaintiffs, the owners of three condominium units within, it not being definitive that Vista Del Mar Condominium Association could represent individual condominium unit owners in this capacity as the common elements are owned by individual condominium unit owners and not by the eleemosynary corporation. (R. p. 80).

After resolution of motions to dismiss wherein it was alleged the Plaintiffs failed to add necessary and indispensable parties, the Defendants named as Third-Party Defendants all remaining condominium unit owners within The Regime. The Appellants are therefore the eleemosynary corporation, Vista Del Mar Condominium Association, and the owners of the individual condominium units within The Regime. The Appellees are the developer of The Regime who was the Declarant under the Master Deed and downstream owners who purchased the subject 2.58 acres of this action and was granted an access easement that is a subject of this action. (R. p. 518).

The subject property was made part of the Vista Del Mar Horizontal Property Regime. Common elements real property belongs to the Appellants. The Defendant Vista Del Mar Condominiums, LLC ("VDMC") was the developer of the project in question and the Declarant under the Master Deed. VDMC filed The Master Deed of the Vista Del Mar Horizontal Property Regime (hereinafter "Master Deed") with the Horry County Register of Deeds on December 4, 2003. (R. p. 518). The filing established a horizontal property regime under S.C. Code §27-31-30 et. seq. The Master Deed initially subjected five and 85/100 (5.85) acres of land and improvements to declaration of The Regime. On June 27, 2006, VDMC recorded the First Amendment to the Master Deed to add an additional five and 00/100 (5.0) acres of land including improvements into The Regime, the same being Phase II. (R. p. 398). The additional property is depicted upon an incorporated plat of public record Horry County Plat Book 214 at Page 102. VDMC constructed a second condominium tower in the second phase, resulting in the real property of The Regime being a combined ten and 85/100 10.85 acres of property. One condominium tower or building was constructed on the original 5.85 acres, and a second condominium tower or building was constructed upon the added 5.0 acres.

VDMC sold its last remaining unit for The Regime on or about December 31, 2007. However, the Master Deed did permit VDMC to construct additional phases and condominium towers. The Master Deed included three alternate triggers to define the end of the transition period. (R. p. 518). Appellants' assert that pursuant to the Master Deed, the sale of the last unit triggered the transition period of The Regime, when the control of The Regime passed to the owners, lasting for three (3) months, ending on March 31, 2008. The Appellees have asserted a different effective date of the end of the transition period.

On or about March 25, 2009, after the date Appellants assert the transition period ended, VDMC filed a Fourth Amendment[1] to the Master Deed in an attempt to partition, divide and remove a portion of the common elements real property of The Regime. A later filed corrective Fourth Amendment to the Master Deed followed and was filed on April 6, 2009. (R. p. 425). This Amendment, referred to in pleadings as the "Removal Amendment" expressly purported to partition, divide and remove 2.58 acres of the developed common elements real property of The Regime. This 2.58 acres was then sold and conveyed by VDMC to GDMB Ocean, LLC on or about December 19, 2013. (R. p. 433).

Further, on December 19, 2013 with an effective date of December 20, 2013, Grande Dunes Development Company, LLC, Villa Marbella Development Company, LLC, Villa Venezia Development Company, LLC and Vista Del Mar Condominiums, LLC, as Assignor, and GDMB Operations, LLC entered into an Assignment of Declarant and Developer Rights in Connection with the Grande Dunes Development.[2] (R. p. 440). After this transaction, GDMB Ocean, LLC or GDMB Operations, LLC purported to grant an access easement interest over portions of the common area of The Regime, purportedly on behalf of the Association.

[1] The Second and Third Amendments to the Master Deed are irrelevant to the issues before this Court.
[2] By instrument recorded in Deed Book 3705 at Page 3116, records of Horry County, South Carolina.

Appellants contend there was no lawful authority for the granting of the access easement and no consent of the owners within The Regime to the granting of the access easement. The 2.58 acres and the easement were sold and conveyed to Atlantic Development Company, LLC.[3]

The underlying lawsuit was filed on January 25, 2017, in which Plaintiff Vista Del Mar Condominium Association asserted the condominium regime owners did not consent to, join in, or in any way ratify the partition, division, removal, and sale of the 2.58 acres from the common elements of The Regime and the owners did not consent to, join in, or in any way ratify the granting of an access easement burdening The Regime's real property. Plaintiff asserted the former of these transactions was void as a matter of law pursuant to S.C. Code §27-31-70. Appellants contend that upon the filing of the First Amendment to the Master Deed, the 2.58 acres of real property that is a subject of this action was a common element.

Appellees contend there are express provisions in the Master Deed that entitled and permitted the removal of common element real property from The Regime. Appellants concede there are provisions in the Master Deed, but contend: 1) the provisions are unlawful and void pursuant to S.C. Code §27-31-70; and 2) assuming the provisions are not voided by law the provisions of the Master Deed were not adhered to in order that the 2.58 acres was removed from the common elements real property of The Regime.

Atlantic Development Company, LLC and Atlantic Coast Funding, LLC[4] filed a motion seeking partial summary judgment as to the partition or division of the 2.58 acres from the common elements of The Regime. (R. p. 301). Another motion seeking partial summary judgment was filed as to the access easement on July 15, 2019, but was not heard until a later date. (R. p. 495). The initial

[3] Title to Real Estate Limited Warranty Deed was recorded in the records of Horry County on January 08, 2016 in Deed Book 3884 at Page 1242.

[4] As the purchaser of the 2.58 acres and the easement.

Summary Judgment motion was heard on August 13, 2019. Initially, the Honorable Larry B. Hyman denied the motion for summary judgment by Order filed November 8, 2019. (R. p. 36). Atlantic Development Company, LLC and Atlantic Coast Funding, LLC filed a motion for the Court to reconsider the denial of their summary judgment motion on November 18, 2019. (R. p. 897). The Court granted the motion to reconsider and after two hearings on January 27, 2020 and February 18, 2020 dealing with the motion to reconsider and both summary judgment motions, reversed its earlier Order on February 20, 2020, and granted summary judgment against all of the Appellants' claims and on a counterclaim and third-party claims to quiet title in favor of the Appellees against the Appellants. (R. p. 55). Appellants assert the granting of summary judgment by the Court was in error. Notice of Appeal in a Civil Case was filed on March 20, 2020 and transcripts of the proceedings were timely ordered and received on May 26, 2020. (R. p. 932).

III. STANDARD OF REVIEW

The trial court granted summary judgment in favor of the Appellees. "When reviewing an order granting summary judgment, the appellate court applies the same standard as the trial court." David v. McLeod Reg'l Med. Ctr., 367 S.C. 242, 247, 626 S.E.2d 1, 3 (2006). Summary judgment is improper when there is a genuine issue as to any material fact; and so, the moving party would not be entitled to judgment as a matter of law. Fleming v. Rose, 350 S.C. 488, 493, 567 S.E.2d 857, 860 (2002). A trial court may not grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," show that there is a genuine issue as to any material fact. Bovain v. Canal Ins., 383 S.C. 100, 678 S.E.2d 422, 424 (2009); S.C. Code Ann. Rule 56 (2020). "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify

the application of the law." Robinson v. Estate of Harris, 378 S.C. 140, 662 S.E.2d 420, 422 (Ct. App. 2008) (citing Moore v. Weinberg, 373 S.C. 209, 215-16 (Ct. App. 2007).

In determining whether a genuine issue of fact exists, the evidence and all reasonable inferences drawn from it must be viewed in the light most favorable to the nonmoving party. Sauner v. Public Serv. Auth. of S.C., 354 S.C. 397, 404, 581 S.E.2d 161, 165 (2003). The Appellants were the non-moving parties before the Court and therefore all reasonable inferences must be viewed in the light most favorable to them. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006).

IV. ARGUMENT

A. THE TRIAL COURT ERRED IN ALLOWING THE DIVISION AND REMOVAL OF A COMMON ELEMENT OF A HORIZONTAL PROPERTY REGIME WHEN THE PLAIN LANGUAGE OF S.C. CODE SECTION 27-31-70 EXPLICITLY BARS SUCH DIVISION.

The Horizontal Property Act clearly and expressly bars the division of a common element in a horizontal property regime, providing expressly "[t]he 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." S.C. Code § 27-31-70. The present case involves a 10.85 tract, made up of an initial 5.85 acre parcel upon which a condominium tower or building had been constructed (Phase I), and a 5.0 acre tract upon which a second condominium tower or building had been constructed (Phase II). This 5.0 acre tract that was phased into The Regime in Phase II included the subject 2.58 acre tract of land that Appellees purported to partition, divide and remove. This 2.58 acres was expressly a "common element", and therefore "shall remain undivided." While the Master Deed for The Regime did include provisions that purported to authorize the removal, the provisions of the Master Deed cannot override the declared public policy set forth in a clearly written statute.

Ordinarily, the use of the word "shall" in a statute means that the action referred to is mandatory. Montgomery v. Keziah, 277 S.C. 84, 282 S.E.2d 853 (1981); South Carolina Dept. of Highways and Public Transp. v. Dickinson, 288 S.C. 189, 341 S.E.2d 134 (1986). The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 437 S.E.2d 6 (1993). "Under the rules of statutory interpretation, use of words such as 'shall' or 'must' indicates the legislature's intent to enact a mandatory requirement." Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002) (citing, In re Matthews, 345 S.C. 638, 550 S.E.2d 311(2001)). 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). The plain language of the statute allows for no interpretation restricting its application. University of South Carolina v. Batson, 271 S.C. 242, 246 S.E.2d 882 (1978). 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. In re Vincent J., at 233, 509 S.E.2d at 262 (citing Paschal v. State Election Comm'n, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992); Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000).

There is absolutely no ambiguity in S.C. Code § 27-31-70. The legislature specifically used the word "shall" three times in two sentences, banning any division of common elements and banning any action for partition or division. The Merriam-Webster dictionary defines the word undivided as "not separated into parts or pieces; existing as a single whole; not divided."

(*Merriam-Webster* online dictionary, 2020). Further, the statute states "any covenant to the contrary shall be void", further mandating that even an attempt, however well written and regardless of how conspicuous, to divide or partition common elements of a horizontal property regime is a nullity. Division and removal of common elements from a regime is simply not permissible. Once the common elements are submitted into a condominium regime, they must exist as a whole.

Despite clear statutory language and legislative intent, the trial court repeatedly recited the Master Deed allowed for this. The trial court accepted the position that "27-31-70 does not bar a developer from removing property subject to a horizontal property regime where the master deed allows it." But a Master Deed cannot allow division and removal as a matter of law. The statute is clear; any covenant within a master deed that allows common elements to be divided or partitioned is void as a matter of law. The statute uses the word "shall," a mandatory requirement. The trial court chose to use its own interpretation of the statute without any authority to do so. There is no other allowable interpretation. The trial court misinterprets the statute even further reading into it the word "conveyed" in misunderstanding the rights of the owners of the common elements. (R. p. 5). This case is about the "partition" and "division" of common elements, which is explicitly not allowed by statute. This case is not about a "conveyance".

Further, the Master Deed in the present case states "[t]he Common Area will remain undivided and no right to partition the same or any part will exist except as provided in the Condominium Act, the Bylaws **and** this Master Deed" (*bold emphasis added*). (Page 9, Section 3.4(c); R. p. 333). S.C. Code section 27-31-70 does not allow an action for division or partition, regardless of any provision in the Master Deed. Provisions in a Master Deed cannot override the

clear language of a statute. Any covenant or agreement within the Master Deed that allows common elements to be removed, partitioned, or divided is void as a matter of law and the 2.58 acres that purportedly was severed from the common elements belong to the unit owners within The Regime. Summary Judgment therefore should have been denied by the Court.

One final point, the Master Deed defines the Developer (the Appellee VDMC) as an owner within The Regime's co-ownership. Appellees have asserted that the provisions of S.C. Code § 27-31-70 were not intended to restrict the Developer's ability to divide and remove common elements from The Regime in order to transfer them to third parties. Appellees have contended S.C. Code § 27-31-70 was intended to restrict condominium owners from selling or alienating an interest in the common elements. "Owner" in the Master Deed is defined as "the record owner, whether one or more persons, of fee simple title in and to any Unit . . . " The Horizontal Property Act defines a "co-owner" as "...a person, firm, corporation, partnership, association, trust or other legal entity, or any combination thereof, who owns an apartment within the building." S.C. Code § 27-31-20(d). The Developer owned unsold units in The Regime and was by definition an owner or co-owner, depending on the cited provision. Therefore, the Developer VDMC, as it was also a co-owner, under Appellees' theory could not sell or alienate an interest in the common elements. "[C]ommon elements...shall not be the object of an action for partition or division of the co-ownership." S.C. Code § 27-31-70.

B. THE TRIAL COURT ERRED IN FINDING THAT A PORTION OF PROPERTY DECLARED INTO A HORIZONTAL PROPERTY REGIME, MADE INTO A COMMON ELEMENT OF THE REGIME, AND USED FOR CONSTRUCTION OF A BUILDING, COULD LATER BE DIVIDED AND REMOVED FROM THE REGIME.

Since the statutory language is clear, the only question is whether the subject 2.58 acres was part of the 5.0 acres that was made part of The Regime at large with the First Amendment to

the Master Deed was a common element. By statutory definition, and by the Appellees' own documents, there is no question the 2.58 acres was a common element. The Appellant VDMC's Fourth Amendment To Master Deed of the Vista Del Mar Horizontal Property Regime and Corrective Fourth Amendment To Master Deed of the Vista Del Mar Horizontal Property Regime expressly stated that the Developer intended to "subdivide portions of the Common Area from the Project . . ." (R. p. 425). However, if there is any question about whether or not the 2.58 acres was a common element, then the question is a question of fact, rendering the Court's granting of summary judgment erroneous.

To demonstrate the 2.58 acres was in fact a common element, we look first to the statutes. There are general and limited common elements listed and defined in S.C. Code section 27-31-20.[5] The relevant language states:

> (f) "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 . . .
>
> (3) The basements, flat roofs, yards, and gardens, in existence or to be constructed or installed, except as otherwise provided or stipulated . . .
>
> (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...

Looking at the 2.58 acre subject property, it was part of a 5.0 acre tract submitted into The Regime with the First Amendment to Master Deed, and upon which a condominium tower or building was constructed. (R. p. 398). Nowhere was the 2.58 acre tract left out or specifically listed as unimproved property. It expressly was part of the overall declaration into The Regime.

[5] The parties agree that there is no question the "limited common element" is inapplicable in this case.

The entire 10.85 acres became improved property, and specifically for purposes of this appeal, the 5.0 acres, which included the subject 2.58 acres, became improved property when the second condominium tower or building was constructed. The property became the "land...on which the building stands." S.C. Code § 27-31-20(f)(1).

The Master Deed in the present case defines the common elements on Page 2 as "**all of the Regime Property** after excluding the Units". (Appellant's Exhibit A Opposing Motion for Summary Judgment, Pg. 2; R. p. 523). There is no question the subject property of our case was made Regime property with the filing of the First Amendment, and the construction of the second condominium tower or building upon it. The requirements of S.C. Code section 27-31-20(f)(1) were met and the subject 2.58 acres was a common element of The Regime.

Further, as stated, the Developer VDMC did not "otherwise provide[d] or stipulate[d]" anything else for the 2.58 acres, and therefore it is a yard or garden in existence. S.C. Code § 27-31-20(f)(3). The Developer VDMC did not state anything to the contrary when declaring the 5.0 acres into The Regime or at any time thereafter. There was no differentiation of the 2.58 acres from the Regime's common elements real property. The requirements of S.C. Code section 27-31-20(f)(3) were met. The Appellees' own Amendment wherein they seek to divide the common element clearly states the ". . . Developer amended the Master Deed removing a subdivided portion of the **Common Area** from the Regime and from the application of the Master Deed . . . " Appellant's Exhibit C, Pg. 1.; R. p. 425) (*emphasis added*). In violation of S.C. Code § 27-31-70 the Developer VDMC's own documents, the Fourth Amendment and Corrective Fourth Amendment, expressly stated a common area was being divided and removed.

Finally, S.C. Code section 27-31-20(f)(7) is the catch-all definition for common elements, providing for "all other elements of the property, in existence . . . rationally of

common use or necessary to its existence, upkeep, and safety." Rational thought to members of The Regime after a building was constructed on a deeded tract of land, would be the remaining part of the land is of common use or necessary for the "existence, upkeep, and safety" of the project. The requirements of S.C. Code section 27-31-20(f)(7) were met. Thus, there are three applicable statutory definition sections for "general common elements" and the Developer VDMC's documents that clearly establish the subject 2.58 acres is a common element of The Regime. The trial court therefore erred when granting summary judgment.

It is clear the intent of the Horizontal Property Act is to protect owners who have the absolute right to know what they are involved with and what their rights, entitlements and obligations are in being a co-owner. There are detailed restrictions required for something to not be a common element once part of a regime. In other words, the default is once something like real property is made a part of a regime, it is a common element. Looking at this in statutory terms, a unit owner has a " . . . common right to a share, with the other co-owners, in the common elements of the property, equivalent to the percentage representing the value of the individual apartment, with relation to the value of the whole property . . . The percentage shall be expressed **at the time the horizontal property regime is constituted, shall have a permanent character, and shall not be altered without the acquiescence of the co-owners representing all the apartments of the property**." S.C. Code § 27-31-60(a) (*emphasis added*). "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 by the actions of the developer." Reyhani v. Stone Creek Cover Condo. II Horizontal Prop. Regime, 329 S.C. 206, 494 S.E.2d 465, 468 (Ct. App. 1997). In Reyhani, the master deed defined common elements as "all of the project except the units." Id. This language is very similar to that found in the Master Deed in

this case, which states "'Common Area' means all of The Regime property after excluding the Units." Appellant's Exhibit A Opposing Motion for Summary Judgment, Pg. 2. (R. p. 523).

The Appellees wrongfully contend that because the 2.58 acres was undeveloped, it did not fit the statutory definition of a common element and therefore the statutory provisions prohibiting removal did not apply. The Appellants contend that the 2.58 acres was in fact developed as it was part of the larger tract that had a condominium building or tower constructed upon it. As demonstrated above, the 2.58 acres clearly meets the definition of a common element. However, if there is any question, then there existed a disputed issue of fact, and the Court's granting of summary judgment was erroneous.

The Appellees' incorrect assertion completely ignores the condominium building or tower that was constructed upon the 5.0 acre parcel of land that was submitted into The Regime by the First Amendment to Master Deed, and which was added to the original 5.85 acres. The additional property is depicted upon an incorporated plat of public record Horry County Plat Book 214 at Page 102. It is nowhere to be found in any of the multiple documents filed by the Appellees that they have a 2.58 acre tract that they will leave unimproved. After the filing of the First Amendment to Master Deed, the combined 10.85 acres was all one common property in The Regime, and to allow a developer to essentially pull anything they wanted out of a regime would not only violate the statutes, but also impedes owners' rights and expectations. To improve any of the land, improved all of the land. Giving credence to Appellees' argument would require the Court to completely ignore the dimensions and property boundaries of the real property that was expressly phased into The Regime. It is clear that not only the land directly under a building can be included as a common element, but also included is the entirety of the property that lies within the boundaries of real property that was expressly phased into The

Regime. Once the additional land was submitted to The Regime, it became a common element and was then part of the "land . . . on which the building stands" and "common elements . . . shall not be the object of an action for partition or division of the co-ownership." S.C. Code § 27-31-70.

C. THE TRIAL COURT ERRED IN FINDING THE TRANSITION PERIOD DID NOT END THREE MONTHS AFTER THE CONVEYANCE OF 99% OF THE MAXIMUM NUMBER OF UNITS TO BE CONTAINED IN ALL PHASES OF THE REGIME, AS THE MASTER DEED SPELLED OUT IT SHOULD.

The Master Deed defines the "Transition Period" as the " . . . time period commencing on the date of recording of this Master Deed and ending on the earlier of:

1. December 31, 2017; or
2. Three (3) months after the 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 this Master Deed executed and filed of record by Developer." (R. pp. 525-526).

The importance of the Transition Period is that once it has ended, the developer can no longer take action regarding The Regime property. While it is the Appellant's position that crystal clear language of S.C. Code section 27-31-70 controls this case, and no provisions included in the Master Deed could allow the division or partition of a common element, the trial court still wrongfully found that the transition period had not ended at the time the subject 2.58 acres was divided and removed from The Regime. The Court used this as another basis for the granting of summary judgment. Appellants contend that this ruling was incorrect, as the

transition period had ended. In any case there remain genuine issues of disputed fact that made summary judgment inappropriate in these contexts.

The Master Deed purportedly allowed the developer the ability to withdraw unimproved property from The Regime during the transition period. As discussed above, the 2.58 acres was actually improved property, so any such authorizing provision would not apply. Further, the developer could not withdraw a common element, which is exactly what the subject 2.58 acres was. Assuming arguendo, these provisions of the Master Deed are not void pursuant to S.C. Code section 27-31-70, then the question becomes when did the transition period end?

"A contract is ambiguous when the terms of the contract are reasonably susceptible of more than one interpretation." DNR v. Town of McClellanville, 345 S.C. 617, 623, 550 S.E.2d 299 (2001) (citing Hawkins v. Greenwood Development Corp., 328 S.C. 585, 592, 493 S.E.2d 875, 878 (Ct. App. 1997); 17A Am. Jur. 2d Contracts § 338 at 345). Whether the language is ambiguous is a question of law for the court; however, if it is determined to be ambiguous, evidence may be used by the parties to establish the intent and then it becomes a question of fact. Id. The appellees argue that the transition period ended when GDMB Operations chose to end it in 2015, pursuant to the third of the alternate termination triggers listed above. Appellants contend that the transition period actually ended on or about March 31, 2008, three months after the last unit constructed was sold, pursuant to the second option.[6] The confusion and resulting question of fact rendered summary judgment inappropriate as there are potentially different meanings of option number two (2) of the Transition Period triggers.

[6] See Plaintiffs' Amended Complaint,¶17 ("Upon information and belief VDMC sold its last remaining unit in Vista Del Mar Horizontal Property Regime on or about December 31, 2007. With the filing of this conveyance the "transition period", as defined in the Master Deed, would have begun and the transition period would have expired on or about March 31, 2008.")

In this case, the Developer stated in the Master Deed that it had the right to " . . . expand The Regime in five additional phases to a total of two hundred fifty (250) Units . . . " (Appellant's Exhibit A Opposing Motion for Summary Judgment, Pg. 28; R. p. 549). While The Regime could be expanded, phases three through five were **never added** to The Regime. Therefore, The Regime consisted solely of two phases, the last unit of which was sold on or about December 31, 2007. This timeline is undisputed. Looking at the Appellee VDMC's chosen language in the Master Deed, was building two phases "in the ordinary course of Developer's business?" At what time did the developer move on from this project, start looking to sell off, or otherwise determine that its "ordinary course of . . . business" was over with two phases? At what time did the developer decide it would not exercise its right to expand into additional phases? Appellees designated Rule 30b (6) witness was unable to answer specific questions related to these issues. These are questions of fact with conflicting answers that make summary judgment an inappropriate and erroneous result.

Furthermore, "[t]o be contained" should be interpreted to be what was actually contained, not some hypothetical unknown number. A plain reading of the Appellee VDMC's language demonstrates this. Appellees contend this means whatever number they want to use, no matter how arbitrary, just because they picked it. Ultimately, the maximum number of units to be contained in all phases of The Regime was 66. This 66th unit was finished and conveyed on or about December 31, 2007. When this was done, option two (2) was triggered and the Transition Period was to end three months after that last conveyance. Therefore, the Transition Period

should have ended on or about March 31, 2008, a date prior to the "Removal Amendment" and prior to conveyance of the subject 2.58 acres and the grant of the easement.[7]

The Appellees dispute Appellants' contention and argue the maximum number of units would be two hundred fifty (250) units, the total units that could have been contained if all phases were added to The Regime. Their position is because ninety-nine percent (99%) of the potential two hundred fifty (250) units were not conveyed, option number two (2) was never triggered. Appellants disagree with Appellees' position, this provision of the Master Deed could be seen as ambiguous. When there are two different meanings and interpretations for the same provision, the Court must hold that the provision is ambiguous and is consequently a question of fact for the fact finder. As a result, summary judgment is not appropriate. Robinson v. Estate of Harris, 662 S.E.2d 420, 422 (Ct. App. 2008) (citing Moore v. Weinberg, 373 S.C. 209, 215-16 (Ct. App. 2007) ("Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.")

D. THE TRIAL COURT ERRED IN ALLOWING AN EASEMENT TO BE GRANTED, WHEN THE GRANTOR HAD NO INTEREST IN THE PROPERTY, NO STATUTORY AUTHORITY TO GRANT SUCH AN EASEMENT, AND NO AUTHORITY IN THE MASTER DEED TO GRANT SUCH AN EASEMENT.

The final issue on appeal revolves around an easement that was improperly granted. "A grant of an easement is to be construed in accordance with the rules applied to deeds and other written instruments." Snow v. Smith, 784 S.E.2d 242, 248 (Ct. App. 2016). A deed cannot convey an interest the grantor does not have or does not have permission to grant. Belue v. Fetner, 251 S.C. 600, 606-07, 164 S.E.2d 753, 756 (1968). As demonstrated above, when the access easement was granted in December 2014, there was no ownership interest by the parties

[7] Although Movants assert that Dan Schuster, the Association's 30(b)(6) witness noted the transition period ended in 2015 and the Association's financial statement stated as such as well, Plaintiffs and Third-Party Defendants take the position that it does not change the fact that the transition period **should have ended** in 2008.

attempting to grant the easement. Therefore, nothing could be granted by this purported easement.

Further, the Master Deed included specific easements that are allowed. There was no reference regarding the granting of additional easements outside of those specifically listed and authorized in Section Eleven (11) (R. p. 546). The Master Deed allows for easements for encroachments as between common areas and units and as between units and units, and easements for air space, utilities, construction, inspection by the developer, emergency personnel, and for a sales office and related signs. No provision of the Master Deed authorizes any other scope of easement to be granted, and again, any such attempt is without authority. When an easement is attempted without authority to grant the same, it is invalid and void *ab initio*. See e.g., Belue v. Fetner, 251 S.C. 600, 606-07, 164 S.E.2d 753, 756 (1968) (stating a deed cannot convey an interest the grantor does not have).

Taking this a step further, based on a last-ditch argument made by the Appellees, the Appellants in no way consented to, joined in, or in any way ratified the access easement. The Appellees' argument there was a signature from the Association on the agreement for the easement is irrelevant to the legal standards above, and further, the Association was actually still under the control of the developer at the time and so there would have been no way for the Appellants to consent to, join in, or ratify the easement. We also again turn to Reyhani, showing that "[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." Reyhani v. Stone Creek Cover Condo. II Horizontal Prop. Regime, 329 S.C. 206, 494 S.E.2d 465 (Ct. App. 1997). The purported granting of the easement by the Developer

would of course deprive the Owners of a property interest without their consent and is therefore invalid. As such, summary judgment should not have been granted in these contexts.

One final interesting point is that in allowing the easement, the trial court quotes the Master Deed – "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." (Appellant's Exhibit A Opposing Motion for Summary Judgment, Pg. 26; R. p. 547). While in reality the contested easement does not meet these terms, the interesting point is that the trial court is allowing the easement over a "common area", i.e, the 2.58 acres, which the court stated it was not a common area. The trial court contradicts itself in trying to reach the ruling it wanted. Summary judgement was improper.

V. CONCLUSION

In conclusion, the Appellants respectfully maintain that the applicable law voids the removal of the subject 2.58 acre common element and the easement, and at a minimum, issues of material facts still remain that must be determined in a trial, such that the decision of the Court of Common Pleas to grant summary judgment to the Defendants/Third-Party Plaintiffs was erroneous. The Appellants seek a reversal and a remand for a trial of this case upon its merits.

Respectfully submitted

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January 19, 2021

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Honorable Larry B. Hyman, Jr., Circuit Court Judge

Appellate Case No. 2020-000528

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

v.

Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; and 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,

And

Atlantic Development Company, LLC and Atlantic Coast Funding, LLC; .....Third-Party Plaintiffs,

v.

Barbara P. Swartz; Nancy S. Case; Winston-Salem Daly Development, LLC; Charles F. Webber; 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. 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; and Michael J. Wilk, ...Third-Party Defendants,

Of which Vista Del Mar Condominium Association; Dennis M. Merritt, Trustee of the Dennis M. Merritt Living Trust; John J. Hawkins; Eleanor N. Hawkins; 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. 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 PhillipH. 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; and Michael J. Wilk, are the .....Appellants,

And

Of which Vista Del Mar Condominiums, LLC; Atlantic Development Company, LLC; Atlantic Coast Funding, LLC; and 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 are the.....Respondents.

CERTIFICATE OF COUNSEL

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

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