2012 WL 10890587 (S.C.Com.Pl.) (Trial Order)
Court of Common Pleas of South Carolina.
Charleston County

LONG GROVE AT SEASIDE FARMS, LLC; the Beach Company;
and Gulfstream Construction Company, Inc., Plaintiffs,
v.
LONG GROVE PROPERTY OWNERS' ASSOCIATION, INC.; Vista
Realty Partners, LLC; and Long Grove Vista, LLC, Defendants.
LONG GROVE PROPERTY OWNERS' ASSOCIATION, INC., Third-Parry Plaintiffs,
v.
JAMES,HARWICK & PARTNERS, INC., n/k/a JHP Architecture/Urban Design, P.C.; Sam
Mayo, d/b/a SCM Construction, Inc.; Essex Engineering Corporation, Third-Party Defendants.

No. 2009CP1006746.
July 23, 2012.

*1 (Not Ending Case)
Hearing Dates: September 27, 2011 and April 30, 2012
Court Reporter: Pamela Ozment Cartee

Order Granting Summary Judgment to Plaintiffs and Third-Party Defendant Harwick in this Declaratory Action and Dismissing Underlying Construction Defects Claim against those Parties

Plaintiffs' Attorney: David J. Parrish.

Defendant's Attorneys: George E. Mullen, Frank E. Grimball & James E. Lady.

3rd Party Harwick Atty: James L. Werner and Laura F. Locklear.

3rd Party Essex Atty: Kent T. Stair, M. Elizabeth Jowers, & J. Patrick Norris.

3rd Party SCM Atty: Morgan S. Templeton & Taylor H. Stair.

Michael Baxley, Judge.

This cases raises the novel question of whether an owner-developer of improved real property, upon selling the property to another developer who intends to alter the condition and legal status of the premises, can: (1) disclaim to the current and subsequent buyers any and all warranties as to the condition of the improvements on the property; (2) permanently release itself from any liability for the condition of such improvements; and (3) require the developer-buyer to assume any and all related liability therefrom. If so, were the steps taken by Plaintiffs in this case sufficient to operate as such a disclaimer and release?

While the underlying dispute in this case involves alleged construction defects at what is now a condominium complex, the parties are not traditionally aligned in this declaratory judgment action. Plaintiffs are the original owners, developers, and builders of what was initially an apartment complex constructed in 1999 and are the defendants in the underlying construction claim. The complex consisted of seventeen (17) residential buildings with two hundred seventy-two (272) units and a clubhouse. In March of 2005, for the sum of $37.25 million, Plaintiffs sold the property to another developer,

Vista, who converted the apartment complex to condominiums. In consummating this sale, documents including disclaimers, releases, and assumptions of liability were executed by Plaintiffs and Vista. After converting the apartment complex to condominiums, Vista prepared and recorded a master deed that created Defendant Long Grove Property Owners Association ("POA"). That POA now claims damages from construction defects against Vista and the original owner-developers, as well as from Third-party Defendant James, Harwick & Partners, Inc., n/k/a JHP Architecture/ Urban Design, P.C. ("JHP").

Plaintiffs filed this action for a declaratory judgment pursuant to South Carolina Code Ann. § 15-53-10, et seq. and Rule 57, SCRCP, naming the POA as a party defendant. Plaintiffs sought to obtain a declaration of the rights of the POA and Plaintiffs concerning the legal effect and enforceability of the disclaimers, releases, and assumptions of liability executed by the parties during the sale, and the subsequent conversion of the rental apartment complex to condominiums.

In response to Plaintiffs' declaratory judgment Complaint, the POA filed counterclaims and third-party claims asserting various causes of action against Plaintiffs and others, including against the original designer of the apartment complex, JHP, for alleged construction defects in the condominiums. On December 30, 2009, Plaintiffs filed a motion to dismiss the PDA's counterclaims pursuant to Rule 12(b)(6), SCRCP, or in the alternative, for a judgment on the pleadings pursuant to Rule 12(c), SCRCP, and JHP filed a similar motion to dismiss the third-party claims against it. By agreement of the parties, while Plaintiffs' motion was- pending, the POA obtained documents and took depositions concerning the transactional aspects of the sale of the property from the apartment complex owner to the condominium converter-developer.

***2** An initial hearing on Plaintiffs' and JHP's motion was held on September 27, 2011. Prior to and during the hearing, and without objection from any party, Plaintiffs, JHP, and the POA submitted and cited to documents and deposition testimony produced during discovery conducted while the motion was pending. The presentation of matters outside the pleadings in effect converted Plaintiffs' and JHP's Rule 12(b)(6) motion to a motion for summary judgment, and the Court has treated and disposed of the motion pursuant to Rule 56, SCRCP. [1] After the initial hearing was conducted, and after substantial review and analysis was undertaken by the Court, a decision letter was issued on October 14, 2011, directing Plaintiffs' and JHP's counsel to prepare proposed Orders granting the summary judgment motion. Thereafter, substantial dispute arose among counsel as to the wording of the various provisions of the proposed Order on the specific holdings necessary to the decisions on the multiple issues raised in this case. Moreover, on the day of the initial hearing, lead counsel for the Defendants had fallen ill at the courthouse and departed before being able to argue his clients' position. Therefore, upon Defendants' request, due to the complex and novel issues at bar and substantial disagreement thereon, the Court rescinded the previous decision letter and set the entire matter for rehearing, which occurred on April 30, 2012. After further argument, legal analysis, and review, the Court's decision remained the same.

After full review, and for the reasons stated below, Plaintiffs and JHP are entitled to the relief sought in their declaratory complaint as a matter of law and are entitled to summary judgment and dismissal of the POA's counterclaims and third-party claims.

STANDARD OF REVIEW

Rule 56(c), SCRCP, provides that a trial court may 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 no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party." *Hancock v. Mid-South Mgmt*, Co., Inc., 381 S.C. 326, 329-30, 673 S.B.2d 801, 802 (2009). "At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct App. 2001). "The purpose of summary judgment is to expedite the disposition of cases

which do not require the services of a fact finder." *Gauld v. O'Shaugnessy* Realty Co., 380 S.C. 548,558, 671 S.E.2d 79, 85 (Ct. App. 2008). The party seeking summary judgment has me burden of clearly establishing the absence of a genuine issue of material fact *Id.* Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Id.* at 558-59, 671 S.E.2d at 85. Rather, the nonmoving party must present specific facts showing a genuine issue for trial. *Id.* at 559, 671 S.E.2d at 85.

FINDINGS OF FACT [2]

1. This lawsuit concerns the Long Grove Condominiums located in the Seaside Farm Development in Mount Pleasant (Charleston County), South Carolina.

2. By Order of the South Carolina Supreme Court filed on November 9, 2010, this Court was vested with exclusive jurisdiction to hear and decide ail matters pertaining to this case.

***3** 3. This matter came before the Court on Plaintiffs' motion to dismiss pursuant to Rule 12(b)(6), SCRCP, or alternatively, for a judgment on the pleadings pursuant to Rule 12(c), SCRCP. JHP joined in these motions.

4. Two hearings on Plaintiffs' motion were held in Darlington County on September 27, 2011 and April 30, 2012, following timely notice to all parties as to the date, time, and location of the hearing. All parties were represented by counsel at the hearings.

5. This Court has jurisdiction over the parties and subject matter of this case.

6. Prior to the motion hearings, Plaintiffs, the POA, and other parties in this case submitted memoranda and exhibits (including documents and deposition transcripts) to the Court without objection by any party. The memoranda, materials submitted, and the arguments presented by counsel at the hearing have all been received and considered by the Court.

7. The presentation to the Court of matters outside the pleadings converted Plaintiffs' and JHP's motions to motions for summary judgment under Rule 56, SCRCP, and the Court has treated these motions as motions for summary judgment pursuant to Rule 56, SCRCP. All parties agree that no further factual development is necessary to decide the issues at bar.

8. Turning to the facts of the case, the Long Grove Condominiums were formerly the Long Grove Apartments, which was a rental apartment complex.

9. Plaintiff Long Grove at Seaside Farms, LLC ("LGSP") was the owner and developer of the apartments. Plaintiff Gulfstream Construction Company, Inc. was the general contractor that constructed the apartments for LGSF. Plaintiff Beach Company was the manager of the entity that in turn was the managing member of LGSF, and Beach Company acted as the property manager for the apartment complex.

10. LGSF, Gulfstream, and Beach Company were affiliated with each other by virtue of common ownership interests.

11. LGSF, Gulfstream, and Beach Company are collectively referred to as "LGSF" in this Order solely for case of reference.

12. The Long Grove Apartments were designed by JHP pursuant to a contract with LGSF, who in turn constructed the project in or around 1999 for use as a rental apartment complex; [3] therefore, in accordance with the express language

of the Sales Contract, JHP is one of the "affiliates" of LGSF for purposes of that Agreement and the other findings of this case.

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

14. In 2004, LGSF considered selling the apartment complex, and hired L.J. Melody & Company as its exclusive marketing advisor to offer the property nationwide. The offering materials described the property as being suitable for continued use as rental apartments (i.e., for "income investors") or for conversion to condominiums (i.e., "converters"). [4]

15. A set price was not specified for the property; instead, the offering materials invited qualified buyers to bid on the property pursuant to certain defined parameters. The offering materials indicated that the property was being offered on an "as is, where is" basis. [5]

***4** 16. As described by John Darby, President of the Beach Company, from the beginning LGSF made it clear that if any buyer intended to convert the property to condominiums, LGSF must be released from all liability associated therewith. [6] This testimony is not controverted.

17. LGSF received bids for the property from both income investors and converters.

18. Ultimately, Defendant Vista Realty Partners, LLC ("Vista") was the high bidder. Vista is a Georgia limited liability company owned by Eduard de Guardiola, who has a law degree and is an experienced real estate developer and condominium converter. [7]

19. Vista was an independent, arms-length buyer mat has no direct or indirect relationship with LGSF.

20. Upon receipt of Vista's high bid, Vista and LGSF began to negotiate the terms of the sale. The initial term sheet signed by Vista and LGSF stated that Vista would indemnify LGSF against any claims made by purchasers of the condominium units. This term sheet also declared that the property would be sold "as-is, where-is and with all faults,"-and further clarified that LGSF would be released from all liabilities except those arising under the purchase and sale agreement. [8]

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

> (1) The Indemnification language will include a release of all claims related to the development, design, construction, maintenance, alteration, and repair of the property. We propose that the release of claim will not only be in the Sales Contract but also in the deed of conveyance at closing and will survive the closing of this transaction. [9]

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

23. Following the negotiations concerning the terms of the contract, LGSF, as the Seller and Vista, [10] as the Purchaser, entered into a Sales Contract for the apartment complex dated January 18, 2005. Paragraph 14 of the Sales Contract stated that the property would be sold "on an 'as is,' 'where is,' 'without recourse' and 'with all defects basis." ' Furthermore, paragraph 15 of the Sales Contract included an assumption of liability and release of claims provision. The -specific language of these provisions follows (emphasis added to highlight relevant portions):

(2) 14. *Condition of Property*, Except as otherwise provided specifically In this Sales Contract, specifically Including but not limited to the representations and warranties contained in Section 6 hereof, Purchaser acknowledges that neither Seller nor anyone acting for or on behalf of Seller has made any representation, statement, warranty, or promise to Purchaser with respect to the Property. Purchaser shad Immediately examine the Property, and become familiar with the physical condition thereof. *The property shall be sold and conveyed strictly on an "as to", "where is", "without recourse" and "with all defects" basis, as it exists on the last day of the Inspection Period, without representation, warranty or covenant, express, impelled or statutory, of any kind whatsoever, including, Without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or otherwise), past or present use, construction. development lease performance. Investment potential, tax ramilications or consequences. Income, compliance with law. habitability. tenancies. merchantability or fitness or aultabilitv for any purpose, all of which are hereby expressly disclaimed except as contained in this Agreement. Without limiting the generality of the foregoing, Purchaser acknowledges that seller has made no representations, warranties or covenants (except as otherwise provided specifically in this Sales Contract. specilically Including but not limited to the5450 representations and warranties contained in paragraph 6 hereon as to the compliance of the Property with any federal, state. municipal or local statutes. laws, rules, regulations or ordinances. Including, without limitation, those pertaining to construction, rent control, building and health codes*, land use for permits issued in connection therewith), zoning, lead paint, urea formaldehyde foam insulation, asbestos, hazardous or toxic wastes or substances, pollutants, contaminants or other environmental matters. Purchaser knowingly and fully assumes the entire risk as to all such matters. Purchaser shall confirm the aforesaid acknowledgments In writing as of the Closing Date. The provisions of this Section shall survive the closing and the delivery of the deed or any expiration or termination of this Agreement ....

15. ***Assumption of Liability and Release of Claims.***

***5** a) Purchaser acknowledges that the Property was originally developed and constructed by Seller and its Affiliates (as herein defined). Purchaser represents that it is purchasing the Property for the purpose of converting the Property into condominiums which will be sold to the public. *Purchaser assumes all responsibility for Identifying and correcting all defects or problems. if any, that may exist, to ensure that the Property Is property constructed and suitable for use as condominiums In accordance with all applicable building regulations, codes, standards, and other applicable laws and requirements*.

b) Accordingly, as part of the valuable consideration being exchanged in this sale transaction, the receipt of which Is hereby acknowledged, *Purchaser on behalf of Itself and its heirs, representatives, successors, and assigns, agrees to never sue and completely releases Seller. The Beach Co., Gulfstream Construction Company. Seller's other affiliates, agents. officers, directors, employees. Insurers, representatives. successors, assigns, and all other companies, partnerships, entitles, or persons Involved in the design, development and/or construction of the apartment buildings and apartments therein and all other Improvements prior to the Closing Date of this sale transaction (collectively, the "Affiliates"). for and from any and all claims of every kind whatsoever arising from or related to the development, design, construction, maintenance, alteration. or repair of the Property. Including unknown and unforeseen claims mat may now exist or that may arise in the future*. At Ms sole expense, Purchaser shall also defend, indemnity and hold the Seller and the Affiliates harmless from any cost, liability, damages, claims or the like which may arise as a result of the same Including reasonable attorney fees and other costs of defense associated therewith, Including, but not limited to, any claims made by future purchasers of condominium units at the Property. Eduard de Guardlola, a principal in the Purchaser, assumes and guaranties these Indemnification obligations if the Purchaser ceases to exist, its assets are depleted or it is otherwise unable, or refuses, to perform the indemnity obligations of the Purchaser in a timely and reasonable manner .... [11]

24. The assumption of liability, disclaimers, and releases in Paragraphs 14 and 15 of the Sales Contract were a key part of the negotiations between LGSF and Vista concerning the terms of the Sales Contract LGSFs representative, John Darby of the Beach Company, testified that those terms were non-negotiable, fundamental terms of the contract
Q: Mr. Darby, was the release and indemnification language In the sales contract and in the letter of Intent, was that a core or fundamental term of the bargain with Vista?

A: Yes.

Q: Would [LGSF] have sold this property to Vista if Vista had not agreed to that language regarding the release and indemnification?

A: No. [12]

25. Vista's owner, Eduard de Guardiola, similarly testified that it would have been a "deal breaker" for LGSF if Vista had refused to agree to the provisions in Paragraphs 14 and 15 of the Sales Contract.
Q: ... you told [POA's counsel] that It was a quote deal breaker end quote for John Darby that these terms of paragraphs 14 and 15 be contained in the contract?

***6** A: Yes.

Q: And tell me what you meant by deal breaker?

A: John told me that he had to have these provisions in the contract in order for him to accept our offer.

Q: In other words, if you didn't agree to it he wasn't going to sell the properly to you.

A: That's correct. [13]

26. Vista's acquisitions and development consultant on the project described these requirements as being a "contentious issue" between Vista and LGSF, [14] and this Court finds that the issues of release, disclaimer, and assumption of liability were specifically debated and bargained for, were understood by all parties, and were a core component of the sales transaction.

27. As part of the sales negotiations, LGSF required and Vista agreed that the Sales Contract include a provision requiring that the Master Deed for any condominium regime that was prepared and recorded by Vista after it purchased the property include a notice to subsequent buyers of the assumption of liability, disclaimers, and releases of all claims against LGSF related to the construction and condition of the property. That provision stated that the assumption of liability and release of claims was intended to be binding on all subsequent purchasers of the property or any condominiums or other subdivisions of the property. [15]

16. *Condominium Regime Document*.

Purchaser [i.e., Vista] acknowledges and agrees that the Assumption of Liability and Release of Claims in Section 15 above is Intended to be binding on all subsequent purchasers of the Properly or any condominiums or other subdivisions of the Property. In order to give effect to this Mention, the provision set forth in Exhibit 1, attached hereto and Incorporated herein, will be Included in the Master Deed (as herein defined) establishing any condominium regime, and in any and all deeds or any other conveyances of all or part of the Property (except for conveyances of condominium units by Purchaser), including, but not limited to, a sate of a company (or corporate stock or partnership interest) Interest.

28. The Sales Contract included an attached exhibit specifying that the following language be included in the Master Deed recorded by Vista:

EXHIBIT 1

Disclosure, Language.

Save and excepting only the limited warranty of title hereinafter set forth and herein contained, the Property iss being conveyed strictly on an "as is', "where is" and "with all defects" basis, without representation, warranty or covenant, express, implied or statutory, of any kind whatsoever, including, without limitation, representation, warranty or covenant as to condition (structural, environmental, mechanical or otherwise), past or present use, construction, development, lease performance, Investment potential, tax ramifications or consequences, Income, compliance with law, habitability, tenancies, merchantability or fitness or suitability for any purpose, all of which are hereby expressly disclaimed. Without limiting the generality of the foregoing) *Grantee I.e. the POAl acknowledges that Grantor's [I.e.. Vtsta's] predecessor in title. Long Grove at Seaside Farms. LLC ("Long Grove") and Its Affiliates (as herein delined) have made no representations. warranties or covenants as to the compliance of the Property with any federal, state, municipal or loal statutes. laws. rules. regulations or oridnances, including, Without limitation. this pertaining to construction*. rent control building and health codes, land use (or permits Issued in connection therewith), zoning, lead paint, urea formaldehyde foam Insulation, asbestos, hazardous or toxic wastes or substances, pollutants, contaminants or other environmental matters.

***7** Grantee acknowledges that the Property was originally developed and constructed by Long Grove and its Affiliates (as herein denied). *Grantor purchased the Property for the purpose of converting the Property Into condominiums which it is selling to the public. Grantor assumed all responsibility for identifying and correcting all defects or problems. If any. that existed, to ensure that the Property is properly constructed and suitable for use as condominlums in accordance with all applicable building regulations. codes, standards, and other applicable laws and requirements*.

Accordingly, as part of the valuable consideration being exchanged in this sale transaction, the receipt and sufficiency of which are hereby acknowledged. *Grantor on behalf of itself and its heirs. representatives. successors, and assigns (including Grantee and all other successors-in-title to all or a portion of the Property) agrees to never sue and completely releases Long Grove at Seaside Farms. LLC. The Beach Co., Gulfstream Construction Company, its affiliates, agents, officers, directors employees. Insurers. representatives. successors, assigns, and all other companies, partnerships, entitles, or persons (collectively. the 'Affiliates") Involved in the design, development and/or construction of the apartment buildings and apartments therein and all other improvements prior to March. [sic] 2005, for and from any and all claims of every kind whatsoever arising from or related to the development design, construction, maintenance. alteration, or repair of the Property. Including unknown and unforeseen claims that may now exist or that may arise in the future*.

Grantor and Grantee acknowledge and agree that the assumption of liability and release of claims above is intended to be binding on all subsequent grantees of the Property or any condominiums or other subdivisions of the Property. In order to give effect to this intention, these provisions are Included in this Master Deed, and will also be included in any other conveyances outside the coverage of tills Master Deed (emphasis added to highlight relevant portions). [16]

29. Following specific discussions and negotiations between the parties and their counsel, the Sales Contract was signed containing the assumption of liability, disclaimers, releases, and notice requirements as reflected Paragraphs 14, 15, and 16 discussed above.

30. The Sales Contract provided Vista with a due diligence period under which it could inspect the condition of the property prior to closing. Vista hired an engineering company, Essex Engineering Corp: of Atlanta, to inspect the property. Essex issued a property condition report that identified defects in the buildings, including water damage on

the exterior balconies. [17] Vista also received a report issued by a local engineer, Russell T. Wallace, P.E., that identified water damage on the exterior balconies of the units. [18]

31. Prior to closing, Vista required LGSF to escrow $200,000 of the sales proceeds to cover Vista's future cost of the balcony repairs. [19] Vista then proceeded to close on the Sales Contract and purchased the apartment complex from LGSF.

***8** 32. The closing of the sale of LGSF's apartment complex to Vista occurred on March 7, 2005. The deed from LGSF to Vista, as recorded in Book C528 at Page 321 in the Charleston County RMC Office, states that the property "is being conveyed strictly on an 'as is,' 'where is' and 'with all defects' basis, without representation, warranty or covenant ... of any kind whatsoever." [20]

33. After closing on the property, Vista began converting the rental apartments to condominiums.

34. Vista hired its own contractors to repair the balconies and perform other work on the buildings. [21] Vista then requested and received the $200,000 in LGSF funds that were escrowed at closing to cover the costs of the balcony repairs.

35. Vista also prepared and recorded a Master Deed that created the Long Grove Horizontal Property Regime and the Long Grove Property Owners Association, Inc. (i.e., the POA). The Master Deed was prepared and recorded by Vista's legal counsel. [22]

36. As required in Paragraph 16 of the Sales Contract between LGSF and Vista, the Master Deed as prepared and recorded by Vista contained notice that LGSF had sold the property on an "as-is" and "with all defects" basis and had disclaimed and been released from all warranties and liabilities associated with the condition of the property. [23]

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

38. When Vista purchased the apartment complex from LGSP, the rental apartments were occupied by rental tenants. Beach Company's property management division had been managing the rental apartments for LGSF, and when Vista purchased the property from LGSF it entered into an apartment management agreement with Beach Company under which Beach Company continued to manage the rental apartments for Vista. [25]

39. That management agreement was for management of the rental units during the conversion process and specifically excluded management of units once Vista had converted them to condominiums. [26]

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

41. Accordingly, for a brief period of time after Vista purchased the apartment complex from LGSF, Beach Company continued to manage the rental units pursuant to its apartment management agreement with Vista, while Vista operated and managed the POA as Vista converted and sold units as condominiums. During mat period, Beach Company sent Vista a letter stating its concerns regarding the scope of the apartment management services that Vista was requesting from Beach Company. That letter, dated August 5, 2005, states in pertinent part:

During the last few months, Vista Realty Partners has requested that the Beach Company assist it in activities related to the construction, repairs, and remodeling work associated with the conversion of Long Grove from apartments to condominiums. For example, Vista has requested that the Beach Company's managers and staff handle apartment to condominium renovations such as vinyl and carpet replacement and painting. Such work might be included in a standard turn of rental units in a completed apartment. However, at this stage of the project, this type of work is related to the construction, repairs, and remodeling work involved in the conversion of the project to condominiums, and the requested work exceeds the scope of The Beach Company's management agreement.

***9** Accordingly, the purpose of this letter is to confirm and document that The Beach Company is acting only as the leasing/rental manager. The Beach Company is not responsible for managing or handling any of the construction and remodeling work associated with Vista Realty Partner's conversion of the project from apartments to condominiums.

Vista Realty Partners agrees that It Is solely responsible for the coordination and supervision of all design, development, construction, and remodeling activities related to conversion of the project from apartments to condominiums. This coordination and supervision includes a turn-key process that follows through with the completion of any and all punch list items. The Beach Company shall have no requirement or responsibility for such Improvements under its the management agreement.

To the fullest extent permitted by law, Vista Realty Partners, on behalf of itself and its successors and assigns, agrees to hold release, harmless, defend, and Indemnify The Beach Company ... of and from any and all claims, lawsuits, demands, tosses, damages, and all other expenses of any kind whatsoever (including without limitation attorney's fees and costs) arising out of or in any way related to Vista Realty Property's development, design, construction, repairs, and remodeling work associated with the conversion of Long Grove from apartments to condominiums; ....

Please acknowledge Vista Realty Partner's receipt, understanding, acceptance, and acknowledgment of this notice and agreement by signing and returning a copy of this letter to my attention no later than August 11, 2005. [28]

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

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

LONG GROVE HORIZONTAL PROPERTY REGIME

PURCHASE AGREEMENT

THIS AGREEMENT is made and entered into this ___ day of ___ 200 ___, by and between Long Grove Vista, LLC, a Georgia limited liability company (hereinafter referred to as the "Seller"), and (hereinafter referred to as the "Purchaser").

....

7. *DISCLAIMER*. Purchaser and Seller acknowledge that they have not relied upon any advice, representations or statements of Brokers [i.e., Beach Company] and waive and shall not assert any claims against Brokers Involving the same. .... Purchaser and Seller agree that Brokers shall not be responsible to advise Purchaser and Seller on any matter, Including but not limited to the following: ... the condition of the Unit, any portion thereof, or any Item therein;

***10** ...

10. *LONG GROVE PROPERTY OWNERS ASSOCIATION. INC.*

(a) *Governing Documents*. Purchaser acknowledges that the Unit being purchased is a portion of the [Long Grove Horizontal Property] Regime and improvements that have been or will be made subject to the Master Deed referred to in Paragraph 1. The nature and extent of the rights and obligations of the Purchaser in acquiring and owning, the Unit will be controlled by and subject to the Master Deed, as well as the Articles of Incorporation, the Bylaws, and the rules and regulations of the Association. Purchaser agrees to comply with all of the terms, conditions and obligations set forth therein.

(b) *Membership In Association*. Upon conveyance of title to the Unit to Purchaser, Purchaser shad automatically become a member of the Association and shall be subject to the assessment obligations and other provisions set forth in the Master Deed, Including the obligation of the Purchaser to pay a contribution to the working capital of the Association referred to In Paragraph 5(b) above.

(c) *Disclosure Package*. Purchaser hereby acknowledges that ha/aha has received a copy of the property condition report required under Section § 27-31 -430 of the South Carolina horizontal Properly Act, a copy of the Master Deed, a copy of the Bylaws of the Association, a copy of the Articles of Incorporation of the Association, a copy of the estimated budget of the Association (the. “Disclosure Package”).

....

24. *ENTIRE AGREEMENT*. This Agreement contains the entire agreement between the parties hereto. No agent, representative, salesman or officer of the parties hereto has authority to make, or has made, any statements, agreements, or representations, either oral or in writing, in connection herewith, modifying, adding to, or changing the terms and conditions hereof and neither party has relied upon any representation or warranty not set forth in this Agreement No dealings between the - parties or customs shall be permitted to contradict, vary, add to, or modify the terms hereof. [30]

44. The “Disclosure Package” referred to in Paragraph 10(c) above included a copy of the Master Deed that contains the disclaimers and releases at issue in this case. [31]

45. When Vista sold its newly developed condominiums to individual condominium unit buyers, the deeds from Vista to the buyers included a provision providing the buyers with notice that Vista had converted the apartments to condominiums. [32]

46. The deeds from Vista to the individual condominium buyers also provided notice that the conveyance was subject to the Master Deed for the POA. [33]

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

48. LGSF had no involvement or communications with the POA until 2009, when the POA, through its attorney, sent demand letters to LGSF (i.e., to Beach Company, Gulfstream, and Long Grove at Seaside Farms, LLC) stating that the POA "is asserting a construction defects claim" against them and demanding a response "in accordance with the Notice and Opportunity to Cure Construction Dwelling Defects Act.", [34]

***11** 49. LGSF, through counsel, responded to the demand letters by sending the POA's counsel a detailed letter informing the POA that LGSF was not involved in the conversion or development of the condominiums', had sold the property to Vista on an "as is", "where is", and "with all defects" basis and had specifically disclaimed and been released from all warranties and liabilities related to the condition of the property; is not legally responsible for any of the alleged construction defects claimed by the POA; and, any claims of the POA concerning alleged defects in the condominium buildings should be directed to Vista and not to LGSF. [35]

50. The POA's counsel sent a brief reply letter stating that the POA "disagrees" with LGSF's position and repeating the POA's demand that LOSF state its "intentions under the Right to Cure Act." [36]

51. The LOSF entities then filed this lawsuit against the POA seeking a declaration concerning the validity of the POA's claims against LGSF.

52. As stated in LGSF's declaratory judgment Complaint, for purposes of the declaratory judgment action only, the construction defects claimed by the POA are assumed to exist, and the sole purpose of the action is to address the legal rights and responsibilities between LGSF and the POA regarding the POA's claims against LGSF. Thus, the declaratory action does not address the merits of the construction defects alleged by the POA. The declaratory judgment Complaint names Vista (i.e., Vista Realty Partners, LLC, and Long Grove Vista, LLC) for notice purposes only.

53. Upon LGSF's filing of this declaratory judgment action, the POA filed counterclaims, crossclaims, and third-party claims against LGSF and the other parries in this case alleging joint and several liability for construction defects in the condominium buildings.

54. In its counterclaims, the POA asserts that LGSF is liable for construction defects in the buildings based on causes of action for breach of the implied warranties of habitability and workmanlike service, breach of express warranties, and negligence. [37]

55. The defects alleged by the POA include but are not limited to leaks and water damage at the balconies. [38] the same component that Vista hired its own contractors to repair after it purchased the property from LGSF and for which Vista received the $200,000 in escrowed funds that were set aside at closing to cover Vista's cost of those repairs.

56. In response to the POA's counterclaims, LGSF filed the motions to dismiss the POA counterclaims that are the subject of this Order.

57. The facts related to the disclaimers and releases at issue are not in dispute and have been fully explored during discovery. No party has contended that additional discovery regarding the issues before the Court is needed or would be beneficial prior to the Court ruling on Plaintiffs' motion. The issue presented to the Court in Plaintiffs' declaratory judgment Complaint and motion constitutes a question of law arising from undisputed facts, and the issue is ripe for adjudication at this time.

58. This Court finds that the determination of the issues raised in LGSF's declaratory judgment Complaint and in its pending motion at this point in the case will serve the interests of justice and judicial economy by eliminating disputes and uncertainties regarding which parties are liable for any actual or alleged defects in the condominiums and will

resolve issues related to insurance coverage claims, indemnification claims and rights, and actual and potential third-party claims. [39]

CONCLUSIONS OF LAW

***12** For the reasons discussed below, the POA's claims against the LGSF entities, including JHP, are barred as a matter of law and should be dismissed.

I. THE COURT FINDS LGSF AND JHP DID NOT EXTEND ANY WARRANTIES TO THE POA AND OWES NO DUTY OF CARE TO THE POA.

59. The POA sued LGSF for breach of the implied warranties of habitability and workmanlike service, breach of express warranties, and negligence, and sued JHP for negligence and breach of express and implied warranties, contending LGSF and JHP are liable to the POA for any construction defects that may exist in the condominium project.

60. Over the years the South Carolina Supreme Court has issued a line of cases imposing liability on builders and sellers of new residential construction based on three legal theories: (1) implied warranty of habitability, which springs from the sale of a new home; (2) implied warranty of workmanlike service, which arises from the construction of a new dwelling; and (3) negligence, which arises when a builder or seller knowingly places defectively constructed new homes in me stream of commerce.

61. The fundamental premise underlying the South Carolina Supreme Court's imposition of liability based on implied warranties and negligence against builders and developers for defective new residential construction is based on the Court's policy of protecting new home buyers against builders that place defective construction into the "stream of commerce." *Kennedy v. Columbia Lumber and Mfg. Co.*, Inc., 299 S.C. 335, 344, 384 S.E.2d 730, 736 (1989) ("We have made it clear that it would be intolerable to allow builders to place defective and inferior construction into the stream of commerce."); *Kirkman v. Parex. Inc.*, 369 S.C. 477, 483, 632 S.E.2d 854, 857 (2006) (stating that the determining factor for imposing the implied warranty of a new house's habitability, is whether the defendant "places it, by the initial sale, into the stream of commerce.") (quoting *Ami v. Shaw*. 289 S.C. 161, 164, 345 S.E2d 715, 717 (1986)).

62. The rationale of the Court's rejection of the doctrine of *caveat emptor* was its concern with the unequal bargaining power between the new home buyer and seller, the new home buyer's reliance on the skills of the builder, and the inability of the new home buyer to inspect a new house for latent defects prior to purchase. *Kennedy v. Columbia Lumber and Mfg. Co.*, Inc., 299 S.C. 335, 343, 384 S.E2d 730, 735-36 (1989); *Lane v. Trenholm Bldg. Co.*, 267 S.C. 497, 500, 229 S.E.2d 728, 729 (1976) (citing *Rutledge v. Dodenhoff*, 254 S.C. 407, 175 S.E.2d 792 (1970)); Sapp v. Ford Motor *Co.*, 386 S.C. 143, 147-48, 687 S.E.2d 4, 497 (2009).

63. In the instant case, the Court finds that LGSF and JHP did not place the condominiums into the stream of commerce and LGSF provided notice that it was specifically disavowing the condition of the property and disclaiming all warranties; thus, the POA's claims against LGSF and JHP are barred as a matter of law.

64. LGSF designed and built the apartments solely for its own use as a rental apartment complex, and did not construct the apartments for sale to individual buyers or for use as condominiums. The fact that LGSF years later sold the apartments to a buyer mat converted the apartment into condominiums does not change the fact that LGSF constructed the apartments only for itself and only for its own use as rental apartments, See Smith v. Breedlove, 377 S.C. 415, 661 S.E.2d 67 (2008) (holding the implied warranty of workmanlike service did not apply to an owner who sold private home that he built as his own general contractor and owed no duty of care in construction of die house to any future purchaser).

***13** 65. When LGSF sold the rental apartment property to Vista, LGSF was aware that Vista intended to convert the property and sell it as condominiums. Therefore, LGSF went to substantial lengths to place both Vista and future owners on notice that the property as sold may contain defects, and that LGSF was disclaiming all warranties and responsibilities related to the condition of the property.

66. From the initial stage of its decision to sell the complex, LGSF insisted that it and its affiliates be released from all liability related to the condition of the property as a condition of the sale if the buyer intended to convert the apartment complex to condominiums. That position was set forth in the LI Melody marketing materials for the property. [40] During the negotiations between LGSF and Vista regarding the terms of the Sales Contract, LGSF notified Vista that the Sales Contract must include the property condition and warranty disclaimers and include Vista's assumption of liabilities and release of claims in order for LGSF to accept Vista's offer to buy the property. LGSF informed Vista that if it did not agree to these conditions as part of the Sales Contract, then LGSF was not going sell Vista the property. [41] Vista's owner realized the core importance of these conditions of sale.

67. The initial Term Sheet executed by LGSF and Vista stated that the property was being sold on an "as is", "where is" and "with all faults" basis and that LGSF would be released from all liabilities related to the condition of the property. [42]

68. Following what were at times characterized as "contentious" negotiations between the principals of LGSF and Vista and their lawyers, Paragraphs 14 and 15 were included in the Sales Contract between LGSF and Vista." Paragraph 14 clearly indicates that LGSF was disavowing and disclaiming any warranties or liability as to the condition of the property. Paragraph 14 also states that the property was being sold on a strictly "as is", "where is", and "with all defects" basis and without any representations or warranties, express or implied. Similarly, Paragraph 15 clearly states mat Vista, on behalf of itself and its successors and assigns, fully releases LGSF and its affiliates for claims related to the development, design, construction, maintenance, alteration, or repair of the property.

69. The Sales Contract gave Vista an opportunity to thoroughly inspect the property before closing. Vista took advantage of this opportunity, and hired Essex Engineering Corp. to provide a property condition assessment prior to closing, and Essex observed certain defects in the building, including water intrusion problems at the balconies. Vista required LGSF to escrow $200,000 of the sale price to cover the cost of those repairs and Vista proceeded to close on its purchase of the property. After it purchased the property, Vista had further ample opportunity to inspect the property before it converted and sold the property as condominiums. Vista hired its own contractors to repair the balconies and perform other work on the buildings as part of the conversion process, and Vista received the $200,000 in escrowed funds as reimbursement for its balcony repair costs.

70. The property condition warranty disclaimers and release of liability provisions contained in the Sales Contract between LGSF and Vista are not mere boiler plate language included in a form sales agreement. Instead, they were specifically bargained for provisions that were specially prepared by and negotiated between two sophisticated commercial real estate entities that were represented by legal counsel throughout the entire process. Nothing in the record indicates a disparity in bargaining power between Vista and LGSF. In signing the contract, Vista acknowledged that it was not relying on the skills of the builder, and Vista had ample opportunity to inspect the property for latent defects before and after it purchased the property and converted it to condominiums.

***14** 71. In a further effort to disavow itself from Vista's planned conversion of the rental apartments to condominiums, LGSF also insisted on the inclusion of Paragraph 16 in the Sales Contract, which required Vista to include notice of the assumption of liability, disclaimers, and releases in the Master Deed that Vista would prepare and file in connection with Vista's conversion and sale of the property as condominiums.

72. Paragraph 24 in the Master Deed, prepared and recorded by Vista after it purchased the property, provides unambiguous notice that LGSF sold the property to Vista on an "as is", "where is", and "with all defects" and had specifically disclaimed and been released from all warranties and claims regarding the condition of the property. This paragraph further provided specific notice to all future buyers that Vista had "assumed all responsibility for identifying and correcting all defects or problems, if any, that existed, to ensure that the property comprising the Regime is properly constructed and suitable for use as condominiums in accordance with all applicable building regulations, codes, standards, and other applicable laws and requirements."

73. LGSF's insistence that this provision be contained in the Master Deed ensured that Vista provided notice to the POA, an entity that was not yet in existence, and to the future buyers of Vista's condominiums that LGSF had disclaimed and been released from all warranties and liabilities associated with the condition of the property. By requiring Vista to include mat notice in the Master Deed, LGSF was ensuring that record notice of the disclaimers and release was provided in the chain of title to the property to as to provide notice to all future buyers.

74. Because LGSF would not be a party to any subsequent deeds issued by Vista to the various purchasers of condominiums and the POA, this Court finds that this recordation in the chain of title was the most practical legal method by which LGSF could attempt to ensure that notice was given to subsequent buyers of the disclaimers, releases, and liability accepted by Vista when purchasing the apartment complex, and the most likely method to be successful in actually providing such notice to subsequent purchasers. In making such a finding, this Court is mindful that, as the seller, Vista is the entity that bears the legal responsibility for making this disclosure, and thus LGSF has taken additional legal steps to not only protect itself, but also to protect downstream purchasers.

75. Stated differently, this Court finds that requiring Vista to include the notice in the Master Deed was a reasonable and practical means to ensure that subsequent buyers of condominiums received notice that LGSF and its affiliates had disclaimed and been fully released from all liabilities related to the condition of the property.

76. Vista complied with the requirements of the Sales Contract and included notice of the assumption of LGSF's disclaimers and release in the Master Deed that Vista prepared and recorded in the chain of title to the property after it purchased the property.

77. The deeds that Vista issued to unit buyers after Vista converted the project to condominiums specifically state that Vista had "converted the units at Long Grove Apartments to condominium ownership," and the deeds from Vista to unit owners indicate that the conveyance was subject to the terms of the Master Deed.

***15** 78. The assumption of liability, disclaimers, and releases contained in the Sales Contract and Master Deed are clear, explicit, unambiguous, and capable of legal interpretation. Therefore, the function of the Court is to interpret the lawful meaning of the terms of the documents and give effect to them. *E.g., Ellie. Inc. v. Miccichi*. 358 S.C. 78, 93, 594 S.E.2d 485, 493 (Ct. App. 2004) ("Where an agreement is clear and capable of legal interpretation, the courts only function is to interpret its lawful meaning, discover the intention of the parties as found within the agreement, and give effect to it."); *Vause v. Mikell*, 290 S;C. 65, 68, 348 S.E.2d 187, 189 (Ct App. 1986) (The construction of an unambiguous deed is a question of law, not fact"); *Hunt v. Forestry Com'm*, 358 S.C. 564, 568-569, 595 S.E.2d 846, 848 (Ct. App. 2004) ("The construction of a clear and unambiguous deed is a question of law for the court.)

79. The Master Deed was recorded in the chain of title to the property and "runs with the land," meaning it is enforceable by and against later grantees. 17 S.C. Juris Covenants § 18. The POA was created, and for a time controlled by Vista, which is the entity that prepared and recorded the Master Deed under which the POA exists.

80. Buyers of condominium units are charged with constructive notice of information recorded in the chain of title to their property. *Carolina Land Co., Inc. v. Bland*, 265 S.C. 98, 107, 217 S.E.2d 16, 20 (1975) ("The law imputes to a

purchaser who proposes to acquire title to real estate notice of the recitals contained in any properly recorded instrument of writing which forms a link in a chain of title to the property proposed to be acquired."); *Harbison Community Ass'n, Inc. v. Mueller*, 319 S.C. 99, 103, 459 S.E.2d 860, 863 (Ct App. 1995) ("A homeowner is charged with constructive notice of any restriction properly recorded within the chain of title.").

81. Buyers who purchased condominium units from Vista were represented by a closing attorney when they closed on the purchase, and the buyers and their closing attorneys were on constructive notice of the notice contained in the Master Deed. The POA and the condominium owners are bound by the terms of the Master Deed, and the POA and unit owners are estopped as a matter of law from disclaiming or collaterally attacking the validity of the assumption of liability, disclaimers, and releases that are contained in the instruments of record applicable to their property. *See Evins v. Richland County Historic Preservation Com'n*, 341 S.C. 15, 20, 532 S.E.2d 876, 878 (2000) ("Estoppel by deed precludes a party to a deed from asserting as against the other any right or title in derogation of the deed, or from denying the truth of any material fact asserted in it").

82. The situation {Resented here is not one where a condominium developer inserted language in a master deed that was intended to prevent buyers from pursuing claims against the condominium developer that created and sold the units. Instead, this is a case where the prior owner of the property purchased by a condominium developer required the condominium developer to provide future buyers with record notice that the prior owner on behalf of itself and its affiliates had disclaimed all warranties and been released from all responsibility for the condition of the property.

84. The POA' formed by Vista and the subsequent buyers of condominiums sold by Vista were on notice of LGSF's disclaimers and releases and as a matter of law, and they are barred from denying or attacking the validity of the notice.

85. Because the POA and condominium buyers were on notice that LGSF had disclaimed and been fully released from all liabilities related to the condition of the property when it sold the used apartment buildings to Vista, as a matter of law the POA cannot now claim that LGSF placed the property in the stream of commerce as is required to trigger liability for construction defects in the property based on theories of implied warranties and negligence.

***16** 86. The assumption of liability, releases, and disclaimers contained in the Sales Contract and Master Deed, which LGSF bargained for as part of the underlying sales transaction when the apartment complex was purchased by Vista with the intention of conversion to * condominiums, all operated to sever any potential claims for breach of warranty or negligence**. Moreover, it would be inappropriate to allow the purchaser of Long Grove (Vista) to waive all warranties and rights of action as part of a purchase bargain, but then create an entity (the POA) that would somehow revive those rights and warranties**.

87. Under these circumstances, LGSF did not extend any warranties to the POA and owes no duty of care to the POA. Therefore, LGSF is entitled to summary judgment on the POA's claims. Furthermore, the express releases, disclaimers and assumptions of liability by Vista operate to bar any potential claims against JHP for breach of warranty or negligence.

II. THE ASSUMPTION OF LIABILITY, DISCLAIMERS, AND RELEASES ARE NOT VOID BASED ON MISTAKE OR "LACK OF MEETING OF THE MINDS."

88. In an effort to oppose the result dictated by the notice of assumption of liability, disclaimers, and releases contained in its Master Deed, the POA argues that Vista's. owner (Eduard de Guardiola) purchased- the property in reliance on LGSFs alleged representations regarding the "quality" of the buildings and with a secret, undisclosed belief that the assumption of liability, disclaimers, and releases as required in the Sales Contract would not be enforceable. Counsel for Vista joined in this argument, which this Court finds self-serving and disingenuous, at best. This Court further finds that the POA is neither factually nor legally situated to raise these arguments. LGSF and Vista were the parties to the Sales

Contact, and the POA that was later formed by Vista did not even exist when Vista negotiated and closed on the Sales Contract. The POA is now attempting to step into Vista's shoes after the fact and advance arguments on behalf of Vista that do not pertain to the POA and to which the POA had no involvement.

89. Moreover, Vista's owner (de Guardiola) is a lawyer and a highly experienced real estate developer. The Sales Contact that he signed on behalf of Vista contains a clause (in Paragraph 14) stating that LGSF was completely disclaiming the condition of the property and stating that Vista was not relying on any alleged oral representations by anyone concerning the condition of the property. Any secret belief that Mr. de Guardiola may have had regarding the "quality" of the buildings or the enforceability of terms of the Sales Contract is irrelevant and was superseded when he proceeded to sign the Sales Contract containing the assumption, disclaimers and releases. *See. e.g., Davis v. KB Home of South Carolina. Inc.*, 394 S.C. 116, 127, 713 S.E.2d 799, 805 (App. 2011) ("The court is without authority to consider parties' secret intentions, and therefore words cannot be read into a contract to impart an intent unexpressed when the contract was executed." (quoting *Pee Dee Stores. Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009)). The issue of the enforceability of the disclaimers and release is a matter of law for the Court to decide and is not controlled by a secret belief of one of the parties that signed the Sales Contract and proceeded to close on the contract containing these terms.

III. THE COURT FINDS THE ASSUMPTION OF LIABILITY, DISCLAIMERS, AND RELEASES IN THE SALES CONTRACT AND MASTER DEED ARE NOT VOID BASED ON LACK OF CONSIDERATION.

***17** 90. The POA contends that the assumption of liability, disclaimers, and releases in the Sales Contract and Master Deed are void based on lack of consideration.

91. The POA first contends these provisions are invalid because no separate or specific consideration for these provisions is recited in the Sales Contract. The POA's arguments regarding alleged lack of consideration in the Sales Contract appear to be based on a mistaken application of the requirements of *Kirkman v. Pare*. Inc.*, which holds that disclaimers of the implied warranty of habitability "must be (1) conspicuous, (2) known to the buyer, and (3) specifically bargained for." 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006).

92. The *Kirkman* elements do not apply to the POA's claim against LOSE It is well established under South Carolina law that the implied warranty of habitability arises solely out of the sale of a new home and is implied only in the initial sale of a home, not in a resale. *Smith v. Breedlove*, 377 S.C. 415, 422, 661 S.E.2d 67, 71 (2008); *Kirkman v. Parex. Inc.*, 369 S.C. at 482-483.632 S.E.2d at 856-857; *Kennedy v. Columbia Lumber & Mfg. Co., Inc.*, 299 S.C. at 344, 384 S.E.2d at 736; Arvai v. Shaw. 289 S.C. at 161, 345 S.E.2d at 717 (1986)); Lane *v. Trenholm Bldg. Co.*, 267 S.C. at 500, 229 S.E.2d at 729. Here, the implied warranty does not apply to LGSF or JHP as a matter of law because LGSF and JHP did not sell a new home-or anything— to the POA.

93. Moreover, the POA's argument regarding lack of consideration in the Sales Contract between LGSF and Vista is not supported by the undisputed testimony of the principals of Vista (Edward de Guardiola) and LGSF (John Darby) who negotiated and signed the Sales Contract. Mr. de Guardiola and Mr. Darby bom unequivocally testified that LGSF would not sell the property to Vista unless Vista agreed to the disclaimers and release. Mr. Darby testified that this was a "core" or "fundamental" term of the Sales Contract Mr. de Guardiola testified that it was a "deal breaker" if Vista did not agree to it. Mr. de Guardiola's acquisition and development consultant described these requirements as being a "contentious issue" between Vista and LGSF. Contrary to the POA's arguments, the disclaimers and release were specifically negotiated, fundamental, and core terms of the contract without which the contract would not exist and no sale would have occurred. *See Flyman University v. Waller*, 124 S.C. 68, 117 S.E. 356, 358 (S.C. 1923) (stating that for purposes of a forming a contract, "valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit, accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other."). "Generally, no special consideration need be singled out or apportioned for each separate provision in a contract, and a number of agreements covering more than one subject may be founded on one

consideration." *Furse v. Timber Acquisition*, 303 S.C. 388, 390, 401 S.E.2d 155, 156 (1991) (citing 17 CJ.S. *Contracts* § 71 (1963). *See also Southern Glass & Plastics Co. v. Duke*, 367 S.C. 421, 428, 626 SE.2d 19, 22 (Ct. App. 2005) ("[P]ublic policy does not require consideration from each party where a general release purports to release not only the paying party, but all other potential defendants, from any and all future liability." (quoting 76 CJ.S. Release § 9 (1994) and citing Hyman v. Ford Motor *Co.*, 142 F.Supp.2d 735, 742 (D.S.C. 2001) (upholding a release even though beneficiary did not provide consideration)).

***18** 94. Vista also received additional consideration concerning construction defects and the responsibility therefor after the closing when it requested and received the $200,000 in funds that were escrowed prior closing to cover the cost of the balcony repairs.

95. Accordingly, the bargained-for consideration exchanged between LGSF and Vista under the Sales Contract is sufficient consideration to support the assumption of liability, disclaimers, and releases.

96. The POA also argues that the release provisions in its Master Deed are void because the POA did not receive any consideration for the releases. LGSF and Vista were the parties to the Sales Contact that gave rise to the release provisions in the Master Deed, and the POA did not exist when the Sales Contract was signed. After it purchased the property, Vista subsequently created, operated, and controlled the POA. When LGSF sold the property to Vista, LGSF had no obligation or ability to pay consideration to a non-existent entity that was later created and controlled by Vista. As stated above, it would be inappropriate to allow the purchaser of Long Grove (Vista) to waive all warranties and rights of action as part of a purchase bargain, but then create an entity (the POA) that would somehow revive those rights and causes of action.

IV. THE COURT FINDS THE RELEASE IS NOT CONTRARY TO PUBIC POLICY UNDER S.C CODE ANN. § 32-2-10.

97. The POA contends the release provisions in the Master Deed are against public policy and unenforceable under S.C. Code Ann. § 32-2-10. This Court finds the POA's reliance on § 32-2-10 is misplaced because that statute pertains to hold harmless clauses in construction contracts (emphasis added):

§ 32-2-10. Hold harmless clauses in certain construction contracts.

Notwithstanding any other provision of law, a promise or agreement in connection with the *design, planning. construction, alteration, repair or maintenance* of a building, structure, highway, road, appurtenance or appliance, Including moving, demolition and excavating, purporting to indemnify the promisee, its independent contractors, agents, employees, or Indemnitees against liability for damages arising out of bodily injury or property damage 'proximately caused by or resulting from the sole negligence of the promises, its Independent contractors, agents, employees, or Indemnitees is against public policy and unenforceable.' Nothing contained in this section shall affect a promise or agreement whereby the promisor shall Indemnify or hold harmless the promisee or the promisee's Independent contractors, agents, employees or Indemnitees against liability for damages resulting from the negligence, In whole or In part, of the promisor, its agents or employees. The provisions of this section shall not affect any Insurance contract or workers' compensation agreements; nor shall It apply to any electric utility, electric cooperative, common carriers by rall and their corporate affiliates or the South Carolina Public Service Authority, [emphasis added]

98. The contract between LGSF and Vista was for the sale of real property containing existing apartment buildings, and the Master Deed was created pursuant to the requirements of the Sales Contract There was no construction contract between LGSF and Vista. The terms of § 32-2-10 are clear and do not apply here.

V. THE COURT FINDS THE RELEASE DOES NOT "PREVENT THE POA FROM FULFILLING ITS FIDUCIARY DUTY TO BRING A LAWSUIT"

***19** 99. The POA contends the release provisions prevent the POA "from fulfilling its fiduciary duty to bring a lawsuit to seek recovery of damages to the property" so as to render the releases unenforceable.[43] The Court finds this argument to be without merit, as the release provisions in the Master Deed only prohibit the POA from suing the prior owners of the apartments and their affiliates. There is no prohibition against a suit versus Vista, who developed and sold the condominiums. The Master Deed provides specific notice that Vista had "assumed all responsibility for identifying and correcting all defects or problems, if any, that existed, to ensure that the property comprising the Regime is properly constructed and suitable for use as condominiums in accordance with all applicable building regulations, codes, standards, and other applicable laws and requirements.".[44] The assumption of liability, disclaimers, and releases simply require the POA to look to Vista to remedy any problems with the condominiums that were created and sold by Vista.

VI. THE COURT FINDS THE RELEASE IS NOT UNCONSCIONABLE, UNJUST, OR UNFAIR TO THE POA.

100. Contrary to the POA's contentions, the release provisions in the Master Deed are not unconscionable, unjust, or unfair to the POA so as to render mem void and unenforceable.

A. The release provisions are clearly contained in the Master Deed.

101. The POA contends the notice of assumption of liability, disclaimers, and releases in the Master Deed are unconscionable because they are "not conspicuous enough" and LGSP "purposefully hid the release by burying it in the Master Deed."[45] The POA was created, exists, and operates by virtue of the Master Deed. The POA is the party suing LGSF, and the POA cannot now contend that it was unaware of terms in the Master Deed, as this is the document under which the POA was created, exists, and operates.

102. Moreover, LGSF did not prepare or record the Master Deed. Vista recorded the Master Deed after it purchased the property, and Vista chose where to place the notice in the Master Deed. That notice spans two pages in the Master Deed, and is set forth together with many other important requirements and restrictions in the Master Deed pertaining to the use and ownership of the property (e.g., the Master Deed defines what portion of the space is owned by individual owners versus being common elements; requires payment of assessments for maintenance and repairs; and contains ARB restrictions on how owners can use and occupy their units). The individual buyers (who are not parties to this lawsuit) were on record notice of all the terms in the Master Deed when they purchased a unit *Cf. Evins v. Richland County Historic Preservation Com'n. supra* ("Estoppel by deed precludes a party to a deed from asserting as against the other any right or title in derogation of the deed, or from denying the truth of any material fact asserted in it."); *Regions Bank v. Schmauch*, 354 S.C. 648, 663-664, 582 S.E.2d 432, 440 (Ct. App. 2003) ("A person who signs a contract or other written document cannot avoid the effect of the document by claiming he did not read it. One entering into a written contract should read it and avail himself of every reasonable opportunity to understand its content and meaning. Every contracting party owes a duty to the other party to the contract and to the public to learn the contents of a document before he signs it") (internal quotations and citations omitted)

B. The release provisions in the Master Deed are not an unenforceable adhesion contract

103. The POA also contends the release provisions in the Master Deed are an unconscionable and unenforceable "contract of adhesion."[46]

***20** 104. As a threshold matter, the release provisions in the Master Deed are not a contract between LGSF and the POA Instead, the Master Deed is an instrument recorded in the chain of title to the property. Vista prepared and recorded the Master Deed to create the POA, and the POA exists and operates pursuant to the terms of the Master Deed. As discussed above, the release provisions were included in the Master Deed to provide notice to future owners. The POA did not exist when LGSF sold the property, and LGSF did not own the property when Vista recorded the Master Deed to create the POA. LGSF did not have—and could not have had—any contractual bargaining or dealings with the POA regarding the terms of the Master Deed.

105. In addition, if the release provisions in the Master Deed were to be deemed an unenforceable adhesion contract, then every other provision in the Master Deed must be considered the same, the effect of which would be to void the entire Master Deed and all other similar master deeds in this State. Thus, the Court rejects this argument.

C. The release provisions are not "unfair" or contrary to public policy.

106. Finally, the POA contends that the release provisions are unfair and should be unenforceable as against public policy in the State of South Carolina. [47]

107. In response to the Court's question posed at the hearing on this matter, the POA's counsel could not identify any other or superior method by which LGSF could have sold the property to Vista without remaining liable to future owners of the property after Vista purchased, developed, and sold it.

108. On this point, this Court rejects the argument that the public policy of this State should be that a seller could never, under any circumstances, avoid liability for the condition of the property if the property is subsequently converted or used for a different purpose by the buyer or the buyer's successors. If this Court were to deem that LGSF should be held liable for the alleged construction defects in these condominiums despite the notices, disclaimers, and releases contained in the Sales Contract and Master Deed, which were extensively and specifically negotiated terms of an arms-length transaction between two sophisticated entities represented by counsel, then the practical effect of such a decision would be that an owner of a developed property can never sell the property without remaining subject to liability if the buyer or a subsequent buyer converts or uses the property for different purposes. Such a result is not within the scope or public policy intent of South Carolina law concerning construction defect claims. The Court finds that the actions undertaken by LGSF in the sale of the apartment complex were sufficient to require a dismissal of the POA's construction defect claims.

VII. THE COURT FINDS NO LEGAL OR FACTUAL REASON TO TREAT THE LGSF PARTIES AND AFFILIATES SEPERATELY FOR PURPOSES OF CONSTRUING THE RELEASE AND DISCLAIMER LANGUAGE.

109. Counsel for the POA argues that the LGSF entities and their affiliates are not entitled to the same benefit from the disclaimers and releases included in the Contract of Sale, as their duties and responsibilities were not the same. The LGSF entities are Long Grove at Seaside Farms, LLC, the owner/developer, Gulfstream Construction Company, Inc., the general contractor who built the apartment complex; and, The Beach Company, the managing entity of the apartment complex. Moreover, Architect JHP, who originally designed the apartment complex, has also moved for summary judgment on the basis mat they-are a third party beneficiary of the disclaimers and releases in the contract Architect JHP correctly argues, as found above, that it is an "affiliate... related to the development, design, construction (of the project)" for which the release "from any and all claims of every kind, including unknown and unforeseen claims ...that may arise in the future" was clearly intended between the parties to the contract. Architect JHP also argues that they are

not a proper third-party defendant pursuant to Rule 14(a), SCRCP, as the claim asserted falls outside the ambit of the rule. The Court does not reach this final argument in making this decision, as it is not dispositive.

***21** 110. Stated succinctly, the POA argues that the Plaintiffs have impermissibly "lumped together" theories of contract, negligence, and warranty in their request for dismissal; that the Court has inappropriately permitted entities who were not signatories to the contract to become gratuitous third-party beneficiaries thereunder; that the laws places different levels of responsibility and culpability upon the various Plaintiff entities and JHP Architect; that certain warranties pertain to some and not to others; and, that certain of the Plaintiff entities and JHP architect have failed to appropriately disclaim any warranties whatsoever and the sales contract to which they were not a party cannot properly disclaim such warranties for them.

111. In response to this argument, the Court returns to the basic principles of contract law and the freedom of the principal parties LGSF and Vista to decide among themselves the terms of their agreement, when such agreement on its face does not violate South Carolina law or public policy. The Court finds no violation of law or public policy here, and thus intends "to ascertain and give effect to the intention of the parties." *Southern Atlantic Financial Services. Inc. vs. Middleton*, 349 S.C 77, 80 562 S.E. 2d 482, 484 (Ct App. 2002).

112. In interpreting the sales contract, this Court finds there is an obvious reason that all related seller entities and affiliates, including JHP, were treated equally and afforded the same protections under the release and disclaimer. To do otherwise would result in vitiating the contract and rendering it meaningless, for if one of the seller entities or affiliates is found liable for damages arising from the conversion of the apartment complex to condominiums, then all the seller entities or affiliates would be subject to derivative liability through subrogation, contribution, indemnification, or any other of a host of joint responsibility theories. Stated simply, under the contract the seller entities and affiliates are either all protected or none protected, and this Court does not perceive mat it is the public policy of this state that no selling party can enter a contract as to real property that would disclaim responsibility when the purchasing party intends to alter the use and legal status of the property.

VIII. THE SALES CONTRACT IS NOT AN IMPERMISSIBLE EXCULPATORY CONTRACT AND DOES NOT TRANSFER NON-DELEGABLE DUTIES

113. Counsel for the POA argues that the Sales Contract amounts to an impermissible exculpatory contract and operates to transfer non-delegable duties and responsibilities.

114. As previously stated, the Court finds it appropriate to point out mat the POA, not being a party to the Sales Contract between LGSF and Vista, lacks proper standing to raise a contractual argument as to the enforceability of the provisions contained within the contract.

115. Moreover, although exculpatory contracts are generally disfavored at law, they are permitted in this state and the South Carolina Supreme Court has specifically upheld exculpatory contracts in recognition of the freedom of private parties to contract as they choose. *Huckaby v. Confederate Motor Speedway. Inc.*, 276 S.C. 629, 281 S.E.2d 223 (1981); *Pride v. Southern Bell Tel. & Tel, Co.*, 244 S.C. 615, 138 S.E2d 155 (1964); *South Carolina Elec, & Gas Co. v. Combustion Eng'g Inc.*, 283 S.C. 182, 322 S.E.2d 453, 459 (Ct. App. 1984).

116. The releases, disclaimers, and assumptions of liability contained within the Sales Contract and Master Deed are not "exculpatory contracts" within the meaning of that term as used by counsel for the POA. Instead, while these terms are binding on the parties to the contract, these provisions also act as a *notice* that clearly advised Vista's successors and assigns (including the POA) that LGSF cold the property to Vista on an "as-is" and "with all defects" basis and it and its affiliates had disclaimed and been released from all liabilities associated with the condition of the property. There was no separate "contract" between LGSF and the POA that would constitute an "exculpatory contract" and the purpose

and effect of LGSF requiring Vista to include those terms in the Master Deed was to provide the POA and subsequent buyers with notice that LGSF and its affiliates had no responsibility or liability for anything that Vista did with the property after Vista purchased the property from LGSF.

***22** 117. Finally, under the POA's argument, every standard release executed in settlement of a construction defects lawsuit, whereby the builders are released from all liability, including future liabilities, would be considered an unenforceable exculpatory contract, thus subjecting settling builders to continuing liability to future purchasers of property. Such a result is contrary to the existing law in this state. *See Kirkman v. Parex. Inc.* 369 S.C. 477, 485, 632 S.E.2d 854, 858 (2006); Smith v. Breedlove. 377 S.C. 415, 661 S.E.2d 67 (2008); *Sapp v. Ford Motor Co.*, 386 S.C. 143, 687 S.E.2d 47 (2009); *Fields v. J. Haynes Waters Builders. Inc.*, 376 S.C. 545, 658 S.E.2d 80 (2008). Thus, the Court rejects this argument

IX. THIS DISMISSAL DECISION DOES NOT APPLY TO THIRD-PARTY DEFENDANTS ESSEX ENGINEERING AND SCM CONSTRUCTION

118. According to the pleadings and evidence in mis case, Essex Engineering was hired by Vista to inspect the premises prior to closing and issue a property condition report The report issued by Essex identified certain defects in the buildings, including water damage on exterior balconies. Allegations have now been raised that the inspection was flawed, failing to uncover multiple defective conditions. This Court previously denied Essex Engineering's motion to dismiss by Order dated October 14, 2011. Essex is not an affiliate entity of LSGF, and was never intended to be protected by the sales contract between LGSF and Vista. There are many issues of material fact in dispute as to the liability of Essex in the underlying construction defects claim, and the dismissal of LGSF and JHP Architect does not extend to Essex.

119. SCM Construction was hired by Vista to provide construction services in the conversion of the apartment complex to condominiums. SCM Construction is not an affiliate entity of LSGF, and was never intended to be protected by the sales contract between LGSF and Vista. There are many issues of material fact in dispute as to the liability of SCM Construction in the underlying construction defects claim, and the dismissal of LGSF and JHP Architect does not extend to SCM Construction.

CONCLUSION

This case contains novel and complex questions of law. Essentially, the Court is asked to choose between LGSFs assertion of the long-recognized right of parties to freely negotiate and contract between themselves in the arms-length sale of improved real property, together with the public policies encouraging alienability and supporting the highest and best use of property, versus the POA's contention that there is a violation here of the state's statutory and case law scheme to protect residential real estate purchasers and owners. It has not escaped the Court's attention that the real estate economic downturn of the year 2008, which may have led to Vista being currently impecunious to the extent that it cannot sufficiently respond to the POA's demands, may be the culprit that brings these issues to bar. But the Court's decision cannot be driven by the financial wherewithal of the parries. Vista was owned by a sophisticated and experienced real estate developer and attorney who willingly undertook legal responsibility for the condition of the apartment complex premises when he made the decision to buy and convert the complex to condominiums. The clear evidence before this Court is that this core condition of sale was specifically required by the seller and willingly accepted by the buyer, who had a full understanding of the downstream implications of such an agreement. If there are construction defects currently existing within the condominium units, then this Court finds that the statutory and case law scheme established to protect the residential owners remains viable, and under the facts and circumstances presented here, this Court further finds Vista answerable thereto, and nothing herein is intended to limit any right of action against Vista or its related entities.

***23** There are no disputed issues of material fact as to LGSF and third-party Defendant Harwick. LGSF's motion is based on the legal effect of an assumption of liability, disclaimers, and releases contained in the Sales Contact between LGSF and Vista, and in the Master Deed that was recorded by Vista, the terms of which are clear and unambiguous. For the foregoing reasons, the POA's claims against the LGSF entities (i.e., Plaintiffs Beach Company, Gulfstream, and Long Grove Seaside Farms, LLC), as well as James, Harwick & Partners, Inc., n/k/a JHP Architecture/Urban Design, P.C., are barred as a matter of law and are dismissed with prejudice.

IT IS SO ORDERED.

<<signature>>

J. Michael Baxley, Presiding Judge

July 23, 2012

Hartsville, South Carolina

Footnotes

1 See Rule 12(b), SCRCP: "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary Judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

2 To the extent that any of the following Findings of Fact constitute Conclusions of Law, they are adopted as such and, conversely, to the extent that any Conclusions of Law constitute Findings of Fact, they are also adopted as such. Because of this Order's length, findings and conclusions are set forth in numbered paragraphs for ease of reference.

3 J. Darby dep. p.14, lines 5-7.

4 E. de Guardiola dep. Ex 23 at Bates CBRE 937-38.

5 E. de Guardiola dep.Ex 23 at Bates CBRE 933.

6 J. Darby Dep. p. 23, line 24-p.25, line 7.

7 E. de Guardiola dep. p. 17, line 3-p. 20, line 3; p. 28, line 24-p. 3*l*, line 7.

8 E. de Guardiola dep. Ex 31.

9 J. Darby letter dated December 28, 2004; Bates Beach Co 000307; E. de Guardiola dep.Ex 3*l*.

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

11 Sales Contract; Complaint Ex. A (emphasis added).

12 J. Darby dep. p.79, line 22-p.80, line 7.

13 B. de Guardiola dep. p. 101, line 16-p.l02, line 3.

14 R. Blatt dep. p 29. lines 11-20.

15 Sales Contract; Complaint Ex. A.

16 Sales Contract; Complaint Ex. A (emphasis added).

17 Ex. 36 to R. Blatt dep.; Bates Essex 0140; and Ex 64 to H. Hooks dep.; Bates Essex 096.

18 Ex. 4 to K. Johnson dep.; Bates BeachCo 000002.

19 Escrow Agreement, Ex. 9 to K.Johnson dep.; Bates BeachCo 000696.

20 Complaint Ex. B (emphasis added).

21 R. Blatt dep. p. 120, lines 3-16.

22 R. Blatt dep. p. 113, lines 2-9.

23 Complaint Ex. C (emphasis added).

24 E. de Guardiola dep. p. 111, line 8-p. 112, line 3.

25 Ex. 11 to K. Johnson dep; Bates BeachCo 00866.
26 Ex. 11 to K. Johnson dep. at Bates BeachCo 000871).
27 K. Johnson dep. p. 76, line 2*l*-p. 77. line 10.
28 Ex. 12 to K. Johnson dep; Bates BeachCo 002079.
29 Ex. 2 to K. Johnson dep; Bates BcachCo 00208.
30 Vista's form Sales Contract; Ex. 19 to J. Darby Dep.; and Ex. 33 to de Guardiola dep. at Bates Vista_00019- 000046.
31 Bates Beach Residential 00001-120.
32 Complaint Ex. D.
33 Complaint.Ex.D.
34 Complaint Bx.E-1, E-2, and E-3.
35 Complaint Ex. F.
36 Complaint Ex. G.
37 POA Counterclaim ¶¶ 62-73, end 82-85.
38 POA Counterclaim ¶¶ 59(a), (b), (f) and (i)). See also POA's Memorandum in Opposition to LGSF's Motion to Dismiss at page 4 (listing the alleged defects in the buildings).
39 The POA has a pending motion to amend its pleading to add unidentified new parties and new causes of action.
40 E. de Guardiola dep. Ex. 23 at Bates CBRE 933.
41 E. de Guardiola dep. p. 101, line 16-p. 102, line 3.
42 E de Guardiola dep. Ex. 31
43 POA Memorandum in Opposition to Plaintiffs' Motion to Dismiss at pp. 33-34; end POA Supplemental Memorandum in Opposition to Plaintiffs' Motion to Dismiss at p. 4.
44 Master Deed ¶ 24; Complaint Bx. C.
45 POA Supplemental Memorandum in Opposition to Plaintiffs' Motion to Dismiss at p.9 & 10.
46 POA Supplemental Memorandum in Opposition to Plaintiffs' Motion to Dismiss at pp. 7-8.
47 POA Supplemental Memorandum in Opposition to Plaintiffs' Motion to Dismiss at pp. 9-10.

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