NO.COA 20-623 28 JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS
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LORI H. POSTAL, Plaintiff, v. DANIEL A. KAYSER, DANIEL A. KAYSER and wife LISA K. KAYSER, JON R. BELLOWS and GAILLARD S. BELLOWS, THOMAS A. SCHIEBER and wife ELIZABETH G. SCHIEBER, DARLEEN P. WILLIAMS REVOCABLE DECLARATION OF TRUST, DARLEEN P. WILLIAMS, DENNIS J. THEODOSSIS and wife TARA C. THEODOSSIS, MATTHEW BUYS and wife ELIZABETH BUYS, WAYNE S. STANKO and JANICE STANKO, GERALD L. VANEMAN, RALPH S. JULIAN and wife MARY F. JULIAN, RYAN MICHAEL ONEILL and wife LILI JOY ONEILL, WILLIAM L. EVERIST and MARY K. EVERIST, GREGORY J. OSWELL, SR. and wife EVELYN M. OSWELL, BARBARA ANN AYERS, LOUIS J. D'AMICO and wife MAYS C. D'AMICO, STEVEN C. SCHNEDLER REVOCABLE TRUST, STEVEN C. SCHNEDLER AS TRUSTEE OF THE STEVEN C. SCHNEDLER REVOCABLE TRUST, DANIEL P. COMER and wife MEREDITH M. COMER, JAMES D. O'BRIEN and wife GISSELLE L. O'BRIEN, SARA EDMONDS GREEN, KENNETH R. HUNT and wife SHANNON U. HUNT,	)	From Buncombe County No. 18-CVS-5034

REBECCA D. TUCKER, MARY H. ELLER, MICHAEL R. FRIEDMAN, TONY L. WILKEY and wife DIANE M. WILKEY, CHRIS L. MANDERSON and wife MELISSA MORAN MANDERSON, RICHARD A. BASS and wife RUTH A. BASS, RYAN 0. HAMNER and wife COURTNEY T. HAMNER, MITZI T. GIBBONS, THOMAS R. WATSON and wife KAREN L. WATSON, JESSICA V. SILVER and GEORGE M. SILVER, LINDA B. VANCE, JASON DANIELIAN and JESSICA DANIELIAN, SCOTT C. CONRAD and wife SUSAN M. KEY, and NOLAND E. WIGGINS, III,,	)
Defendants.	)

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BRIEF OF *AMICUS CURIAE* COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLANTS

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BRIEF OF *AMICUS CURIAE* COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF APPELLANTS

****

ISSUE PRESENTED

DID THE TRIAL COURT ERR IN ITS APPLICATION OF CHAPTER 47B OF THE NORTH CAROLINA GENERAL STATUES TO THE PROTECTIVE COVENANTS AT ISSUE?

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Founded in 1973, *amicus curiae* Community Associations Institute ("CAI")[1] is an international organization dedicated to providing information, education, resources and advocacy for community association leaders, members and professionals with the intent of promoting successful communities through effective, responsible governance and management. CAI's more than 42,000 members include

[1] No person or entity other than *amicus curiae* CAI, its members, and its counsel, directly or indirectly, either wrote this Brief or contributed money for its preparation.

homeowners, board members, association managers, community management firms, and other professionals who provide services to community associations. CAI is the largest organization of its kind, serving more than 73.5 million homeowners who live in more than 347,000 community associations in the United States.

In North Carolina alone, there are over 17,000 community associations collectively representing over 2,025,000 households or 53% of the owner-occupied households in North Carolina. Thus, in North Carolina, common interest communities are even more prevalent than they are nationwide – in fact, more than twice as widespread.[2]

Residential use restrictions are nearly universal in community association governing documents and certain deed restrictions throughout the United States. If allowed to stand, the trial court's Order Granting Plaintiff's Motion for Partial Summary Judgment will have significant ramifications in this State as well as others, with respect to the application of Marketable Title Acts to restrictive covenants. The trial court's interpretation of the North Carolina Real Property Marketable Title Act effectively eviscerates the long-standing principle of North Carolina and national jurisprudence of common interest community property owners' guarantee of a common plan and scheme of development and the maintenance of property values through the application of covenants running with the land. As this issue appears to be one of first impression in this State, it is paramount that the North Carolina Real Property Marketable Title Act be interpreted and applied correctly, giving full

[2] House Select Committee on Homeowners Associations, Report to the 2011 General Assembly of North Carolina. It can only be presumed that these figures have grown since that time.

deference to the intent and purpose of the Act as well as full deference to the well-established legal precedents surrounding common scheme and plan of development.

STATEMENT OF THE FACTS

CAI incorporates by reference the statement of facts set forth in Appellants' Brief to this Court. The following more limited statement sets forth the facts that are relevant to the arguments of *amicus curiae.*

On or around November 5, 1959, Developer Grover Redmon and his wife subdivided certain land now commonly known as the Beaverlake Heights Subdivision. (R p 13) On or around December 14, 1959, Mr. Redmon and wife recorded certain Protective Covenants in Book 823, Page 205 of the Buncombe County Registry ("Covenants"). (R pp 32-34) Pursuant to deed recorded in Book 939, Page 45 of the Buncombe County Registry, Lot 30 and a portion of Lot 30A in the Beaverlake Heights Subdivision were further subdivided to create a larger parcel and a smaller parcel. (R p 18). The smaller parcel of land created thereby was purchased on or around September 18, 2017 by Appellee, Lori H. Postal pursuant to that deed recorded in Book 5591, Page 1975 of the Buncombe County Registry ("Property"). (R pp 18-20) The Covenants encumber the Property. The Covenants provide, *inter alia*, that such Covenants run with the land and bind all successors. (R pp 33-34) The Covenants also provide that "[n]o residential structure shall be erected or placed on any building lot, which lot has an area of less than 15,000 square feet[.]" (R p 33) The Property is only .22 acres, or approximately 9,583 square feet. (R pp 45-47) Therefore, the Covenants expressly prohibit building residential structures upon the Property.

All other lots within Beaverlake Heights were subjected to the Covenants to effectuate Mr. and Mrs. Redmon's intent of establishing a common plan and scheme of development throughout the community. (R pp 31-32)

On or around November 13, 2018, Appellee filed its Complaint against Appellants seeking a declaratory judgement to, *inter alia*, invalidate the Covenants under Chapter 47B of the North Carolina General Statutes, the Real Property Marketable Title Act ("Act"). (R p 20) On February 28, 2020, Judge Thornburg entered the Order Granting Plaintiff's Motion for Partial Summary Judgment ("Order"). (R pp 89-95)

STATEMENT OF THE GROUNDS FOR APPELLATE REVIEW AND STANDARD OF REVIEW

CAI incorporates by reference the grounds for appellate review and the standard of review set forth in Appellants' Brief to this Court.

ARGUMENT

The issue of whether valid restrictive covenants which establish a common plan and scheme of development may be nullified under the Act is not settled in North Carolina's higher courts. Specifically, the North Carolina Court of Appeals has not addressed whether N.C.Gen.Stat. § 47B-3 (13) excludes from the Act's operation only a specific or singular covenant restricting certain property to residential use, or whether the exception applies to a set of protective covenants under a common scheme and plan of development which comprehensively serve to restrict certain property to residential use. It is the position of *amicus curiae* that the latter interpretation is the correct application given the purpose and intent of the Act,

reasonable principles of statutory interpretation, and the application of established North Carolina legal precedent.

I. THE TRIAL COURT ERRED IN HOLDING THAT ALL BUT ONE OF THE PROTECTIVE COVENANTS ARE NULL AND VOID WITH RESPECT TO THE SUBJECT PROPERTY.

A. The Exceptions Of N.C.Gen.Stat. § 47B-3 (13) Apply To Each of the Protective Covenants At Issue Because All Collectively Establish A Residential Use.

Appellee will contend that because the Covenants do not appear in the 30-year chain of title, the Act may be used to invalidate all such covenants not specifically restricting the Property to "residential use only." This position misconstrues the exceptions to the Act. Indeed, the Order erroneously concludes that "[b]y reason of the Marketable Title Act, all covenants and restrictions in the Restrictive Covenants are void and of no effect upon the Subject Property *other than the Residential Restriction limiting the Subject Real Property to residential use."* (R p 94) (emphasis added) This holding effectively strikes all other Covenants, including the minimum lot size and residential building requirement, as the same are purportedly not excepted from the provisions of N.C.Gen.Stat. § 47B-3 (13); however, this statute provides that certain interests *are* excepted from the Act's operation. Specifically, N.C.Gen.Stat. § 47B-3 (13) provides that the Act shall not affect or extinguish the following rights:

> Covenants applicable to a general or uniform scheme of development which restrict the property to residential use only, provided said covenants are otherwise enforceable. The excepted covenant may restrict the property to multi-family or single-family residential use or simply to residential use. Restrictive covenants other than those mentioned herein which limit the property to residential use only are

not excepted from the provisions of Chapter 47B.

The Covenants, among other things, provide for use of the Property for residential purposes only, establish architecture and setback restrictions, establish various outbuilding restrictions, provide that such Covenants shall bind successors and run with the land, and most pertinent to this appeal, establish that no residential structure may be built upon any lot containing less than 15,000 square feet. (R pp 32-34)

When examined in context with the Act, it is difficult to see how all the Covenants do not collectively "restrict the property to residential use only." Each Covenant expressly provides for certain limitations and the uses that may be applied to *each residential lot*. The fact that the first Covenant is the only individual Covenant which contains the keywords that lots are for "residential purposes" does not make the remainder of the Covenants any less "residential." In fact, a correct application of the Covenants provides that the first Covenant sets forth the residential use of the property, and each and every Covenant that follows necessarily operates in conjunction with the first and expands on/advances that residential use. Consequently, the Covenants collectively establish those restrictions which form a uniform scheme of development whereby all lots in the Beaverlake Heights Subdivision are equally and uniformly restricted to residential use.

Thus, N.C.Gen.Stat. § 47B-3 (13) provides that the Covenants are all excepted from invalidation under the Act. To hold any other way is to achieve an absurd result. The trial court's conclusion elevates the phrase "residential purposes" to the status of

magic language; but that conclusion cannot be reconciled with the intentional language of the statutory exception spelled out in the beginning subsection (13): "Covenants applicable to a general or uniform scheme of development… ." *Id.* Further, based on the specific usage of the plural term "covenants" twice in N.C.Gen.Stat. § 47B-3 (13), the plain meaning of this provision is to except the covenants as a whole adopted pursuant to a general or uniform scheme of development. *See Martin v. N.C. Dep't of Health & Human Servs.*, 194 N.C. App. 716, 719, 670 S.E.2d 629, 632 (2009) ("Where the language of a statute is clear, the courts must give the statute its plain meaning").[3] Additionally, and as is further addressed below, an alternate interpretation which would so narrowly construe the Act to except only a categorical use restriction is to disregard the Act's legislative purpose entirely.

B. The Exceptions of N.C.Gen.Stat. § 47B-3 (13) Apply to Each of the Protective Covenants At Issue Because All of the Covenants Form The Basis Of A General Or Uniform Scheme Of Development.

[3] At least one appellate opinion has referenced *in dicta* conclusions of law made by a North Carolina trial court that has noted this pluralization and held that N.C.Gen.Stat. § 47B-3 (13) was applicable and excepted the subject restrictive covenants; however, no North Carolina appellate Court has addressed this argument. *See Rice v. Coholan*, 205 N.C. App. 103, 108, 695 S.E.2d 484, 488 (2010) ("The trial court…made the following conclusions of law…In the plain language of the Marketable Title Act, the legislature pluralized the word 'restrictions.' As such, Section 13 of the Marketable Title Act is applicable, and the Marketable Title Act does not act to extinguish the Restrictive Covenants"). Although not addressing the pluralization of "covenants", in *Buysse v. Jones*, the Court of Appeals again referenced *in dicta* the lower Court's holding that a collective set of restrictive covenants were excepted under N.C.Gen.Stat. § 47B-3 (13) from invalidation under the Act; however, just as in *Rice*, the appellate Court declined to address arguments related to the validity of such restrictive covenants under the Act. 808 S.E.2d 334, 336 (N.C. Ct. App. 2017) ("The trial court's order found genuine issues of material fact exist concerning the definition of the word 'street' and an exception to the Marketable Title Act protected the restrictive covenants of Gimghoul Neighborhood. N.C. Gen. Stat. § 47B-3(13) (2015)").

The Covenants contain substantially common restrictions which among other things, restrict the use of the lots, establish setbacks, limit what may be constructed on the lots, and thus, collectively form the overall uniform scheme of development. Just as the Covenants form the basis of the general or uniform scheme of development, the Covenants also concertedly set forth the applicable residential character of the Beaverlake Heights Subdivision. Taken together, the Covenants establish the very residential use of the subdivision. Accordingly, these Covenants are the exact type that N.C.Gen.Stat. § 47B-3 (13) seeks to except.[4]

The language of subsection (13) is specific and intentional in referring to a general or uniform scheme of development, and that language has significant meaning that cannot be ignored in interpreting this exception to the applicability of the Act. To hold that only the first Covenant falls within the exception is to ignore North Carolina's established precedent which recognizes the applicability of common restrictive covenants running with the land pursuant to a general or uniform scheme of development. *See, e.g., Hawthorne v. Realty Syndicate*, 300 N.C. 660, 667, 268 S.E.2d 494, 499 (1980) ("[w]hether the growth and general development of an area represents such a substantial departure from the purposes of its original plan as equitably to warrant removal of restrictions formerly imposed is a matter to be decided in light of the specific circumstances of each case."'); *Logan v. Sprinkle*, 256

[4] *Amicus curiae's* position does present a question: under this interpretation of the Act, which covenants under a general or uniform scheme of development would *not* be excepted? The answer to this also illuminates the true intent of the Act: all residential covenants adopted under a general or uniform scheme of development would be excepted; however, covenants such as industrial, mixed-use, retail, office, and other forms of non-residential covenants, while nonetheless adopted pursuant to a general or uniform scheme of development, would all fail to qualify for protection under N.C.Gen.Stat. § 47B-3 (13) as the same are not residential in nature.

N.C. 41, 47, 123 S.E.2d 209, 213 (1961) ("Where a residential subdivision is laid out according to a general scheme or plan and all the lots sold or retained therein are subject to restrictive covenants, and the value of such development to a large extent rests upon the assurance given purchasers that they may rely upon the fact that the privacy of their homes will not be invaded by the encroachment of business, and that the essential residential nature of the property will not be destroyed, the courts will enforce the restrictions and will not permit them to be destroyed by slight departures from the original plan." (internal citations omitted)); *Dill v. Loiseau*, 263 N.C.App. 468, 823 S.E.2d 642, 645 (2019) ("It is well established that where 'an owner of a tract of land subdivides it and conveys distinct parcels to separate grantees, imposing common restrictions upon the use of each parcel pursuant to a general plan of development, the restrictions may be enforced by any grantee against any other grantee.'" quoting *Hawthorne, supra,* at 665, 268 S.E.2d at 497); *Medearis v. Trs. of Meyers Park Baptist Church*, 148 N.C. App. 1, 5-6, 558 S.E.2d 199, 203 (2001), *disc. review denied*, 355 N.C. 493, 563 S.E.2d 190 (2002) ("Restrictive covenants may be enforced by and against any grantee '[w]here the owner of a tract of land subdivides it and sells distinct parcels thereof to separate grantees, imposing restrictions on its use pursuant to a general plan of development or improvement....'" quoting *Sedberry v. Parsons*, 232 N.C. 707, 710, 62 S.E.2d 88, 90 (1950)). A statutory interpretation which would reject the firmly rooted significant property right in restrictive covenants that form the foundation of a general and uniform scheme of development

would be inconsistent with North Carolina's long established common law principles and public policy.

The trial court's holding would render entire subdivisions at risk of losing their uniform scheme of development. Indeed, in this case, contained within the first Covenant is also a single-family dwelling restriction. (R p 32) If such restriction is invalidated for not being a "residential use" restriction, as the Order provides, a party could construct an apartment building upon a Beaverlake Heights lot as long as it is declared "residential." Such a use departs completely from the established uniform scheme of development for the subdivision and renders the exception of N.C.Gen.Stat. § 47B-3(13) meaningless. By invalidating all but one of the Covenants, the trial court ignores the firmly rooted function of covenants running with the land which establish a general plan and scheme of development, and the effect of the order is to destroy this uniform plan and scheme in the Beaverlake Heights Subdivision.

II. THE TRIAL COURT'S APPLICATION OF THE ACT RUNS AFOUL OF BOTH THE PURPOSE AND THE INTENT OF THE ACT.

The Act was adopted in North Carolina in 1973 as Senate Bill 408 (SL 1973, 255). The General Assembly provided the specific declaration of policy and statement of purpose as follows:

> It is the purpose of the General Assembly of the State of North Carolina to provide that if a person claims title to real property under a chain of record title for 30 years, and no other person has filed a notice of any claim of interest in the real property during the 30-year period, then all conflicting claims based upon any title transaction prior to the 30-year period shall be extinguished.

N.C.Gen.Stat. § 47B-1. As was widely bemoaned at the time, title searches had become perilous and burdensome, and the Act was adopted in response to both local interests, and the adoption of similar legislation in other states. The Act was largely patterned after the Model Marketable Title Act, which has been adopted in one form or another in approximately 18 states. Edward S. Finley, Jr., *Property Law – North Carolina's Marketable Title Act – Will the Exceptions Swallow The Rule?* 52 N.C.L. Review REB 213 (1973). Importantly, Finley's article provides contemporaneous insight into the legislative intent behind the exception in Section 47B-3(13):

"The last exception, subsection (13), excepts equitable servitudes that restrict property to residential use. By including this exception, preservation of uniform residential sections through equitable servitudes, patterned to function like zoning ordinances, prevailed over notions favoring individual aspects of private ownership and court reluctance to honor titles encumbered by equitable servitudes." *Id.* at 220. This contemporaneous learned interpretation is remarkably prescient to the facts of the present case. Finley makes clear the legislature did not have in mind a sole use restriction as to residential use, but an exception for a comprehensive set of servitudes, functioning almost as a private zoning ordinance. Accordingly, for the trial court to sever all but the first Covenant, is to defeat a core purpose of the Covenants at issue – private zoning under a common scheme of development under which <u>all</u> property owners that are bound can rely. To allow Appellee to invalidate all but one of the Covenants is to create an inequitable escape hatch for owners unhappy

with certain restrictions running with their land, while the remainder of owners who purchased in reliance of the same remain bound.

As provided above, the purpose of the Act is simple: to provide a fixed time of 30-years to establish root of title, subject to certain exceptions. N.C.Gen.Stat. § 47B-1. The policy of the Act is to simplify title searches and clear title of remote defects, not to nullify otherwise valid restrictive covenants on the land, which form a general or uniform scheme of development. *Id.* Indeed, stated another way, the Act's clearly articulated purpose is to cut off claims of title to real property, not residential restrictive covenants. The trial court's failure to appreciate this distinction drastically expands the policy underlying the Act beyond that which was intended.

Other scholarly writings of the day noted the pitfalls and unintended consequences of using marketable title acts without a "covenants exception" to invalidate otherwise valid covenants: "The unburdening of one lot in the subdivision might cause the restrictions to become unenforceable *throughout* the subdivision, because the entire subdivision would no longer be burdened uniformly." Walter E. Barnett, *Marketable Title Acts Panacea or Pandemonium*, 53 Cornell L. Rev. 75 (1967). The scenario described above is precisely the reason the North Carolina Legislature adopted the exception listed in N.C.Gen.Stat. § 47B-3 (13). Without it, or by misconstruing it as the trial court did, owners who purchase land in reliance on uniformity and covenants applicable to a common plan and scheme of residential development have no protection from post-hoc efforts of developers seeking to change the very nature of the subdivision in which these owners live and reside.

In addition to its stated purpose above, the Act provides further guidance as to its interpretation:

> This Chapter shall be liberally construed to effect the legislative purpose of simplifying and facilitating real property title transactions by allowing persons to rely on a record chain of title of 30 years as described in G.S. 47B-2, subject only to such limitations as appear in G.S. 47B-3.

N.C.Gen.Stat. § 47B-9. The obtrusively narrow interpretation advanced by Appellee contradicts the Act's clear directive that the Act shall be liberally construed, subject to the exceptions set forth therein. *See Taylor v. J. P. Stevens & Co.*, 300 N.C. 94, 102, 265 S.E.2d 144, 148–49 (1980) ("where a strict literal interpretation of the language of a statute would contravene the manifest purpose of the legislature, the policy and goals behind the statute should control"). If the Legislature intended such a narrow interpretation of N.C.Gen.Stat. § 47B-3, it would have so provided. *N.C. Dep't of Correction v. N.C. Med. Bd.*, 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009) ("Because the actual words of the legislature are the clearest manifestation of its intent, we give every word of the statute effect, presuming that the legislature carefully chose each word used").

Covenants throughout North Carolina protect the reasonable expectations of owners subject thereto that the character and nature of communities will remain the same. This Court should recognize and guard these expectations even more vigorously when the nature of the property interest is residential in nature. The legislature certainly intended the residential nature of restrictions to elevate the law's concern for those unique property rights. The Act's stated purpose and the requirement that it be liberally construed provide that N.C.Gen.Stat. § 47B-3 (13)

cannot be as mechanically applied as Appellee suggests. The crucial distinction is between cutting off ancient claims of title, thereby simplifying title searches as intended by the Marketable Title Act and destroying restrictions on the use of land created by valid covenants running with the land. To allow Appellees to invalidate these Covenants would violate the contract between the property owners established by the recorded Covenants.[5] This was never the intent of the Act. Accordingly, to give full deference to the Act's purpose and construction, as well as to firmly established common law principles, residential use covenants excepted from the Act must include all the restrictive covenants applicable to a general or uniform scheme of development such as the Covenants at issue on appeal.

CONCLUSION

For all the foregoing reasons, CAI respectfully requests that the Court of Appeals reverse the trial court's Order Granting Plaintiff's Motion for Partial Summary Judgment.

[5] This likewise presents a constitutional issue as the Act cannot be used to impair the contract relied upon by purchasers who bought property in the Beaverlake Heights Subdivision. *See* U.S. Const. art. I § 10, cl. 1 ("No State shall…pass any…Law impairing the Obligation of Contracts…").

This the 30th day of September, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 28 (j) of the Rules of Appellate Procedure, counsel for *amicus curiae* certifies that the foregoing brief, which is prepared using 12-point proportionally spaced font with serifs, is less than 3,750 words (excluding covers, captions, indexes, tables of authorities, counsel's signature block, certificates of service, this certificate of compliance, and appendixes) as reported by the word-processing software.

BY: Electronically Submitted

H. Weldon Jones, III

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing brief on all parties by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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