NO.COA 20-450 26 JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS
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C. E. WILLIAMS, III and wife, MARGARET W. WILLIAMS, R. MICHAEL JAMES, and wife, KATHERINE H. JAMES, STRAWN CATHCART and wife, SUSAN S. CATHCART, MARK B. MAHONEY and wife, NOELLE S. MAHONEY,,	)	From Mecklenburg County No. 18-CVS-15898
Plaintiffs,	)	
v.	)	
MICHAEL REARDON and wife, KARYN REARDON,	)	
Defendants, and	)	
JEFFREY S. ALVINO and wife, KRISTINA C. ALVINO, et al.,	)	
Necessary Party Defendants.	)	

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

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INDEX

TABLE OF CASES AND AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

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

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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 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 Defendants' Motion for Summary Judgment will have significant ramifications in this State as well as others, with

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[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.

[2] These figures were first determined in a report by the North Carolina General Assembly in 2011. 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.

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 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 Appellant's 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 September 27, 1927, the E.C. Griffith Company subdivided certain land now known commonly as the Eastover Subdivision and recorded certain Protective Covenants in Book 679, Page 8 of the Mecklenburg County Registry ("Covenants"). (R p 19) The Covenants encumber Lot 4, Block 3 in Eastover, commonly referred to as 227 Cherokee Road, as depicted in Book of Maps 3, Page 317 of the Mecklenburg Registry ("Reardon Property"). (R p 18) The Covenants provide, *inter alia*, that such Covenants run with the land and bind all successors. (R p 18) Other lots within Eastover were subjected to substantially similar covenants as part

of the initial conveyances of such property within Eastover in order to effectuate E.C. Griffith Company's intent of establishing a common plan and scheme of development throughout the community. (R pp 863-1317)

On or around August 13, 2018, Appellant filed its Complaint against Defendant-Appellee Michael Reardon and wife, Karyn Reardon ("Appellee") seeking to enforce the Covenants against Appellee for violation of a setback restriction contained therein. On or around October 11, 2018, Appellee filed its Answer, Affirmative Defenses, and Counterclaim, seeking to invalidate the Covenants under Chapter 47B of the North Carolina General Statutes, the Real Property Marketable Title Act ("Act"). (R pp 29-30) On May 14, 2020, Judge Bell entered the Order Granting Defendants' Motion for Summary Judgment ("Order"). (R pp 1490-1491)

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 Appellant's 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 COVENANTS 2 THROUGH 10 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.

The Order erroneously concludes that the Reardon Property is subject to the Covenants only insofar as the Reardon Property "'shall be used for residential purposes only and not otherwise,' and that the property is not subject to any of the remaining restrictive covenants contained in this deed." (R p 1491) This holding effectively strikes Covenants 2 through 10 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 Reardon Property for residential purposes only, establish architecture and setback restrictions,

establish various outbuilding and fencing restrictions, provide for signage limitations, set forth rights-of-way, and provide that such Covenants shall bind successors and run with the land. (R p 19)

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 only" does not make the remainder of the Covenants any less "residential." In fact, a correct application of the Covenants provides that Covenant 1 sets forth the residential use of the property, and each and every Covenant that follows necessarily operates in conjunction with the first and furthers that residential use. Consequently, the Covenants collectively establish those restrictions which form a uniform scheme of development whereby all lots 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 only" 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.

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

[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)").

character of the Eastover 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.

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 Marketable Title Act. To hold that only Covenant 1 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 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*, ___ N.C.App.

___, 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, if the apartment and setback restrictions of the Covenants are invalidated for not being "residential use" restrictions, a party could construct an apartment building upon an Eastover 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 Eastover 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. Even more significantly to the case here, Finley notes: "Mecklenburg County was influential in the exception of equitable servitudes from the operation of the act since large residential areas surrounding Charlotte fall outside the city limits and beyond the jurisdiction of city zoning ordinances." *Id.*, note 63. 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 all property owners that are bound can rely. To allow Appellees 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. 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 Defendants' Motion for Summary Judgment.

This the 7th day of August, 2020.

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N.C. R. App. P. 33(b) Certification: I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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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

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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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This the 7th day of August, 2020.

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