

SUPREME COURT OF NORTH CAROLINA

EXECUTIVE OFFICE PARK)
OF DURHAM ASSOCIATION,)
INC.)

Petitioner-Appellant,)

v.)

MARTIN E. ROCK a/k/a)
MARTIN A. ROCK,)

Respondent-Appellee.)

From Durham County
No. 18 SP 1035

From N.C. Court of Appeals
COA 20-405

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

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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.

ISSUE PRESENTED

WHETHER THE COURT OF APPEALS ERRED BY CONCLUDING THAT N.C. GEN. STAT. § 47C-3-116 DID NOT APPLY AND THEREFORE DID NOT PROVIDE THE CONDOMINIUM ASSOCIATION WITH THE POWER OF SALE FORECLOSURE.

PROCEDURAL HISTORY

Community Associations Institute (“CAI”) incorporates by reference the procedural history set forth in the New Brief of Petitioner-Appellant Executive Office Park of Durham Association, Inc. (“Association”).

GROUND FOR APPELLATE REVIEW
AND STANDARD OF REVIEW

CAI incorporates by reference the grounds for appellate review and standard of review set forth in the Association’s New Brief to this Court.

STATEMENT OF THE FACTS

CAI incorporates by reference the full statement of facts set forth in the Association’s New Brief to this Court, but for ease of review, summarizes the pertinent points. The Association is a condominium association for the Executive Office Park of Durham Condominium (“Condominium”). It is an older condominium, established under the Unit Ownership Act, Chapter 47A of the North Carolina General

Statutes. Chapter 47A applies to condominiums that were created before October 1, 1986. The instrument which created the Condominium is the Declaration of Unit Ownership recorded in Book 1097, Page 308 of the Durham County Registry (“Declaration”).

In 1986, the General Assembly enacted the North Carolina Condominium Act, Chapter 47C of the North Carolina General Statutes. Chapter 47C applied in its entirety to condominiums created on or after October 1, 1986. Importantly, select provisions of Chapter 47C were also deemed to be applicable to older condominiums. One such provision was N.C. Gen. Stat. § 47C-3-116 entitled “Lien for sums due the association; enforcement.”

As more fully set forth in the Association’s New Brief, after Respondent-Appellee failed to pay assessments on condominium units he owned, the Association commenced collection procedures. The Association filed a Claim of Lien to secure payment of the assessments, and proceeded with power of sale foreclosure as provided for in § 47C-3-116. On appeal, the Court of Appeals determined that the Association was bound by the provisions of Chapter 47A and § 47C-3-116 did not apply. *Foreclosure of a Lien by Exec. Off. Park of Durham Ass'n, Inc. v.*

Rock, 2021-NCCOA-211, 277 N.C. App. 444, 861 S.E.2d 353, *review allowed, writ allowed*, 867 S.E.2d 665 (N.C. 2022) (hereinafter “Opinion”).

STATEMENT OF INTEREST

Founded in 1973, CAI 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 43,000 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 74.1 million homeowners who live in more than 355,00 community associations in the United States.

CAI estimates that 35-40% of all community associations are condominium associations. North Carolina ranks 5th in the number of community associations by state, with 14,300 associations serving

2,756,000 residents. *See* 2020-2021 U.S. National and State Statistical Review, Foundation for Community Association Research.²

Community associations are nearly universal in having governing documents that require the payment of assessments to support the functioning of the association. In a typical condominium, the association is required to maintain and repair every portion of the property and buildings located thereon, excluding the individual units themselves. That includes roofing, structural supports, foundations, building surfaces, parking areas and landscaping among many other things.

For decades, condominium associations have utilized a non-judicial power of sale process to foreclose liens for assessments. The process provides an efficient and economic path to secure the funds an association must have to carry out its duties. If allowed to stand, the Court of Appeals' decision in this matter will have significant ramifications with respect to the operation of not only "old" Chapter 47A condominium associations, but also other planned communities subject to an analogous act, the Planned Community Act set out in Chapter 47F, which governs townhome, single family detached, and other residential developments.

² 2020-2021 U.S. National and State Statistical Review, available at: https://foundation.caionline.org/wp-content/uploads/2021/07/2021StatsReview_Web.pdf.

ARGUMENT

The Court of Appeals' rationale appears to be that because the Condominium is an "old" condominium formed under Chapter 47A, the provisions of G.S. § 47C-3-116 simply do not apply. The appellate court noted that Chapter 47A contains no provision for a non-judicial power of sale foreclosure, a point which is not in dispute. Opinion at ¶20. The court then inexplicably found that G.S. § 47C-3-116 only applies to condominiums created after October 1, 1986, and that the application of the statute to the Condominium would be improper as it would invalidate existing provisions of the Declaration or Unit Ownership Act. Opinion at ¶20. The Court of Appeals misapplied the law.

I. THE APPELLATE COURT ERRED BECAUSE N.C. GEN. STAT. § 47C-3-116 IS APPLICABLE TO THIS MATTER.

The fact that the Condominium was established pursuant to the Unit Ownership Act, Chapter 47A of the North Carolina General Statutes, is of no consequence. Our legislature, when enacting Chapter 47C, understood that certain provisions of the statute should be applicable to *all* condominiums absent some express intention to the contrary. That would necessarily include those formed under Chapter 47A, as "[c]ondominiums are a creature of statute." *See* 15B Am. Jur. 2d

Condominiums, Etc. § 3 (explaining that all condominiums are statutorily created). Every condominium before the enactment of the North Carolina Condominium Act would have been established pursuant to Chapter 47A.

The applicability of the Condominium Act is outlined in N.C. Gen. Stat. § 47C-1-102. Several provisions, including § 47C-3-116 which is at issue here, were deemed to “apply to all condominiums created in this State on or before October 1, 1986, unless the declaration expressly provides to the contrary.” N.C. Gen. Stat. § 47C-1-102(a) (2021). The Declaration does not expressly provide to the contrary, and the Court of Appeals did not claim that it did. Per the Official Comment to the statute, “the enumerated provisions automatically apply to condominiums created under pre-existing law, even though no action is taken by the unit owners.” N.C. Gen. Stat. § 47C-1-102 cmt. 4 (2021).

The statute continues: “Those sections apply only with respect to events and circumstances occurring after October 1, 1986, and do not invalidate existing provisions of the declarations, bylaws, or plats and plans of those condominiums.” N.C. Gen. Stat. § 47C-1-102(a) (2021). Though not entirely clear, the Court of Appeals seems to argue that that

the Condominium did not have the lien authority granted by § 47C-3-116 because application of the statute would invalidate existing provisions of the Declaration and/or the Unit Ownership Act. Opinion at ¶20.

The Declaration authorized a lien for unpaid assessments when filed in the “Office of the Clerk of Superior Court of Durham County in the manner provided for by Article 8 of Chapter 44 of the General Statutes of North Carolina as amended.” Opinion at ¶ 4. Similarly, § 47A-22 of the Unit Ownership Act authorized a lien for unpaid common expenses to be foreclosed pursuant to Article 8 of Chapter 44 of the North Carolina General Statutes. N.C. Gen. Stat. § 47A-22 (2021). Article 8 of Chapter 44 of the North Carolina General Statutes is a largely repealed body of law. The only two remaining provisions simply allow a lien to be filed in the office of the clerk of superior court and outline how a lien can be discharged. *See* N.C. Gen. Stat. § 44-38 and § 44-48. There is essentially nothing to invalidate by applying § 47C-3-116. Instead, § 47C-3-116 provides a procedure for the prompt, efficient and orderly collection of assessments that is not addressed by the former statute.

II. THE APPELLATE DECISION UNDERMINES THE LEGISLATIVE INTENT BEHIND RETROACTIVE APPLICATION OF NOT ONLY PORTIONS OF THE CONDOMINIUM ACT, BUT ALSO THE PLANNED COMMUNITY ACT.

The fact that certain provisions of Chapter 47C were made applicable to all condominiums was obviously intentional, and this Court must “presume that the legislature acted with care and deliberation.” *See Bowers v. City of High Point*, 339 N.C. 413, 419–20, 451 S.E.2d 284, 289 (1994). “[I]t will never be assumed, if any other conclusion is permissible, that [the legislature] has done a vain and foolish thing.” *People's Bank v. Loven*, 172 N.C. 666, 90 S.E. 948, 950 (1916). Further, the presumption is that “statutes are enacted by legislative bodies with care and deliberation, and with knowledge of former related statutes.” *State v. Lance*, 244 N.C. 455, 457, 94 S.E.2d 335, 337 (1956).

The legislature chose to include § 47C-3-116 as a provision that would be retroactive to older condominiums. There was purpose in that decision, and the decision by the Court of Appeals undermines that purpose. Indeed, per the North Carolina Comment to the Condominium Act, “the need for revision of the previous ‘first generation’ North Carolina statute was evident because that statute did not reflect the

actual day to day experience of those who have contact with the condominium form of ownership." N.C. Gen. Stat. Chapter 47C, N.C. Comment (2021).

The Condominium Act, Chapter 47C, was modeled on the Uniform Condominium Act of 1980. Per official comment attached to the statute, uniformity was also a factor in making certain provisions applicable to all condominiums regardless of age:

[I]t is desirable, for reasons of uniformity, for the Act to apply to all condominiums located in a particular state, regardless of whether the condominium was created before or after adoption of the Act in that state. To the extent that different laws apply within the same state to different condominiums, confusion results in the minds of both lenders and consumers. Moreover, because of the inadequacies and uncertainties of condominiums created under old law, and because of the requirements placed on declarants and unit owners' associations by this Act which might increase the costs of new condominiums, different markets might tend to develop for condominiums created before and after adoption of the Act.

N.C. Gen. Stat. § 1-102 cmt. 1 (2021). With respect to the retroactive provisions, commenters noted: "Many of the sections which do apply should measurably increase the ability of the unit owners to effectively manage the association, and should help to encourage the marketability of condominiums created under early condominium statutes." N.C. Gen. Stat. § 1-102 cmt. 4 (2021).

If the Opinion stands, there are different laws that would apply to “old” and “new” condominiums, but the impact is not limited to condominiums. The Planned Community Act, Chapter 47F of the North Carolina General Statutes, applies in its entirety to planned communities³ created after January 1, 1999, but contains similar applicability language as to pre-1999 communities as that found in § 47C-1-102. *See* § 47F-1-102 (2021). The Opinion would call into question application of any statutory provision declared to be applicable to condominiums and planned communities, regardless of age, many of which affect the day-to-day operations of the some 14,000 plus associations in this state. The legislature was trying to level the playing field and enact provisions to assist in association management. The Court of Appeals has subverted that goal.

III. THE APPELLATE DECISION HARMS PROPERTY OWNERS AND REMOVES PROTECTIONS PROVIDED UNDER N.C. GEN. STAT. § 47C-3-116.

Condominium associations are dependent upon collection of assessments from owners to pay for common expenses. Common

³ The Planned Community Act sets forth the statutory framework for non-condominium residential communities such as townhomes and single family detached homes.

expenses range from costs of maintenance and repair of the condominium (e.g., roofs, structural components, siding, parking areas), to landscaping and insurance coverage, to payment of professional fees for accountants, attorneys, and management staff. Unit owners pay collectively to support the operation of the condominium. There is no source of income for these associations except through the assessment stream. Accordingly, any increase in common expenses necessarily involves an increase in the assessments that each owner pays.

If the Court of Appeals is correct, and “old” condominiums do not have power of sale foreclosure, the options for collection are judicial foreclosure of a lien or a legal suit for monetary damages. Both of those options require a lengthy judicial process and greatly increase legal fees for the association which, in turn, impacts innocent owners financially. Interestingly, the delinquent owner is also adversely impacted financially. Under § 47C-3-116, there is a cap of \$1200 on attorneys’ fees for non-contested foreclosure proceedings. There is no such cap with a judicial foreclosure or direct suit.

Section 47C-3-116 does not invalidate any provision of the Unit Ownership Act. It simply provides a process for non-judicial foreclosure

where no such process previously existed. It protects the association and innocent owners by providing an efficient and reliable method of collection. It aids delinquent property owners by providing a defined framework for the collection of assessments that incorporates consumer protections via required notices and language on liens to warn consumers about the potential for foreclosure, specific service requirements, and the appointment of a trustee who has a fiduciary obligation to the defaulting owner and association lien holder. *See generally*, N.C. Gen. Stat. § 47C-3-116 (2021). The application of § 47C-3-116 is paramount to protect associations and owners and to provide an enforceable process under which all parties understand their obligations.

CONCLUSION

For decades, condominiums in this State have exercised a power of sale foreclosure pursuant to Section 3-116 of the Condominium Act. That power has been exercised in older condominiums based on the retroactive application of the provision, as set forth by the General Assembly. That retroactive application has been upheld in numerous contexts, as discussed in detail by the Association in its New Brief. For the reasons

set forth here, and in the Association's New Brief, CAI requests that this Court reverse the Opinion of the Court of Appeals.

This the 18th day of April 2022.

SELLERS, AYERS, DORTCH & LYONS, PA

By: /s/ Cynthia A. Jones
Cynthia A. Jones
N.C. State Bar No. 32755
cjones@sellersayers.com
310 S. McDowell Street, Suite 410
Charlotte, North Carolina 28204
Phone: 704-377-5050

*Counsel for Amicus Curiae
Community Associations Institute*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served the foregoing on the parties to this action electronically via electronic mail and the court's electronic filing system, and by depositing a copy of the same in the United States Mail, First Class postage prepaid, in envelope(s) addressed as follows:


Mark L. Hayes
P.O. Box 51387
Durham, NC 27717
markhayes@appealnc.com

Counsel for Respondent-Appellee

J. Matthew Waters
P.O. Box 10669
Raleigh, NC 27605
mwaters@jordanprice.com

Counsel for Petitioner-Appellant

This 18th day of April 2022



Cynthia A. Jones