NO.228A21 26 JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
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C INVESTMENTS 2, LLC, Plaintiff, v. ARLENE P. AUGER, HERBERT W. AUGER, ERIC E. CRAIG, GINA D. CRAIG, LAURA K. DUPUY, STEPHEN J. EZZO, JANICE HUFF EZZO, ANNE CARR GILMAN WOOD, as the Trustee of the FRANCIS DAVIDSON GILMAN, III TRUST f/b/o PETS U/W dated June 29, 2007, LAUREN HEANEY, BRIDGET HOLDINGS, LLC, GINNER HUDSON, JACK HUDSON, CHAD JULKA, SABRINA JULKA, ARTHUR MAKI, RUTH MAKI, JENNIE RAUBACHER and MATTHEW RAUBACHER, as Co-Trustees of the Raubacher/Cheung Family Trust dated November 11, 2008, LAWRENCE TILLMAN, LINDA TILLMAN, ASHFAQ URAIZEE, and JABEEN URAIZEE, JEFFREY STEGALL and VALERIE STEGALL, Defendants.	)	From Mecklenburg County COA 19-976

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

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

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ISSUE PRESENTED

WHETHER THE COURT OF APPEALS ERRED BY CONCLUDING THAT THE EXCEPTION IN N.C. GEN. STAT. § 47B-3(13) OF THE MARKETABLE TITLE ACT (I.E. FOR "COVENANTS APPLICABLE TO A GENERAL OR UNIFORM SCHEME OF DEVELOPMENT WHICH RESTRICT THE PROPERTY TO RESIDENTIAL USE ONLY") DID NOT SAVE FROM NULLIFICATION UNDER THE ACT EIGHT (8) OUT OF THE NINE (9) PROTECTIVE COVENANTS FOR COUNTRY COLONY, EVEN THOUGH THE COURT OF APPEALS CONCLUDED THAT ALL THE RESTRICTIONS WERE PART OF A GENERAL OR UNIFORM SCHEME OF DEVELOPMENT.

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 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 355,000 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

[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.

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 Court of Appeals' decision in this matter will have significant ramifications in this State as well as others, with respect to the application of Marketable Title Acts to restrictive covenants. The Court's interpretation of the North Carolina Real Property Marketable Title Act ("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 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 Appellants' Brief to this Court.

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.

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[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.

ARGUMENT

The Supreme Court of North Carolina 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 general or uniform scheme 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 reasonable principles of statutory interpretation, the application of established North Carolina legal precedent, and the purpose and intent of the Act.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT ALL BUT ONE OF THE PROTECTIVE COVENANTS ARE EXTINGUISHED.

The Court of Appeals held in *C Investments 2, LLC v. Auger*, that N.C. Gen. Stat. § 47B-3(13) excludes from the Act's operation only a singular covenant restricting property to residential use, and that other residential covenants not specifically restricting property to residential use are not excepted and can thus be extinguished if not appearing in a property's 30-year record chain of title. 277 N.C. App. 420, 860 S.E.2d. 295 (2021), *disc. rev. granted,* __ N.C. __, __ S.E.2d __ (2022). In so holding, the Court of Appeals relied exclusively on the plain meaning of the language in the Act. While the majority posits that Appellants seek to "rewrite statutes to ensure they achieve what we believe is the legislative intent", this is not the case. *Id.* 277 N.C. App at 422, 860 S.E.2d. at 298. Rather, *Amicus* CAI contends that notwithstanding the purpose and intent of the Act (addressed below), this Court may still hold that the collective set of covenants at issue survive under a proper

interpretation of the Act.

A. The Court Of Appeals Neglected To Address The Meaning Of The Specific Statutory Reference To "General Or Uniform Scheme Of Development" As Part Of Its Analysis Of N.C. Gen. Stat. § 47B-3(13).

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.

In interpreting the above, the majority ignores the language, *applicable to a general or uniform scheme of development.* In fact, the majority removed this phrase altogether as part of its grammatical analysis of the statute:

> We thus reject Defendants' proposed interpretation and hold that this exception in N.C. Gen. Stat. § 47B-3(13) applies only to 'covenants…which restrict the property to residential use only' and not to other covenants that are part of a general or uniform scheme of development and merely accompany a covenant restricting the property to residential use only.

C Inv. 2 v. Auger, 277 N.C. App. at 426, 860 S.E.2d. at 300 (emphasis added). Accordingly, the Opinion effectively ignores the operative phrase, *applicable to a general or uniform scheme of development*, and instead surgically removes the same from consideration altogether. While attempting to analyze the subject modified by the phrase, "which restrict," the Court judicially redlines the statute and fails to recognize that the phrase, "applicable to a general or uniform scheme of development" has specific and significant meaning.

The covenants at issue collectively establish those restrictions which form a uniform scheme of development whereby all lots in the Country Colony Subdivision are equally and uniformly restricted to residential use. Covenants 2-9 which do not explicitly provide for residential use restrictions, do not, as the Court suggests, "merely accompany" the first covenant which restricts property to residential use only. *Id.* This interpretation minimizes the foundational purpose of a collective set of covenants – to establish the *general or uniform scheme of development* in the first place. There can be no general or uniform scheme of development if the remaining covenants are not given deference.

The covenants at issue 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 Country Colony Subdivision. Taken together, the covenants establish the very residential use of the subdivision. Accordingly, the covenants at issue 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 Act. *See e.g. First Mount Vernon Indus. Loan Ass'n v. ProDev XXII, LLC*, 209 N.C. App. 126, 133, 703 S.E.2d 836, 841 (2011) ("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.") (quoting *N.C. Dep't of Corr. v. N.C. Med. Bd.,* 363 N.C. 189, 201, 675 S.E.2d 641, 649 (2009)).

To hold that only the first covenant at issue 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., 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)); *see also 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). 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 (or fail to recognize it altogether) would be inconsistent with North Carolina's long-established common law principles and public policy.

The Court distinguishes and attempts to distance "covenants" from the phrase, "applicable to a general or uniform scheme of development"; however, this harshly strict interpretation renders the latter phrase as mere surplusage, without meaning, and that conclusion cannot be reconciled with the intentional inclusion of the phrase in the Act. *See State v. Morgan*, 372 N.C. 609, 614, 831 S.E.2d 254, 258 (2019) ("a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.") (citation omitted).

As such, the Court's emphasis on subject/verb agreement as part of its interpretation of the plain meaning of the Act ironically ignores the plain meaning of the phrase, "applicable to a general or uniform scheme of development*"* altogether. Had the legislature intended to exclusively except a singular covenant restricting property to residential use only, it would have so provided, and it would have omitted from the exception the phrase, applicable to a "general or uniform scheme of development."

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 <u>covenants as a whole</u> adopted pursuant to a general or uniform scheme of development.[3]

[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)

As part of its analysis of the Act, the Court of Appeals ignores the firmly rooted function of covenants running with the land which establish a general or uniform scheme of development, and the Court's failure to recognize this phrase serves to destroy the uniform plan and scheme in the Country Colony Subdivision.

B. The Court Of Appeals Misinterpreted N.C. Gen. Stat. § 47B-3(13) Regarding The Type Of Non-residential Covenants That Are Not Excepted From The Act.

As part of the Court's dissection of N.C. Gen. Stat. § 47B-3(13), regarding the second sentence of the statute, the majority provides,

> By stating that the excepted covenant 'may restrict the property to multi-family or single-family residential use or simply to residential use,' the statute indicates that it applies solely to these specific covenants, not to other, related ones that might accompany these specific covenants as part of a uniform scheme of development. Defendants' proposed interpretation would render the second sentence superfluous by broadening the exception for residential use to include many other forms of covenants.

C Inv. 2 v. Auger, 277 N.C. App. at 427, 860 S.E.2d at 300 (emphasis added). Again, the majority's approach confuses the plain meaning of this provision. By providing that the excepted covenant "may restrict the property to multi-family or single-family residential use or simply to residential use," N.C. Gen. Stat. § 47B-3(13) simply

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("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)").

affirms that covenants applicable to non-residential planned communities are not excepted; i.e. commercial or business use covenants. Plainly read, this provision cannot be interpreted to mean that only one specific residential use covenant can survive. Such an interpretation ignores reference in the first sentence of N.C. Gen. Stat. § 47B-3(13) to "covenants applicable to a general or uniform scheme of development." Rather, properly construed, this provision recognizes the existence of covenants that are fundamentally not residential in nature. 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.

This interpretation is crystalized by the final sentence of N.C. Gen. Stat. § 47B-3(13): "Restrictive covenants other than those mentioned herein which limit the property to residential use only are not excepted from the provisions of Chapter 47B." (emphasis added). Plainly read, this provision recognizes that commercial, business, and otherwise non-residential covenants do not qualify for exception under N.C. Gen. Stat. § 47B-3(13). It does not, as the Court suggests, allow Appellee to invalidate all but one of the residential covenants at issue.[4]

[4] This interpretation is consistent with applicable North Carolina law. Both the North Carolina Planned Community Act and Condominium Act recognize the distinction between lots/units restricted to "nonresidential" purposes: "This Chapter does not apply to a planned community…[i]n which all lots are restricted exclusively to nonresidential purposes." N.C. Gen. Stat. § 47F-1-102(b)(2); "This Article applies to all units subject to this chapter, except…as modified or waived by agreement of purchasers of units in a condominium in which all units are restricted to nonresidential use." N.C. Gen. Stat. § 47C-4-101(a).

Accordingly, this provision is hardly "superfluous" as the Court suggests, and the majority fails to recognize that these are the types of non-residential covenants that are not excepted instead of those otherwise valid residential covenants forming a general or uniform scheme of development.

II. THE COURT OF APPEALS' APPLICATION OF THE ACT RUNS AFOUL OF THE PURPOSE AND THE INTENT OF THE ACT AND CREATES AN ABSURD RESULT.

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 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 Court of Appeals'

failure to appreciate this distinction drastically expands the policy underlying the Act beyond that which was intended.[5]

The practical effect of the Court of Appeals' decision will create an absurd result. This Court should endeavor to pierce beyond the obtrusively narrow interpretation adopted by the Court of Appeals and recognize the unintended and sweeping effect such a holding will have. *See State v. Barksdale*, 181 N.C. 621, 107 S.E. 505, 507 (1921) ("where a literal interpretation of the language of a statute will lead to absurd results, or contravene the manifest purpose of the Legislature, as otherwise expressed, the reason and purpose of the law shall control and the strict letter thereof shall be disregarded.").

Although the issue on appeal relates to a neighborhood subjected to protective covenants, and not to a declaration for a planned community, as is commonly recognized today, the Court's interpretation of the Act leads to a result that is indisputably unintended by the Act and in deviation of the Act's stated purpose. The Act was adopted in 1973 in an age when planned communities were in their infancy. The planned community model of development now constitutes the vast majority of residential communities currently being constructed throughout North Carolina. Planned communities are governed by an incorporated association of property owners and made subject to a declaration of covenants. These declarations contain covenants related to, among other things, the obligation for owners to pay assessments; the lien

[5] An alternate reading of the Act will not complicate title searches or create burden on the title insurance industry. Title searchers must already identify residential use restrictions pursuant to N.C. Gen. Stat. § 47B-3(13). Invalidating all covenants save for a specific residential use restriction does not advance the Act's purpose of simplifying title searches.

rights of the association; the property held and owned by the association and the association's maintenance responsibilities therefor; and the use restrictions and architectural control provisions applicable to the development. Owners purposefully purchase property in these communities based on these declarations and the assurance that such covenants stabilize property values.

If allowed to stand, the Court of Appeals' holding places communities at risk of having entire declarations invalidated save for a singular residential use restriction. Consequently, communities will be stripped of the ability to collect assessments or maintain common area and the general scheme of development will be nullified. Owners who purchased in reliance of the existence of such covenants will be without remedy and denied of such property rights historically recognized and upheld by North Carolina courts. *See Logan v. Sprinkle*, 256 N.C. 41, 47, 123 S.E.2d 209, 213 (1961).

Older planned communities are especially at risk where conveyances were made without specific reference to declarations in the title and property documents, or more concerningly, in communities where a single owner may have held title to property for a period beyond the Act's 30-year chain of title period. Owners successful in invalidating covenants under Act will create a patchwork of "donut holes" throughout subdivisions, whereby a declaration will apply to one property within a planned community, yet not another. This will deprive owners' associations of voting members required to pay assessments, all while such owners avail themselves of private roadways and other amenities funded by assessments paid by owners

remaining bound by the declaration. In extreme situations, the associations themselves could eventually be without the necessary means to operate entirely. These scenarios present absurd results that must be avoided.

At the time the Act was adopted, planned communities, as the term is now recognized and understood, once represented a fraction of the single-family development in North Carolina. It would be absurd to hold that the Act may now be used to invalidate entire declarations forming the basis of this form of residential development that was seldom used at the time the Act became law.

For all these reasons, the Court of Appeals' overly rigid interpretation of the Act will result in an upending of the planned community model of development if not reversed, a result which the Act never countenanced. Accordingly, to give full deference to the Act's purpose and construction, as well as to avoid absurd results, 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 this Court reverse the decision of the Court of Appeals affirming the trial court's Order Granting Plaintiff's Motion for Partial Summary Judgment.

This the 12th day of April, 2022.

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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 the foregoing Brief was filed electronically with the North Carolina Supreme Court pursuant to Rule 26(a)(2) of the North Carolina Rules of Appellate Procedure, and has been served this day upon counsel's correct and current e-mail address(es) pursuant to Rule 26 (c) as follows:

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