IN THE SUPREME COURT

STATE OF GEORGIA

DEERLAKE HOMEOWNERS ASSOCIATION, INC.,	)	
Petitioner/Appellant,	)	SUPREME COURT CASE NO.: S22C0433
v.	)	
CRAIG BROWN	)	COURT OF APPEALS CASE NO.: A21A1090
Respondent/Appellee.	)	

AMICUS CURIAE BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

/s/ Jason LoMonaco
Jason LoMonaco
Georgia Bar No. 141836

/s/ George E. Nowack
George E. Nowack, Jr
Georgia Bar No.547360

/s/ Julie M. Howard
Julie M. Howard
Georgia Bar No. 492310

NOWACK HOWARD, LLC.
Attorneys for *Amicus Curiae*
Community Associations Institute
One Alliance Center, Suite 1650
3500 Lenox Road, N.E.
Atlanta, Georgia 30326
(770) 863-8900
jason@nowackhoward.com

I. INTRODUCTION

Community Associations Institute (hereinafter "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 355,000 community associations in the United States. https://foundation.caionline.org/publications/factbook/statistical-review/

CAI respectfully submits this brief as an *Amicus Curiae* pursuant to Georgia Supreme Court Rule 23. CAI submits this brief to encourage this Court to grant the pending Petition for Certiorari filed by Petitioner Deerlake Homeowners Association, Inc. CAI files this *Amicus Curiae* Brief to highlight for the Court's consideration the conflict in binding precedent created by the decision of the Court of Appeals and the unintended consequence it will have by forcing confrontations between owners and their homeowners associations that can easily devolve into physical altercations.

"The function of an amicus curiae 'is to call the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration.... He has no control over the litigation and no right to institute any proceedings therein, he must accept the case before the court with the issues made by the parties.' 4 Am. Jur. 2d 110, 111, Amicus Curiae, § 3." Village of North Atlanta v. Cook, 219 Ga. 316, 322(3), 133 S.E.2d 585 (1963).

In this decision, the Court of Appeals holds that a homeowners association is not entitled to an injunction to abate a violation if its declaration of covenants also allows it to perform self-help and bill any associated costs to the violating owner. The Court of Appeals has now held that the alternative remedy to exercise self-help and bill the costs to the violator is an "adequate remedy at law" and, therefore, that the violation cannot be "irreparable harm." The Court of Appeals, in eliminating injunctive relief as a remedy, leaves homeowner associations with self-help as the only option to abate a covenant violation. This single abatement remedy, self-help, will require board members or their agents to enter a neighbor's property and remove the violation. Confrontation is inevitable. If self-help is the only option to abate violations, avoiding the risk of personal injury will outweigh enforcement. That will result in another unanticipated consequence. Even fewer homeowners will volunteer to serve on their community's board of directors.

This case is "of great concern, gravity, or importance to the public" within the meaning of Supreme Court Rule 40 because: 1) the decision of the Court of Appeals is in direct conflict with prior binding precedent of that Court concerning the issue of "irreparable harm" in covenant violation cases; 2) as diligently pointed out by Petitioner, the decision will lead to confrontations and potentially physical altercations with property owners when associations are forced to exercise the purported "adequate remedy" of "self-help" abatement and 3) as a result of these confrontations, homeowners will only be discouraged from volunteering for their community's board of directors.

For example, the day after the Court of Appeals issued its opinion in this case, a homeowner in Texas reacted with violence so extreme to make national news when his local municipality attempted to mow his lawn in order to abate persistent code violations. The homeowner shot at the contractors mowing his lawn and ended up in a five-hour police standoff, after which he was ultimately killed. See,

https://www.washingtonpost.com/nation/2021/10/29/overgrown-lawn-police-shooting/

While such extreme violence will probably never become the normal response it is only reasonable to presume that physical altercations will become increasingly commonplace if homeowners associations are required to resort to self-help to abate property maintenance and similar violations. This unintended consequence of the decision of the Court of Appeals is of great concern to CAI, its members, and

affiliates, and, particularly, to the citizens of Georgia who live in homeowners associations. For these and the other reasons set forth herein, CAI respectfully requests that this Court grant a writ of certiorari.

II. THE DECISION DIRECTLY CONFLICTS WITH BINDING PRECEDENT OF THE COURT OF APPEALS

In its October 26, 2021 decision in this case, the Court of Appeals made the following ruling that is in direct conflict with established Court of Appeals precedent. The Court ruled as follows:

> Here, the trial court did not err in finding that the Association was not entitled to injunctive relief. Accepting the allegations of the complaint as true, the Declaration allowed the Association to abate or remove a violation and to assess "all costs, including reasonable attorney's fees actually incurred[ ]" in exercising such self-help against the violating lot owner. The fact that this contractual language was permissive is irrelevant to the determination of whether it constituted an adequate remedy at law. In light of this option, the Association did not show that it would suffer irreparable harm if the trial court did not order Brown to remedy the maintenance violations. Deerlake Homeowners Ass'n, Inc. v. Brown, 864 S.E.2d 202, 205 (Ga. Ct. App. 2021), reconsideration denied (Nov. 12, 2021)

This holding, that covenant violation is not irreparable harm, and that self-help is an adequate remedy at law, is in direct conflict with established binding precedent of the Court of Appeals and this Court.

In Smith v. Pindar Real Estate Co., 187 Ga. 229, 200 S.E. 131 (1938), this Court held that a plaintiff seeking to enjoin a violation of a covenant running with

the land does not have to show "irreparable harm" and is entitled to injunctive relief even when damages are recoverable at law. This Court stated:

> To warrant relief by injunction in the case of a covenant restricting erections upon the premises conveyed, it is not essential that the plaintiff should show any actual damage resulting from the breach of covenant of which he complains; and if a clear breach be shown, equity may interpose its preventive aid **regardless of the question of damages**, since the covenantee is entitled to the benefit of his covenant.' 2 High on Injunctions (4th ed.), 1142, § 1158. As aptly stated in *Star Brewery Co. v. Primas*, 163 Ga. 652, 45 N.E. 145, 147: 'Equity will interpose by injunction to prevent the breach of negative covenants annexed to leases or deeds. The prohibition of their breach is indirectly an enforcement of their specific performance. Equity will interfere by injunction to prevent the breach of an express, negative covenant, **even though no substantial injury is caused by such breach**. It will also so interfere **even though the damages, if any, may be recoverable at law**. The reason is that the owner of land, selling or leasing it, may insist upon just such covenants as he pleases, touching the use and mode of enjoyment of the land. He has a right to define the injury for himself, and the party contracting with him must abide by the definition.' [emphasis supplied] Id at 235.

Relying on Smith, in Focus Entertainment Int'l, Inc. v. Partridge Greene, Inc., 253 Ga. App. 121, 558 S.E.2d 440 (2001) (physical precedent only), the Court of Appeals held that the mere violation of a covenant running with the land results in irreparable harm as a matter of law without any showing by the party enforcing the covenant. The Court of Appeals stated:

> Thus, the violation of a restrictive covenant that is part of the development scheme affects the grantor and all other grantees, causing irreparable harm to the value of their respective property interests, because such restrictive covenant was part of the valuable contract consideration given and relied upon in the conveyance of land. Id. **Thus, irreparable harm automatically occurs as a matter of law**

> **arising from a violation of a covenant running with the land**, the relationship of the parties as grantor-grantee, and the consideration of the conveyance of less than a fee simple absolute for the burden imposed upon the land in the form of a restrictive covenant to protect the grantor and others who may wish to purchase the remaining land in the future. *Smith v. Pindar Real Estate Co.*, 187 Ga. 229, 235(1), 200 S.E. 131 (1938) (restrictive covenant violation does not require proof of damages for enforcement). **Thus, no special showing of irreparable harm is necessary other than the violation of a valid restrictive covenant** [emphasis supplied] Id. at 127-28.

In Westpark Walk Owners, LLC v. Stewart Holdings, LLC, 288 Ga. App. 633, 655 S.E.2d 254 (2007), the Court of Appeals solidified the holding of Focus Entertainment as *binding precedent* when it held:

> Where an interest in land is threatened, "**such harm is deemed irreparable to the unique character of the property interest, i.e., money damages are not adequate compensation to protect the interest harmed**." (Citations omitted.) *Focus Entertainment Intl. v. Partridge Greene, Inc.*, 253 Ga.App. 121, 127(4)(a), 558 S.E.2d 440 (2001) (physical precedent only). See also *Smith v. Pindar Real Estate Co.*, 187 Ga. 229, 235(1), 200 S.E. 131 (1938) (injunctive relief may be appropriate for violation of restrictive covenant even where no substantial injury is caused by the breach or "even though the damages, if any, may be recoverable at law") (citation and punctuation omitted). Accordingly, the trial court erred in denying injunctive relief on the grounds that Westpark failed to prove irreparable injury or that it had an adequate remedy at law. . . . But **even though irreparable harm may be assumed** in a case involving the breach of a real estate covenant, the mere allegation of such a breach does not entitle the movant to an injunction [emphasis supplied] Id. at 635.[1]

[1] The Court of Appeals went on to rule that an injunction was not merited in that instance because no violation had been proven.

Although Focus Entertainment was physical precedent only pursuant to the Rules of the Court of Appeals in effect at the time,[2] its central holding, that irreparable harm occurs as a matter of law when a covenant restricting land is violated, was specifically upheld and reiterated ***as binding precedent*** in Westpark.

Focus Entertainment and Westpark do not just stand for the well-established general principle that proving irreparable harm is not always required at the *interlocutory* injunction stage of a proceeding. Both cases also clearly espouse the specific binding precedent that, when a covenant running with the land is violated, irreparable harm occurs as a matter of law and the party seeking to enjoin (interlocutory and permanent) the violation is never required to show irreparable harm. This principle is crystal clear from both cases as quoted above. Accordingly, it is established binding precedent of the Court of Appeals in cases involving violations of covenants running with the land that "a trial court errs in denying injunctive relief on the grounds that the party failed to prove irreparable injury or

[2] See Section 33.2(a) of the Rules of the Georgia Court of Appeals: "(1) Effective August 1, 2020: If an appeal is decided by a division of this Court or by the Court sitting en banc, a published opinion in which a majority of the judges fully concur in the rationale and judgment of the decision is binding precedent. (2) Prior to August 1, 2020: If an appeal was decided by a division of this Court, a published opinion in which all three panel judges fully concur is binding precedent. An opinion is physical precedent only (citable as persuasive, but not binding, authority), however, with respect to any portion of the published opinion in which any of the panel judges concur in the judgment only, concur specially without a statement of agreement with all that is said in the majority opinion, or dissent.

that it had an adequate remedy at law." 7 Ga. Proc. Special Remedies and Proceedings § 2:29 [Citing to Westpark, supra].

In the present case, contrary to its established binding precedent, the Court of Appeals ruled that Petitioner Deerlake was not entitled to an injunction abating Respondent's violations of the covenants at issue because it purportedly has an adequate remedy at law in the form of self-help, the costs of which it can charge to Respondent. This holding directly contradicts the central holdings in Focus Entertainment and Westpark, thus creating a conflict in the controlling case law of the Court of Appeals on this issue. This patent conflict in the binding precedent of the Court of Appeals will only lead to uncertainty and inconsistent trial court decisions in covenant violation injunction cases throughout Georgia. Such a conflict in Court of Appeals precedent can only be resolved by this Court. Therefore, the undersigned respectfully submits that this case clearly satisfies the requirements of Supreme Court Rule 40 and that a writ of certiorari should be granted.

Furthermore, this decision of the Court of Appeals is inconsistent with the clear terms of the Georgia Property Owners' Association Act (the "Act") which expressly includes injunctive relief as a remedy to enforce covenant violations. O.C.G.A. §44-3-223 states in relevant part as follows:

> Every lot owner and all those entitled to occupy a lot shall comply with all lawful provisions of the property owners' association instrument. . . Any lack of such compliance **shall be grounds** for an action to recover sums due, for damages or **injunctive relief, or for any other remedy**

> **available at law or in equity**, maintainable by the association . . . If and to the extent provided in the instrument, the association shall be empowered to impose and assess fines and suspend temporarily voting rights and the right of use of certain of the common areas and services paid for as a common expense in order to enforce such compliance. . .

The Act expressly provides for injunctive relief as a remedy for violations of a restrictive covenant without qualification and in addition to other available remedies at law or in equity. Notably, unlike fines and suspending voting and use privileges, the Act does not state that a covenant (i.e., the "instrument") must provide for injunctive relief before it can be pursued as a remedy. Under the Act, the remedy of injunctive relief is plenary and not dependent on whether the enforcing party has suffered irreparable harm or has an adequate remedy at law.

III. CONCLUSION

Because the decision of the Court of Appeals is in direct conflict with both prior binding precedent and the Georgia Property Owners' Association Act, because the decision will inevitably lead to confrontations and potentially physical altercations, and because that will discourage homeowners from serving on their association's board of directors, CAI and the undersigned respectfully requests that a writ certiorari be granted.

This 10th day of December 2021.

/s/ Jason LoMonaco
Jason LoMonaco
Georgia Bar No. 141836

NOWACK HOWARD, LLC.
Attorneys for *Amicus Curiae*
Community Associations Institute
One Alliance Center, Suite 1650
3500 Lenox Road, N.E.
Atlanta, Georgia 30326
(770) 863-8900
jason@nowackhoward.com

IN THE SUPREME COURT
STATE OF GEORGIA

DEERLAKE HOMEOWNERS ASSOCIATION, INC.,	)	
Petitioner/Appellant,	)	SUPREME COURT CASE NO.: S22C0433
v.	)	
CRAIG BROWN	)	COURT OF APPEALS CASE NO.: A21A1090
Respondent/Appellee.	)	

CERTIFICATE OF SERVICE

COMES NOW the undersigned, who hereby certifies in accordance with Supreme Court Rule 14, a true and accurate copy of the within and foregoing **AMICUS CURIAE BRIEF OF COMMUNITY ASSOCIATIONS INSTITUTE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI** has been previously served upon the opposing party by depositing (or causing to be deposited) same in the United States Mail, First Class, with sufficient postage affixed to assure delivery, addressed to:

Craig Brown
3651 Peachtree Parkway, Ste E-415
Suwanee, Georgia 30024

Joanna Eljazzar
LAZEGA & JOHANSON LLC
P.O. Box 250800
Atlanta, Georgia 30305

This 10th day of December 2021.

/s/ Jason LoMonaco
Jason LoMonaco
Georgia Bar No. 141836