No. 214A21 TENTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA
****

BELMONT ASSOCIATION, INC., Plaintiff-Appellee, v. THOMAS FARWIG AND WIFE RANA FARWIG AND NANCY MAINARD, Defendants-Appellants.	)	From Wake County

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BRIEF OF *AMICUS CURIAE* COMMUNITY ASSOCIATIONS INSTITUTE – NORTH CAROLINA CHAPTER, INC. IN SUPPORT OF APPELLEE

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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 – NORTH CAROLINA CHAPTER, INC. IN SUPPORT OF APPELLEE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Founded in 1973, amicus curiae Community Associations Institute – North Carolina Chapter, Inc. ("CAI")[1] is the North Carolina Chapter for Community Associations Institute, 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.

As of April, 2020, the population of North Carolina was approximately 10,439,388.[2] Approximately 2,756,000 North Carolinians live in 1,109,000 homes in 14,300 community associations.[3] Ninety-four percent of residents say their association's rules protect and enhance property values.[4] Almost all of these North Carolinians live in a community that has some form of restrictive covenant that contains an architectural control process such as the one in this case.

Protective covenants are the legal contracts puts in place by developers to

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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] This figure is from the U.S. Census Bureau.
[3] These figures are derived from the results of the Foundation for Community Association Research "2020-2021 U.S. National and State Statistical Review" and from CAI's 2020 Homeowner Satisfaction Survey.
[4] These figures are derived from the results of CAI's "2020 Homeowner Satisfaction Survey."

ensure a continued and consistent plan and scheme of development into the future. Architectural review is designed to ensure that the interests of the community as a whole are served, and the overarching plan and scheme of development is preserved. Architectural control restrictions are common throughout North Carolina and have been enforced in a variety of contexts. Given that covenants cannot possibly contemplate every improvement or alteration a homeowner may desire, an architectural review committee ("ARC") is necessary to protect homeowners' reasonable expectation that the community's character and nature will remain preserved. Accordingly, architectural control provisions are broadly drafted and designed to capture many different types of changes which cannot all be specifically foreseen. This protects the community from changes that would detract from the community aesthetic, be inconsistent with the plan or scheme of development, and ultimately lead to a community very different than what the developer envisioned. Since ARCs are imperative in maintaining the community's common scheme and plan, it is crucial that their authority not be improperly limited and that their decisions made in good faith be enforced.

STATEMENT OF THE FACTS

CAI incorporates by reference the Statement of Facts set forth in Plaintiff-Appellee's New Brief to this Court. In addition, CAI sets forth the following facts.

Defendants' solar panel application was denied twice—first by the Belmont ARC and then by the Board of Directors on appeal. (EX p 14; pp 27—28) The denial was consistent with the denial of similar applications by other residents. (R pp 169—

193). On at least four (4) instances, the ARC has reviewed applications for panels that would be placed on roof surface of homes open to common or public access. (R pp 169—193; EX p 14; pp 27—28) Each time, the ARC determined that the proposed location of the panels was inconsistent with the architectural standards of the community. *Id.*

Blue Raven Solar, LLC is one of the four (4) businesses that comprise the *amicus curiae* self-denominated as "Solar Industry Businesses." As Defendants purchased the solar panel system and installation from them, Blue Raven Solar, LLC clearly has a material financial interest in the outcome of this particular case and such should be considered in review of its *amicus curiae* brief.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE EXCEPTION IN N.C.G.S. § 22B-20(d) APPLIES HERE AND THUS, THE ARCHITECTURAL CONTROL PROCESS EFFECTIVELY PROHIBITING SOLAR PANELS ON THE ROOF SURFACE OF A HOME SLOPING TOWARDS AN AREA OPEN TO COMMON OR PUBLIC ACESS IS NOT VOID.

This Court should reject Defendants' argument for a distorted interpretation of N.C.G.S. § 22B-20 that would defy logic, contradict the legislature's intent, and effectively re-write the private contract—that is the Declaration of Protective Covenants for Belmont (the "Declaration"). The Court of Appeals correctly concluded that the exception provided by N.C.G.S. § 22B-20(d) applies here, and therefore, the decision of the ARC that "would prohibit" public-facing solar panels is not void.

N.C.G.S. § 22B-20(b) invalidates agreements running with the land that would prohibit, or have the effect of prohibiting, solar panel installation on residential property. N.C.G.S. § 22B-20(b). N.C.G.S. § 22B-20(c) provides an exception for

agreements regulating the location of solar panels as long as they do not have the effect of preventing the reasonable use of solar panels for residential property. *Id.* § 22B-20(c). N.C.G.S. § 22B-20(d) then provides an exception to the *entire* statute. It allows prohibition of solar panels that are visible by a person on the ground in certain locations (including on a roof surface that slopes downward toward the same areas open to common or public access that the façade of the structure faces) and specifically provides that they are not void. *Id.* § 22B-20(d).

A. The Exception in N.C.G.S. § 22B-20(d) Applies Despite the Absence in the Covenants of an Express Prohibition on Solar Panels in Areas Facing Public Access or Common Areas.

Defendants argue that since there is no express prohibition on public-facing solar panels in the Declaration, N.C.G.S. § 22B-20(d) does not apply. (Defendants-Appellants' New Brief p 10) They base this argument on the fact that subsection (b) voids agreements running with the land that "*would prohibit, or have the effect of prohibiting*" solar panel installation on residential property and subsection (d) provides an exception for agreements that only "*would prohibit*" solar panel installation in certain locations. The Court of Appeals correctly concluded that the exception in N.C.G.S. § 22B-20(d) applies here despite the Declaration not expressly restricting public-facing solar panels.

i. The Court of Appeals was Correct to Look to the Title of the Bill and the Legislative History to Interpret the Statute.

Defendants claim that the plain language of the statute is "clear and unambiguous" and thus, "the Court of Appeals majority's foray into legislative history and examination of the statute's title was superfluous." (Defendants-Appellants' New

Brief p 20) Yet, the fact that reasonable, intelligent minds differ in their interpretation of the language, demonstrates that it is, in fact, ambiguous and unclear, making review of legislative history and the title of the Bill appropriate. The majority's opinion, as well as the dissent's, deal largely, if not mostly, with how the statute should be interpreted. Most of Defendants-Appellants' New Brief consists of attempts to persuade this Court that their interpretation is correct and the statute is clear and unambiguous. However, even the Solar Industry Businesses in their *Amicus* Brief state that the statute is "confusing." (Brief by *Amicus Curiae* Solar Industry Businesses in Support of Defendants-Appellants p 2). Thus, clearly considering the legislative history of the statute is appropriate.

This Court has consistently held that, "When a statute is ambiguous or unclear in its meaning, resort must be had to judicial construction to ascertain the legislative will, and the courts will interpret the language to give effect to the legislative intent." *State v. Green*, 348 N.C. 588, 596, 502 S.E.2d 819, 824 (1998). "The legislative intent '... is to be ascertained by appropriate means and indicia, such as the purposes appearing from the statute taken as a whole, the phraseology, the words ordinary or technical, the law as it prevailed before the statute, the mischief to be remedied, the remedy, the end to be accomplished, statutes in *pari materia*, the preamble, the title, and other like means....' Other indicia considered by this Court in determining legislative intent are the <u>legislative history</u> of an act and the circumstances surrounding its adoption, earlier statutes on the same subject, the common law as it was understood at the time of the enactment of the statute, and previous

interpretations of the same or similar statutes." *Id.* (quoting *State v. Partlow,* 91 N.C. 550, 552 (1884)).

Since there is ambiguity in the statute, specifically between the words, "effect of preventing" and the words, "would prohibit," the Court should look to the legislative history and the title of the Bill, to determine legislative intent.

ii. The Title of the Bill and the Legislative History Demonstrate the Legislature's Intent to Allow Agreements Running with the Land that Would Prohibit or Have the Effect of Prohibiting Solar Panels Facing Public Access or Common Areas.

The first edition of Senate Bill 670, introduced in March, 2007, did not contain the subsection (d) exemption. *See* S. 670 (First Edition, 13 March 2007). The second edition of the Bill included the subsection (d) exemption. *See* S. 670, Commerce, Small Business and Entrepreneurship Committee Substitute (Second Edition, Adopted 22 May 2007). This second edition of the Bill was captioned as "AN ACT TO PROVIDE THAT CITY ORDINANCES, COUNTY ORDINANCES, AND DEED RESTRICTIONS, COVENANTS, AND OTHER SIMILAR AGREEMENTS CANNOT PROHIBIT *OR HAVE THE EFFECT OF PROHIBITING* THE INSTALLATION OF SOLAR COLLECTORS *NOT FACING PUBLIC ACCESS OR COMMON AREAS* ON DETACHED SINGLE-FAMILY RESIDENCES." *Id.*

The title is a summation of the purpose of the Bill. It is direct evidence of the intent of the drafters. This Court has specifically found that the title of the bill is important when interpreting a statute.

> "[T]he title is part of the bill when introduced, being placed there by its author, and probably attracts more attention than any other part of the proposed law, and if it passes into law the title thereof is consequently

> a legislative declaration of the tenor and object of the Act.... Consequently, when the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered."

State ex rel. Cobey v. Simpson, 333 N.C. 81, 90, 423 S.E.2d 759, 764 (1992).

N.C.G.S. § 22B-20 may have been promulgated with an overarching intent to encourage the use of solar panels, but subsection (d) was clearly added with the intent to provide an exception allowing restrictions on solar panels facing public access or common areas. The title of the second edition of the Bill in which the subsection (d) was added makes it clear that the legislature intended the statute to void agreements running with the land that prohibit or have the effect of prohibiting the installation of solar collectors not on roofs facing public access or common areas on detached single-family residences. Logically, it follows that the legislature intended that such agreements that *would prohibit,* and, as the Court of Appeals' majority correctly concludes, such agreements that *have the effect of prohibiting,* the installation of solar collectors visible to a person on the ground on roof surfaces sloping towards areas open to common or public access, are otherwise enforceable. *Belmont Ass'n, Inc. v. Farwig*, 2021-NCCOA-207, ¶ 17, 860 S.E.2d 259, 264.

II. ARCHITECTURAL REVIEW COMMITTEES ARE IMPORTANT TO MAINTAINING THE PLAN AND SCHEME OF DEVELOPMENT FOR PLANNED COMMUNITIES AND THEIR LEGALITY IS WELL-ESTABLISHED.

When N.C.G.S. § 22B-20(d) was added, ARCs were commonplace with recognized importance. When a person buys a home that is subject to a declaration, they agree to a set of rules designed to protect homeowners' reasonable expectation that the character and nature of communities will remain intact. Homeowners want

to be protected from structural changes or improvements by others that would detract from the community aesthetic, leading to decreased property values and changes to the community's character. ARCs ensure that the interests of the community as a whole are being served, that a common scheme or plan and scheme is upheld, and that property values are protected. As one court noted,

> It is no secret that housing today is developed by subdividers who, through the use of restrictive covenants, guarantee to the purchaser that his house will be protected against adjacent construction which will impair its value, and that a general plan of construction will be followed. Modern legal authority recognizes this reality and recognizes also that the approval of plans by an architectural control committee is one method by which guarantees of value and general plan of construction can be accomplished and maintained.

Rhue v. Cheyenne Homes, Inc., 168 Colo. 6, 8, 449 P.2d 361, 362 (1969).

The ARC is made up of homeowners who are appointed by the board which is also usually comprised of homeowners. If the ARC is in some way failing to carry out the will of the collective, the ARC members can be removed by the board. Further, our courts have consistently upheld the legality of restrictive covenants requiring prior approval of improvements by an ARC. *Raintree Homeowners Ass'n, Inc. v. Bleimann*, 342 N.C. 159, 163, 463 S.E.2d 72, 74 (1995). *Raintree* developed the standard by which ARC decisions are judged. The Court found that a covenant providing that the ARC is the sole arbiter of the plans and can withhold approval for any reason, including purely aesthetic ones, is enforceable according to its terms in the absence of any evidence that the ARC acted arbitrarily or in bad faith. *Id.* at 163–64, 463 S.E.2d at 75.

In *Raintree*, the ARC rejected the homeowners' application to install vinyl siding. *Id.* at 159, 463 S.E.2d at 72. There, the Supreme Court found compelling the fact that the ARC had consistently decided that vinyl siding was inappropriate for the neighborhood. *Id.* at 165, 463 S.E.2d at 75. So long as the ARC's decision is made in good faith and is not arbitrary or capricious, the ARC decisions are upheld. It is clear in the present case that the denial of the application was not arbitrary or in bad faith, but rather, based on the longstanding policy of denying or requiring screening of improvements that can be seen from the street in front of the home and the determination that Defendants' public-facing solar panels are inconsistent with the plan and scheme of development. (EX p 14) As the ARC stated, "All ARC applications proposed by owners are reviewed on its visual aesthetic impact to the community and the lot" and the solar panels were denied "because the installation can be seen from the road in front of the home, and is not able to be shielded." *Id.* " The Board upheld the denial on appeal, explaining, "The panels were placed on the front roof, which faces public areas and/or streets), and the Board found that this location created an aesthetically unpleasing effect, one that could not be shielded. Two other Belmont residents applied for solar installations and their applications were also denied since they included front facing solar panels. The same reason for denial was given to them - that it created an aesthetically unpleasing effect, and could not be shielded." (Ex p 27)

As stated, before reviewing Defendants' application, the ARC had already reviewed and denied at least two applications for solar panels on public-facing roofs

since they were inconsistent with the plan and scheme of development. (R p 169; pp 178-193;) Then, after denying Defendants' solar panel application, they denied another application for solar panels on a public-facing roof as they were inconsistent with the plan and scheme of development. (R p 169; pp 171-177) The fact that the ARC has routinely denied similar applications by others for public-facing solar panels demonstrates that its denial of Defendants' application was not arbitrary or capricious, but rather a result of upholding a common plan and scheme of development in Belmont.

III. THE DECLARATION SHOULD BE ENFORCED IN THE SAME MANNER AS ANY OTHER CONTRACT.

A recorded declaration is a contract that a person knowingly enters when buying property that is subject to the declaration. "Covenants accompanying the purchase of real property are contracts which create private incorporeal rights, meaning non-possessory rights held by the seller, a third-party, or a group of people, to use or limit the use of the purchased property." *Armstrong v. Ledges Homeowners Ass'n, Inc.*, 360 N.C. 547, 554, 633 S.E.2d 78, 85 (2006).

Our courts have long emphasized the importance of the liberty to contract freely. The right to enter a binding contract belongs to every person not under a legal disability. *Sylva Shops Ltd. P'ship v. Hibbard*, 175 N.C. App. 423, 427, 623 S.E.2d 785, 789 (2006). So long as the contract is not contrary to public policy or prohibited by statute, parties are free to contract as they deem appropriate. *Id.* "It is the simple law of contracts that as a man consents to bind himself, so shall he be bound." *Troitino v. Goodman*, 225 N.C. 406, 414, 35 S.E.2d 277, 283 (1945). This Court has

continuously held that a restrictive covenant should be enforced in the same manner as any other contract. *Se. Jurisdictional Admin. Council, Inc. v. Emerson*, 363 N.C. 590, 683 S.E.2d 366 (2009); *Armstrong*, 360 N.C. at 554, 633 S.E.2d at 85; *Wise v. Harrington Grove Cmty. Ass'n*, 357 N.C. 396, 584 S.E.2d 731 (2003). As such, "[i]f the plain language of a contract is clear, the intention of the parties is inferred from the words of the contract." *State v. Philip Morris USA Inc.*, 359 N.C. 763, 773, 618 S.E.2d 219, 225 (2005).

The covenants here are not contrary to law or public policy and are thus enforceable. As stated, our courts have consistently upheld covenants that afford broad, discretionary power to ARCs to review, approve, and deny, where appropriate, proposed modifications on lots in planned communities. Moreover, the restriction here on public-facing solar panels is not void as against public policy since N.C.G.S. § 22B-20 (d) applies.

Defendants ask this Court to disregard the very clear architectural control processes in the Declaration that all Belmont homeowners bought into. Defendants were not forced to buy property that is subject to the Declaration. When they chose to do so, they were clearly on notice that they were not permitted to add an improvement without the ARC's prior approval. Now, having purchased property in Belmont, and having agreed to the Declaration, they ask this Court to perform mental gymnastics to interpret a statute in an illogical, nonsequential manner that effectively re-writes the Declaration to suit Defendants' desires. Such a request should be denied.

IV. THE LACK OF AN EXPRESS PROHIBITION ON SOLAR PANELS ON ROOF SURFACES THAT SLOPE TOWARDS AREAS OPEN TO COMMON OR PUBLIC ACCESS DOES NOT RENDER THE COVENANTS UNENFORCEABLY AMBIGUOUS.

Defendants argue that the Declaration's ARC provisions are capable of a less restrictive interpretation in which the ARC does not have the statutory authority to prohibit public-facing solar panels. (Defendants-Appellants' New Brief p 24) In support, they reference the *J. T. Hobby & Son, Inc. v. Fam. Homes of Wake Cty., Inc.* case in which this Court held that ambiguities in covenants should be resolved in favor of the unrestrained use of land. 302 N.C. 64, 70, 274 S.E.2d 174, 179 (1981).

Defendants would have this Court hold that since the covenants do not explicitly prohibit public-facing solar panels, it is ambiguous whether or not the ARC has authority to deny applications for public-facing solar panels and, if it is ambiguous, they should be interpreted to mean that the ARC does *not* have authority. However, the architectural control processes in the Declaration are not ambiguous. The covenants explicitly require the ARC's prior approval for any improvements. Article XI, Section 1 of the Declaration provides, in part, as follows:

> …no construction of, alteration of, additions to, or changes to any improvement on a Lot…shall be commenced, nor shall any of the same be placed, altered or allowed to remain, until the [ARC] has approved in writing the Plans therefor…

(R p 73)

Article I, section (bb) of the Declaration defines an "Improvement" as, in part:

> any structure and all appurtenances thereto of every kind and type and any other physical change upon, over, across, above or under any part of the Properties, including…any other improvement of, to, or on any portion of the Properties. . .

(R p 28)

"Include" or "including" is defined in Article I of the Declaration as, "being inclusive of, but not limited to, the particular matter described, unless otherwise clearly obvious from the context." *Id.*

Further, the Declaration states,

> The [ARC] shall have the right to refuse any Plans for improvements which are not, in its sole discretion, suitable or desirable for the Properties, including for any of the following: (i) lack of harmony of external design with surrounding structures and environment; and (ii) aesthetic reasons. Each owner acknowledges that determinations as to such matters may be subjective and opinions may vary as to the desirability and/or attractiveness of particular improvements.

(R pp 73-74)

It is clear that the ARC's approval is required for improvements, that solar panels would be considered an improvement, and that the ARC has the power to deny an improvement which is not, in its sole discretion, suitable or desirable. Thus, the absence of an express restriction mentioning the word "solar panels" does not render the covenants ambiguous. Since the covenants are not ambiguous, they should be enforced as written.

The law in North Carolina does not require an architectural control provision to list all conceivable modifications it may have jurisdiction over. To hold that the ARC cannot deny an application for something unless it is specifically prohibited would be to re-write the covenants and to render the ARC essentially useless. "Declarations of covenants that are intended to govern communities over long periods of time are necessarily unable to resolve every question or community concern that

may arise during the term of years." *Armstrong*, 360 N.C. at 557, 633 S.E.2d at 86. It is obvious that not every potential improvement or alteration to a lot can be contemplated in a declaration. Thus, an ARC, who has the discretion to approve or deny something based on whether it conforms to or detracts from the community aesthetic, is important to maintaining the integrity of the subdivision. If every improvement or alteration that could be prohibited had to be expressly laid out in the Declaration, there would be no use for a review committee who is tasked with assessing the request and using their discretion to determine whether it would conform to or detract from the common scheme or plan.

CONCLUSION

WHEREFORE, for all the foregoing reasons, CAI respectfully requests that the opinion of the majority in the Court of Appeals be affirmed.

This the 4th day of October 2021.

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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.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date the foregoing brief was filed electronically with the Supreme Court of North Carolina and served upon the attorneys of record by electronic mail, addressed to:

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