

2:18 CV-00084-RMG
**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION**

CANAN ERDOGAN, et al.,

Plaintiffs,

v.

**PRESERVE AT CHARLESTON PARK HOMEOWNERS ASS'N, INC., et
al.,**

Defendants

**BRIEF OF THE COMMUNITY ASSOCIATIONS INSTITUTE
AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT
BLACK, SLAUGHTER & BLACK, P.A.'S
MOTION TO DISMISS**

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RULE 24.1(b) CORPORATE DISCLOSURE STATEMENT

The Community Associations Institute (“CAI”) is a national, nonprofit research and education organization. CAI is neither a “parent corporation” nor a “publicly held corporation that owns 10% or more of its stock.” Thus, there is no such corporation to which Rule 24.1(b) would apply.

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INTEREST OF AMICUS CURIAE

With leave of court, Community Associations Institute (“CAI”) respectfully submits this *amicus curiae* brief¹ in support of Defendant Black, Slaughter, & Black, P.A.’s Motion to Dismiss *Canan Erdogan, et al., v. Preserve at Charleston Park Homeowners Association, Inc., et al.*, No. 2:18-CV-00084-RMG (“Motion to Dismiss”). Pursuant to the Federal Rules of Appellate Practice 29-2(a) and (e), and for the reasons discussed below, CAI urges this Court to grant the Motion to Dismiss.

CAI is a national, nonprofit research and education organization formed in 1973 by the Urban Land Institute and the National Association of Home Builders to provide effective and objective guidance for the creation and operation of condominiums, cooperatives, and homeowner associations.

CAI has more than 34,000 members including homeowners, associations, volunteer board members, managers, attorneys, accountants, community bankers, insurers, and other professionals and service providers. There are more than sixty CAI chapters in the United States, plus Canada, the United Kingdom, United Arab Emirates, and South Africa.

Amicus Curiae CAI presents the perspective of homeowners and their

¹ Pursuant to Rule 37.6, this brief in whole is authored by Marvin J. Nodiff, Esq. No money was contributed by the Community Associations Institute or any other person to fund the preparation or submission of this amicus brief.

community associations which is unavailable from the parties in this matter. CAI submits this brief in keeping with its longstanding interest in promoting understanding regarding the operation and governance of community associations, and in providing expertise and background not possessed by any party to the case.

SUMMARY OF ARGUMENT

I. Homeowners in South Carolina and Across the Country have Rights and Expectations that Homeowner Associations will be Financially Stable with Effective Remedies to Recover Unpaid Assessments Including Lien Rights and Equitable Foreclosure.

The central issue presented here is whether recorded covenants requiring a property owner to pay assessments to a homeowner association (“HOA”) for services are invalid with respect to the HOA’s lien rights and authority to enforce the lien by equitable foreclosure in the event of nonpayment. Plaintiffs contend that this court should declare such rights invalid solely on the basis that South Carolina lacks statutory authority for such liens and equitable foreclosure. In so arguing, Plaintiffs expect this court to disregard and preempt a century of well-settled law as determined by the state courts of South Carolina. The law of real covenants which supports the creation of homeowner associations and lien rights derives from the Common Law and requires no statutory basis. Unlike condominiums, HOAs are not creatures of statute and have existed in the United States since the 18th and 19th century (e.g., Louisburg Square in Boston and Gramercy Park developed in 1832 in

New York City). This case is of substantial importance to homeowners in South Carolina and other states across the country because homeowners rely on their HOAs to be financially stable to carry out their functions and deliver essential services.

II. This Case Presents a Significant Legal Issue Because It Would Drastically Change the Remedies for Homeowner Associations to Collect Unpaid Assessments in South Carolina and Across the Country.

Plaintiffs base all their claims on the argument that homeowner associations in South Carolina do not have legal authority to file liens or enforce such liens by equitable foreclosure to collect unpaid assessments. Plaintiffs argue that, in the absence of state statutory authority, HOA remedies are limited to actions at law to collect the debt. Such a result would override state court decisions and create differential treatment of homeowners and HOAs across the country.

III. Plaintiffs' Complaint is Unsupported by Authority and Should be Dismissed.

Each claim in Plaintiffs' Complaint relies on a single theory: covenants granting the rights of lien and equitable foreclosure in CC&Rs are invalid. This theory is erroneous as a matter of law. The Motion to Dismiss fully addresses each element of the test applicable to whether a complaint must be dismissed.

IV. This Court Should Abstain Because Real Property is a Field of Law Dominated by the States.

Consistent with the states' interest in matters of real property law, any issues of fairness surrounding the process of foreclosure are more appropriately left to the

South Carolina legislature. Further, this court should avoid the possibility of multiple and conflicting decisions. Accordingly, this court should abstain from considering Plaintiffs' Complaint by granting the Motion to Dismiss.

ARGUMENT

I. Homeowners in South Carolina and Across the Country have Rights and Expectations that Homeowner Associations will be Financially Stable with Effective Remedies to Recover Unpaid Assessments Including Lien Rights and Equitable Foreclosure.

At the heart of this matter is the relationship between homeowners and their homeowner associations (also known as “planned communities”). Accordingly, it is important to understand the role of HOAs in providing essential services, and the benefits that accrue to homeowners where their HOA maintains financial stability.

A. Community Associations Are Self-Governing Entities that Provide Essential Services and Infrastructure for Homeowners.

1. Defining Community Associations. Nationally recognized commentator Wayne S. Hyatt has described condominiums, planned communities and cooperatives – generically known as common-interest communities (“CICs”) -- as private real estate developments created under state law by a set of recorded documents governed and operated by an owners’ association commonly known as a “community association.”²

Associations vary in name and legal structure, but share three common features: (i) all homeowners are automatically members of the association bound by

² Wayne S. Hyatt, *Condominium and Homeowner Association Practice: Community Association Law*, at 19 (ALI-ABA 3d ed., 2000) (hereinafter, “Hyatt”). The governing documents for condominiums are typically known as the “declaration” and for planned communities the “covenants, conditions and restrictions” (“CC&Rs”). Hyatt at 19.

the governing documents by virtue of ownership of a lot or unit within the CIC, (ii) the association provides maintenance of infrastructure and common improvements, insurance and other services for property other than the individual lots or units, and (iii) the owners have a mandatory obligation to pay assessments.³

In the condominium context but applicable to HOAs, “Condominium unit owners comprise a little democratic sub-society of necessity more restrictive as it pertains to use of condominium property than may be existent outside the condominium organization.”⁴

“[T]he community association operates ... with powers and responsibilities to operate, preserve, regulate and maintain the property...”⁵ “Community associations are housing management organizations that deliver three core services to their residents: governance, community, and business services.”⁶ The homeowner “looks to the association for collective action to protect its interest in the common elements.”⁷

2. HOA Services and Functions. Homeowners receive many basic services

³ *Id.*, 7-8.

⁴ *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 181-82 (Fla. App. 1975).

⁵ Hyatt at 30.

⁶ Foundation for Community Association Research, *The Community Association Fact Book 2016*, Sec. 3.2 (2017) (“FCAR Fact Book 2016”).

⁷ *Terre Du Lac Association v. Terre Du Lac, Inc.*, 737 S.W.2d 206 (Mo. App. 1987).

and functions from their HOAs, such as maintenance of infrastructure, including streets, snow and ice removal, storm water management, trash collection, public lighting, and green space.⁸ HOAs maintain common ground and recreation facilities, and provide insurance coverage. Further, HOAs have broad authority to protect the interests of their residents through such functions as restrictions on use of property, and architectural design to preserve the community's aesthetic appeal.

3. *Growth of Community Associations.* Beyond the parties here, this case may affect millions of homeowners in the country.⁹

The community association form of homeownership has grown rapidly: in 1970, the nation had 10,000 associations with 700,000 housing units and 2.1 million residents, compared to 2016 estimates of 342,000 associations with 26.3 million housing units and 69 million residents. It is estimated the number of U.S. community associations in 2017 will be between 345,000 and 347,000. HOAs (planned communities) account for approximately 51-55%, condominiums for 42-45%, and cooperatives for 3-4%.

⁸ Foundation for Community Association Research, *Survey of Large-Scale Associations*, http://www.cairf.org/research/factbook/large_scale_survey.pdf, (July 19, 2016) (hereinafter, "FCAR Large-Scale Associations").

⁹ Foundation for Community Association Research, 2016 Statistical Review. <https://foundation.caionline.org/wp-content/uploads/2017/07/2016StatsReviewFBWeb.pdf>. ("FCAR").

In short, *one of every five Americans lives in a community association.*¹⁰

South Carolina alone contains an estimated 6,800 associations with 1,372,000 residents, of which at least 50 percent reside in homeowner associations.¹¹

The phenomenal growth of community associations is attributable to several important benefits. Community associations:

- Have assumed many functions historically provided by local governments, thus easing the financial burden of municipalities.
- Offer economies of scale in construction and operation and provide lower-cost, entry-level housing for many homebuyers.
- Maintain home values that protect lenders' security with corresponding tax benefits for local government.

4. *The Value of Homeownership.* Associations foster homeownership by providing a sense of community and amenities and services beyond the reach of many Americans individually.

Homeownership is well recognized as a source of personal financial stability and equity. Homeownership also makes important contributions to our society by fostering civic involvement as residents sink roots in their communities. A recent

¹⁰ FCAR estimates that in 2016, \$88 billion in assessments were collected from homeowners; associations were responsible for \$5.545 trillion in home values (4th quarter), \$25 billion were contributed to reserves for repair and replacement of roofs and other components, and a value of \$1.93 billion in services provided by volunteer directors and committee members.

¹¹ *Id.*

study finds that homeownership builds social capital with the following community benefits:

1. Homeownership creates incentives for households to improve the quality of their communities since community quality is capitalized into the value of their homes.
2. Increased length of tenure encourages investments in community since homeowners will consume the benefits of community over a longer time.
3. Homeowners have a greater sense of community and greater participation: 15% are more likely to vote in local elections; 10% more likely to know their U.S. representative by name; 9% more likely to know the identity of their school board head; 6% more likely to work on solving local problems.
4. Homeowners are more likely to invest in local amenities such as gardening and upkeep of their property.
5. Social capital fosters communication by developing a common language with neighbors.
6. Social capital fosters trust among neighbors through shared activities.¹²

Thus, in addition to building financial equity, homeownership itself provides numerous societal benefits for the entire community.

B. Homeowners Fund HOAs and Rely on Effective Means to Collect Unpaid Assessments to Achieve Financial Stability.

The bundle of HOA services and functions protect the homeowners interests

¹² “Incentives and Social Capital: Are Homeowners Better Citizens?” in *Chicago Working Paper in Law & Economics* (January 1998). "Incentives and Social Capital: Are Homeowners Better Citizens?" by Edward L. Glaeser and Denise DiPasquale

and property values. In return, HOAs rely on assessments to pay for such services and functions, and the homeowners rely on the HOA having effective means to collect unpaid assessments to ensure it has adequate funds.

Assessment revenue is critical. The Massachusetts Appeals Court described assessments as the “life’s blood” of an association and stated, “Failure ... to pay ... common expense assessments would have a serious financial impact on the stability of a condominium association.”¹³

To foster financial stability and ensure HOAs have effective authority to collect unpaid assessments, CC&Rs -- the governing documents of HOAs -- include an affirmative covenant to pay assessments. Recognizing HOAs are voluntary creditors that provide services in return for a promise to pay, the CC&Rs secure the homeowner’s obligation by a continuing lien on the homeowner’s property. If the homeowner fails to pay, the CC&Rs provide the means to recover through equitable foreclosure and action at law to collect the debt.

Each homeowner is obligated to pay assessments to the HOA, which relies on full and prompt payment.¹⁴ Assessments from homeowners pay for essential

¹³ *Blood v. Edgar’s, Inc.*, 632 N.E.2d 419 (1994).

¹⁴ Comments on assessments, by the Joint Editorial Board of the Uniform Law Commission, are relevant to HOAs and all other forms of community association, although the context relates to lien priorities. Report of the Joint Editorial Board for Uniform Real Property Acts, *The Six-Month “Limited Priority Lien” for Association Fees Under the Uniform Common Interest Ownership Act* at 1 (June 1, 2013)

services, and the HOA must ensure that such services are not interrupted due to lack of funds. Budget shortfalls due to an association's inability to collect assessments fully and promptly would result either in (a) reduced maintenance and/or services ... which would impact property values and compromise the collateral of all lenders in the community or (b) increased assessments for the other owners who already are paying their fair share.¹⁵

As the HOA copes with loss of revenue, the defaulting homeowner gets a "free ride" on the backs of others who are paying assessments (at higher amounts). The defaulting homeowner continues to receive the benefits of HOA services which preserve property value while being subsidized by his or her neighbors.

Thus, the public policy perspective is framed by the best interests of the community as a whole: All homeowners in an HOA have an obligation to pay assessments for common services; such services preserve the interests of homeowners; and a loss of revenue leads to a decline in services or an increase in assessments which shifts the burden to others. For these reasons, homeowners

(hereinafter, "JEB Report"). The Uniform Law Commission ("ULC," formerly known as the National Conference of Commissioners on Uniform State Laws), established the Joint Editorial Board for Uniform Real Property Acts ("JEB") consisting of members from the ULC, the ABA Section of Real Property, Probate and Trust Law, and the American College of Real Estate Lawyers, responsible for monitoring ULC's uniform real property acts. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.2d 408, 413 (Nev. 2014).

¹⁵ JEB Report at 1.

expect the HOA to have effective means to recover unpaid assessments, including the right to impose a lien and to enforce it by equitable foreclosure.

II. This Case Presents a Significant Legal Issue Because It Would Drastically Change the Remedies for Homeowner Associations to Collect Unpaid Assessments in South Carolina and Across the Country.

The question of enforceability of restrictive covenants contained in recorded CC&Rs is a field dominated by state common law. This case affects the rights and expectations of homeowners in South Carolina and other states across the country to ensure HOAs will be financially stable and have effective remedies to recover unpaid assessments including lien rights and equitable foreclosure.

State courts have uniformly held that a covenant to pay, contained in recorded governing documents, is a covenant running with the land distinguishable from other contractual agreements. “A ‘covenant’ is a contract, an agreement, a promise, or a species of express contract. The word ‘covenant’ means to enter into a formal agreement, to bind oneself in contract, and to make a stipulation...”¹⁶

Restrictive covenants, sometimes referred to as "real covenants," are agreements "to do, or refrain from doing, certain things with respect to real

¹⁶ Restatement (Third) of Property: Servitudes, Sec. 1.1. *Crichton v. Augustus Energy Res., LLC.*, Civil Action No. 15-cv-00835-KLM, 2017 U.S. Dist. LEXIS 177684 (D. Colo. Oct. 26, 2017).

property."¹⁷ Therefore, covenants, in a sense are contractual in nature and bind the parties thereto in the same manner as would any other contract. Restrictive covenants are construed like contracts and may give rise to actions for breach of contract. However, restrictive covenants affecting real property cannot be properly and fully understood without resort to property law.

Restrictive covenants differ from contracts in that they run with the land, meaning that they are enforceable by and against later grantees.¹⁸ "There are several ways in which restrictive covenants may be created. The most common means are: (1) by deed; (2) by declaration; and (3) by implication from a general plan or scheme of development."¹⁹ Promises in deeds for the grantee to perform some act may be expressly or impliedly made a lien upon the land which is subject to foreclosure on breach and which binds the land through constructive notice even in the hands of innocent purchasers.²⁰ Numerous states apply this policy.²¹

¹⁷ *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 361, 628 S.E.2d 902, 913 (Ct. App. 2006) (citation and quotation marks omitted).

¹⁸ *Id.*

¹⁹ *Id.* at 362, 628 S.E.2d at 913. *Kinard v. Richardson*, 407 S.C. 247, 754 S.E.2d 888 (Ct. App. 2014).

²⁰ 7 Thompson, Real Property (1962 Grimes Replacement) § 3157 at 93.

²¹ *See, Boyle v. Lake Forest Property Owners Ass'n*, 538 F.Supp. 765, 769 (S.D.Ala.1982) (acceptance of lien manifests intent to let the property stand as security for the obligation, applying state law); *Bessemer v. Gersten*, 381 So.2d 1344, 1349 (Fla.1980) (reinstating a trial court's judgment of foreclosure); *Brendonwood Common v. Franklin*, 403 N.E.2d 1136, 1141 (Ind.App.1980)

Covenants that require property owners to pay to a homeowners association assessments that have a beneficial effect on the value of the owners' properties touch and concern land and therefore run with the land.²²

In an early seminal case, one court found that a lien arising from a covenant against defendant's real property was enforceable as a covenant that runs with the land, that the covenant was intended to run with the land, that the covenant touched and concerned the land, and that the parties had privity of estate.²³

Like South Carolina, homeowners associations in New Jersey are created by the filing of CC&Rs contained in deeds and association bylaws without statutory origin.²⁴ The CC&Rs include restrictions and conditions that run with the land and

(reversing trial court which failed to order sale of properties when it found delinquent assessment liens to be enforceable), and *Kell v. Bella Vista Vil. Prop. Owners Ass'n*, 258 Ark. 757, 528 S.W.2d 651, 653 (1975) (affirming judgment permitting property owners' association to foreclose on liens because of unpaid assessments); and see *Mendrop v. Harrell*, 233 Miss. 679, 103 So.2d 418 (1958); *Rodruck v. Sand Point Maintenance Commission*, 48 Wash.2d 565, 295 P.2d 714, 720 (1956), and *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938). Thus, we find ample support for and no contrary state of the law against a foreclosure action under these circumstances. *Leisuretowne Asso. v. McCarthy*, 193 N.J. Super. 494, 475 A.2d 62 (Super. Ct. App. Div. 1984).

²² *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006).

²³ *Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

²⁴ E. Richard Kennedy & Mark D. Imbriani, *The Rights of Tenants in Condominium and Homeowner Association Communities*, 174 N.J. Law. 18, 18 (1996).

bind all current and future property owners.²⁵ The bylaws set forth the rules and regulations that govern an association's members.²⁶ Because such documents are instruments affecting title to real estate, homeowners associations may record their governing documents,²⁷ which serves as notice to subsequent judgment creditors and purchasers.²⁸

It is well established that membership obligations requiring homeowners in a community ... to pay a fair share toward community maintenance are enforceable as contractual obligations²⁹ and create a lien on the property.³⁰

Even where an HOA had lost its nonprofit corporate status, organized a new nonprofit HOA and assigned its rights to the new association, the Missouri Supreme Court held that the new association had the right to collect assessments due under the covenant running with the land and owed under the declaration.³¹

²⁵ Gemma Giantomasi, Note, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 Fordham L. Rev. 2503, 2508 (2004).

²⁶ *Id.* at 2507.

²⁷ See N.J.S.A. 46:16-1 and -2.

²⁸ See N.J.S.A. 46:21-1.

²⁹ *Paulinskill Lake Ass'n, supra*, 165 N.J. Super. at 45, 397 A.2d 698.

³⁰ *Leisuretowne Ass'n, Inc. v. McCarthy*, 193 N.J. Super. 494, 501, 475 A.2d 62 (App.Div.1984) (affirming foreclosure on lien arising from defendants' nonpayment of monthly maintenance fees required by recorded covenants).

³¹ *DeBaliviere Place Ass'n v. Veal*, 337 S.W.3d 670 (2011).

Thus, the states have developed an extensive body of common law that uniformly upholds the validity and enforceability of restrictive covenants contained in HOA governing documents without requiring separate statutory authority.

III. Plaintiffs' Complaint Should be Dismissed.

The Motion to Dismiss addresses each element of the test applicable to whether a complaint must be dismissed and is adopted by reference herein. Each claim in Plaintiffs' Complaint relies on a single theory: covenants granting the rights of lien and equitable foreclosure in CC&Rs are invalid. Amicus CAI, in our brief above, and the cases gathered in the Motion to Dismiss, demonstrate that this theory is erroneous as a matter of law.

The state courts of South Carolina and across the country hold that such covenants run with the land and are not merely contractual in nature and can create an enforceable contractual lien and/or an equitable lien. State courts have developed an extensive body of law upholding the validity and enforceability of equitable liens arising out of recorded covenants without separate statutory authority. Plaintiffs cite no authority to the contrary.

IV. This Court Should Abstain Because Real Property is a Field of Law Dominated by the States.

Consistent with the states' interest in matters of real property law, any issues of fairness surrounding the process of foreclosure are more appropriately left to the

South Carolina legislature. A few other states have considered this issue and set forth procedural safeguards surrounding the lien and foreclosure process.³²

Indeed, the South Carolina legislature is considering issues surrounding HOAs as evidenced by proposed legislation.³³ This process should be left to the South Carolina legislature, should the state's lawmakers determine the need for further oversight in the lien and foreclosure process, outside of the judicial oversight and procedure process already existing.

For these reasons, this court should recognize that such matters are more appropriately left for South Carolina's legislature. This court should abstain from considering Plaintiffs' Complaint by granting the Motion to Dismiss.

CONCLUSION

The questions presented in Plaintiffs' Complaint are extremely important with potential impact on millions of homeowners living in HOAs in South Carolina and across the country. Without effective means to collect unpaid assessments from

³² See, e.g., The Davis-Stirling Common Interest Development Act, Civ. Code § 4000 et seq. (California's Act that governs and sets guidelines for HOAs; this Act still allows HOAs to record liens and foreclose but also includes additional requirement where HOAs meet with homeowners upon request to discuss delinquent assessments and work out a payment plan before foreclosure.)

³³ See Tom Davis, *Creating A State Homeowners Association Czar Is a Bad Idea*, The Island Packet, available at <http://www.islandpacket.com/opinion/op-ed/article179489866.html>. See also H. 3886, "Homeowners Association Act" (2017).

defaulting homeowners, the financial burden of paying for HOA services would be transferred to other homeowners already paying their fair share.

Courts in South Carolina and numerous other states have uniformly upheld the validity and enforceability of the covenant to pay, and related rights of lien and equitable foreclosure, contained in CC&Rs. Plaintiffs cite no authority to support their contention that such covenants are invalid.

This is an appropriate matter for the court to abstain, leave further consideration to the state legislature, and avoid the potential for conflicting judicial decisions. For all these reasons, this court should grant the Motion to Dismiss

Dated: March 19, 2018.

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CERTIFICATE OF COMPLIANCE TO RULE 33.1

Pursuant to the Rules of the Supreme Court of the United States, Rules 33.1(g) and 33.1(h), the undersigned certifies the attached brief complies with the word limitations, is Times New Roman 14-point font, double-spaced, and contains 3,882 words. Pursuant to Rule 33.1(h), the undersigned has relied upon the word count of the word processing system used to prepare the attached brief.

Dated: March 19, 2018.

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The undersigned hereby certifies that a true and accurate copy of the foregoing was filed with the Clerk of the Court United States District Court for the District of South Carolina Charleston Division by using the appellate CM/ECF system on March 19, 2018. The following participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system:

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