



# THE TITLE COMPANY OF NORTH CAROLINA

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## ENFORCEABILITY OF “AESTHETIC” REQUIREMENTS IN RESTRICTIVE COVENANTS

Most modern residential subdivisions have provisions in the CCR’s which provide for architectural review or otherwise impose “aesthetic” requirements on improvements to be built within the subdivision. How have North Carolina courts viewed these “aesthetic” restrictions?

Because restrictive covenants are not favored in the law, ambiguities are to be resolved in favor of the unrestricted use of land. *Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1981). This rule of strict construction, however, must not be used to defeat the plain and obvious purposes of the restriction and the intentions of the parties. *Long v. Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967).

*Webster’s Real Estate Law in North Carolina*, §18-6 notes that the traditional premise for the strict construction rule is being modified by usage in the subdivision context to a more “public policy” standard. “The language of the restriction must be analyzed in light of the objects sought to be obtained, and the conditions and circumstances surrounding the premises involved.” *Webster’s* §18-6 at p. 846.

In *Boiling Spring Lakes v. Coastal Services Corp.*, 27 N.C. APP. 191, 195, 218 S.E. 2d 476, 478 (1975), a restrictive covenant required building plans to be submitted to and approved by the grantor prior to construction. The Court laid out the following rules governing approval of building plans by a grantor:

The exercise of the authority to approve the . . . plans cannot be arbitrary. There must be some standards. Where these standards are not within the restrictive covenant itself, they must be in other covenants stated or designated, or they must be otherwise clearly established in connection with some general plan or scheme of development. . . . [A] restrictive covenant requiring approval of house plans is enforceable only if the exercise of the power in a particular case is reasonable and in good faith.

*Id.* at 195-96, 218 S.E. 2d at 478-79.

In support of this rule, the Court relied upon decisions in other jurisdictions, especially *Syrian Antiochian Orthodox Archdiocese v. Palisades Associates*, 110 N.J. Super. 34, 264 A. 2d 257 (1970); and *Rhue v. Cheyenne Homes, Inc.*, 168 Colo. 6, 449 P. 2d 361 (1969).

In *Syrian*, the court considered a covenant which prohibited the creation of structures or improvements unless improvements to be built were shown on a plat, and the plat, plans and specifications were approved by the developer. The developer could refuse to approve any such plans which were not suitable in his opinion, though no objective standards were set forth within the covenant to guide the developer/grantor. In finding such restrictions to be valid and enforceable, the court stated:

[t]he purpose of such a provision is to afford mutual protection to the property owners living in the development against injury, whether taking the form of diminished property values or otherwise, that would result from the construction of a residence or other improvement that was unsightly, in singularly bad taste, *discordantly at variance with neighboring homes in architectural appearance*, or otherwise offensive to the proposed or developed standards of the neighborhood. *Syrian* at 40, 264 A. 2d at 261. (Emphasis added.)

Similarly, in *Rhue*, that court was called upon to consider a covenant which required plans for construction of houses to be submitted to an architectural committee for approval. Here, the court observed:

[i]t 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* at 8, 449 P. 2d at 362.

The *Syrian* and *Rhue* cases were both cited, with approval, by the N.C. Court of Appeals in *Smith v. Butler Mountain Estates Property Owners Association, Inc.*, 90 N.C. App. 40, 367 S.E.2d 401 (1988).

The North Carolina courts have adopted the majority view with respect to covenants requiring submission of plans and prior consent to construction. Such clauses, even if vesting the approving authority with broad discretionary power, are valid and enforceable so long as the authority to consent is exercised *reasonably* and in *good faith*.

The Court of Appeals has upheld provisions in restrictive covenants which require approval by an architectural control committee of any improvements in the subdivision. *Christopher Properties, Inc. v. Postell*, 106 N.C. App. 180, 415 S.E.2d 786 (1992).

The question remains a factual one---what are “reasonable” and “good faith” uses of the police power delegated to the review committee and what are “arbitrary and capricious” rulings.

With regard to the exercise of authority given architectural review committees, the Supreme Court has stated: “[A] restrictive covenant requiring approval of house plans is enforceable only if the exercise of the power in a particular case is reasonable and in good faith.” *Raintree Homeowners Assn. v. Bleimann*, 342 N.C. 159, 163, 463 S.E.2d 72, 74 (1995).

In *Raintree*, the defendant homeowners wanted to replace wood siding with vinyl siding. Pursuant to a restrictive covenant, the defendants applied to the Architectural Review Committee (“ARC”) for approval of their plans. This restrictive covenant made the ARC the sole arbiter of such plans, with the authority to withhold approval for any reason. The ARC denied the defendant’s initial request, then gave

## Case Notes

them a re-hearing, and after consideration of the new evidence, denied the application again. This decision was appealed to the full board of the association, which upheld the ARC. The Supreme Court found the defendants had failed to produce any evidence that the ARC acted unreasonably or in bad faith -- the ARC had considered defendants' application for vinyl siding on three separate occasions, despite the fact that it had previously found the material unacceptable, and the ARC had consistently denied other applications for vinyl siding. *Id.* at 165, 463 S.E.2d at 75.

In both *Raintree* and *Smith v. Butler Mountain Estates Property Owners Association, Inc.* (*op. cit.*), the respective architectural review committees involved the landowners in the application process. Once the application was initially denied, the architectural review committees made concrete suggestions to the landowners about what was needed for approval. The committees also clearly communicated to the landowners legitimate reasons why their applications had been denied.

While the enforcement of a specific provision will be dependent upon the wording of the restriction and the proposed use of the property, the Courts appear to be more willing to approve the action of the architectural review committee if there are some standards to which the committee can refer in making its decision, and not just the arbitrary and subjective opinion of one or two homeowners in the subdivision. The enforcement is more likely to be upheld if the review committee provides "due process" to the applicant, by allowing a reasonable opportunity to be heard, and if the initial application is turned down, a chance to re-apply, with concrete suggestions regarding the changes which would be needed for approval, and clear and legitimate reasons why the application was denied.

**Homeowner's Association—Common Area—Condemnation—Single Tract—*Dept. of Transportation v. Fernwood Hill Townhome Homeowners' Assoc.*, \_\_\_ N.C.App. \_\_\_, \_\_\_ S.E.2d \_\_\_, (COA06-964, Sept. 4, 2007)** In a case of first impression, the Court of Appeals found that where each townhouse owner holds a fee simple interest in his or her unit, a property interest in the entire common area by virtue of a recorded easement, and a property interest in the other units as a result of restrictive covenants, there exists a substantial unity of ownership across the entire tract to support a "substantial unity of ownership. All of the individual townhome owners in the development are necessary parties to a condemnation action, and the entire portion of the common area condemned should be valued as one parcel.

**MLS Listing --Negligent Misrepresentation---*Crawford v. Mintz*, \_\_\_ N.C.App. \_\_\_, \_\_\_ S.E.2d \_\_\_, (COA07-141, Dec. 4, 2007)** The original MLS listing indicated the seller's house was connected to city sewer. The listing contained a disclaimer, "Information deemed reliable, but not guaranteed." A copy of the MLS report furnished to the buyer by the buyer's agent did not include the disclaimer. After closing, the buyer discovered that the house was connected to a septic tank which resulted in an action against the listing agent for negligent misrepresentation.

The Court held that the justifiable reliance element of negligent misrepresentation had to be based on the MLS report as originally entered by the listing agent and not the version omitting the disclaimer provided by the buyer's agent. The opinion stated that representations can be understood "only when considered in light of accompanying disclaimers" so that "such disclaimers are material provisions in MLS listings that may have important consequences for the legal rights and responsibilities of real estate purchasers, sellers, and their agents."

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