

In this article, I'd like to take the opportunity to give some discussion on a subject that we get questions about on a weekly basis: old restrictive covenants and the Marketable Title Act. No, sadly this article will not be me telling you that the builder who keeps contacting you is correct and that any restrictive covenant more than 30 years old is no longer effective. It's more complicated than that. What I'd like to do is provide some background analysis of the Marketable Title Act and the *C Investments 2 v Auger* case, with the hope of providing any practicing attorney a basis on which they can 1) be prepared to have a discussion with clients who face issues related to old CCR's and manage expectations; and 2) be prepared to provide a title company with as much information as possible when requesting coverage. This article will be a bit longer than usual, but I hope all of our readers will find it helpful and informative.

The Marketable Title Act

The Marketable Title Act (N.C.G.S. § 47B) was enacted in 1973, with the stated general purpose of extinguishing claims, covenants and other encumbrances on title that do not appear within the 30-year chain of title. The reasoning being that if limited searching to provide marketable title as required by most real estate contracts was not available, the searching of title would over time inherently become overly burdensome and expensive in order for a purchaser to be sure of the status of the title they were obtaining. It would also delay closings and invite extensive litigation just to create marketable titles for basic transactions.

The MTA attempted to establish a 30-year period after which qualifying covenants, if they did not appear on a recorded document within the chain of title, would be extinguished and unenforceable. The 30-year period can be established by either a single owner, or an unbroken chain of owners during that period all meeting the same requirement of not having the encumbrance of record during their time of ownership.

Note that the 30-year period must be "anchored" by a title transfer from which the 30-year period begins to run. The 30-year lookback period cannot end during the middle of a titleholder's time in ownership. For example: if the current owner obtained the property by deed dated 10 years ago; their predecessor 10 years before that; and the previous title holder 20 years before that; the qualifying lookback period would not end during the middle of the 20-year titleholder's ownership even though that would be 30 years from the current date. Title must be clear all the way back to that titleholder's deed, even if that is longer than 30 years.

The MTA is not absolute. As of writing, there are 14 exceptions appearing in the statute which will not be extinguished under the terms of the MTA even if they do not appear within the 30-year lookback period:

- 1) Rights, etc. appearing in or inherent to the "muniments of title" (i.e., the deed);
 - a. *A general reference to something like "covenants and restrictions of record" is insufficient – must be a specific book and page reference;*
- 2) If Notice of the encumbrance is filed during the 30-year period;

- a. *Anyone subject to the restrictions can file a document naming all of the other parties subject to the restriction/encumbrance as a Grantee, and by doing so will start the running of the 30 year lookback period again for ALL of those properties;*
- 3) Rights of those in present, actual and open possession of the property;
 - a. *So, the MTA would not operate to kick out a tenant currently in possession of the property or forestall any claim of adverse possession*
- 4) Rights of any person holding marketable record title per the tax books;
- 5) Mineral rights;
- 6) Railroad rights of way of any kind;
- 7) Railroad rights established by Charter or other Congressional or legislative grant;
- 8) Easements for:
 - a. Water control if the body of water still exists;
 - b. Placing and maintaining public utilities (gas, electric, telephone, etc.)
 - c. Land or water conservation
- 9) Rights of the United States;
- 10) Rights created subsequent to the 30-year lookback period;
- 11) Deeds of Trust, Mortgages and other security instruments;
- 12) Rights registered under Torrens Law
 - a. *This is an old alternative to the deed system for registering ownership of property*
 - b. *A Certificate is issued by the Court and is conclusive evidence of ownership and encumbrances on a given piece of property*
 - c. *Certificate is recorded in the Registry*
 - d. *Not subject to matters such as adverse possession*
 - e. *Originally adopted in NC in 1913, but after a brief period of popularity (particularly in the eastern part of the state) it quickly dwindled in use*
 - f. *Still in effect, but rarely used*
- 13) Covenants applicable to a general or uniform scheme of development restricting property to residential use (or more specifically to single-family or multi-family residential use);
 - a. *See discussion of case law below interpreting this provision*
- 14) Any covenant contained in documents governing:
 - a. A Condominium organized under Ch. 47A or 47C

- b. A cooperative as defined in Ch. 47F
- c. A planned community organized under Ch. 47F (excluding planned communities exclusively for nonresidential purposes)
 - i. *Planned communities created prior to January 1, 1999 (when the Planned Community Act went into effect) only get this protection if they had an active HOA when exception 14 went into effect on July 1, 2022*

The MTA closes with two basic provisions. One states that it does not alter any relevant statute of limitations or statutes governing the effect of registering or failing to register instruments.

The other, which is likely more important to the discussion that follows, concerns interpretation of the statute. § 47B-9 states that the MTA “...shall be liberally construed to effect the legislative purpose of simplifying and facilitating real property title transactions by allowing persons to rely on a record chain of title of 30 years...” As we will see, this statement of core purpose was key to the rulings in recent case law by both the Court of Appeals and the NC Supreme Court.

C Investments 2, LLC v. Auger, et al – Court of Appeals and Supreme Court Decisions

Despite being a significant piece of legislation for property rights, the Marketable Title Act has rarely been litigated or brought before the courts. Recently, however, two major decisions have been handed down by the Court of Appeals and the NC Supreme Court regarding the MTA, both concerning the same case: *C Investments 2, LLC v. Auger, et al* (“*Auger*”).

During 2016 and 2017, C Investments 2, LLC purchased seven lots in the Country Colony neighborhood of Charlotte. Country Colony is a small development off of Providence Road across from Charlotte Latin School in South Charlotte. The neighborhood dates back to the 1950s, when it was first subdivided by the Newson family.

Before conveying any lots, the Newsons imposed a list of 9 “Protective Covenants” on the property, which were stated to run with the land and be enforceable at law or equity by any lot owner against another lot owner. They generally limited the property to residential use and defined the nature and location of structures that could be erected on the property. They were very typical of restrictions for the time.

1. All lots in the tract shall be known and described and used for residential lots only.
2. No structure shall be erected, altered, placed or permitted to remain on any residential building plot other than one detached single-family dwelling not to exceed two and one-half stories in height and a private garage, and other outbuildings incidental to residential use of the plot.
3. No building shall be erected on any residential building plot nearer than 100 feet to the front lot line nor nearer than 20 feet to any side line.
4. No noxious or offensive trade or activity shall be carried on upon any lot nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood.
5. No trailer, basement, tent, shack, garage, barn or other outbuilding erected in the tract shall at any time be used as a residence temporarily or permanently, nor shall any structure of a temporary character be used as a residence.
6. No dwelling costing less than \$10,000.00 shall be permitted on any lot in the tract. The ground floor area of the main structure, exclusive of one story open porches and open car ports, shall be not less than 1200 square feet in case of a one story structure. In the case of a one and one-half, two or two and one-half story structure, the ground floor area of the main structure, exclusive of one-story open porches or open car ports, shall not be less than nine hundred square feet. (It being the intention to require in each instance the erection of such a dwelling as would have

cost not less than the minimum cost provided if same had been erected in January, 1952.)

7. A right of way is and shall be reserved along the rear of each lot and along the side line of each lot where necessary, for pole lines, pipes and conduits for use in connection with the supplying public utilities service to the several lots in said development.

8. In the event of the unintentional violation of any of the building line restrictions herein set forth, the parties hereto reserve the right, by and with the mutual written consent of the owner or owners, for the time being of such lot, to change the building line restrictions set forth in this instrument; provided, however, that such change shall not exceed ten percent of the original requirements of such building line restrictions.

9. None of the lots shown on said plat shall be subdivided to contain less than two acres and only one residence shall be erected on each of said lots.

The deeds for the 7 lots purchased by C Investments did not contain these restrictions or any reference by book and page to these restrictions during the 30-year chain of title as defined in the MTA.

In 2019, C Investments 2, LLC filed a motion for a Declaratory Judgment asking the court to declare the Protective Covenants unenforceable. In particular, C2 wished to build duplexes or other multifamily housing on the property which would violate restrictions on the type of structure and setback lines. They argued that the plain terms of the MTA rendered these covenants unenforceable as to their lots. Other neighborhood owners joined for or against.

The District Court issued a Summary Judgment in favor of C2 invalidating the Newson restrictions. The defendant parties appealed first to the Court of Appeals, which upheld the Summary Judgment, and then to the Supreme Court which also affirmed the lower court rulings.

The Defendants case primarily rested on the argument that all of the restrictions fell within Exception 13 of the MTA as "covenants applicable to a general or uniform scheme of development which restrict the property to residential use". Their contention was that not only the restriction to residential use was excepted but also any other covenants relating to that residential use or general residential scheme of the neighborhood.

The Courts disagreed. The COA opined that the homeowners' contention that the "phrase should be read to broadly include accompanying covenants relating to the residential use of the property...cannot be squared with the statute's plain language". The court goes on: "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."

Put simply, the COA declined to broaden the scope of Exception 13 to include any limitations *related or incidental* to residential use of the property and only saved the limitation on residential use itself. Both the COA and the SCNC go on extensively parsing how a restriction to residential *use* is different from restrictions on the type, location and appearance of structures even if the latter does contain some essential nexus to residential character. For example, a single-family home could house multiple families or even a business, and a multifamily structure could house a single family. Both opinions separated restrictions such as setback lines and type of homes that could be built as distinctly different from the use of the property, with only the latter falling under Exception 13 of the MTA.

It should be noted that there was a dissenting judge in the COA opinion, and Chief Justice Newby dissented from the SCNC ruling. Both dissenting judges disagreed with the majority opinions' conclusions that the restrictions *related* to residential use did not fall under Exception 13 rather than just the use itself, as well as the majority opinions' understanding of the legislature's intent in passing the MTA. It is also of note that there has been shakeup to the Supreme Court composition since the 2022 decision, so a rehearing of the same facts could potentially yield a different result.

Subsequent and Pending Legislation

The COA decision and SCNC decisions both sent shockwaves through the real estate community. Overnight, restrictions on many properties suddenly became potentially invalid by a strict reading of the opinions. Combined with the passage of Charlotte's Unified Development Ordinance loosening restrictions on multifamily housing in traditionally single-family areas, and the general trend of encouraging housing density within City limits, builders in our area have become substantially more willing to build new structures that violate old restrictions.

Attorneys representing condominium, cooperative and planned community associations were in a panic over rulings that had the potential to invalidate their entire scheme of development. In response to these concerns, the legislature in 2022 added Exception 14 to the MTA specifically excluding any matters appearing in documents creating those types of communities under their validating statutes.

House Bill 642 was presented in April 2023, which would rewrite portions of Exception 13 to address the COA and SCNC ruling – specifically they attempt to make it clear that restrictions *related* to residential use, and not just the use itself, were covered under this exception. As of writing, that bill has passed the first reading but was referred back to the Judiciary Committee for further input. No movement has occurred since, and the bill remains stalled in Committee as of writing this article.

Underwriting Considerations

Immediately after the rulings were handed down, most underwriters did not materially alter their requirements for providing coverage over old restrictive covenants falling within the MTA and the *Auger* case. It was reasoned that with the decisions being made only recently, and the lack of other rulings citing these decisions, the high potential for litigation and the potential for new legislation addressing the findings of the Courts that it remained unsettled law and a risk they were unwilling to provide coverage for.

Recently, as we have moved further from the decisions and no new legislation or litigation is yet imminent, some underwriters have begun considering insuring over old restrictions on a case-by-case basis. Specifically, where the restrictions meet the terms of the MTA and the *Auger* case, and there is other evidence of potential violations within the neighborhood that have destroyed the common scheme of development character, they have been willing to provide at least forced removal coverage for new structures.

So, if you have a client requesting coverage over old restrictions on the basis of the MTA, here are a few helpful points that you may want to be prepared to discuss with your underwriter when requesting coverage:

- 1) **Consider whether the fact pattern fits both the Marketable Title Act and the *Auger* case.**
 - a. An unbroken chain of title anchored by a deed at least 30 years old, in which no document appears referencing the restrictions by book and page number
 - b. Does not fit within one of the 14 exceptions
 - c. When Exception 13 may be applicable, whether the covenants fit within the same facts as the *Auger* case (i.e., covenants relating to a particular use of the property will survive, but setbacks, types of structures, etc. may be extinguished)
- 2) **Discuss Neighborhood Conditions**
 - a. Is there an active HOA or other owner's association?
 - b. Are there other violations of the same covenants within the neighborhood by a significant number of the lots subject to the same restrictions?
 - c. Is there any history of litigation in this particular neighborhood?
- 3) **Exactly What Violations Exist/Are Proposed?**
 - a. Part of the risk analysis here is what type of violation may occur. Are we talking about violating a setback line by a few feet which may not even be noticeable without someone out there using a laser measuring device, or are we proposing to build a duplex, townhome or other multifamily structure that does not exist in the neighborhood currently?

Again, as I'm sure all of my underwriters would want me to tell you, none of this will guarantee coverage from any title company. All requests are assessed on a case-by-case basis, but hopefully this gives you some insight into the points which are considered by title insurance underwriters when making these decisions and will have you well prepared to make a reasonable argument for obtaining coverage for your client.

As always, I welcome any follow-up questions or comments, and I hope our readers find this article helpful and informative.

/s BSS