An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-250

No. COA20-623

Filed 1 June 2021

Buncombe County, No. 18 CVS 5034

LORI H. POSTAL, Plaintiff,

v.

DANIEL A. KAYSER and wife LISA K. KAYSER, JON R. BELLOWS and GAILLARD S. BELLOWS, THOMAS A. SCHIEBER and wife ELIZABETH G. SCHIEBER, DARLEEN P. WILLIAMS REVOCABLE DECLARATION OF TRUST, DARLEEN P. WILLIAMS, DENNIS J. THEODOSSIS and wife TARA C. THEODOSSIS, MATTHEW BUYS and wife ELIZABETH BUYS, WAYNE S. STANKO and JANICE STANKO, GERALD L. VANEMAN, RALPH S. JULIAN and wife MARY F. JULIAN, RYAN MICHAEL ONEILL and wife LILI JOY ONEILL, WILLIAM L. EVERIST and MARY K. EVERIST, GREGORY J. OSWELL, SR. and wife EVELYN M. OSWELL, BARBARA ANN AYERS, LOUIS J. D'AMICO and wife MAYE C. D'AMICO, STEVEN C. SCHNEDLER REVOCABLE TRUST, STEVEN C. SCHNEDLER AS TRUSTEE OF THE STEVEN C. SCHNEDLER REVOCABLE TRUST, DANIEL P. COMER and wife MEREDITH M. COMER, JAMES D. O'BRIEN and wife GISSELLE L. O'BRIEN, SARA EDMONDS GREEN, KENNETH R. HUNT and wife SHANNON U. HUNT, REBECCA D. TUCKER, MARY H. ELLER, MICHAEL R. FRIEDMAN, TONY L. WILKEY and wife DIANE M. WILKEY, CHRIS L. MANDERSON and wife MELISSA MORAN MANDERSON, RICHARD A. BASS and wife RUTH A. BASS, RYAN O. HAMNER and wife COURTNEY T. HAMNER, MITZI T. GIBBONS, THOMAS R. WATSON and wife KAREN L. WATSON, JESSICA V. SILVER and GEORGE M. SILVER, LINDA B. VANCE, JASON DANIELIAN and JESSICA DANIELIAN, SCOTT C. CONRAD and wife SUSAN M. KEY, and NOLAND E. WIGGINS, III, Defendants.

Appeal by defendants from judgment entered 28 February 2020 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 28 April 2021.

Roberson Haworth & Reese, PLLC, by Alan B. Powell and Andrew D. Irby, for plaintiff-appellee.

Ball Barden & Cury P.A., by J. Boone Tarlton and Ervin L. Ball, Jr., for defendants-appellants Wayne and Janice Stanko.

Roberts & Stevens, P.A., by Wyatt Stevens and Kenneth R. Hunt, for defendants-appellants except Wayne and Janice Stanko.

Jordan Price Wall Gray Jones & Carlton PLLC, by H. Weldon Jones, III, and Hope Derby Carmichael, for amicus curiae Community Associations Institute.

Offit Kurman, P.A., by Amy P. Hunt and Zipporah Basile Edwards, for amicus curiae North Carolina Land Title Association.

DIETZ, Judge.

¶ 1 The parties in this case own property in a residential subdivision in Buncombe County referred to in the record as Beaverlake Heights. The lots are subject to a series of restrictive covenants from the 1950s limiting the lots to residential use only and imposing other restrictions on the number, size, location, and various design elements of structures located on each lot:

> NOW, THEREFORE, in consideration of the premises and for the advantage which the Subdividers will receive from the sale of such lots in a restricted subdivision, the Subdividers, for themselves, their heirs, administrators and successors in title, covenant and agree and hereby restrict the above referred to property as follows:
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> 1. That said premises shall be used solely for residential purposes; that no building shall be erected, altered, placed or permitted to remain thereon other than one detached

single family dwelling, not to exceed two and one-half stories in height, and an attached or unattached private garage for not more than two cars.

2. That no building shall be erected, placed, or altered on any lot until the construction plans and specifications, and a plat showing the location of same on the premises have been approved in writing by Grover Redmon, or his duly authorized agent or agents, and that no fence or wall shall be erected, placed or altered on any lot nearer to any street than the minimum building or setback line, unless similarly approved.

3. No building shall be located nearer to the front lot line or nearer to the side street line than the building setback lines shown on the recorded plat. In any event, no building shall be located on any residential building lot nearer than 25 feet to the front lot line, or nearer than 15 feet to any side street line. No building except a detached garage or other out building located 50 or more feet from the front lot line shall be located nearer than 12 feet to any side lot line. No dwelling shall be located on any interior lot nearer than 35 feet to the rear lot line. For the purposes of this covenant, eaves, steps, and open porches shall not be considered as a part of a building, provided, however, that this shall not be construed to permit any portion of a building on a lot to encroach upon another lot.

4. No residential structure shall be erected or placed on any building lot, which lot has an area of less than 15,000 square feet or a width of less than 90 feet at the front building set back line.

5. 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.

6. No trailer, basement, tent, shack, garage, barn, or other

outbuilding erected in the subdivision 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.

7. The ground floor area of the main structure, exclusive of one-story open porches and garages, shall be not less than 1400 square feet in the case of a one-story structure and not less than 1100 feet in the case of a one and one-half, two, or two and one-half story structure.

8. That during the term of thirty years from date hereof, no building shall be erected upon a sub-division of a lot shown on the above plat, or subsequent plats, except when such sub-division forms an addition to a lot so shown thereon and then only upon compliance with all other restrictions herein contained. The sub-dividers expressly reserving the right, however, to sell and convey any part or parcel of any lot shown on said plats in connection with and to be merged with any adjoining lot, so as to create one or more lots of larger area than shown on said plat. During the term of thirty years from date hereof, no lot or any building constructed thereon may be sold or conveyed to any person of bad character.

9. Excepting and reserving, however, a right of way five feet in width along the rear and side lines of each lot for any and all water, sewer, telephone, light and gas lines, with the right reserved to the subdividers and their successors in interest, servants, agents, and employees, to go upon said right of way for the purpose of constructing any of said lines or making repairs or replacements in any of said lines. The lots will also be conveyed subject to any utilities lines which might have been shown on any prior recorded plats of the property or part thereof.

10. These covenants are to be covenants running with the land and shall be binding on all of the parties hereto and on all persons, firms or corporations claiming by, through

> or under them for a period of thirty years (30) from the date of this Agreement, at which time said covenants shall be automatically extended for successive periods of ten years, unless by vote of a majority of the then owners of the lots in the subdivision it is agreed to change said covenants in whole or in part.
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> 11. If the parties hereto, or any of them, or their heirs or assigns, shall violate or attempt to violate any of the covenants herein set forth, it shall be lawful for any other person or persons owning lots in the subdivision to prosecute in proceedings at law or in equity against the person or persons violating or attempting to violate any such covenants and either to prevent him or them from so doing or to recover damages or other dues for such violation. The invalidation of any of these covenants by judgment or court order shall in no wise affect any of the other provisions which shall remain in full force and effect.
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> 12. Subdividers hereby warrant that they are the owners of all of the lots above referred to and have a good legal right to execute this Restrictive Agreement.

¶ 2 This case was heard shortly after a case raising the identical legal issues, and in which a number of parties in this case submitted *amicus curiae* briefing. *C Invs. 2, LLC v. Auger*, 2021-NCCOA-209. The dispositive question is whether the challenged covenants are extinguished by operation of the Real Property Marketable Title Act, N.C. Gen. Stat. § 47B-1 *et seq*., or whether they fall within the exception contained in N.C. Gen. Stat. § 47B-3(13).

¶ 3 For the reasons stated in *C Investments 2*, we affirm the trial court's judgment. *Id.* at ¶¶ 12–40. Under the plain language of the Marketable Title Act, the only

challenged covenant that survives extinguishment is the portion of the first one stating that "said premises shall be used solely for residential purposes." The remaining covenants are extinguished by operation of the Marketable Title Act.[1] Accordingly, the trial court properly entered summary judgment in favor of the Appellee. We affirm the trial court's judgment.

AFFIRMED.

Judges COLLINS and JACKSON concur.

Report per Rule 30(e).

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[1] As we noted in *C Investments 2*, the Marketable Title Act contains other exceptions, some of which arguably could apply to certain covenants challenged in this case, such as the ninth covenant concerning a right of way for water, sewer, telephone, light, and gas lines. The parties in this appeal addressed only the exception in N.C. Gen. Stat. § 47B-3(13) and we therefore limit our appellate review solely to those arguments. *See* N.C. R. App. P. 28(b)(6).