

## Memorandum 81-55

Subject: Study H-407 - Marketable Title (Obsolete Restrictions--  
staff draft)

Private restrictions on land use ordinarily take one of two forms-- covenants, which are enforceable by damages or injunctive relief, and conditions, which are enforceable by forfeiture of the property. In addition, negative easements may require a property owner to refrain from using the property in a certain way. If property burdened by a land use restriction is transferred, the burden is transferred with the property in the case of a condition or negative easement and may or may not be transferred with the property in the case of a covenant. If the covenant is merely a personal agreement between the parties it does not continue to burden the property; if the covenant "runs with the land" it continues to burden the property. Even a covenant that does not satisfy the technical requirements for running with the land at law may still be enforceable in equity if it is part of a scheme of mutual covenants; in this case it is called an "equitable servitude" and continues to burden the property.

The main concern with the effect of land use restrictions on marketability of property has been the forfeiture effect of conditions subsequent. See discussion in Memorandum 81-62 (reverter act). Professor Basye points out (Clearing Land Titles § 143 (2d. ed. 1970)) that statutes commonly draw a distinction between forfeiture and non-forfeiture restrictions. The latter have seemed less in need of a durational limit for a number of reasons. As they do not involve a potential loss of title, their tendency to impair marketability is not so great. They also become unenforceable and generally may be discharged in a judicial proceeding when time and circumstances have deprived them of their utility. Further, in large, well planned, privately developed subdivisions and communities covenants reinforcing the general arrangement may have a useful life longer than any period which might be fixed in a statute limiting the duration of restrictions in general.

In addition to the problems pointed out by Professor Basye, covenants, conditions, and restrictions play a key role in condominium and shopping

center projects. Ronald P. Denitz of Tishman West Management Corp. has stated to the Commission previously that the business expectation of both commercial and residential parties in these situations is grounded in reliance upon and enforcement of the restrictions, which are reasonably expected, as a business matter, to remain effective throughout the life of their financial commitment to the project or development.

The staff is also concerned with restrictions that limit the use of property for public or charitable purposes, e.g., a grant that restricts the use of property to protect environmentally sensitive areas, a grant to a school district for educational purposes, a grant to a church for use as a camp for underprivileged children. Such restrictions may not be obsolete, yet there may be no person having a sufficient economic motivation to preserve the restrictions.

The staff believes it would be undesirable to impose a maximum duration or a rerecording requirement on land use restrictions generally (as opposed to restrictions enforceable by forfeiture). There is a substantial risk that land use restrictions that are not obsolete will be erased through an inadvertent failure to record. In addition, where there are multiple parcels, rerecording may be impractical since it may be necessary to rerecord as to every parcel involved in order to preserve the mutually binding effect of the restrictions. In general, there does not appear to be dissatisfaction with the duration of non-forfeiture restrictions.

If a restriction does become obsolete, California law is clear that a court can find the restriction unenforceable. Although this requires judicial action to clear title, the staff believes that it is appropriate in this situation. The most that should be done by statute is to make clear that negative easements as well as restrictive covenants and equitable servitudes are subject to termination by court action for changed conditions. New York has such a statutory provision and Simes & Taylor have prepared a Model Act concerning the Discharge of Restrictions on the Use of Land to accomplish this. The staff has incorporated such a provision in the attached draft of a tentative recommendation relating to obsolete restrictions.

There is one other matter the Commission should consider at this time in connection with restrictions on land use. Simes & Taylor state (The Improvement of Conveyancing by Legislation 231 (1960)):

Sometimes a building restriction has been violated by a permanent structure of such a character that thereafter it would be extremely expensive to comply with the restriction by a change in the structure. Under these circumstances, can the title be approved without qualification? It is true, various common law doctrines can often be relied upon to give relief, such as estoppel, acquiescence, laches, relative hardship, and change of conditions. But all these involve facts extrinsic to the record which are often difficult to determine. It is believed that, in addition to these doctrines, there should be a short statute of limitations with respect to all kinds of actions for breach of a covenant with respect to land use. In a few states such statutes have been enacted.

Simes & Taylor recommend a two-year statute of limitation for enforcement of a land use restriction.

The staff does not know why the period here should be any shorter than the general five-year statute for actions affecting real property, and we have in the staff draft codified the five-year statute for land use restrictions. Whether injunctive relief (as opposed to damages for breach of the restriction) would be appropriate within the five-year period will depend upon the facts in the particular case.

Respectfully submitted,

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STAFF DRAFT

## TENTATIVE RECOMMENDATION

relating to

## OBSOLETE RESTRICTIONS

Restrictions on land use take a number of forms, including covenants, conditions, equitable servitudes, and negative easements. When a restriction in the form of a covenant, condition, or equitable servitude becomes obsolete, it is unenforceable.<sup>1</sup> Whether this rule applies equally to negative easements is not clear.<sup>2</sup> The various forms of land use restrictions serve the same functions<sup>3</sup> and should be treated the same when they become obsolete. The rule that an obsolete restriction is unenforceable should be codified and should be applied to all private land use restrictions regardless of form.<sup>4</sup>

The statute of limitation applicable to enforcement of a restriction on land use is also not clear. Although it is assumed that the general five-year statute applicable to real property actions applies,<sup>5</sup>

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1. See, e.g., discussions in 3 B. Witkin, Summary of California Law, Real Property §§ 402-407 (8th ed. 1973); 2 A. Bowman, Ogden's Revised California Real Property Law §§ 23.29-23.34 (1975); 4 H. Miller & M. Starr, Current Law of California Real Estate §§ 25:11-25:16 (rev. 1977).
  2. A negative easement is an easement that limits the use of the servient tenement as opposed to an affirmative easement, which permits acts to be done upon the servient tenement. Easements of both types are subject to abandonment. See, e.g., discussions in 3 B. Witkin, Summary of California Law, Real Property §§ 374-376 (8th ed. 1973); 1 A. Bowman, Ogden's Revised California Real Property Law §§ 13.49-13.50 (1974); 3 H. Miller & M. Starr, Current Law of California Real Estate § 18:64-18:67 (rev. 1977).
  3. Cf. Civil Code § 815.1 ("conservation easement" means limitation of land use in form of easement, restriction, covenant, or condition for conservation purposes).
  4. See, e.g., N.Y., McKinney's Real Prop. Actions and Proc. Law § 1951; see also Model Act concerning the Discharge of Restrictions on the Use of Land (Simes & Taylor 1960).
  5. See, e.g., 2 A. Bowman, Ogden's Revised California Real Property Law §§ 23.25, 23.32 (1975).

there is authority to the contrary.<sup>6</sup> In theory, at least, a covenant would be governed by the four-year statute applicable to a contract founded upon a written instrument,<sup>7</sup> a condition or negative easement would be governed by the five-year statute applicable to real property actions,<sup>8</sup> and an equitable servitude would not be subject to any statutory limitation period but to such equitable doctrines as waiver, estoppel, and laches.<sup>9</sup> Just as these various forms of land use restrictions that serve the same functions should be treated alike when they become obsolete, so should they be subject to the same statutory limitation period. The five-year limitation period for real property actions generally is appropriate for breach of a land use restriction, and its application should be made clear by statute.<sup>10</sup>

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The Commission's recommendations would be effectuated by enactment of the following measure:

An act to add Title 5 (commencing with Section 880.020) to Part 2 of Division 2 of the Civil Code, relating to land use restrictions.

The people of the State of California do enact as follows:

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6. See, e.g., *Lincoln, v. Naron Development Co.*, 10 Cal. App.3d 619, 89 Cal. Rptr. 128 (1970) (statute of limitation not applicable to breach of condition).
  7. Code Civ. Proc. § 337(1).
  8. Code Civ. Proc. § 319.
  9. See, e.g., 4 H. Miller & M. Starr, *Current Law of California Real Estate* § 25:15 (rev. 1977).
  10. The five-year limitation period should be absolute and not subject to tolling. This will enhance marketability after breach of a restriction.

Civil Code §§ 880.020-888.040 (added)

SECTION 1. Title 5 (commencing with Section 880.020) is added to Part 2 of Division 2 of the Civil Code, to read:

## TITLE 5. MARKETABLE RECORD TITLE

## CHAPTER 1. GENERAL PROVISIONS

Article 1. Construction§ 880.020. Declaration of policy and purposes

880.020. (a) The Legislature declares as public policy that:

(1) Real property is a basic resource of the people of the state and should be made freely alienable and marketable to the extent practicable.

(2) Interests in real property and defects in titles created at remote times, whether or not of record, often constitute unreasonable restraints on alienation and marketability of real property.

(3) Such interests and defects produce litigation to clear and quiet titles, cause delays in real property title transactions, and hinder marketability of real property.

(4) Real property title transactions should be possible with economy and expediency. The status and security of recorded real property titles should be determinable to the extent practicable from an examination of recent records only.

(b) It is the purpose of the Legislature in enacting this title to simplify and facilitate real property title transactions in furtherance of public policy by enabling persons to rely on record title to the extent provided in this title, subject only to the limitations expressly provided in this title and notwithstanding any provision or implication to the contrary in any other statute or in the common law. This title shall be liberally construed to effect the legislative purpose.

Comment. Subdivision (a) of Section 880.020 is drawn from North Carolina marketable title legislation, N.C. Gen. Stat. § 47B-1 (19\_\_). The declaration of public policy is intended to demonstrate the significance of the state interest served by this title and the importance of the retroactive application of the law to the effectuation of that

interest. See In re Marriage of Bouquet, 16 Cal.3d 583, 592, 546 P.2d 1371, \_\_\_\_\_, 128 Cal. Rptr. 427, \_\_\_\_\_ (1976) (upholding changes in the community property laws as retroactively applied).

A statute may require recordation of previously executed instruments if a reasonable time is allowed for recordation. See discussion in 1 A. Bowman, Ogden's Revised California Real Property Law § 10.4 at 415-16 (1974). The burden on holders of old interests of recording a notice of intent to preserve is outweighed by the public good of more secure land transactions. See, e.g., Wichelman v. Messner, 250 Minn. 88, 121, 83 N.W.2d 800, 825 (1957) (upholding Minnesota marketable title legislation):

A number of marketable title acts have been passed by various states. Such limiting statutes are considered vital to all who are engaged in or concerned with the conveyance of real property. They proceed upon the theory that the economic advantages of being able to pass uncluttered title to land far outweigh any value which the outdated restrictions may have for the person in whose favor they operate. These statutes reflect the appraisal of state legislatures of the 'actual economic significance of these interests weighed against the inconvenience and expense caused by their continued existence for unlimited periods without regard to altered circumstances.' . . . They must be construed in the light of the public good in terms of more secure land transactions which outweighs the burden and risk imposed upon owners of old outstanding rights to record their interests.

Subdivision (b) is drawn from Section 9 of the Model Marketable Title Act. If the application of a particular statute or common law rule conflicts with the provisions of this title, this title governs.

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§ 880.030. Effect on other law

880.030. Nothing in this title shall be construed to:

(a) Extend the period for bringing an action or doing any other required act under a statute of limitation.

(b) Limit application of the principles of waiver and estoppel, laches, and other equitable principles.

(c) Affect the operation of any statute governing the effect of recording or failure to record, except as specifically provided in this title.

Comment. Subdivision (a) of Section 880.030 is drawn from Section 7 of the Model Marketable Title Act and Section 3-308 of the Uniform Simplification of Land Transfers Act (1977). Subdivision (b) is new; notwithstanding the maximum record duration or period of enforceability of interests in property pursuant to this title, the owner of an interest may waive or be estopped from asserting the interest within the prescribed time. Subdivision (c) is drawn from Section 7 of the Model Act.

Article 2. Application of Title§ 880.240. Interests excepted from title

880.240. The following interests are not subject to expiration pursuant to this title:

(a) The interest of a person using or occupying real property and the interest of a person under whom a person using or occupying real property claims, to the extent the use or occupancy would have been revealed by reasonable inspection or inquiry.

(b) An interest of the United States or pursuant to federal law in real property that is not subjected by federal law to the recording requirements of the state and that has not terminated under federal law.

(c) An interest of the state or a local public entity in real property.

(d) A conservation easement pursuant to Chapter 4 (commencing with Section 815) of Title 2.

Comment. Subdivision (a) of Section 880.240 is drawn from Section 3-306(2) of the Uniform Simplification of Land Transfers Act (1977). Subdivision (a) makes clear that if a person in possession claims under another person, whether by lease, license, or otherwise, the interest of the other person does not expire.

Subdivision (b) is drawn from Section 6 of the Model Marketable Title Act and Section 3-306(4) of the Uniform Act. The Comment to the Model Act states, "The exception as to claims of the United States would probably exist whether stated in the statute or not."

Subdivision (c) is comparable to provisions in a number of jurisdictions that have enacted marketable record title legislation.

Subdivision (d) recognizes that a conservation easement may be created that is perpetual in duration. Section 815.2.

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[CHAPTER 2. ANCIENT MORTGAGES AND DEEDS OF TRUST]

[CHAPTER 3. DORMANT MINERAL RIGHTS]

[CHAPTER 4. UNEXERCISED OPTIONS]

[CHAPTER 5. POWERS OF TERMINATION]

[CHAPTER 6. ABANDONED EASEMENTS]



32697

CHAPTER 8. OBSOLETE RESTRICTIONS

§ 888.010. "Restriction" defined

888.010. As used in this chapter, "restriction" means a limitation on the use of real property in a deed, will, or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, easement, or other restriction.

Comment. Section 888.010 implements application of this chapter to private land use restrictions of all types. Cf. Section 815.1 ("conservation easement" defined). This chapter applies to negative easements; affirmative easements are governed by Chapter 6 (commencing with Section 886.010) (abandoned easements). For additional provisions applicable to conditions subsequent, see Chapter 5 (commencing with Section 885.010) (powers of termination).

32698

§ 888.020. Obsolete restriction

888.020. (a) If a restriction becomes obsolete, the restriction expires and is unenforceable.

(b) As used in this section, a restriction is obsolete if the restriction is of no actual and substantial benefit to the person entitled to enforce the restriction, whether by reason of changed conditions or circumstances or for any other reason.

Comment. Section 888.020 is drawn from the Model Act concerning the Discharge of Restrictions on the Use of Land (Simes & Taylor 1960). See also Section 885.040 and Comment (obsolete power of termination). It codifies case law relating to obsolete restrictions. See, e.g., discussion in 3 B. Witkin, Summary of California Law, Real Property §§ 402-407 (8th ed. 1973). It also extends the case law rule to negative easements. It does not extend to "conservation easements," however, which are perpetual in duration. See Sections 815.2(b) (conservation easements) and 880.240 (interests excepted from title).

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§ 888.030. Time for enforcement of restriction

888.030. (a) The period for commencement of an action to enforce a restriction is five years after breach of the restriction.

(b) The time prescribed in subdivision (a) is absolute and is not suspended by the disability or lack of knowledge of any person or tolled for any other reason.

Comment. Subdivision (a) of Section 888.030 makes clear that the statutory limitation period applicable to enforcement of a restriction is five years. Cf. Code Civ. Proc. § 319 (five years). This ensures a uniform limitation period regardless whether the restriction is in the form of a covenant, condition, negative easement, or equitable servitude. Cf. 2 A. Bowman, Ogden's Revised California Real Property Law §§ 23.25, 23.32 (1975) (five years).

Subdivision (b) precludes tolling of the limitation period for marketability of title purposes. In this respect Section 888.030 differs from the general five-year limitation period for real property actions.

Section 888.030 prescribes the limitation period for an action to enforce breach of a restriction; it does not otherwise affect the existence or continued vitality of the restriction. However, Section 888.030 does not preclude earlier termination of a restriction through waiver or estoppel. See Section 880.030(b) (application of waiver and estoppel). See, e.g., Bryant v. Whitney, 178 Cal. 640, 174 Pac. 32 (1918) (waiver); Jewett v. Albin, 90 Cal. App. 535, 266 Pac. 329 (1928) (waiver or estoppel).

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#### § 888.040. Transitional provisions

888.040. (a) Except as otherwise provided in this section, this chapter applies on the operative date to all restrictions, whether created before, on, or after the operative date.

(b) This chapter shall not cause a restriction to expire or become unenforceable before the passage of two years after the operative date of this chapter.

Comment. Section 888.040 makes clear the legislative intent to apply this chapter immediately to existing restrictions. It provides a two-year grace period to enable enforcement of restrictions that would expire or become unenforceable upon enactment of this chapter and a shorter grace period for enforcement of restrictions that would expire or become unenforceable within two years after enactment of this chapter. The two-year grace period does not operate to extend enforceability of a restriction that would expire or become unenforceable by operation of law apart from this chapter, either pursuant to case law limitations on enforceability of restrictions or pursuant to applicable statutes of limitation.