

## Memorandum 95-24

### Marketable Title: Obsolete Restrictions

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A private restriction on land use ordinarily takes one of two forms — a covenant, which is enforceable by damages or injunctive relief, or a condition, which is enforceable by forfeiture of the property. In addition, a negative easement 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, but 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. 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 that 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. 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,

Nathaniel Sterling  
Executive Secretary

## 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 limitations 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> 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

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1. See, e.g., discussions in 4 B. Witkin, *Summary of California Law Real Property* §§ 502-507 (9th ed. 1987); 2 A. Bowman, *Ogden's Revised California Real Property Law* §§ 23.29-23.34 (1975); 7 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:19 (2d ed. 1990).

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 4 B. Witkin, *Summary of California Law Real Property* §§ 474-476 (9th ed. 1987); 1 A. Bowman, *Ogden's Revised California Real Property Law* §§ 13.49-13.50 (1974); 5 H. Miller & M. Starr, *Current Law of California Real Estate* § 15:77-15-38 (2d ed. 1989).

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., *Real Prop. Actions and Proc. Law* § 1951 (McKinney 19 ); see also L. Simes & C. Taylor, *Model Act concerning the Discharge of Restrictions on the Use of Land* (1960).

5. See, e.g., 2 A. Bowman, *Ogden's Revised California Real Property law* §§ 23.25, 23.32 (1975).

6. See, e.g., *Lincoln v. Narom Development Co.*, 10 Cal. App. 3d 619, 89 Cal. Rptr. 128 (1970) (statute of limitations not applicable to breach of condition).

7. Code Civ. Proc. § 337(1).

8. Code Civ. Proc. § 319.

9. See., e.g., 5 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:23 (2d ed. 1990).

generally is appropriate for breach of a land use restriction, and its application should be made clear by statute.<sup>10</sup>

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

## PROPOSED LEGISLATION

An act to add Title 5 (commencing with Section 888.010) 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:*

### **Civil Code §§ 888.010-888.040 (added)**

SECTION 1. Chapter 8 (commencing with Section 888.010) is added to Title 5 of Part 2 of Division 2 of the Civil Code, to read:

## 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 7 (commencing with Section 887.010) (abandoned easements). For additional provisions applicable to conditions subsequent, see Chapter 5 (commencing with Section 885.010) (powers of termination).

### **§ 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 4 B. Witkin, *Summary of California Law Real Property* §§ 502-507 (9th ed. 1987). It also extends the case law rule to negative easements. It does not extend to "conservation easements," however, which are perpetual in duration. See Section 815.2(b) (conservation easements) and 880.240 (interests excepted from title).

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10. The five-year limitation period should be absolute and not subject to tolling. This will enhance marketability after breach of a restriction.

**§ 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 P. 32 (1918) (waiver); *Jewett v. Albin*, 90 Cal. App. 535, 266 P. 329 (1928) (waiver or estoppel).

**§ 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.