

Memorandum 95-45

Marketable Title: Obsolete Restrictions (Comments on Tentative Recommendation)

The Commission circulated for comment over the summer its tentative recommendation relating to obsolete restrictions on land use. The tentative recommendation represents a modest effort to try to clear the land records of obsolete restrictions by codifying two rules:

(1) Enforcement of a restriction on land use is subject to a five-year limitation period.

(2) A restriction on land use is unenforceable if it is “obsolete” — defined as being of no actual and substantial benefit to the person entitled to enforce it.

A copy of the tentative recommendation is attached.

We received two letters commenting on the tentative recommendation. The State Bar Real Property Section (Exhibit pp. 1-2) has a number of substantive concerns, which are discussed below, and which cause the Section to withhold support for the proposals. Professor Susan French of UCLA Law School (Exhibit p. 3) agrees with the basic concepts of the tentative recommendation, but has some tangential issues, which are discussed below.

Statute of Limitations for Enforcement of Violation of a Restriction

The tentative recommendation notes that various types of restrictions have different limitations periods associated with them, depending upon whether the restrictions are found in a covenant, condition, easement, or equitable servitude. The tentative recommendation would impose a uniform five-year enforceability period, consistent with the general statutes of limitation for real property matters.

Professor French points out that the limitation period relates to enforcement of a viable restriction, and suggests that a person seeking enforcement will logically look to the statutes of limitation in the Code of Civil Procedure, rather than to the marketable title provisions in the Civil Code. Therefore, the limitation period should be relocated with the other limitations periods in the Code of Civil Procedure. The staff does not agree; the Civil Code provisions on marketability

of title are not an illogical location for enforcement provisions, since they are in the nature of statutes of limitation. In fact, the Marketable Title Act already includes a specific statute of limitations. See Civ. Code § 885.050 (five year statute of limitation for exercise of power of termination).

The State Bar Real Property Section is concerned that if a homeowner's association elects not to enforce a particular restriction under certain circumstances, the association could forfeit its ability to enforce the restriction for similar violations after the five-year time period has elapsed. It is not the intent of the tentative recommendation to cause forfeiture for non-enforcement. We can make clear by statute that failure to enforce a restriction as to one violation is not a waiver of the right to enforce the restriction as to other violations.

§ 888.050. Failure to enforce restriction not a waiver

888.050. Failure to commence an action to enforce a restriction within the time prescribed in Section 888.030 does not create an implication that the restriction is obsolete within the meaning of Section 888.020 and does not waive the right to enforce the restriction for any other violation of the restriction.

Comment. Section 888.050 preserves the rights of a person to whom a restriction is of actual or substantial benefit, regardless of the person's election not to enforce the restriction for a particular violation. Cf. Section 888.020 (obsolete restriction).

Restriction Unenforceable if Obsolete

Professor French agrees with the concept that obsolete restrictions should be terminable, but does not believe the statute goes far enough. She anticipates that the Restatement, Third, of Property (Servitudes) will consider other types of servitudes besides land use restrictions, will consider land use restrictions that may retain value for the beneficiary but that can no longer accomplish their intended purpose (and may even be causing harm to the community), and will consider the possibility of substituting damages for injunctive relief in appropriate cases. She concludes that the tentative recommendation is OK as far as it goes, but "Once the Restatement project is completed, I expect that you will want to undertake a comprehensive review of California servitudes law." The staff agrees that it will be useful to review the new Restatement when it is done to see what new light it may shed on these issues; but we would not hold up this project for that reason alone.

The State Bar Real Property Section cannot support the proposal for termination of obsolete covenants in the context of CC&Rs in common interest

developments. It would conflict with the “reasonableness” standard applicable to enforcement of CC&Rs in common interest developments under Civil Code Section 1354. “Homeowners associations charged with the enforcement of these restrictions would be faced with an additional defense that the restriction is unenforceable because it provides no actual and substantial benefit to the association or its members.” And it is unclear under the proposal who would bear the burden of proof on this issue.

The staff agrees that the statutory standard of “reasonableness” for enforceability of common interest development CC&Rs would conflict with the “obsolete” standard of the tentative recommendation, and that the burden of proof should be clear. We would revise the proposed statute to resolve these matters:

§ 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.

(c) The burden of proof under this section is on the person seeking a determination that a restriction is obsolete.

(d) This section does not apply to a restriction that is an enforceable equitable servitude under Section 1354.

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 & 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* §§ 502-07 (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 Sections 815.2(b) (conservation easements), 880.240 (interests excepted from title). Nor does it extend to equitable servitudes enforceable under Section 1354, which are enforceable unless “unreasonable”.

The difference in standards between this section and the “unreasonableness” approach of Section 1354 also highlights an additional issue the Commission should consider. The standard we have developed — “no actual or substantial benefit” — is an effort to achieve an objective standard, drawn from case law. This should be distinguished from a subjective standard, such as “intent to

abandon”, which also has been applied by some courts. The subjective standard is more protective of the interests of the beneficiary than the objective standard, and it has been suggested to the staff that the subjective standard is preferable. The staff does not agree with this suggestion, but the issue is presented for Commission resolution.

One alternative would be to embrace the reasonableness standard of Section 1354, which is an objective standard and which already applies in one important area of law. The staff’s concern is that “reasonableness” offers less guidance to the parties and courts than the “actual and substantial benefit” provision in our current draft.

Transitional Provisions

The statute provides a two-year grace period after the operative date before a restriction becomes unenforceable. Section 888.040. For purposes of clarity and ease of use of the statute, the staff would codify the operative date: “This chapter becomes operative on January 1, 1997.”

Proposed Method Of Proceeding

If the Commission approves the revisions suggested in this memorandum, the staff believes we should recirculate the proposal in revised form, at least to selected parties that would be most interested in it. Specifically, we would send it to the State Bar Real Property Section, the California Land Title Association, the California Association of Realtors, and any other interested groups or persons we are able to identify. It should be possible to seek further comment and still have a final recommendation for next session if the proposal appears sound.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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August 16, 1995

Law Revision Commission
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File: _____

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

Re: Tentative Recommendations

Ladies and Gentlemen:

On behalf of the Real Property Section of The State Bar, we would like to respond to the following tentative recommendations of the California Law Revision Commission:

Repeal of Civil Code Section 1464: The First Rule in Spencer's Case:

We support your recommendation to repeal Civil Code section 1464. We agree that this section is outdated and that its continued presence in the statutory scheme could cause interpretative problems because of later enacted statutes.

Marketable Title: Obsolete Restrictions:

We cannot support your recommendation in its current form. Our principal concern is the effect this legislation would have on the enforcement of CC&Rs in common interest developments.

The proposed legislation would apply to CC&Rs that are enforceable equitable servitudes under Civil Code section 1354(a). Homeowners associations charged with the enforcement of these restrictions would be faced with an additional defense that the restriction is unenforceable because it provides no actual and substantial benefit to the association or its members. It is not clear under the proposal whether the association or the challenger would bear the burden of proving whether the restriction retained any actual and substantial benefit.

The proposed legislation could adversely affect the provisions of Civil Code section 1354, which provide in part that equitable servitudes are enforceable unless "unreasonable". In addition, it could result in a requirement that the issue of whether a use restriction is enforceable in a particular situation must be determined on a case-by-case basis, a result recently rejected by the California Supreme Court in Nahrstedt v. Lakeside Village Condominium Association (1994) 8 Cal 4th 361.

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Furthermore, an association faces the uncertainty that if it elects not to enforce a particular restriction under certain circumstances, the association could forfeit its ability to enforce the restriction for similar violations after the five-year time period has elapsed.

We would be willing to reconsider our position if restrictions enforceable under Civil Code section 1354 are exempt from its provisions and if the burden issue is clarified.

If you have any questions regarding any of the above, please contact the undersigned.

Very truly yours,

JEFFREY G. WAGNER



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cc: Manny Fishman, Chair



Law Revision Commission

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JUL 1 1995

SCHOOL OF LAW
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File: _____

June 29, 1995

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739

RE: Tentative Recommendation for Obsolete Restrictions:

Your proposal to apply the same rule to covenants, conditions, equitable servitudes, and negative easements that impose land use restrictions is consistent with the approach taken in the new Restatement, Third, of Property (Servitudes), which applies the same rule to all types of servitudes in the absence of demonstrable differences that call for application of different rules. See Introduction, Tentative Draft No. 1 at xxiii (1989).

One problem I see with the recommendation is locating the statute of limitations in this Chapter. The limitations period applies to actions to enforce restrictions, not to obsolete restrictions (which are unenforceable under 888.010). The limitations period will be easier to find if it is located with other statutes of limitation.

Substantively, I agree with the premise that obsolete restrictions should expire or be terminated, but I do not believe the proposed statute goes far enough. The Restatement project has not yet reached the question of terminating servitudes for obsolescence, but when we do (probably in 1996-97), I expect our deliberations to cover considerably more ground. Among other things, I expect to consider the problems of obsolete affirmative covenants and easements, of servitudes that can no longer accomplish their intended purpose (and may even be causing harm to the community), but retain value for the beneficiary, and the possibilities of substituting damages for injunctive relief in appropriate cases.

If § 880.030 is relocated, I see no harm in adopting your proposed legislation, but believe you should revisit the issue at a later date. Once the Restatement project is completed, I expect that you will want to undertake a comprehensive review of California servitudes law.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Susan F. French".

Susan F. French
Professor of Law
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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

**Marketable Title:
Obsolete Restrictions**

April 1995

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

**COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE
RECEIVED BY THE COMMISSION NOT LATER THAN August 31, 1995.**

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

**California Law Revision Commission
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MARKETABLE TITLE:

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.¹ Whether this rule applies equally to negative easements is not clear.² The various forms of land use restrictions serve the same functions³ 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.⁴

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,⁵ there is authority to the contrary.⁶ In theory, at least, a covenant would be governed by the four-year statute applicable to a contract founded upon a written instrument,⁷ a condition or negative easement would be governed by the five-year statute applicable to real property actions,⁸ and an equitable servitude would not be subject to any statutory limitation period but to such equitable doctrines as waiver, estoppel, and laches.⁹ 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

1. See, e.g., discussions in 4 B. Witkin, *Summary of California Law Real Property* §§ 502-07 (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* §§ 474-76 (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.¹⁰

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

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:

Civ. 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 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 & 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* §§ 502-07 (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 Sections 815.2(b) (conservation easements), 880.240 (interests excepted from title).

§ 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.