Study H-407 September 21, 1995

First Supplement to Memorandum 95-45

Marketable Title: Obsolete Restrictions (More Comments on Tentative Recommendation)

Attached is a letter from the California Land Title Association, Forms and Practices Committee, commenting on the tentative recommendation on obsolete land use restrictions. Exhibit pp. 1-2. CLTA supports the concept and intent of the proposal, but raises a number of specific issues that need to be addressed.

Statute of Limitations for Enforcement of Violation of a Restriction

Under the tentative recommendation, the five-year statute of limitations for enforcement of a restriction violation runs regardless of "lack of knowledge" of the violation. CLTA raises the issue of a hidden violation, such as a person covertly operating a business out of a home in violation of a residential use restriction until the five-year limitation period has run. "The proposed language would prevent an action to enjoin conduct of the business upon discovery." Exhibit p. 2.

The example posited by CLTA is an instance of a continuing or ongoing violation of the restriction by conduct, as opposed to a violation at a fixed point in time, such as an improvement constructed in violation of a setback restriction. The statute could make clear that in the case of an ongoing violation, the statute does not run as to instances of conduct that occur within the statutory limitation period, only as to violations beyond the limitation period. However, we must be careful not to preclude application of the doctrines of waiver and estoppel, where the words or conduct of the person entitled to enforce the restriction lead the violator to act in reliance on an implied waiver of the restriction, even if the statute has not yet run as to the violation.

This approach to the CLTA problem does not address the related issue of a concealed violation of a restriction at a fixed point in time that only becomes evident after the five year limitations period has run. We should be cautious about rewarding a wrongdoer who successfully conceals the wrongdoing for the statutory period. This argues for eliminating the "lack of knowledge" language from the draft, and starting the limitations period running from discovery of the

violation. But, the whole reason for an absolute statute of limitations is to promote marketability of title by providing some certainty as to the enforceability of apparent encumbrances. Running the statute from the time a person has knowledge of a violation would defeat this purpose.

These considerations lead the staff to conclude that **maybe it is best simply to omit the statute of limitations from the draft**. If we try to codify the limitations period, we will have to examine all the court-developed doctrines surrounding enforcement of statutes of limitation to determine which should be preserved and which rejected. For marketable title purposes, it will be more manageable to limit the current draft to enforceability of obsolete restrictions, rather than to cover issues of enforcement of viable restrictions.

Restriction Unenforceable if Obsolete

CLTA is concerned that the obsolescence standard in the draft may conflict with the body of law that has developed concerning equitable servitudes. 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. **We propose to except equitable servitudes from this provision.** See the draft in Memorandum 95-45.

CLTA is also concerned about the standard proposed in the tentative recommendation. The standard we have developed — "no actual or substantial benefit" — is an effort to achieve an objective standard, drawn from case law. But as CLTA points out, this standard is sufficiently vague that no person can rely on a restriction's being obsolete without a court determination. The staff agrees that this is the result — we can not see any other means to try to clear land titles of obsolete restrictions. Other provisions of the marketable title act impose expiration periods, such as 30 or 60 years, for various interests, subject to renewal. But this would cause too many problems for restrictions that may be relied on to maintain the character of a land development indefinitely. We think the standard we have developed in this draft for determining obsolescence is more certain than other standards sometimes used by the courts, such as "intent to abandon", but this does not mean our standard is completely satisfactory.

Now that we are considering taking common interest development equitable servitudes out of the proposal, perhaps we can move to a fixed expiration period, such as 30 or 60 years, for other types of use restrictions. The expiration period would be subject to extension by an interested person

recording a notice, as with other interests under the marketable title act. The staff suggests this as a possibility for discussion at the meeting. We also have before us for discussion the concept of preserving a subjective standard such as "intent" or an alternate objective standard such as "reasonableness" for determining obsolescence. See Memorandum 95-45.

One problem that a fixed expiration period would cure is raised by CLTA — the possibility that a restriction might fall within the definition of "obsolete" at one time but at a later time become viable again. If a person violates the restriction at a time when it is "obsolete", will the restriction be enforceable against the person if it later becomes viable? The answer has to be that the restriction is applied in light of the circumstances existing at the time enforcement is sought. This reinforces the concept that obsolescence cannot be relied on absent a court determination, under the existing draft. If we keep the basic approach of an obsolescence standard, it may be preferable to state directly in the statute that a court declaration is necessary:

> **§ 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 <u>if the court determines that, at the time of the determination,</u> 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.

Definition of "Restriction"

CLTA notes that the reference to easements in Section 880.010 ("restriction" defined) is overbroad, since only a use limitation imposed by means of a negative easement is intended to be covered. **The staff agrees and would revise the draft to refer to "negative easement".**

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

CHICAGO TITLE

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September 19, 1995

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

Re: Item H-407
Marketable Title: Obsolete Restriction

Ladies and Gentlemen:

This letter is written on behalf of the California Land Title Association, Forms and Practices Committee.

The Forms and Practices Committee, which met on June 8 and 9, 1995 had the following comments concerning this proposed legislation:

1. Concern was expressed that a substantial body of case law was being summarized and codified in merely a three line subsection in §888.0020(b). We understand that a body of law of "obsoleteness" presently exists with regard to equitable servitudes, that is not presently the case with covenants, negative easements and other contractual limitations.

2. Concern was expressed that the phase "no actual and substantial benefit to the person entitled to enforce the restriction," is sufficiently vague to invite litigation. It would appear that no title insurer or member of the public dealing with real property could, without a judicial determination, determine that the requirements of the subsection are met. Also, it is conceivable to have one person for whom the restriction does not have an actual and substantial benefit who conveys to a person for whom the restriction does have an actual and substantial benefit. Does this result in a revivor of a restriction which was previously obsolete?

3. The Comment to 888.010 states that this section is to apply to negative easements. That should be stated expressly in the definition of "Restriction" by the insertion "negative" before the word "easement".

4. The five year Statute of Limitations set forth in 888.030 is satisfactory to the Forms and Practices Committee. Concern was expressed, however, with the provisions providing that lack of knowledge does not prevent the running of the statute. For example, the proposed language would have the following results: suppose a standard residential restriction provides that no homeowner will carry out a business from his or her home. A homeowner carries out a substantial mail order business from his home concealing the conduct of the business for five years. The proposed language would prevent an action to enjoin conduct of the business upon discovery.

5. CLTA supports the concept and intent of the proposed legislation.

Again, we appreciate being kept apprised of this item and would appreciate being provided with any further drafts of the proposed legislation. Also, we would appreciate being kept apprised of developments concerning this item and if there is any exchange in memoranda or public meetings, we would appreciate being kept informed.

Sincerely,

Edward S. Rusky
Vice President
Associate Regional Counsel

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