

Study H-407

October 2, 1995

Memorandum 95-63**Marketable Title: Obsolete Restrictions (Draft of Revised Tentative Recommendation)**

Attached to this memorandum is a draft of a revised tentative recommendation relating to obsolete restrictions on land use. The draft implements the Commission's decisions on this matter made after reviewing comments at the September 1995 meeting:

(1) A land use restriction should expire after 60 years, subject to preservation by recordation of a statutory notice before that time. This limitation would not apply to common interest development equitable servitudes. The 60-year expiration period would be part of the general scheme of the Marketable Record Title Act. We have set out the general provisions of the Act, including the provisions for recording a notice of intent to preserve an interest, as an Exhibit.

(2) Breach of a restriction should be enforceable for a period of five years, provided that a failure to bring an action within the five year period is not a waiver of the restriction itself or of the right to bring an action for another breach.

If this draft is acceptable, we will circulate it as a revised tentative recommendation on this subject.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

TITLE 5

Marketable Record Title

[Division 2, Property—Part 2, Real or Immovable Property—Title 5, Marketable Record Title; Title added Stats 1982 ch 1268 § 1. Former Title 5, entitled "Powers", consisting of §§ 878-940, was enacted 1872 and repealed Code Amdts 1873-74 ch 612 § 123.]

Chapter

1. General Provisions. § 880.020
2. Ancient Mortgages and Deeds of Trust. § 882.020
3. Mineral Rights. § 883.110
4. Unexercised Options. § 884.010
5. Powers of Termination. § 885.010
6. Unperformed Contracts for Sale of Real Property. § 886.010
7. Abandoned Easements. § 887.010

Witkin Summary (9th ed) Real Property §§ 14 et seq.

CHAPTER 1

General Provisions

Article

1. Construction. § 880.020
2. Application of Title. § 880.240
3. Preservation of Interests. § 880.310

ARTICLE 1

Construction

[Division 2, Property—Part 2, Real or Immovable Property—Title 5, Marketable Record Title—Chapter 1, General Provisions—Article 1, Construction; Added Stats 1982 ch 1268 § 1.]

Section

- 880.020. Legislative policy and purpose.
880.030. Construction of title.

Witkin Summary (9th ed) Security Transactions in Real Property §§ 108, 109, Real Property §§ 14 et seq; Cal Jur 3d (Rev) Easements and Licenses in Real Property § 47; Miller & Starr, Cal Real Estate 2d § 15:81.

§ 880.020. Legislative policy and purpose.

(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 in order to enable and encourage full use and development of the real property, including both surface and subsurface interests.

(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 because the interests are no longer valid or have been abandoned or have otherwise become obsolete.

(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, with respect to the property interests specified 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. Added Stats 1982 ch 1268 § 1. *Witkin Summary (9th ed) Secured Transactions in Real Property § 108, 109; Miller & Starr, Cal Real Estate 2d §§ 8:48, 8:95, 9:95, 9:96.*

§ 880.030. Construction of title. Nothing in this title shall be construed to:

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

(b) Affect the operation of any statute governing the effect of recording or failure to record, except as specifically provided in this title. Added Stats 1982 ch 1268 § 1. *Miller & Starr, Cal Real Estate 2d §§ 8:95, 9:95, 9:96.*

ARTICLE 2

Application of Title

[Division 2, Property—Part 2, Real or Immovable Property—Title 5, Marketable Record Title—Chapter 1, General Provisions—Article 2, Application of Title; Added Stats 1982 ch 1268 § 1.]

Section

- 880.240. Interests not subject to expiration of record.

880.250. Time limitations.

880.260. Effect of commencement of action.

Witkin Summary (9th ed) Real Property § 14.

880.240. Interests not subject to expiration of record. The following interests are not subject to expiration or expiration of record pursuant to this title:

a) The interest of a person in possession (including use or occupancy) of real property and the interest of a person under whom a person in possession claims, to the extent the possession 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. Added Stats 1982 ch 1268 § 1. *Miller & Starr, Cal Real Estate 2d §§ 8:48, 8:95, 9:95, 9:96.*

§ 880.250. Time limitations. (a) The times prescribed in this title for expiration or expiration of record of an interest in real property or for enforcement, for bringing an action, or for

doing any other required act are absolute and apply notwithstanding any disability or lack of knowledge of any person or any provisions for tolling a statute of limitation and notwithstanding any longer time applicable pursuant to any statute of limitation.

(b) Nothing in this title extends the period for enforcement, for bringing an action, or for doing any other required act, or revives an interest in real property that expires and is unenforceable, pursuant to any applicable statute of limitation. Added Stats 1982 ch 1268 § 1. *Miller & Starr, Cal Real Estate 2d §§ 8:48, 8:95, 9:95, 9:96, 11:4.*

§ 880.260. Effect of commencement of action. An interest in real property, as specified in this title, does not expire or expire of record and is not unenforceable pursuant to this title at the time prescribed in this title if within the time an action is commenced to enforce, establish, clear title to, or otherwise affect the interest and a notice of the pendency of the action is recorded as provided by law. For the purpose of this section, action includes special proceeding and arbitration proceeding. Added Stats 1982 ch 1268 § 1. *Miller & Starr, Cal Real Estate 2d §§ 8:48, 8:95, 9:95, 9:96, 11:8.*

ARTICLE 3

Preservation of Interests

[Division 2, Property—Part 2, Real or Immovable Property—Title 5, Marketable Record Title—Chapter 1, General Provisions—Article 3, Preservation of Interests; Added Stats 1982 ch 1268 § 1.]

Section

880.310. Requirement of notice; Effect of recordation of notice.

880.320. Persons who may record notice.

880.330. Verification and content of notice.

880.340. Form of notice.

880.350. Recording procedure.

880.360. Slander of title.

880.370. Retroactivity of limitation statutes.

Witkin Summary (9th ed) Security Transactions in Real Property § 108, Real Property § 23; Miller & Starr, Cal Real Estate 2d §§ 8:48, 8:95.

§ 880.310. Requirement of notice; Effect of recordation of notice. (a) If the time within which an interest in real property expires pursuant to this title depends upon recordation of a notice of intent to preserve the interest, a person may preserve the person's interest from expiration by recording a notice of intent to preserve the interest before the

interest expires pursuant to this title. Recordation of a notice of intent to preserve an interest in real property after the interest has expired pursuant to this title does not preserve the interest.

(b) Recordation of a notice of intent to preserve an interest in real property does not preclude a court from determining that an

interest has been abandoned or is otherwise unenforceable pursuant to other law, whether before or after the notice of intent to preserve the interest is recorded, and does not validate or make enforceable a claim or interest that is otherwise invalid or unenforceable. Recordation of a notice of intent to preserve an interest in real property creates a presumption affecting the burden of proof that the person who claims the interest has not abandoned and does not intend to abandon the interest. Added Stats 1982 ch 1268 § 1. *Miller & Starr, Cal Real Estate 2d* §§ 8:48, 9:95, 9:96.

§ 880.320. Persons who may record notice. A notice of intent to preserve an interest in real property may be recorded by any of the following persons:

- (a) A person who claims the interest.
- (b) Another person acting on behalf of a claimant if the person is authorized to act on behalf of the claimant or if the claimant is one of a class whose identity cannot be established or is uncertain at the time of recording the notice of intent to preserve the interest. Added Stats 1982 ch 1268 § 1. *Miller & Starr, Cal Real Estate 2d* §§ 8:48, 9:96.

§ 880.330. Verification and content of notice. Subject to all statutory requirements for recorded documents:

- (a) A notice of intent to preserve an interest in

real property shall be in writing and signed and verified by or on behalf of the claimant. If the notice is made on behalf of a claimant, the notice shall include a statement of the authority of the person making the notice.

(b) The notice shall contain all of the following information:

(1) The name and mailing address of the claimant. If the notice is made by or on behalf of more than one claimant the notice shall contain the name and mailing address of each claimant.

(2) A statement of the character of interest claimed. The statement shall include a reference by record location to the recorded document that creates or evidences the interest in the claimant.

(3) A legal description of the real property in which the interest is claimed. The description may be the same as that contained in the recorded document that creates or evidences the interest in the claimant. Added Stats 1982 ch 1268 § 1. *Cal Jur 3d (Rev) Easements and Licenses in Real Property* § 47; *Miller & Starr, Cal Real Estate 2d* § 9:95.

§ 880.340. Form of notice. Subject to all statutory requirements for recorded documents, a notice of intent to preserve an interest in real property shall be in substantially the following form:

RECORDING INFORMATION

Recording requested by:
After recording return to:

FOR USE OF COUNTY
RECORDER

Indexing instructions.

This notice must be indexed as follows:

Grantor and grantee index—each claimant is a grantor.

NOTICE OF INTENT TO PRESERVE INTEREST

This notice is intended to preserve an interest in real property from extinguishment pursuant to Title 5 (commencing with Section 880.020) of Part 2 of Division 2 of the Civil Code (Marketable Record Title).

Claimant

Name:

Mailing address:

(must be given for each claimant)

Interest

Character (e.g., power of termination):

Record location of document creating or evidencing
interest in claimant:

Real Property

Legal description (may be same as in recorded
document creating or evidencing interest in claimant):

I assert under penalty of perjury that this notice is not recorded for the purpose of slandering title to real property and I am informed and believe that the information contained in this notice is true. If this notice is made on behalf of a claimant, I assert under penalty of perjury that I am authorized to act on behalf of the claimant.

Signed: _____ Date: _____
(claimant)

(person acting on behalf
of claimant)

State of _____, ss.

County of _____,

On this _____ day of _____, in the year _____, before me (here insert name and quality of officer), personally appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence), to be the person whose name is subscribed to this instrument, and acknowledged that he (she or they) executed it.

Signed: _____ Office: _____
Office: _____

Added Stats 1982 ch 1268 § 1. *Cal Jur 3d (Rev) Easements and Licenses in Real Property § 47; Miller & Starr, Cal Real Estate 2d §§ 8:48, 9:95, 9:96.*

§ 880.350. Recording procedure. (a) A notice of intent to preserve an interest in real property shall be recorded in the county in which the real property is situated.

(b) The county recorder shall index a notice of intent to preserve an interest in real property in the index of grantors and grantees. The index entry shall be for the grantor, and for the purpose of this index, the claimant under the notice shall be deemed to be the grantor. If a notice of intent to preserve is recorded by or on behalf of more than one claimant, each claimant shall be deemed to be a grantor and a separate index entry shall be made for each claimant. Added Stats 1982 ch 1268 § 1. *Miller & Starr, Cal Real Estate 2d §§ 8:48, 9:95, 9:96.*

§ 880.360. Slander of title. A person shall not record a notice of intent to preserve an

interest in real property for the purpose of slandering title to the real property. If the court in an action or proceeding to establish or quiet title determines that a person recorded a notice of intent to preserve an interest for the purpose of slandering title, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the recording. Added Stats 1982 ch 1268 § 1. *Miller & Starr, Cal Real Estate 2d §§ 8:48, 9:95, 9:96.*

§ 880.370. Retroactivity of limitation statutes. If the period prescribed by statute during which a notice of intent to preserve an interest in real property must be recorded expires before, on, or within five years after the operative date of the statute, the period is extended until five years after the operative date of the statute. Added Stats 1982 ch 1268 § 1. *Cal Jur 3d (Rev) Easements and Licenses in Real Property § 47; Miller & Starr, Cal Real Estate 2d § 15:81.*

§§ 881, 882. Enacted 1872. Repealed Code Amdts 1873-74 ch 612 § 123.

MARKETABLE TITLE:
ENFORCEABILITY OF LAND USE RESTRICTIONS

Obsolete Restrictions

Restrictions on land use take a number of forms, including covenants, conditions, equitable servitudes, and negative easements. Such restrictions may serve useful purposes for a while, and eventually fall into disuse and become obsolete. Unless action is taken to remove an obsolete restriction, the restriction remains of record indefinitely and impairs the marketability of the property on which the restriction is imposed.

A restriction in the form of a covenant, condition, or equitable servitude that has become obsolete is unenforceable.¹ Whether this rule applies equally to a negative easement is not clear.² It is not possible to tell from the record whether a particular restriction has become obsolete and is unenforceable; a court determination is necessary. The cases and statutes have applied various standards to this determination.³

The Marketable Record Title Act⁴ provides a mechanism for clearing land title records of obsolete interests by operation of law, without the need for court proceedings. Under this statute, various types of recorded interests in real property are extinguished after passage of a sufficiently long period of time. A person wishing to preserve the property interest may do so by recording a statutory form that extends the life of the interest.

This simple mechanism has been applied to rid the land title records of such encumbrances as ancient mortgages and deeds of trust,⁵ dormant mineral rights,⁶ powers of termination,⁷ and unperformed contracts for sale of real property.⁸ The

1. See, e.g., discussions in 4 B. Witkin, *Summary of California Law Real Property* §§ 502-07, at ___ (9th ed. 1987); 2 A. Bowman, *Ogden's Revised California Real Property Law* §§ 23.29-23.34, at ___ (1975); 7 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:19, at ___ (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, at ___ (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* §§ 15:77-15-78, at ___ (2d ed. 1989).

3. Compare Civil Code § 885.040 (restriction "of no actual or substantial benefit to the holder") with Civil Code § 1354 (equitable servitude enforceable "unless unreasonable"). Decisions have also used abandonment standards, as well as waiver, estoppel, and laches concepts. See discussions cited in footnote 1, *supra*.

4. Civil Code §§ 880.020-887.090.

5. Civil Code §§ 882.020-882.040.

6. Civil Code §§ 883.210-883.270.

7. Civil Code §§ 885.010-885.070.

8. Civil Code §§ 886.010-886.050.

Law Revision Commission recommends that it be applied to land use restrictions as well. Because such restrictions may be intended to have enduring effect, a relatively long 60-year expiration period is appropriate. And because equitable servitudes in common interest developments are continually overseen and amended as appropriate by their governing bodies, these restrictions should not be subject to an expiration period; they are enforceable unless unreasonable.⁹

Statute of Limitations

The statute of limitations applicable to breach of a restriction on land use is likewise not clear. Although it is assumed that the general five-year statute applicable to real property actions applies,¹⁰ there is authority to the contrary.¹¹ In theory, at least, a covenant would be governed by the four-year statute applicable to a contract founded upon a written instrument,¹² a condition or negative easement would be governed by the five-year statute applicable to real property actions,¹³ and an equitable servitude would not be subject to any statutory limitation period but to such equitable doctrines as waiver, estoppel, and laches.¹⁴ Just as these various forms of land use restrictions that serve the same functions should be uniformly subject to a 60-year expiration period, so should breach of the restrictions be uniformly subject to a clear single statutory limitation period.

The general five-year limitation period for an action to recover real property¹⁵ is appropriate for an action on breach of a land use restriction; its application should be made clear by statute. If notice of a breach is recorded,¹⁶ the statute should make clear that the five year limitation period runs from the date of recordation. This will help clear land titles from the encumbrance of such notices that been recorded but never acted upon.

Failure of a person to enforce a restriction within five years after breach should preclude further action on that breach, but should not in itself be deemed a waiver or abandonment of the underlying restriction. Non-enforcement of a restriction for a particular breach may be considered as part of a pattern or constellation of circumstances that indicate waiver or abandonment.¹⁷ However, to imply waiver or abandonment of the underlying restriction from a failure to act on a particular

9. Civil Code § 1354.

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

11. 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).

12. Code Civ. Proc. § 337(1).

13. Code Civ. Proc. § 319.

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

15. See, e.g., Code Civ. Proc. § 319.

16. [Citation.]

17. 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).

breach would undesirably precipitate enforcement actions in cases where the holder of the restriction is otherwise inclined to be lenient.

PROPOSED LEGISLATION

Civ. Code §§ 888.010-888.060 (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, negative 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. Common interest development equitable servitudes excepted

888.020. This chapter does not apply to a restriction that is an enforceable equitable servitude under Section 1354.

Comment. Section 888.020 excepts equitable servitudes in common interest developments from expiration by operation of law under this chapter. Enforceability of those restrictions is governed by Section 1354 (restriction enforceable “unless unreasonable”).

§ 888.030. Expiration of restriction

888.030. (a) A restriction of record expires at the last of the following times:

(1) Sixty years after the date the instrument creating or otherwise evidencing the restriction is recorded.

(2) Sixty years after the date a notice of intent to preserve the restriction is recorded, if the notice is recorded within the time prescribed in paragraph (1).

(3) Sixty years after the date an instrument creating or otherwise evidencing the restriction or a notice of intent to preserve the restriction is recorded, if the instrument or notice is recorded within 60 years after the date such an instrument or notice was last recorded.

(b) This section applies notwithstanding any provision to the contrary in the instrument creating or otherwise evidencing the restriction or in another recorded document unless the instrument or other recorded document provides an earlier expiration date.

Comment. Section 888.030 provides for expiration of a restriction after 60 years, notwithstanding a longer or indefinite period provided in the instrument creating the restriction. The expiration period runs from the date of recording rather than the date of creation of the restriction because the primary purpose of this section is to clear record title. The expiration period can be extended for up to 60 years at a time by recordation of a notice of intent to preserve

the restriction. See Section 880.310 (notice of intent to preserve interest). Recordation of a notice of intent to preserve the restriction does not enable enforcement of a restriction that is unenforceable because it has been abandoned or become obsolete due to changed conditions or otherwise. See Sections 880.310 (notice of intent to preserve interest), 888.040 (chapter does not revive unenforceable restriction), & Comments.

For the effect of expiration of a power of termination pursuant to this section, see Section 888.050 (effect of expiration). This section does not affect conservation easements pursuant to Sections 815-816. See Section 880.240 (interests excepted from title) & Comment.

888.040. Chapter does not revive unenforceable restriction

888.040. Nothing in this chapter shall be construed to revive or make enforceable a restriction that is otherwise unenforceable before expiration of the times provided in Section 888.030, whether because the restriction is abandoned, obsolete, unlawful, or for any other reason.

Comment. Section 888.040 supplements Sections 880.250(b) (title does not revive or extend period of enforceability under statute of limitations) and 880.310(b) (recordation of notice of intent to preserve interest does not preclude court determination of unenforceability). A restriction that is obsolete is unenforceable. See, e.g., discussion in 4 B. Witkin, *Summary of California Law Real Property* §§ 502-07, at __ (9th ed. 1987). A discriminatory restriction is void and unenforceable. See, e.g., Section 53 (restriction on sex, race, color, religion, ancestry, national origin, or disability).

§ 888.050. Effect of expiration of restriction

888.050. Expiration of a restriction pursuant to this chapter makes the restriction unenforceable and is equivalent for all purposes to a termination of the restriction of record.

Comment. Section 888.050 provides for the clearing of record titled to real property by operation of law after a restriction has expired under Section 888.030 (expiration of restriction). Title can be cleared by judicial decree prior to the time prescribed in Section 885.020 in case of an otherwise unenforceable restriction. See Section 888.040 & Comment.

§ 888.060. Operative date

888.060. (a) This chapter is operative January 1, 1997.

(b) Subject to Section 880.370, this chapter applies on the operative date to all restrictions, whether executed or recorded before, on, or after the operative date.

Comment. Section 888.060 makes clear the legislative intent to apply this chapter immediately to existing restrictions. Section 880.370 provides a five-year grace period for recording a notice of intent to preserve a restriction that expires by operation of this chapter before, on, or within five years after the operative date of this chapter.

STATUTE OF LIMITATIONS

Code Civ. Proc. § 336 (amended)

SEC. 2. Section 336 of the Code of Civil Procedure is amended to read:

Code Civ. Proc. § 336 (amended). Five year statute of limitations

336. Within five years:

(a) An action for mesne profits of real property.

(b) An action for breach of a restriction, as defined in Section 888.010 of the Civil Code. The period prescribed in this subdivision runs from the date of the breach or, if a notice of the breach is recorded within five years after the date of the breach, from the date of recordation. A failure to commence an action within the period prescribed in this subdivision does not waive the right to commence an action for any other breach of the restriction and does not, in itself, create an implication that the restriction is abandoned, obsolete, or otherwise unenforceable. This subdivision shall not bar commencement of an action for breach of a restriction before January 1, 1999, and until January 1, 1999, any other applicable statutory or common law limitation shall continue to apply to such an action.

Comment. Subdivision (b) is added to Section 336 to make clear that the statutory limitation period applicable to enforcement of a restriction is five years, consistent with the general statutes governing recovery of real property. *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. See Civil Code § 880.010 (“restriction” defined); *cf.* 2 A Bowman, Ogden’s Revised California Real Property Law §§ 23.25, 23.32 (1975) (five years).

Subdivision (b) recognizes the practice of recording a notice of breach where authorized pursuant to the restriction. [Citation.] However, if an action on the breach is not brought within five years after recordation, the notice is unenforceable.

Under subdivision (b), a failure to enforce a breach within the limitation period should not alone be grounds to imply a waiver or abandonment of the restriction. However, such a failure may, combined with other circumstances, be grounds for waiver or estoppel or evidence of abandonment or obsolescence. 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). It should be noted that a restriction may become unenforceable due to passage of time or for other reasons. *Cf.* Civil Code §§ 888.030 (expiration of restriction), 888.040 (chapter does not revive unenforceable restriction), & Comments.

Subdivision (b) provides a two-year grace period to enable action on a breach that would become unenforceable upon enactment of this chapter and a shorter grace period for action on a breach that would become unenforceable within two years after enactment of this chapter. The two-year grace period does not operate to extend the time to act on a breach that would become unenforceable by operation of law apart from this chapter, either pursuant to case law limitations or applicable statutes of limitation.