Study H-407 February 2, 1996

Memorandum 96-10

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

The Commission in November 1995 circulated for comment its revised tentative recommendation relating to enforceability of land use restrictions. The proposal would (1) limit duration of a land use restriction to 60 years (unless renewed within the 60 year period) and (2) impose a 5-year limitation period for an action to enforce a restriction that has been breached.

Attached are letters from the California Land Title Association (Exhibit pp. 1-2) and the State Bar Real Property Section (Exhibit pp. 3-6). Their comments are analyzed below.

"RESTRICTION" DEFINED

The term "restriction" is defined broadly in proposed Civil Code Section 784 to include all forms of restriction on use of real property. The State Bar Real Property Section suggests the definition be expanded to make clear it includes restrictions contained in declarations under Civil Code Section 1353(a) (common interest development declaration of restrictions intended to be enforceable as equitable servitudes). **The staff has no problem with this suggestion.**

> 784. "Restriction", when used in a statute that incorporates this section by reference, means a limitation on the use of real property in a deed, declaration, or other instrument, whether in the form of a covenant, equitable servitude, condition subsequent, negative easement, or other restriction.
>
> **Comment.** Section 784 provides a definition of "restriction" for application in Chapter 8 (commencing with Section 888.010) (obsolete restrictions) of Title 5 and in Code of Civil Procedure Section 336 (statute of limitations). The reference to "declaration" includes a declaration of restrictions in a common interest development intended to be enforceable as equitable servitudes. See Section 1353(a).

The proposal would impose a 60-year limitation period on a restriction, renewable by recordation of a notice of intent to preserve the interest within the 60-year period.

Environmental Use Restrictions

The State Bar Real Property Section notes that environmental use restrictions may be imposed on contaminated property to protect against release of hazardous substances. These are intended to remain in place well in excess of 60 years, and therefore should be exempted from the 60-year limitation period.

The staff agrees that is an appropriate exemption, and would add it:

> 888.020. This chapter does not apply to ~~a~~ any of the following:
>
> (a) A restriction that is an enforceable equitable servitude under Section 1354.
>
> (b) An environmental restriction under Section 1471 or other restriction that serves the same function.
>
> **Comment.** Subdivision (a) of 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").
>
> Subdivision (b) supplements the exception of conservation easements in Section 880.240(d) (interests excepted from title). Subdivision (b) applies to a restriction intended to protect present or future human health or safety or the environment as a result of the presence of hazardous materials (Health and Safety Code Section 25260), whether in the form of a covenant or in another form. Compare Section 1471 (covenant) with Sections 784, 888.010 ("restriction" defined). Nothing in this section precludes the parties to an environmental restriction from providing by agreement that this chapter applies to the restriction.

Restrictions That Affect Multiple Parcels

Under the marketable title act, any person who claims an interest in property, such as a person entitled to enforce a restriction, may file a notice to preserve the interest. California Land Title Association raises the issue of a 500 lot subdivision. "Could one interested party preserve the CC&R's for the other 499? What if the other 499 interested parties do not want the restriction(s) preserved?" The State Bar Real Property Section has the same concern — allowing one person to

preserve a restriction that may burden multiple properties "is counterproductive to the goal of the statute."

The policy of the Marketable Record Title Act is to terminate an interest automatically by passage of time, so long as it is truly obsolete and no person cares sufficiently to record a notice of intent to preserve the interest. If a person cares enough to take action to record a notice of intent to preserve a restriction, we do not terminate the restriction automatically by passage of time. Some other means to terminate it, such as a court determination that the restriction is obsolete and unenforceable, should be used.

CLTA and the State Bar appear to be concerned primarily with subdivisions in which a restriction may once have both benefited and burdened multiple parcels but now is largely irrelevant. Why shouldn't such a restriction, once it reaches 60 years of age, expire automatically, unless a majority of the owners agree that it should be renewed?

The staff can see numerous problems with this approach:

• First, how is a majority determined? Do joint owners count as one? Are owners of larger parcels entitled to a greater vote? Are owners of more valuable parcels entitled to a greater vote? Suppose several parcels have been combined? Suppose a parcel has been partitioned?

• Second, is it sound policy? There may be situations where a restriction is of real and continuing importance to a few property owners even though it is largely irrelevant to the majority of them.

• Third, would it be legal? Constitutional vested property rights principles are involved here. The courts have upheld the constitutionality of marketable title legislation as applied to a person who fails to act within the statutory period. The cases have not addressed the question of a property owner who seeks to act within the statutory period but cannot because others do not want to. The staff believes this type of provision would not pass constitutional muster.

The State Bar Section offers what may be a workable alternative — if the restriction contains an amendment procedure, the notice of intent could be adopted and recorded using the same procedure for the adoption and recordation of an amendment.

> 888.035. If a restriction is subject to a procedure for revision or termination, a person may not record a notice of intent to preserve the restriction except pursuant to the procedure for revision or termination.

Comment. Section 888.035 is a limitation on Section 880.310 (notice of intent to preserve interest). Under this section, for example, if a restriction may be revised or terminated by a two-thirds vote of the persons entitled to enforce the restriction, recordation of a notice of intent to preserve the restriction is subject to a two-thirds vote.

This makes some sense, although its constitutionality remains uncertain. Take, for example, a restriction that may be amended or terminated by a two-thirds vote of the affected property owners. To provide by law for automatic termination after 60 years unless there is a two-thirds vote to extend the restriction defeats the minority rights the amendment procedure was designed to protect. Certainly **it could be applied prospectively**, and maybe it should — although it would have no effect until far in the future.

888.033. (b) This section applies only to a restriction executed after the operative date of this chapter.

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

(b) Subject to Sections 880.370 and 888.033, 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.

Section 888.033 provides a special procedure for recordation of notice of intent to preserve an interest; application of the procedure is prospective only.

Another question one must ask about such a provision is what will it apply to? The staff suspects that most restrictions that include provisions for their own revision or termination are restrictions imposed in the common interest development context. But we have excluded common interest development restrictions from the coverage of the 60-year duration statute. Are there enough other types of restrictions with amendment provisions to make this worth doing?

In any event, both CLTA and the State Bar Section believe clarification is needed on the extent to which recordation of a notice of intent to preserve a restriction by one person affects others benefited or burdened by the restriction. **The staff suggests the following language**:

888.037. Recordation of a notice of intent to preserve a restriction within the time prescribed in Section 888.030 preserves the restriction for the benefit of the claimant or claimants named in the notice against the real property described in the notice.

Comment. Section 888.037 is a specific application of the general principles set out in Sections 880.310-880.330. Under these provisions, a person may preserve the person's own interest by recording a notice of intent to preserve the interest. Section 880.310 (notice of intent to preserve interest). A person may record a notice on the person's own behalf or on behalf of another claimant if the person is authorized to act on behalf of the claimant. Section 880.320 (who may record notice). The notice must identify each claimant for which the notice is recorded and the property against which the restriction is claimed. Section 880.330 (contents of notice); see also Section 880.340 (form of notice).

Automatic Renewal Provisions

California Land Title Association would like clarification of the uncertainty that may be created by automatic renewal provisions that may be contained in CC&Rs. Proposed Section 888.030(b) addresses this issue:

> 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.

We would add language to the Comment making explicit that the 60 year expiration period applies "notwithstanding a longer or indefinite period or automatic renewal provided in the instrument creating the restriction."

Form of Notice of Intent to Preserve Interest

California Land Title Association asks what form of notice of intent to preserve an interest is contemplated by the proposal. The statutory form is set out in general provisions of the Marketable Record Title Act. **We would add to the Comment** a cross-reference to the statutory form. "The form of a notice of intent to preserve the restriction is prescribed in Section 880.340."

STATUTE OF LIMITATIONS

The proposal would impose a 5-year limitation period on an enforcement action for breach of a restriction, running from the time a person entitled to enforce the restriction should have discovered the breach through the exercise of

reasonable diligence, or if a notice of the breach is recorded, from the time of recordation.

Terminology

The draft uses "breach" terminology, whereas in its suggested redrafts the State Bar Real Property Section refers to "violation" of a restriction. "Violation" is a more modern and more inclusive term, and **we will adopt that terminology** in subsequent drafts.

Reasonable Diligence

The State Bar Real Property Section is concerned that running the statute from the time a person should, through the exercise of reasonable diligence, have discovered a violation is too onerous — it imposes a duty on parties responsible for enforcement of restrictions to conduct periodic inspections to root out violations. They suggest that running the statute from the date of discovery is sufficient, noting that a number of other statutes of limitation have "discovery" starting dates.

The "reasonable diligence" language in the draft serves a number of purposes. Consider the case of an absentee where the violation was obvious; if the absentee doesn't check on the property for 10 years, the absentee will not discover the violation, even though the violation would have been discoverable with reasonable diligence.

The "reasonable diligence" language also addresses a proof problem. What happens when a person brings an action to enforce a restriction 10 years after the violation occurred, claiming the restriction was not discovered until then? Even though the violation may have been reasonably apparent, how can one prove when discovery actually occurred?

The State Bar Section rightly points out that a number of existing statutes of limitation run from discovery of the injury, but they fail to point out that a number of other statutes of limitation impose a reasonable diligence qualification. Would a different standard satisfy the purposes of the reasonable diligence requirement without appearing to impose a duty on homeowners' associations to search out violations?

The staff thinks the reasonable diligence standard is sound and is a common concept in the California limitations statutes. However, in the interest of finding

a middle ground, **the staff suggests that the Commission consider the following alternative**:

> The period prescribed in this subdivision runs from the earlier of the following times:
>
> (1) The time a person entitled to enforce the restriction discovered the violation.
>
> (2) The time the violation would have been reasonably apparent to a person entitled to enforce the restriction.

Recorded Notice of Violation

The State Bar Real Property Section recommends deletion of the provision in the draft running the statute of limitations from the date of recordation of a notice of violation. "It effectively enables the limitations period to be extended from five to approximately ten years."

This provision was added to the draft in response to California Riviera Homeowners Ass'n v. Superior Court, 44 Cal. Rptr. 2d 595 (1995), which allows a homeowners association to record a notice of violation. The opinion in that case has since been ordered depublished by the Supreme Court. References to the case should be deleted from the recommendation.

For all of these reasons, **the staff agrees with the State Bar recommendation**. "The period prescribed in this subdivision runs from the time a person entitled to enforce the restriction discovered or through the exercise of reasonable diligence should have discovered the violation ~~or, if a notice of the breach is recorded within five years after that time, from the date of recordation~~."

Multiple Persons Entitled to Enforce Restriction

The State Bar Real Property Section points out that under the draft, the statute of limitations would begin to run any time the owner of a separate interest in a common interest development discovers a violation. However, as a practical matter, enforcement is handled almost exclusively by the homeowner's association, and the separate interest owner may fail to report the violation to the association. To address this concern, they would add a provision that runs the statute from the time the association discovers the violation.

This raises the broader issue of whether the running of the statute as to one person entitled to enforce a restriction binds all persons entitled to enforce the restriction. The issue comes up because, under the draft, the statute runs from discovery rather than from occurrence of the violation. Discovery may occur at

different times by different persons entitled to enforce the restriction. Does discovery by one person trigger the statute as to the other persons? The draft is ambiguous on this point. However, the State Bar Section rightly assumes that the intent of the section is that discovery by the owner of a separate interest triggers the running of the statute as to the homeowner's association.

The staff thinks the statute should run separately as to each person entitled to enforce the interest. Why should discovery by one person, who may not be particularly impacted, prejudice the rights of other persons who are beneficiaries of the restriction and may have a greater interest in enforcing it when they learn of the violation? Thus the provision would state that the statute of limitations "runs from the time ~~a person entitled~~ the person seeking to enforce the restriction discovered" the violation.

There is also the subsidiary point raised by the State Bar Section of whether a separate interest owner's knowledge may be imputed to the homeowner's association for purposes of running the statute of limitations. When is the homeowner's association deemed "discover" the violation? The Bar suggests this should occur when an "authorized representative" of the association discovers the violation.

This is a general problem in the law, not unique to homeowners' associations. When is any non-natural person deemed to have knowledge of a fact for purposes of the law? Rather than trying to reinvent this body of law in the statute, **the staff suggests we simply make reference in the Comment** to the concepts as applied in the homeowners' association context:

> For the purposes of this section, a homeowners' association entitled to enforce a restriction under Section 1354 of the Civil Code is deemed to have knowledge of a violation when a representative of the association, as opposed to the owner of a separate interest in the development, has knowledge of the violation.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

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January 10, 1996

VIA FACSIMILE
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RE: Marketable Title - Obsolete Restrictions

Dear Mr. Sterling:

At its December 1, 1995 meeting, the CLTA Forms and Practices Committee considered the revised draft of the legislation with respect to obsolete restrictions which you submitted with your letter dated October 3, 1995.

I have been asked by the committee to express the following concerns about the proposed legislation.

1. Please clarify the uncertainty which may be created by automatic renewal provisions which may be contained in CC&R's which may later become subject to the proposed legislation. As between the proposed statute and CC&R's with automatic renewal provisions, which would control?

2. The comment to Section 888.020 of the proposed legislation refers to Civil Code Section 880.320 to identify those persons entitled to record a Notice of Intent to preserve a restriction. Essentially, any person who claims an interest may record such a notice. How would that work in a 500 lot subdivision. Could one interested party preserve the CC&R's for the other 499? What if the other 499 interested parties do not want the restriction(s) preserved? Please clarify.

3. What form for the Notice of Intent is contemplated by the proposed legislation?

If you have any questions, do not hesitate to contact me.

Very truly yours,

Rick Dosa
Vice President
Regional Counsel

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cc: Sandra Fuhrman, Esq.
via fax

DICTATED BUT NOT READ

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Re: Obsolete Restrictions/Statute of Limitations

Dear Nate:

Set forth below are comments that the Real Property Section has received regarding the November 1995 draft of the proposed statutes on Obsolete Restrictions and Statute of Limitations.

Obsolete Restrictions:

(1) Environmental Use Restrictions: Attorneys practicing in the environmental law area have expressed concerns over the potential effect of the proposed statute on environmental use restrictions. As I understand it, such restrictions are imposed on contaminated property to protect against releases of hazardous substances. These types of restrictions may need to remain in place well in excess of 60 years. We would recommend that you exempt environmental use restrictions from the obsolete restriction statute. I have enclosed for your review proposed exemption language prepared by Mike Zischke of the law firm of Landels, Ripley & Diamond. If you have any questions regarding the proposed language, please contact Mike directly at 415/512-8700.

(2) Notice of Intent: We remain concerned about the procedure for recording a notice of intent that restarts the 60-year period. The proposed statute does not describe who has the authority to record such a notice. I understand from our recent telephone conversation that your interpretation is that any property owner could record the notice. In my opinion, this is counterproductive to the goal of the statute. I would suggest that language be included to state that if the restrictions contain an amendment provision, the notice of intent could be adopted and recorded utilizing the same procedure for the adoption and recordation of an amendment. If the restrictions are silent, the notice could be adopted and recorded with the consent of a majority of the owners of the affected properties. In any event, some

procedure regarding the adoption and recordation of the notice of intent needs to be included.

Statute of Limitations:

(1) Commencement of the Limitation Period: Under the proposed language, the limitation period commences at the time "when, through the exercise of reasonable diligence, a person entitled to enforce the restriction should have discovered the breach or, if a notice of breach is recorded, within five years after that time from the date of recordation".

We would recommend that you delete the latter commencement period. It effectively enables the limitations period to be extended from five to approximately ten years. In addition, I have received comments that the use of the "reasonable diligence" language imposes a duty on parties responsible for the enforcement of restrictions to conduct periodic inspections to root out violations. We would suggest that the commencement period start with the date of discovery of the violation. Numerous other statute-of-limitations provisions have a "discovery" starting date. See, for example, CCP §§ 337(3), 338(c), (d), (e), (f), (h), (i) an (k), 338.1, 339(1 and (3) and 340(5).

Furthermore, in most CC&Rs governing common interest developments, any homeowner technically can enforce the restrictions; however, as a practical matter, enforcement is handled almost exclusively through the association. Therefore, if a neighbor discovers the violation, the statute would begin to run even if the violation is not reported to the association. In order to address the following concerns, we would suggest the following as a substitute for the second sentence of section 336(b):

> **The period prescribed in this subdivision runs from the time when a person entitled to enforce the restriction discovers the facts constituting the violation. If the restriction is contained in a declaration described in Civil Code section 1353(a), the period prescribed in this subdivision runs from the time when an authorized representative of the association described in section 1351(a) discovers the facts constituting the violation.**

(2) Civil Code Section 784: We would suggest that the statutory definition of "restriction" in the proposed CC § 784 be

expanded to make it clear that it includes restrictions contained in declarations under CC § 1353(a).

If you have any questions regarding any of the above-referenced comments, please give me a call.

I assume you will provide me with a copy of any subsequent revisions to the November proposals.

Very truly yours,

JEFFREY G. WAGNER

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