Study H-407 April 5, 1996

First Supplement to Memorandum 96-10

Marketable Title: Obsolete Restrictions (Public Land Use Restrictions)

We have received communications from a number of public land use agencies in the form of letters from the San Francisco Bay Conservation and Development Commission (Exhibit pp. 1-2) and the Tahoe Regional Planning Agency (Exhibit pp. 3-4), and phone calls from the California Coastal Commission and the California Tahoe Conservancy (from which we are expecting, but have not yet received, letters).

These agencies note that they regularly impose land use restrictions as part of their permitting and transfer processes. The restrictions are intended to preserve the land in natural condition or to provide public access to it on a permanent basis. The agencies request that the obsolete restriction proposal accommodate these types of restrictions in some manner, without imposing a continuing burden on the agencies to monitor and take further action with respect to them.

The staff believes this is an appropriate and reasonable request. The Marketable Title Act has always excepted from its operation interests in land held by public entities:

> 880.240. 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.

It is not crystal clear, however, that a use restriction imposed and enforceable by a public entity is an "interest in real property" as used subdivision (c). The

staff recommends that an express exception be added for land use restrictions enforceable by public entities:

> 888.020. This chapter does not apply to 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.
>
> (c) A restriction enforceable by a public entity.
>
> **Comment.** Subdivision (c) is a specific application of Section 880.240. A public land use restriction is an interest in property that is excepted from the operation of the Marketable Record Title Act. Restrictions imposed by state and regional land use agencies, such as the California Coastal Commission, the San Francisco Bay Conservation and Development Commission, the Tahoe Regional Planning Agency, and the California Tahoe Conservancy, are included within the coverage of subdivision (c).

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

STATE OF CALIFORNIA PETE WILSON, *Governor*

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March 22, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, California 94303-4739

SUBJECT: Tentative Recommendation Re:
Expiration of Land Use Restrictions

To Whom It May Concern:

We have recently become aware of a tentative recommendation that the California Law Revision Commission proposed in January 1996 concerning the expiration of land use restrictions contained in deeds or other instruments. This proposal would limit the life of such restrictions to 60 years with a right to extend it up to another 60 years.

It is not clear from the proposal whether or not it is limited to restrictions contained only in conveyances between private parties and would therefore have no effect on restrictions imposed through a governmental permit process such as the Commission's. To the extent that this is not true, we have significant concerns with the proposal.

The Commission is a state agency established in 1965 to protect San Francisco Bay and its immediate surroundings from unnecessary and haphazard filling, which was resulting in the loss of approximately 2,000 acres of tide and submerged lands per year prior to the Commission's establishment. The Commission is also required to ensure that any new project built along the Bay shoreline provides public access to the waterfront. Any person or entity who wants to place fill within the Commission's jurisdiction, extract materials worth more than $20, or make any substantial change in use in land, water, or a structure must first obtain a permit from the Commission. Such permits typically contain a number of conditions, often concerning providing public access to and along the shoreline, limiting future construction to protect public views, and limiting future filling to create a permanent Bay shoreline. Such conditions are implemented by requiring that the permittee permanently guarantee the condition by executing and recording a binding agreement with the Commission that contains a legal description of the property being restricted and providing that such restriction shall become part of any future conveyance of the any interest in the affected property and shall also run with the land. The San Francisco Bay Plan, which contains legally binding policies that the Commission must comply with when it issues a permit, provides that such restrictions be made in perpetuity or at least so long as any structure or use authorized by the permit continues to exist.

Although most people do not think in terms of time spans of 120 years or more, it is certainly conceivable and in some cases even easily foreseeable that such structures and activities that the Commission authorizes could continue in existence for more than 60 or even 120 years. The Commission has been in existence for over 30 years, so our earliest restrictions are already reaching the half-way point in your proposal. Thus, if the Law Revision Commission's tentative recommendation were to become law, it would limit the Commission's ability to authorize such activities, could affect past Commission permit conditions, and could require the Commission to limit all permits to such a time span. This, in turn, would require re authorization every 60 or 120 years.

Because of the significant impact of your proposal on our operations, we ask that you make explicit that this recommendation does not apply to permits issued by governmental agencies such as the Commission whose purpose is to protect the public interest.

Please forward any additional information about this proposal for our further review, and please consider our comments even though they are late. We only learned of this proposal several days ago.

Please contact Jonathan Smith, our senior legal counsel, if you have any questions.

Sincerely,

WILL TRAVIS
Executive Director

cc: Marjorie Cox
Dan Siegel

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April 8, 1996

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Dear Sir/Madam:

SUBJECT: Proposed Revisions To Enforceability of Land Use Restrictions

Thank you for the opportunity to comment on the tentative recommendation regarding amendments to Section 888 of the California Civil Code. I apologize for the lateness of these comments but we just received a copy of the tentative recommendation in March.

These comments are made on behalf of the Tahoe Regional Planning Agency (TRPA), a bistate agency with land use planning jurisdiction over the Tahoe Region. TRPA was created in 1969 by the Tahoe Regional Planning Compact (Compact), an interstate compact between California and Nevada, which was ratified by Congress under the Compact Clause of the U.S. Constitution. The parallel citations for the Compact are: Cal. Gov't Code Section 66801; Nev.Rev.Stat. 277.200; P.L. 96-551, 94 Stat. 3233 (1980). TRPA has resource and land use planning responsibilities for the Tahoe Region which encompasses 207,000 acres of land. About two-thirds of the Tahoe Region is in California.

Because TRPA is an agency created by a Congressionally-approved interstate compact, TRPA is not a state or federal agency. Rather, TRPA is a separate legal entity with a unique status. Because TRPA is not a state agency of either state, and because the compacting states cannot amend the Compact without the other state's enactment of an identical provision and the consent of Congress, TRPA is not subject to either state's laws. However, the laws of the compacting states are used by courts to interpret the Compact and the actions of TRPA in the event of an ambiguity.

As part of its mandate from the Compact, TRPA has adopted a regional plan and implementing ordinances designed to protect and preserve environmental quality in the Tahoe Region. TRPA's growth management plan includes transfer of development programs. Enclosed is a brief overview of the transfer programs.

Our primary enforcement tool is the recordation of deed restrictions documenting the particular transfer transaction e.g., land coverage transfer, a development right/allocation transfer, or an existing development transfer. Deed restrictions give notice to subsequent purchasers of the status of the parcel. TRPA is concerned that an innocent purchaser could be easily defrauded if recorded restrictions do not give notice that the property has been restricted or permanently forfeited as a condition of a transfer.

The background information is necessary to understand the context of TRPA's concerns and comments. Although TRPA's deed restrictions would not be directly affected by the proposed revisions to California law providing for an automatic expiration, the California code provisions may be relied upon to invalidate or challenge a TRPA deed restriction. Further, there may be

confusion on the part of California property owners, title companies or others, regarding the applicability of the California Civil Code provisions to TRPA deed restrictions. In addition, TRPA has a memorandum of understanding (MOU) with the California Tahoe Conservancy to operate as a "land bank" or broker of land coverage and other development entitlements in the Tahoe Region. The proposed revisions may affect the operation and enforceability of the Conservancy's easements and acquisitions, which would affect the functioning of the MOU and TRPA's transfer programs. The Tahoe Conservancy will be submitting separate comments.

TRPA believes that the proposed revisions are overbroad in that only "conservation easements" or common interest servitudes are exempted. There are deed restrictions, easements and "equitable servitudes" in use today that are not easily defined and that do not fit within the traditional real property definitions. The deed restrictions required by TRPA are not easements or interests in real property in the classic sense. As you may know, recordation of land use restrictions or permit conditions has become a common means to enforce and monitor regulatory provisions. TRPA is not the only land use agency which uses deed restrictions to monitor and enforce land use or entitlement transfers and the proposed revisions could negatively impact years of regulatory effort and control.

Although Section 880.240 of the Civil Code exempts interests held by the federal government, or a state or local government, this provision would not clearly exempt interests held by regional agencies such as TRPA or the deed restrictions recorded to enforce permit conditions. Further, it is not clear how the exclusions in Section 880.240 relate to the automatic expiration provisions proposed in Section 888. TRPA is also concerned that placing the burden of renewal on the public agency is unrealistic. It would be extremely time-consuming and expensive to identify the existing deed restrictions (imposed since 1972) and record renewals at the appropriate time. Further, in the future, monitoring and filing renewals would require a significant amount of staff time, which is a limited commodity.

In conclusion, TRPA requests that public entities, such as TRPA and the Conservancy, be clearly exempted from the requirement to renew deed restrictions or easements. Such an exclusion would avoid ambiguity and uncertainty in the Tahoe Region.

Please do not hesitate to contact me if you have questions regarding this matter. I would appreciate being advised of further revisions or hearings on this matter.

Sincerely,

Susan E. Scholley

Susan E. Scholley
Special Projects Attorney

c: John Gussman, CTC
Daniel Siegel, Cal. AG