Study H-407 May 3, 1996

Second Supplement to Memorandum 96-10

Marketable Title: Obsolete Restrictions (Conservation Restrictions)

The purpose of the marketable title statutes is to rid the land title records of obsolete record interests by operation of law, without the need to maintain a quiet title action to establish marketability of title. Examples of restrictions of this type include a residential restriction on a property that is now zoned commercial or an illegal racial covenant.

The purpose of the marketable title statutes is not to terminate or cause a forfeiture of an interest that is or may be still viable. Thus if a land use restriction may have continuing utility, the law avoid terminating the restriction automatically. The owner of the burdened land still has the option, if necessary, of a judicial proceeding to determine that the restriction is in fact obsolete and to obtain a court order terminating it.

We have received, and continue to receive, communications concerned about land use restrictions for environmental or conservation purposes. Restrictions of this type are intended to protect the land from degradation or to maintain it in its natural condition in perpetuity. See letters attached to Memorandum 96-10 and its First Supplement. See also the letter attached to this memorandum from the California Coastal Commission (Exhibit pp. 1-2).

The staff thinks it is clear as a matter of public policy that these types of restrictions should not be subject to the automatic 60-year termination legislation, but should be terminable only on a court order finding that the restriction has in fact become obsolete. The problem, however, is adequately to identify the relevant types of restrictions from the record.

The earlier memoranda propose language to make clear that the following types of restrictions are exempt from the 60-year termination scheme:

(1) A conservation easement under Civil Code Section 815.
(2) An environmental restriction under Civil Code Section 1471 or another restriction that serves the same function.
(3) A restriction enforceable by a public entity.

This listing may not be sufficiently comprehensive. A conservation easement, for example, is defined by statute as a voluntary easement; it would not include an easement exacted by a local government as a condition for issuance of a use permit. This could be addressed by adding broader language such as:

> (4) A negative easement that serves the same function as a conservation easement under Section 815, whether conveyed voluntarily or in fulfillment of a requirement of a public entity.

An alternate, or supplemental, approach would be to refer to:

> (5) A restriction recorded in fulfillment of a requirement of a public entity, provided that fact appears on the record.

There may be other types of restrictions still to be covered. We are awaiting letters from such entities as the Tahoe Conservancy, and public land trusts, with which we have been in contact.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

STATE OF CALIFORNIA – THE RESOURCES AGENCY PETE WILSON, Governor

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April 8, 1996

Nathaniel Sterling, Executive Secretary
California Law Revision Commission
4000 Middlefield Rd., Rm. D-1
Palo Alto, CA 94303-4739

Re: Proposed Marketable Record Title Act (Proposed Civil Code §§ 888.010-888.060)

Dear Mr. Sterling:

The purpose of this letter is to reiterate in writing the comments we offered to you in the course of a recent phone conversation on the above-referenced proposed legislation. We cannot support the subject proposed legislation as presently drafted.

The proposed legislation would limit the maximum period of land use restrictions to 60 or, if extended, 120 years. It would apply to all restrictions imposed by governmental agencies except those which take the form of interests in real property of either the United States (or pursuant to federal law), the state, or a local public entity, of "conservation easements" (Civil Code §§ 880.240(b)-(d)), or of covenants and restrictions ("CC&R's") set forth in a declaration recorded pursuant to Civil Code § 1353 in connection with certain common interest developments (proposed Civil Code § 888.020.)

In effectuating the purposes of the land use regulatory programs provided for in the California Coastal Act of 1976 (Public Resources Code (PRC) Division 20, section 30000 *et seq.*) the Coastal Commission places heavy reliance on the recordation by development project proponents of deed restrictions and "negative easements" or offers of dedication thereof. The Commission requires such restrictions to have a duration no shorter than the time that the development for which the Coastal Commission has issued a permit remains in existence and thus confers benefit on the affected property. In many if not most cases such a duration will exceed the 60 and even 120 year expiration periods provided for in the proposed legislation.

It is unlikely that negative easements recorded in satisfaction of a condition to a permit the Coastal Commission has granted would qualify as a "conservation easement" as that term is used and defined in Civil Code §§ 815-816. Thus, such negative easements would not qualify for the "conservation easement" exception to the 60 or 120 year durational limitation set forth in the proposed legislation. This unlikelihood derives

from considerations which include but are not limited to the fact that relevant provisions of law characterize a "conservation easement" as being "voluntary" in nature. (Civil Code § 815.2(a).) In addition, although some offers of dedication of negative easements recorded pursuant to the requirements of a Coastal Commission permit have been accepted by state or local governmental agencies or subdivisions, an equal if not more common practice is for such easements to be accepted by locally-based, private nonprofit organizations. Thus a significant proportion of Coastal Commission-required restrictions (including *all* deed restrictions) do not fall within the scope of any exemption either in existing law (Civil Code § 880.240) or in the subject proposed legislation.

We recommend strongly that before this legislation is presented for introduction in the legislature it be amended to add to proposed section 888.020 or elsewhere an additional exemption for "restrictions recorded in fulfillment of any requirement of any governmental agency." A revised section 888.020 would read "This chapter does not apply to a restriction that is either (a) an enforceable equitable servitude under Section 1354; or (b) a restriction recorded in fulfillment of any requirement of any governmental agency." Such an additional exemption may well be consistent with your original intent in drafting the subject legislation, as reflected in the statement in the comment to proposed section 888.010 that such legislation is intended to apply "to *private* land use restrictions of all types." (Emphasis added.)

We also endorse the similar views of our sister agency, the S.F. Bay Conservation and Development Commission, as set forth in its letter to you dated March 22, 1996.

Thank you for your consideration of these views. Please feel free to contact John Bowers at (415) 904-5220 if you should desire any further clarification of our position.

Sincerely,

RALPH FAUST
Chief Counsel