Study H-407 June 12, 1996

Third Supplement to Memorandum 96-10

Marketable Title : Obsolete Restrictions (More on Conservation Restrictions)

We have received further input from private land use trusts concerning the nature of conservation easements and other devices that they use to try to protect land in its natural condition. See letters of the Marin Agricultural Land Trust (Exhibit p. 1), The Nature Conservancy (Exhibit p. 2), and The Trust For Public Land (Exhibit pp. 3-8).

The thrust of their comments is that the provision in the draft exempting conservation easements as defined in Civil Code Section 815.1 is too narrow. That provision only applies to voluntary perpetual easements. But some conservation restrictions may be given in response to public agency requirements, may be limited in term, or may take the form of a covenant or other restriction besides an easement.

The staff agrees that our draft should be broadened to accommodate this. Putting together these comments with previous comments on this subject, we suggest a combined exception along the following lines:

> 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 substantially the same function.
>
> (c) A restriction enforceable by a public entity or recorded in fulfillment of a requirement of a public entity, provided that fact appears on the record.
>
> (d) A conservation easement under Chapter 4 (commencing with Section 815) of Title 2, or a negative easement or other restriction that serves substantially the same function, including an open space easement under the Open Space Act of 1974 (Chapter 6.6 (commencing with Section 51070) of Part 1 of Division 1 of Title 5 of the Government Code) and a restriction under the California Land Conservation Act of 1965 (Chapter 7 (commencing with Section 51200) of Part 1 of Division 1 of Title 5 of the Government Code), regardless whether the easement or other restriction is given voluntarily and whether or not it is perpetual in duration.

Comment. Section 888.020 supplements the general exceptions from this title provided in Section 880.240. Nothing in this section precludes the parties to an excepted restriction from providing by agreement that this chapter applies to the restriction.

Subdivision (a) 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) 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).

Subdivision (c) is a specific application of Section 880.240(c). 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, as well as restrictions imposed by federal agencies, are included within the coverage of subdivision (c).

Subdivision (d) broadens the exception provided in Section 880.240(d). A "conservation easement" within the meaning of Section 815 must be conveyed voluntarily and is perpetual in duration. Subdivision (d) excepts a negative easement or other restriction that serves substantially the same function as a conservation easement even though it may have been conveyed in fulfillment of a requirement of a public entity and even though it may not be perpetual in duration. An open space easement under the Open Space Act of 1974, for example, or a restriction under the Williamson Act, may be limited in duration. See Gov't Code §§ 51075(d) (open space easement), 51244-51244.5 (contract to limit use of agricultural land).

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Marin Agricultural Land Trust

P.O. Box 809, Point Reyes Station, California 94956 • (415) 663-1158

May 14, 1996

Nathaniel Sterling, Executive Secretary
California Law Review Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

Re: Obsolete Land Use Restrictions

Dear Nat:

Thank you for your call and the draft language regarding exemptions from the proposed legislation for clearing land title records of obsolete restrictions.

Our only suggestion is that the language of paragraph (d) of draft Sec. 888.020 be revised to be more consistent with the language of Civil Code Sec. 815.1:

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

Please feel free to call me or Jamie O. Harris, our attorney on real estate and land use issues, if you have questions about this suggestion.

Thanks again for consulting us.

Sincerely,

Robert Berner
Executive Director

cc: Jamie O. Harris, Esq.
William T. Hutton, Esq.
Corey Brown, Trust for Public Land
Putnam Livermore, Esq.
Thomas S. Barrett

The Nature Conservancy

California Regional Office
201 Mission Street, 4th Floor
San Francisco, California 94105
TEL 415 777-0487
FAX 415 777-0244 & 415 777-0772

International Headquarters
Arlington, Virginia
TEL 703 841-5300

June 4, 1996

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

Re: Obsolete land use restrictions

Dear Mr. Sterling:

Thank you for your letter of May 10, 1996 regarding the proposed revisions to the Marketable Record Title Act. We have one suggested change:

888.020. This chapter does not apply to any of the following:

. . .

(d) A negative easement, covenant, equitable servitude, condition subsequent, or other restriction, that serves the same function as a conservation easement under Section 815, . . .

. . .

We appreciate the opportunity to comment. Please feel free to contact me with any questions.

Sincerely,

Laurel Mayer
California Regional Counsel

t:\eobrien\lawrevis.ion\sterling

THE TRUST FOR PUBLIC LAND

Conserving Land for People

By Fax

June 4, 1996

Law Revision Commission
RECEIVED
JUN 0 4 1996
File:

California Law Review Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739
Attn: Nathaniel Sterling

Re: Marketable Title Legislation

Dear Mr. Sterling:

I am enclosing a memo by our legal intern, Kelly Pritchett, on the proposed legislation.

Kelly discusses the effect of the legislation on the subset of conservation restrictions that are not perpetual in nature (and thus not within the scope of Section 815 of the Civil Code).

We hope these comments are useful. Good luck in formulating this legislation.

Sincerely,

Nelson J. Lee
Senior Vice President and
General Counsel

The Trust for Public Land
National Office
116 New Montgomery
Fourth Floor
San Francisco, CA 94105

(415) 495-4014
Fax (415) 495-4103

THE TRUST FOR PUBLIC LAND

MEMORANDUM

TO: Nelson Lee, Esq.
FROM: Kelly Prichett
DATE: June 4, 1996
RE: Proposed Legislation - Impact on Conservation Easements

What impact would proposed legislation amending the Marketable Record Title Act have on conservation easements?

Purpose of the proposed legislation

The proposed legislation expands the Marketable Record Title Act ("MRTA") by removing restrictions (as defined therein) from title. The aim is to remove restrictions which would otherwise impair the marketability of title indefinitely. Various types of recorded interests in real property would be extinguished automatically after the passage of sixty years, commencing with the date of recordation of the instrument (unless the time is extended pursuant to certain notice requirements). This would eliminate the need for court proceedings as restrictions would expire by operation of law. See [Proposed] Cal. Civ. Code §§ 880.020 et seq..

Background - The Market Recordable Title Act

In an effort to aid in the smooth and efficient conveyance of real property, many states have adopted marketable title acts. See Cal. Civ. Code § 880.020 (comment). California adopted the MRTA in 1982 as Title 5 of the California Civil Code Division 2, Part 2, Sections 880.020 et seq. Currently, Title 5 is comprised of seven chapters. The proposed legislation would be added as Chapter 8.

The MRTA extinguishes certain interests in real property after an applicable expiration date. Such interests include ancient mortgages and deeds of trust (or other security interests). See Cal. Civ. Code §§ 882.020 - 882.040. Pursuant to the MRTA, security interests would be no longer enforceable either ten years after the date of maturity or sixty years after the date the instrument was recorded if the date of maturity is not fixed or is otherwise unclear. Id.

The MRTA also includes provisions to terminate "dormant mineral rights." Cal. Civ. Code §§ 883.110-883.270. It also extinguishes unexercised options which have not terminated by their own terms. Cal. Civ. Code §§ 884.010-884.030. Such interests would

be rendered unenforceable unless they were preserved according to the notice requirements of the MRTA. See, e.g., Cal. Civ. Code § 883.230 (notice of intent to preserve mineral right).

A great change effectuated by the MRTA was in abolishing both fees simple determinable and possibilities of reverter. Cal. Civ. Code § 885.020; see also, 5 Miller & Starr, Cal. Real Estate, §§ 11:4-11:5 (1989). There are certain exceptions where such interests have not been abolished (e.g., a reversionary interest conditioned upon the continued production of or removal of oil, gas or other minerals (Cal. Civ. Code § 885.015(a))). Through the MRTA, "fees determinable have become fees simple subject to a restriction in the form of a condition subsequent." Cal. Civ. Code § 885.020. All possibilities of reverter became a power of termination. Id.

A power of termination would expire thirty years after the date of recordation of the instrument creating the interest if it is not otherwise extended pursuant to other provisions of the statute. See, e.g., § 885.030(2)(notice of intent to preserve the power of termination may be recorded during the thirty year period, thereby preserving the interest for a least thirty more years). As with other provisions of the MRTA which extinguish certain interests, a power of termination can be preserved by taking certain affirmative steps in recording a notice to preserve such an interest.

The MRTA applies to unperformed contracts for sale of real property so that such a contract does not constitute a cloud on the title to the real property. See Cal. Civ. Code § 886.040. It also applies to abandoned easements. Cal. Civ. Code § 887.010-887.090. In the case of abandoned easements, an owner of real property subject to an easement may bring an action to establish its abandonment and to clear record title of the easement. Id. § 887.040(a). Again, subject to the provisions of the MRTA, an interest in an unperformed contract or an easement can be preserved by recording a notice to preserve such interests. See, e.g., § 887.060 (notice of intent to preserve easement).

By its terms, the MRTA does not limit the number of times a holder of an interest could record a notice of intent to preserve an interest. It appears one could record such a notice repeatedly so long as notice were filed during an applicable statutory period.

Proposed legislation

The proposed legislation has been designed to remove restrictions on title sixty years after the date an instrument creating the restriction if recorded, or sixty years after the date that a notice of intent to enforce the restriction is recorded. A recorded restriction is defined as a "covenant, equitable servitude, condition subsequent, negative easement or other restriction." [Proposed] Cal. Civ. Code § 784. Although the MRTA already has provisions regarding the termination of certain encumbrances such as abandoned easements (§ 887.010-887.090), conditions subsequent (§ 885.010 (defining power of termination)) and easements (§ 887.010 (defining easements as "a burden or servitude upon land, whether or not attached

to other land . . . that allows the holder. . . to do acts upon the land.")), such encumbrances were narrowly defined, were arguably within the scope of the MRTA, or were excluded from the application of the MRTA. The proposed legislation expands the application of the MRTA to encumbrances that might not otherwise be covered. Such an encumbrance would automatically become unenforceable after an applicable sixty-year term. However, it is possible to preserve a restriction by recording a notice of intent to preserve the restriction sometime within the sixty year period. [Proposed] Cal. Civ. Code § 888.030. Such a notice would then be subject to a sixty year limitation before it would, likewise, become unenforceable. As with the other provisions of the MRTA, there is no apparent limit on how many times one could record a notice to preserve a restriction.

Effect on Conservation Easements

Conservation easements are exempt from the MRTA pursuant to § 880.240(d). This provision defines interests which specifically are not subject to expiration pursuant to Title 5. One such interest is "a conservation easement pursuant to Chapter 4 (commencing with Section 815) of Title 2." The proposed legislation § 888.010 defines a "restriction," and within that section there is a comment which states that the proposed chapter does not apply to conservation easements "pursuant to Section 815-816" [of Chapter 4]. This language is repeated in proposed Cal. Civ. Code § 888.030, which defines the terms of a restriction's termination. Thus, the proposed legislation clearly exempts conservation easements, as defined by §§ 815-816, from automatic termination.

However, one of §§ 815-816 defining criteria for a conservation easement is that it be perpetual. Cal. Civ. Code § 815.2(b). This means that any conservation easement whose duration is less than perpetual would be swept into the scope of the proposed legislation and subject to automatic termination. Thus, a conservation easement granted for 99 years, for example, would be subject to the provisions of the new legislation because it is a restriction pursuant to proposed Cal. Civ. Code § 784, but not a conservation as defined by Cal. Civ. Code § 815.2. Although conservation easements are typically granted in perpetuity, the proposed legislation would apply to any conservation easement granted for a finite period even though the period might be quite long.

Conservation easements which are created pursuant to the Open Space Act of 1974 or the Williamson Act fall within the scope of the proposed legislation. Under these two acts, a restriction placed on real property (although for conservation purposes) could be for a duration as short as ten years. See, e.g., § 51081. The term would automatically be renewed unless the parties recorded a notice not to renew the term. Cal. Gov. Code § 51081 (Open Space Act of 1974); Cal. Gov. Code § 51244 (Williamson Act). Therefore, it appears any restriction placed on real property pursuant to these acts would be extinguished unless affirmative steps were taken to preserve the restrictions. (See below).

In order to preserve an interest in a restriction placed on real property, one can record a notice of intent to preserve the restriction pursuant to proposed Cal. Civ. Code

§ 888.030. Like the notice provisions in effect for other provisions of the MRTA, the proposed section requires an affirmative act by the grant holder. For purposes of the Open Space and Williamson Acts (together, the "Acts"), this affirmative notice requirement appears to override the automatic renewal of a term of years once the cumulative number of years exceed sixty from date of recordation of the instrument creating the interest. This presents a conflict. The Acts require an affirmative act to end the restriction while the proposed legislation requires an affirmative act to preserve the restriction. For example, if the term of a restriction created pursuant to either of the Acts were for thirty years, then upon expiration of the second renewal of the term (i.e., the sixtieth year) the term would be automatically renewed, but concurrently, the restriction also would be automatically extinguished.

The proposed legislation does not indicate which statutes' provisions would prevail if there were a conflict between with the Acts and the proposed legislation. It is unclear what effect the proposed legislation would have in the case where a restriction created pursuant to either of the Acts is for a term of thirty five years, for example. By operation of either of the Act's provisions the term of a restriction would be automatically renewed on the thirty-fifth year. On the sixtieth year the proposed legislation would extinguish the restriction. However, on the seventieth year (or the second renewal date) would the restriction be revived and a new thirty-five year term commence? The proposed legislation states, "This section applies notwithstanding any provision to the contrary in the instrument creating or otherwise evidencing the restriction. . . unless the instrument . . . provides an earlier expiration date." [Proposed] Cal. Civ. Code § 888.030(b). This language suggests that the proposed legislation would override the provisions of the Acts to cut short the duration of any renewable term to no more than sixty years in the aggregate.

Because the proposed legislation does allow an interest in a restriction to remain in effect by recording a notice, the potential conflict between the automatic renewal features of the Acts and the automatic termination features of the MRTA could arguably be reconciled. However, the automatic renewal features of the both of the Acts appear to have been designed to take advantage of the parties' inertia by not requiring an affirmative step be taken except when one wishes to terminate a restriction. In the case of the Open-Space Easement Act, the preference for preserving the restriction is further demonstrated by the fact that a notice of nonrenewal must be approved by the the county or city in which the real property lies and the procedure for abandonment must be followed. See the Thomas S. Barrett and Putnam Livermore, The Conservation Easement in California, p. 24 (1983). Similarly, under the Williamson Act a party wishing to terminate the restriction may only receive the power not to continue the restriction only after a determination is made that doing so would be in the public interest. Cal. Gov. Code § 51282(a)(2). The proposed legislation would undermine this oversight function of the Acts' provisions if it could automatically extinguish the restriction even where a holder of the restriction potentially could be unable to terminate the restriction.

Although the need to record a notice would burden an easement holder with an

affirmative duty to enforce the grant, this burden has already been considered by the legislature when they enacted the MRTA since that act creates similar burdens for holders of other types of restrictions. Apart from the potential conflict arising with the Acts' provisions for automatic renewal, the proposed legislation does not add extra burdens beyond what it does to similar types of interests in real property by requiring certain affirmative steps be taken to preserve such interests.