

## First Supplement to Memorandum 96-47

### Obsolete Restrictions: Issues Relating to Chain of Title

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Memorandum 96-47 deals with issues relating to preservation of restrictions affecting multiple parcels. The question has come up whether recordation of a notice of intent to preserve an interest that affects multiple parcels would create a record outside the chain of title and therefore not discoverable through standard grantor-grantee title search methods. This supplemental memorandum explores the question.

#### Notice of Intent to Preserve an Interest

The notice of intent to preserve an interest must identify the person claiming the interest, the character of the interest (and record location of the document creating or evidencing it), and the property against which the interest is asserted. Civ. Code § 880.320. In the case of a land use restriction, the interest being preserved is the restriction, the person claiming the interest is the beneficiary of the restriction, and the property against which the interest is asserted is the property burdened by the restriction.

The form of the notice of intent to preserve an interest under the marketable title act looks something like this (Civ. Code § 880.340):

#### 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):

### **Recording Information**

A notice of intent to preserve an interest in real property must be recorded in the county in which the real property is located. Civ. Code § 880.350(a). In the case of a land use restriction, this would be the county in which the property burdened by the restriction is located.

The county recorder is instructed to index the notice 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.” Civ. Code § 880.350(b).

In the context of a land use restriction, the notice of intent to preserve the restriction would be indexed by the name of the beneficiary or person entitled to enforce the restriction, as “grantor”. Although this may seem counterintuitive (one would ordinarily think of the person who gives up full use of the land as the grantor), its purpose is to enable the beneficiary of the restriction to avoid doing an extensive title search and the possibility of incorrectly identifying the current owner of the property burdened by the restriction.

### **Title Searches**

Under the scheme of the marketable title act, in order to determine whether a particular property interest has been preserved, one would start with the recorded instrument creating the interest. In the case of a land use restriction, this would be the recorded CC&Rs or whatever type of restriction is involved. If the restriction was recorded more than 60 years earlier, it would be extinguished by passage of time unless the person in whose favor the restriction runs, or that person’s successor in interest, has recorded a notice of intent to preserve it or has recorded another document evidencing the restriction.

Thus to search the title one would search the grantor index to determine whether the person in whose favor the restriction runs or that person's successor has recorded any document relating to the restriction. If not, the restriction has expired.

The title search required to determine whether a restriction has been preserved as to a particular parcel is thus not a search of the chain of title of grantors and grantees of the burdened property, but a search of the chain of title of the beneficiary of the restriction. To ensure that an owner of the burdened property is on notice that a document affecting the restriction (notice of intent to preserve it) will be indexed in the public records in a chain that is not the owner's direct line, it may be helpful to add to the statute something like the following:

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

(b) Recordation of a notice of intent to preserve a restriction is constructive notice to the owner of the real property described in the notice, notwithstanding the indexing of the notice under the name of the claimant pursuant to Section 880.350.

**Comment.** Subdivision (a) of 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 a restriction by recording a notice of intent to preserve the restriction. 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 other claimant. Section 880.320 (who may record notice). The notice must identify each claimant for which the notice is recorded, the specific restriction or restrictions being preserved, and the property against which the restriction is claimed. Section 880.330 (contents of notice); see also Section 880.340 (form of notice).

Subdivision (b) emphasizes the point that even though recordation of a notice of intent to preserve an interest is indexed under the name of the interest claimant and not under the name of the property owner, the property owner is on inquiry notice of its recordation. A chain of title search for a notice of intent to preserve an interest will therefore require a search from creation of the restriction down the line of persons entitled to enforce the restriction rather than down the line of owners of the property burdened by the restriction.

## **Multiple Parcels**

How does this work where there are multiple parcels involved (e.g., a subdivision), and particularly where the restriction takes the form of mutual equitable servitudes?

**Selective preservation.** The staff in Memorandum 96-47 suggests that the beneficiary of a restriction affecting multiple parcels be authorized to preserve the restriction selectively as to individual parcels by identifying the particular parcels. How does the owner of a particular parcel determine from the records whether the restriction has been preserved as to that parcel? This would be done by the standard marketable title search technique — go back to the instrument creating the restriction against the property and then search down the chain of title of the person entitled to enforce the restriction (grantor index) to see whether that person or that person's successor in interest has recorded a notice of intent to preserve the restriction against the burdened property or has recorded another instrument evidencing the restriction.

**Mutual preservation of equitable servitudes.** The staff in Memorandum 96-47 suggests that in the case of mutual equitable servitudes, recordation of a notice of intent to preserve the interest against a particular parcel has the effect of also preserving the mutual interest against the parcel of the person recording the notice. To determine whether an interest has been preserved as to any given parcel subject to the equitable servitudes, one would go back to the instrument creating the servitudes and search down the chain of title of each person entitled to enforce the servitude. If there is a notice of intent to preserve the servitude in the chain of title, it preserves the interest both as to the property identified in the notice and as to the property of the person recording the interest.

**Multiple search problem.** As a practical matter, the search requirement will be burdensome where there is a large subdivision and many persons entitled to enforce the restriction. In order to ensure that a restriction has not been preserved as to any particular parcel it will be necessary to search the chain of title of every person authorized to enforce the restriction to see whether any of them has preserved the restriction against the parcel. Is there anything that can be done to ease this burden, short of relegating the property owner to the traditional quiet title remedy for an obsolete restriction? The staff cannot think of any — identifying and indexing by current owner of the affected parcel would impose an unacceptable burden on a person wishing to preserve the restriction. A person wishing to take advantage of the automatic termination feature of the marketable

title act will just have to do the necessary search to establish clear title. The land title industry, with its computerized data bases, will be helpful in this respect.

**Preserving as to an entire subdivision.** The staff in Memorandum 96-47 suggests that a person wishing to preserve an interest as to an entire subdivision be allowed to do so without identifying individual parcels, provided the subdivision is identified in the restriction. How could an individual owner in the subdivision tell whether someone has preserved the subdivision restrictions as to the entire subdivision? The search mechanism would be the same as for any other restriction — go back to the initial instrument establishing the restriction and go down the grantor index looking for action by persons entitled to enforce it. Again, in a large subdivision this will be a burdensome task. And again, the land title industry has something to offer in this respect.

Respectfully submitted,

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Executive Secretary