

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

*Revised* TENTATIVE RECOMMENDATION

## Marketable Title: Enforceability of Land Use Restrictions

November 1995

This **revised** tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **January 31, 1996**.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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## SUMMARY OF REVISED TENTATIVE RECOMMENDATION

This recommendation would address two issues in enforcement of land use restrictions — it would provide a mechanism for clearing land title records of an obsolete restriction, and it would clarify the applicable statute of limitations for enforcement of breach of a restriction. Under these proposals:

(1) A land use restriction would expire of record 60 years after it was recorded, but could be preserved for another 60 years at a time by recording a statutory notice. The 60-year expiration period would not apply to common interest development equitable servitudes.

(2) Breach of a restriction would be enforceable for a period of five years, but a failure to bring an action within the five year period would not waive the underlying restriction or the right to bring an action for another breach of the restriction.

MARKETABLE TITLE:  
ENFORCEABILITY OF LAND USE RESTRICTIONS

OBSOLETE RESTRICTIONS

Restrictions on land use take a number of forms, including covenants, conditions, equitable servitudes, and negative easements. Such restrictions may serve useful purposes for a while, and eventually fall into disuse and become obsolete. Unless action is taken to remove an obsolete restriction, the restriction remains of record indefinitely and impairs the marketability of the property on which the restriction is imposed.

A restriction in the form of a covenant, condition, or equitable servitude that has become obsolete is unenforceable.<sup>1</sup> Whether this rule applies equally to a negative easement is not clear.<sup>2</sup> It is not possible to tell from the record whether a particular restriction has become obsolete and is unenforceable; a court determination is necessary. The cases and statutes have applied various standards to this determination.<sup>3</sup>

The Marketable Record Title Act<sup>4</sup> provides a mechanism for clearing land title records of obsolete interests by operation of law, without the need for court proceedings. Under this statute, various types of recorded interests in real property are extinguished after passage of a sufficiently long period of time. A person wishing to preserve the property interest may do so by recording a statutory form that extends the life of the interest.

This simple mechanism has been applied to rid the land title records of such encumbrances as ancient mortgages and deeds of trust,<sup>5</sup> dormant mineral rights,<sup>6</sup> powers of termination,<sup>7</sup> and unperformed contracts for sale of real property.<sup>8</sup> The

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1. See, e.g., discussions in 4 B. Witkin, *Summary of California Law Real Property* §§ 502-07, at 681-684 (9th ed. 1987); 2 A. Bowman, *Ogden's Revised California Real Property Law* §§ 23.29-23.34, at 157-1161 (1975); 7 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:19, at 577-582 (2d ed. 1990).

2. A negative easement is an easement that limits the use of the servient tenement as opposed to an affirmative easement, which permits acts to be done upon the servient tenement. Easements of both types are subject to abandonment. See, e.g., discussions in 4 B. Witkin, *Summary of California Law Real Property* §§ 474-76, at 653-655 (9th ed. 1987); 1 A. Bowman, *Ogden's Revised California Real Property Law* §§ 13.49-13.50, at 575-577 (1974); 5 H. Miller & M. Starr, *Current Law of California Real Estate* §§ 15:77-15-78, at 590-596 (2d ed. 1989).

3. Compare Civ. Code § 885.040 (restriction "of no actual or substantial benefit to the holder") with Civ. Code § 1354 (equitable servitude enforceable "unless unreasonable"). Decisions have also used abandonment standards, as well as waiver, estoppel, and laches concepts. See discussions cited in footnote 1, *supra*.

4. Civ. Code §§ 880.020-887.090.

5. Civ. Code §§ 882.020-882.040.

6. Civ. Code §§ 883.210-883.270.

7. Civ. Code §§ 885.010-885.070.

1 Law Revision Commission recommends that it be applied to land use restrictions  
2 as well. Because such restrictions may be intended to have enduring effect, a  
3 relatively long 60-year expiration period is appropriate. And because equitable  
4 servitudes in common interest developments are continually overseen and  
5 amended as appropriate by their governing bodies, these restrictions should not be  
6 subject to an expiration period; they are enforceable unless unreasonable.<sup>9</sup>

## 7 STATUTE OF LIMITATIONS

8 The statute of limitations applicable to breach of a restriction on land use is  
9 likewise not clear. Although it is assumed that the general five-year statute  
10 applicable to real property actions applies,<sup>10</sup> there is authority to the contrary.<sup>11</sup> In  
11 theory, at least, a covenant would be governed by the four-year statute applicable  
12 to a contract founded upon a written instrument,<sup>12</sup> a condition or negative  
13 easement would be governed by the five-year statute applicable to real property  
14 actions,<sup>13</sup> and an equitable servitude would not be subject to any statutory  
15 limitation period but to such equitable doctrines as waiver, estoppel, and laches.<sup>14</sup>  
16 Just as these various forms of land use restrictions that serve the same functions  
17 should be uniformly subject to a 60-year expiration period, so should breach of the  
18 restrictions be uniformly subject to a clear single statutory limitation period.

19 The general five-year limitation period for an action to recover real property<sup>15</sup> is  
20 appropriate in an action for breach of a land use restriction; its application should  
21 be made clear by statute. If notice of a breach is recorded,<sup>16</sup> the statute should  
22 make clear that the five-year limitation period runs from the date of recordation.  
23 This will help clear land titles from the encumbrance of such notices that have  
24 been recorded but never acted upon.

25 Failure of a person to enforce a restriction within five years after breach should  
26 preclude further action on that breach, but should not in itself be deemed a waiver  
27 or abandonment of the underlying restriction. Non-enforcement of a restriction for  
28 a particular breach may be considered as part of a pattern or constellation of

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<sup>8</sup>. Civ. Code §§ 886.010-886.050.

<sup>9</sup>. Civ. Code § 1354.

<sup>10</sup>. See, e.g., 2 A. Bowman, *Ogden's Revised California Real Property Law* §§ 23.25, 23.32, at 1155, 1159 (1975).

<sup>11</sup>. See, e.g., *Lincoln v. Narom Development Co.*, 10 Cal. App. 3d 619, 89 Cal. Rptr. 128 (1970) (statute of limitations not applicable to breach of condition).

<sup>12</sup>. Code Civ. Proc. § 337(1).

<sup>13</sup>. Code Civ. Proc. § 319.

<sup>14</sup>. See, e.g., 5 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:23, at 585 (2d ed. 1990).

<sup>15</sup>. See, e.g., Code Civ. Proc. § 319.

<sup>16</sup>. See *California Riviera Homeowners v. Superior Court*, 44 Cal. Rptr. 2d 595 (1995).

1 circumstances that indicate waiver or abandonment.<sup>17</sup> However, to imply waiver  
2 or abandonment of the underlying restriction from a failure to act on a particular  
3 breach would undesirably precipitate enforcement actions in cases where the  
4 holder of the restriction is otherwise inclined to be lenient.

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<sup>17</sup>. See, e.g., *Bryant v. Whitney*, 178 Cal. 640, 174 P. 32 (1918) (waiver); *Jewett v. Albin*, 90 Cal. App. 535, 266 P. 329 (1928) (waiver or estoppel).

1 PROPOSED LEGISLATION

2 RESTRICTION DEFINED

3 **Civ. Code § 784 (added). “Restriction”**

4 SECTION 1. Section 784 is added to the Civil Code, to read:

5 784. “Restriction”, when used in a statute that incorporates this section by  
6 reference, means a limitation on the use of real property in a deed or other  
7 instrument, whether in the form of a covenant, equitable servitude, condition  
8 subsequent, negative easement, or other restriction.

9 **Comment.** Section 784 provides a definition of “restriction” for application in Chapter 8  
10 (commencing with Section 888.010) (obsolete restrictions) of Title 5 and in Code of Civil  
11 Procedure Section 336 (statute of limitations).

12 MARKETABLE RECORD TITLE ACT

13 **Civ. Code §§ 888.010-888.060 (added)**

14 SEC. 2. Chapter 8 (commencing with Section 888.010) is added to Title 5 of  
15 Part 2 of Division 2 of the Civil Code, to read:

16 CHAPTER 8. OBSOLETE RESTRICTIONS

17 **§ 888.010. “Restriction” defined**

18 888.010. As used in this chapter, “restriction.” has the meaning provided in  
19 Section 784.

20 **Comment.** Section 888.010 implements application of this chapter to private land use  
21 restrictions of all types. See Section 784 (“restriction” means limitation on use of real property in  
22 deed or other instrument, whether in form of covenant, equitable servitude, condition subsequent,  
23 negative easement, or other restriction). *Cf.* Section 815.1 (“conservation easement” defined).  
24 However, this chapter does not apply to conservation easements pursuant to Sections 815-816.  
25 See Section 880.240 (interests excepted from title) & Comment. Moreover, this chapter does not  
26 apply to equitable servitudes in common interest developments. Section 888.020. This chapter  
27 applies to negative easements; affirmative easements are governed by Chapter 7 (commencing  
28 with Section 887.010) (abandoned easements). For additional provisions applicable to conditions  
29 subsequent, see Chapter 5 (commencing with Section 885.010) (powers of termination).

30 **§ 888.020. Common interest development equitable servitudes excepted**

31 888.020. This chapter does not apply to a restriction that is an enforceable  
32 equitable servitude under Section 1354.

33 **Comment.** Section 888.020 excepts equitable servitudes in common interest developments  
34 from expiration by operation of law under this chapter. Enforceability of those restrictions is  
35 governed by Section 1354 (restriction enforceable “unless unreasonable”).

36 **§ 888.030. Expiration of restriction**

37 888.030. (a) A restriction of record expires at the last of the following times:

1 (1) Sixty years after the date the instrument creating or otherwise evidencing the  
2 restriction is recorded.

3 (2) Sixty years after the date a notice of intent to preserve the restriction is  
4 recorded, if the notice is recorded within the time prescribed in paragraph (1).

5 (3) Sixty years after the date an instrument creating or otherwise evidencing the  
6 restriction or a notice of intent to preserve the restriction is recorded, if the  
7 instrument or notice is recorded within 60 years after the date such an instrument  
8 or notice was last recorded.

9 (b) This section applies notwithstanding any provision to the contrary in the  
10 instrument creating or otherwise evidencing the restriction or in another recorded  
11 document unless the instrument or other recorded document provides an earlier  
12 expiration date.

13 **Comment.** Section 888.030 provides for expiration of a restriction after 60 years,  
14 notwithstanding a longer or indefinite period provided in the instrument creating the restriction.  
15 The expiration period runs from the date of recording rather than the date of creation of the  
16 restriction because the primary purpose of this section is to clear record title.

17 The expiration period can be extended for up to 60 years at a time by recordation of a notice of  
18 intent to preserve the restriction. See Section 880.310 (notice of intent to preserve interest). For  
19 persons entitled to record a notice of intent to preserve the restriction, see Section 880.320.  
20 Recordation of a notice of intent to preserve the restriction does not enable enforcement of a  
21 restriction that is unenforceable because it has been abandoned or become obsolete due to  
22 changed conditions or otherwise. See Sections 880.310 (notice of intent to preserve interest),  
23 888.040 (chapter does not revive unenforceable restriction), & Comments.

24 For the effect of expiration of a restriction pursuant to this section, see Section 888.050 (effect  
25 of expiration). This section does not affect conservation easements pursuant to Sections 815-816.  
26 See Section 880.240 (interests excepted from title) & Comment.

#### 27 **888.040. Chapter does not revive unenforceable restriction**

28 888.040. Nothing in this chapter shall be construed to revive or make  
29 enforceable a restriction that is otherwise unenforceable before expiration of the  
30 times provided in Section 888.030, whether because the restriction is abandoned,  
31 obsolete, unlawful, or for any other reason.

32 **Comment.** Section 888.040 supplements Sections 880.250(b) (title does not revive or extend  
33 period of enforceability under statute of limitations) and 880.310(b) (recordation of notice of  
34 intent to preserve interest does not preclude court determination of unenforceability). A  
35 restriction that is obsolete is unenforceable. See, e.g., discussion in 4 B. Witkin, Summary of  
36 California Law *Real Property* §§ 502-07, at 681-684 (9th ed. 1987). A discriminatory restriction  
37 is void and unenforceable. See, e.g., Section 53 (restriction on sex, race, color, religion, ancestry,  
38 national origin, or disability).

#### 39 **§ 888.050. Effect of expiration of restriction**

40 888.050. Expiration of a restriction pursuant to this chapter makes the restriction  
41 unenforceable and is equivalent for all purposes to a termination of the restriction  
42 of record.

43 **Comment.** Section 888.050 provides for the clearing of record title to real property by  
44 operation of law after a restriction has expired under Section 888.030 (expiration of restriction).  
45 Title can be cleared by judicial decree prior to the time prescribed in Section 888.030 in case of  
46 an otherwise unenforceable restriction. See Section 888.040 & Comment.

§ 888.060. Operative date

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

(b) Subject to Section 880.370, 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.

STATUTE OF LIMITATIONS

Code Civ. Proc. § 336 (amended). Five year statute of limitations

SEC. 3. Section 336 of the Code of Civil Procedure is amended to read:

336. Within five years:

(a) An action for mesne profits of real property.

(b) An action for breach of a restriction, as defined in Section 784 of the Civil Code. The period prescribed in this subdivision runs from 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 the breach is recorded within five years after that time, from the date of recordation. A failure to commence an action within the period prescribed in this subdivision does not waive the right to commence an action for any other breach of the restriction and does not, in itself, create an implication that the restriction is abandoned, obsolete, or otherwise unenforceable. This subdivision shall not bar commencement of an action for breach of a restriction before January 1, 1999, and until January 1, 1999, any other applicable statutory or common law limitation shall continue to apply to such an action.

**Comment.** Subdivision (b) is added to Section 336 to make clear that the statutory limitation period applicable to enforcement of a restriction is five years, consistent with the general statutes governing recovery of real property. *Cf.* Section 319 (five years). This ensures a uniform limitation period regardless whether the restriction is in the form of a covenant, condition, negative easement, or equitable servitude. See Civ. Code § 784 (“restriction” defined); *cf.* 2 A Bowman, Ogden’s Revised California Real Property Law §§ 23.25, 23.32, at 1155, 1159 (1975) (five years). It should be noted that, while equitable servitudes in common interest developments are covered by this section, they are not subject to expiration under the obsolete restriction provisions of the Marketable Record Title Act. See Civ. Code § 888.020 (common interest development equitable servitudes excepted).

Subdivision (b) recognizes the practice of recording a notice of breach where authorized pursuant to the restriction. *California Riviera Homeowners v. Superior Court*, 44 Cal. Rptr. 2d 595 (1995). However, if an action on the breach is not brought within five years after recordation, the notice is unenforceable.

Under subdivision (b), a failure to enforce a breach within the limitation period should not alone be grounds to imply a waiver or abandonment of the restriction. However, such a failure may, combined with other circumstances, be grounds for waiver or estoppel or evidence of abandonment or obsolescence. See, e.g., *Bryant v. Whitney*, 178 Cal. 640, 174 P. 32 (1918) (waiver); *Jewett v. Albin*, 90 Cal. App. 535, 266 P. 329 (1928) (waiver or estoppel). It should be noted that a restriction may become unenforceable due to passage of time or for other reasons. *Cf.*



1 Civ. Code §§ 888.030 (expiration of restriction), 888.040 (chapter does not revive unenforceable  
2 restriction), & Comments.

3 Subdivision (b) provides a two-year grace period to enable action on a breach that would  
4 become unenforceable upon enactment of this chapter and a shorter grace period for action on a  
5 breach that would become unenforceable within two years after enactment of this chapter. The  
6 two-year grace period does not operate to extend the time to act on a breach that would become  
7 unenforceable by operation of law apart from this chapter, either pursuant to case law limitations  
8 or applicable statutes of limitation.