

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Marketable Title: Enforceability of Land Use Restrictions

October 1996

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

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

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STATE OF CALIFORNIA

PETE WILSON, Governor

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October 10, 1996

To: The Honorable Pete Wilson
Governor of California, and
The Legislature of California

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

(1) A land use restriction expires of record 60 years after it was recorded, but may be preserved for another 60 years at a time by recording a statutory notice. The 60-year expiration period does not apply to a publicly-held or -imposed restriction, an environmental or conservation easement, or a common interest development equitable servitude.

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

This recommendation is submitted pursuant to Resolution Chapter 38 of the Statutes of 1996.

Respectfully submitted,

Allan L. Fink
Chairperson

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. These restrictions may serve useful purposes for a while, and eventually fall into disuse and become obsolete. A common example is a restriction of property to residential uses in an area that is now substantially commercial.¹ Unless action is taken to remove the obsolete restriction, it remains of record indefinitely and impairs the marketability of the property on which it is imposed.

A restriction in the form of a covenant, condition, or equitable servitude that has become obsolete is unenforceable.² Whether these rules apply equally to a negative easement is not clear.³ It is not possible to tell from the record whether a particular restriction has become obsolete and is unenforce-

1. See, e.g., *Key v. McCabe*, 54 Cal. 2d 736, 356 P.2d 169, 8 Cal. Rptr. 425 (1960); *Hirsch v. Hancock*, 173 Cal. App. 2d 745, 343 P.2d 959 (1959).

2. See, e.g., discussions in 4 B. Witkin, *Summary of California Law Real Property* §§ 502-07, at 681-84 (9th ed. 1987); 2 A. Bowman, *Ogden's Revised California Real Property Law* §§ 23.29-23.34, at 1157-61 (1975); 7 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:19, at 577-82 (2d ed. 1990).

3. 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. See, e.g., discussions in 4 B. Witkin, *Summary of California Law Real Property* § 434, at 614-15 (9th ed. 1987); 5 H. Miller & M. Starr, *Current Law of California Real Estate* § 15:9, at 414-15 (2d ed. 1989). 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 653-55 (9th ed. 1987); 1 A. Bowman, *Ogden's Revised California Real Property Law* §§ 13.49-13.50, at 575-77 (1974); 5 H. Miller & M. Starr, *Current Law of California Real Estate* §§ 15:77-15:78, at 590-96 (2d ed. 1989).

able; a court determination is necessary. The cases and statutes have applied various standards to this determination.⁴

Likewise, a racial covenant may burden property. Although a covenant of this type is illegal and unenforceable,⁵ it nonetheless remains of record and may cause substantial embarrassment to the current owner. Court action is necessary to clear the land title of this cloud.

The Marketable Record Title Act⁶ 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,⁷ dormant mineral rights,⁸ powers of termination,⁹ and unperformed contracts for sale of real property.¹⁰ The Law Revision Commission recommends that it be applied to land use restrictions as well.

Because a land use restriction may be intended to have enduring effect, a relatively long 60-year expiration period is appropriate. The restriction could be preserved by a person

4. Compare Civ. Code § 885.040(b)(1) (restriction “of no actual and 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 *supra* note 2.

5. Civ. Code §§ 53, 782, 782.5; *Shelley v. Kraemer*, 334 U.S. 1 (1948).

6. Civ. Code §§ 880.020-887.090.

7. Civ. Code §§ 882.020-882.040.

8. Civ. Code §§ 883.210-883.270.

9. Civ. Code §§ 885.010-885.070.

10. Civ. Code §§ 886.010-886.050.

entitled to enforce the restriction for 60 years at a time by recording a notice of intent to preserve the interest.

Some restrictions, supported by public policy, are intended to be permanent and should not be subject to an automatic expiration period at all. These include (1) restrictions imposed or enforceable by a public entity,¹¹ e.g., to provide public access to the coast; (2) environmental restrictions,¹² which protect against release of hazardous materials; and (3) conservation easements¹³ to preserve land in its natural condition.

Equitable servitudes in common interest developments also should be exempt from the 60-year expiration period. Restrictions of this type do not ordinarily become obsolete because they are continually overseen and amended as appropriate by their governing bodies. They remain enforceable unless unreasonable.¹⁴

STATUTE OF LIMITATIONS

The statute of limitations applicable to violation of a restriction on land use is likewise not clear. Although it is assumed that the general five-year statute applicable to real property actions applies,¹⁵ there is authority to the contrary.¹⁶ In theory, at least, a covenant could be governed by the four-year

11. This is a specific application of the general marketable title rule. See Civ. Code § 880.240(c).

12. Civ. Code § 1471.

13. See, e.g., Civ. Code § 815 (conservation easements); Gov't Code §§ 51070 (Open-Space Easement Act of 1974), 51200 (California Land Conservation Act of 1965). This is a specific application of the general marketable title rule. See Civ. Code § 880.240(d).

14. Civ. Code § 1354.

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

16. 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).

statute applicable to a contract founded upon a written instrument,¹⁷ a condition could be governed by the five-year statute applicable to real property actions,¹⁸ a negative easement could be governed by the three-year statute applicable to abatement of a nuisance,¹⁹ and an equitable servitude could be subject to both equitable doctrines as waiver, estoppel, and laches,²⁰ and to the general four-year statute of limitations.²¹

Just as these various forms of land use restrictions that serve the same functions should be uniformly subject to a 60-year expiration period, so should violation of the restrictions be uniformly subject to a clear single statutory limitation period.

The general five-year limitation period for an action to recover real property²² is appropriate in an action for violation of a land use restriction; its application should be made clear by statute.

Failure of a person to enforce a restriction within five years after violation should preclude further action on that violation, but should not in itself be deemed a waiver or abandonment of the underlying restriction. Non-enforcement of a restriction for a particular violation may be considered as part of a pattern or constellation of circumstances that indicate waiver or abandonment.²³ However, to imply waiver or abandonment of the underlying restriction from a failure to act on a particular violation would undesirably precipitate enforcement actions

17. Code Civ. Proc. § 337(1).

18. Code Civ. Proc. § 319.

19. Code Civ. Proc. § 338(b). See 5 H. Miller & M. Starr, *Current Law of California Real Estate* § 15:71, at 580-81 (2d ed. 1989).

20. See, e.g., 7 H. Miller & M. Starr, *Current Law of California Real Estate* § 22:23, at 585 (2d ed. 1990).

21. Code Civ. Proc. § 343. See 3 B. Witkin, *California Procedure Actions* §§ 320-21, at 351-52 (3d ed. 1985).

22. Code Civ. Proc. § 319.

23. See, e.g., *Bryant v. Whitney*, 178 Cal. 640, 174 P. 32 (1918) (waiver).

in cases where the holder of the restriction is otherwise inclined to be lenient.

PROPOSED LEGISLATION

RESTRICTION DEFINED

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

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

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

Comment. Section 784 provides a definition of “restriction” for application in Chapter 8 (commencing with Section 888.010) (obsolete restrictions) of Title 5 and in Code of Civil Procedure Section 336 (statute of limitations). The reference to “declaration” includes a declaration of restrictions in a common interest development intended to be enforceable as equitable servitudes. See Section 1353(a).

MARKETABLE RECORD TITLE ACT

Civ. Code §§ 888.010-888.090 (added)

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

CHAPTER 8. OBSOLETE RESTRICTIONS

§ 888.010. “Restriction” defined

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

Comment. Section 888.010 implements application of this chapter to private land use restrictions of all types. See Section 784 (“restriction” means limitation on use of real property in deed or other instrument, whether in form of covenant, equitable servitude, condition subsequent, negative easement, or other form of restriction). *Cf.* Section 815.1

(“conservation easement” defined). However, this chapter does not apply to a number of specified restrictions. See Sections 880.240 (interests excepted from title), 888.020 (restrictions excepted). This chapter applies to negative easements; affirmative easements are governed by Chapter 7 (commencing with Section 887.010) (abandoned easements). For additional provisions applicable to conditions subsequent, see Chapter 5 (commencing with Section 885.010) (powers of termination).

§ 888.020. Restrictions excepted

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 Easement 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 Easement 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).

§ 888.030. Expiration of restriction

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

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

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

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

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

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

The expiration period can be extended for up to 60 years at a time by recordation of a notice of intent to preserve the restriction. See Section 880.310 (notice of intent to preserve interest). The form of a notice of intent to preserve the restriction is prescribed in Section 880.340. For persons entitled to record a notice of intent to preserve the restriction, see Section 880.320. Recordation of a notice of intent to preserve the restriction does not enable enforcement of a restriction that is unenforceable because it has been abandoned or become obsolete due to changed conditions or otherwise. See Sections 880.310 (notice of intent to preserve interest), 888.070 (chapter does not revive unenforceable restriction), & Comments.

For the effect of expiration of a restriction pursuant to this section, see Section 888.080 (effect of expiration). This section does not affect restrictions excepted by statute from its operation. See Sections 880.240 (interests excepted from title), 888.020 (restrictions excepted).

§ 888.040. Notice of intent to preserve restriction

888.040. (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 888.040 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.

§ 888.050. Mutuality of preservation of restriction

888.050. Recordation of a notice of intent to preserve a restriction that is enforceable as a mutual equitable servitude preserves the restriction (1) for the benefit of the claimant or claimants named in the notice against the real property described in the notice and (2) for the benefit of the real property described in the notice against the claimant or claimants.

Comment. Section 888.050 makes clear that one party's recordation of a notice of intent to preserve a mutual equitable servitude does not destroy the mutuality of the equitable servitude — its benefits and burdens are preserved both for the party recording the notice and the party against whom it is recorded.

§ 888.060. Preservation of restriction as to entire tract or subdivision

888.060. In lieu of the legal description of the real property in which the interest is claimed as otherwise required by paragraph (3) of subdivision (b) of Section 880.330 and notwithstanding the provisions of Section 880.340, Section

888.040, or any other provision in this title, a notice of intent to preserve a restriction that is enforceable as a mutual equitable servitude may refer generally and without specificity to all property located within a tract or subdivision, and preserves the restriction for the benefit of all property located within the tract or subdivision, if the tract or subdivision is identified in the restriction as composed of parcels subject to the restriction pursuant to a general plan of restrictions common to all the parcels and designed for their mutual benefit.

Comment. Section 888.060 allows recordation of a single notice of intent to preserve a restriction enforceable as a mutual equitable servitude as to an entire subdivision if the subdivision is identified in the restriction. If the subdivision is not identified in the restriction, the restriction may be preserved as to the entire subdivision by identifying all parcels that are subject to the restriction.

§ 888.070. Chapter does not revive unenforceable restriction

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

Comment. Section 888.070 supplements Sections 880.250(b) (title does not revive or extend period of enforceability under statute of limitations) and 880.310(b) (recordation of notice of intent to preserve interest does not preclude court determination of unenforceability). A restriction that is obsolete is unenforceable. See, e.g., discussion in 4 B. Witkin, *Summary of California Law Real Property* §§ 502-07, at 681-84 (9th ed. 1987). A discriminatory restriction is void and unenforceable. See, e.g., Section 53 (restriction on sex, race, color, religion, ancestry, national origin, or disability).

§ 888.080. Effect of expiration of restriction

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

Comment. Section 888.080 provides for the clearing of record title to real property by operation of law after a restriction has expired under Section 888.030 (expiration of restriction). Title can be cleared by judicial decree prior to the time prescribed in Section 888.030 in case of an otherwise unenforceable restriction. See Section 888.070 & Comment.

§ 888.090. Operative date

888.090. (a) This chapter is operative January 1, 1998.

(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 888.090 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 violation of a restriction, as defined in Section 784 of the Civil Code. The period prescribed in this subdivision runs from the time the person seeking to enforce the restriction discovered or, through the exercise of reasonable diligence, should have discovered the violation. A failure to commence an action for violation of a restriction within the period prescribed in this subdivision does not waive the right to commence an action for any other violation 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 violation of a restriction before January 1,*

2000, and until January 1, 2000, 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, at 1155; 23.32, at 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(a) (common interest development equitable servitudes excepted).

For purposes of subdivision (b), the time when a homeowners’ association is deemed to have knowledge of a violation of a restriction would be determined under general principles of imputed knowledge. See, e.g., Civ. Code § 2332. Thus an incorporated or unincorporated homeowner’s association is deemed to have knowledge of a violation of a restriction when an appropriate officer or agent of the association has knowledge of the violation.

Under subdivision (b), a failure to enforce a violation 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). It should be noted that a restriction may become unenforceable due to passage of time or for other reasons. *Cf.* Civ. Code §§ 888.030 (expiration of restriction), 888.070 (chapter does not revive unenforceable restriction), & Comments.

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