



COMMUNITY ASSOCIATION
**Law
Seminar**

JANUARY 11-14, 2023 | NEW ORLEANS, LA

**Not So Fast:
Combating Marketable Title Acts to Preserve
Community Restrictions**

**Friday, January 13
9:30-10:40 a.m.**

**Kayleigh Long, Esq., Hirzel Law, PLC, Farmington, MI
Nicholas J. Meinert, Esq., Kaman & Cusimano, Columbus, OH**

ISBN: 978-1-59618-039-0

© 2023 Community Associations Institute
2023 Community Association Law Seminar

Speakers/authors are solely responsible for obtaining all necessary permissions or licenses from any persons or organizations whose materials are included or used in their presentations and/or contributed to this work.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, audio, visual, or otherwise, without the prior written consent of the publisher. Inquiries should be directed to Community Associations Institute.

Community Associations Institute
6402 Arlington Blvd., Suite 500
Falls Church, VA 22042
www.caionline.org

This publication is designed to provide accurate and authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought. —From a Declaration of Principles, jointly adopted by a Committee of the American Bar Association and a Committee of Publishers

Printed in the United States of America



Not So Fast

Combating Marketable Title Acts to Preserve Community Restrictions

Kayleigh B. Long, Hirzel Law, PLC, Farmington, MI
Nicholas J. Meinert, Kaman & Cusimano, LLC, Cleveland, OH

@CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE




1



Overview



- What are marketable title acts?
 - What is “marketable title?”
 - Why do marketable title acts exist?
 - How do they work?
 - Where do they exist?
- Marketable title acts’ negative impact on community restrictions
- Combating the negative impacts of marketable title acts

@CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE



2



COMMUNITY ASSOCIATION
Law Seminar

What Are Marketable Title Acts?

©CAISocial @CAIAvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE



3



COMMUNITY ASSOCIATION
Law Seminar

What is “marketable title?”

©CAISocial @CAIAvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE





4

COMMUNITY ASSOCIATION
Law Seminar

- Acceptable to a reasonably prudent person who has full knowledge of the facts and their legal significance
- Free from encumbrances and defects so there is no reasonable doubt as to its validity
- Will not expose a purchaser to an unreasonable possibility of litigation to remove a defect
- Can be freely resold at its fair value


©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE

5

COMMUNITY ASSOCIATION
Law Seminar




Lee signs a purchase agreement to obtain marketable title to 123 Main Street. The legal description for 123 Main Street includes the following:

Commencing at the Northwest corner of said Section 25, thence South 30 rods to the intersection of road leading from the county road at or near Charles Magnuson's place in Sunrise City; thence along the center . . .

Will Lee's title to 123 Main Street be marketable?

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE



6




Lee signs a purchase agreement to obtain marketable title to 123 Main Street. Lee knows that 123 Main Street used to be a gasoline station and there are underground storage tanks on the property; however, he does not know whether the surrounding soil is contaminated. If no soil test is performed, will Lee's title to 123 Main Street be marketable?

7

Why do marketable title acts exist?

8





COMMUNITY ASSOCIATION
Law Seminar

To simplify and facilitate land transactions

“Claims of a bygone era cling like barnacles to land titles and encumber them long after they should have been scraped clean”

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE

9



COMMUNITY ASSOCIATION
Law Seminar

How do marketable title acts work?

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO


© 2023 COMMUNITY ASSOCIATIONS INSTITUTE




10

COMMUNITY ASSOCIATION
Law Seminar

The Model Marketable Title Act



1. Establish the “root of title”

A conveyance or other title transaction, whether or not it is a nullity, in the record chain of title of a person, purporting to create or containing language sufficient to transfer the interest claimed by that person, upon which that person relies as a basis for marketability of title, and which was the most recent to be recorded as of a date 30 years before marketability of title

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE

community ASSOCIATIONS INSTITUTE


©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

11

COMMUNITY ASSOCIATION
Law Seminar

2. Verify unbroken record chain of title for at least 30 years

Official public records disclose a conveyance, or other title transaction, of record not less than 30 years before the time marketability is determined, and the conveyance or other title transaction, purports to create the interest or contains language sufficient to transfer the interest to the person claiming the interest or some other person from whom the purported interest has become vested




© 2023 COMMUNITY ASSOCIATIONS INSTITUTE

community ASSOCIATIONS INSTITUTE

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

12

COMMUNITY ASSOCIATION
Law Seminar




3. Identify any interests, defects, or notices of interest in land in the root of title or subsequent record chain of title

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE community ASSOCIATIONS INSTITUTE

13

COMMUNITY ASSOCIATION
Law Seminar




4. Extinguish any interests, defects, or notices of interest in land that fall outside the 30-year record chain of title

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE 50th Anniversary community ASSOCIATIONS INSTITUTE

14

COMMUNITY ASSOCIATION
Law Seminar



5. Analyze any interests or defects that arise before the date of the root of title but have been incorporated or referenced in one or more documents within the 30-year record chain of title

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE

community ASSOCIATIONS INSTITUTE

15

COMMUNITY ASSOCIATION
Law Seminar

Has the interest or defect been sufficiently identified?

- “Subject to a deed dated July 4, 1976 from A to B”
- “Subject to a mortgage from A to B”
- “Subject to existing encumbrances”
- “Subject to easements and restrictions of record”
- “Subject to a deed recorded at Instrument # 1234”
- “Subject to a mortgage from A to B recorded at Liber 123, Page 456”
- “Subject to encumbrances found in Document # 5678”
- “Subject to easements and restrictions in Instrument # 7890”

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE

50th anniversary community ASSOCIATIONS INSTITUTE

16

COMMUNITY ASSOCIATION
Law Seminar

Has the interest or defect been properly preserved?



Attempts to preserve an interest after it has already been extinguished by later recording a notice of interest are invalid

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE

COMMITTED TO COMMUNITY
community ASSOCIATIONS INSTITUTE

17

COMMUNITY ASSOCIATION
Law Seminar

6. Identify any restrictions that are clearly observable by physical evidence or use or occupancy that would have been revealed by reasonable inspection



©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE

50th Anniversary
community ASSOCIATIONS INSTITUTE

18

Rece conveyed 123 Main Street to Desmond via a recorded deed in 1965 with a reserved right of entry in the event of a breach of certain conditions. Desmond conveyed 123 Main Street to Kirk in 1970 via a recorded deed but the deed did not state or refer to the right of entry.*

- In 2013, does Kirk hold title to 123 Main Street subject to the right of entry?

**Derived from Michigan Land Title Standards (Sixth Edition)*

19

Pat conveyed 123 Main Street to Lee via a recorded deed in 1965 for so long as it was used as a football stadium, but if it ceased to be so used, 123 Main Street would revert to Pat and his heirs. Lee conveyed 123 Main Street to David via a recorded deed and specifically stated it was subject to the possibility of reverter in the 1956 deed, including the recording information.*

- In 2013, does David hold title to 123 Main Street subject to the possibility of reverter?

**Derived from Michigan Land Title Standards (Sixth Edition)*

20

The owner of the CAI Subdivision records a declaration of covenants and restrictions against the subdivision in 1975. In 1978, Lee conveys Lot 1 to Pat via a recorded deed that does not mention the declaration. The declaration has not been amended since it was first recorded.*

- In 2009, does Pat hold title to Lot 1 subject to the 1975 declaration of covenants and restrictions?

**Derived from Florida Uniform Title Standards*

21

The owner of the CAI Subdivision records a declaration of covenants and restrictions against the subdivision in 1975. In 1978, Lee conveys Lot 1 to Pat via a recorded deed that does not mention the declaration. The declaration has not been amended since it was first recorded. In 2004, Pat conveys Lot 1 to Kirk subject to the 1975 declaration, including its recording information.*

- Does Kirk hold title to Lot 1 subject to the 1975 declaration of covenants and restrictions?

**Derived from Florida Uniform Title Standards*

22

Law Seminar
COMMUNITY ASSOCIATION

@CAISocial @CAIAvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE

The 1925 plat for the CAI Subdivision contained a setback restriction. A deed to Lot 1 in the subdivision recorded in 1953 references the name of the recorded plat, as do the other recorded deeds in the chain of title, but not the setback restriction.

- In 2022, is Lot 1 subject to the 1925 setback restriction?

**Derived from Florida Uniform Title Standards*

23

Law Seminar
COMMUNITY ASSOCIATION

Where do marketable title acts exist?

COMMITTED TO COMMUNITY
CAI
ESTATE

community ASSOCIATIONS INSTITUTE

@CAISocial @CAIAvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE

24

COMMUNITY ASSOCIATION
Law Seminar




- Connecticut
- Florida
- Illinois
- Indiana
- Iowa
- Kansas
- Michigan
- Minnesota
- Nebraska
- North Carolina
- North Dakota
- Ohio
- Oklahoma
- South Dakota
- Utah
- Vermont
- Wyoming

©CAISocial @CAIAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE




25

COMMUNITY ASSOCIATION
Law Seminar




- **Common threads**
 - Statutory chain of title
 - 20-50 years
 - Most common is 40 years
 - What interests are subject to and excluded from the effects of the act
 - Process for recording notices of interest in land
 - Liberal construction provision
 - Slander of title/false claim provisions

©CAISocial @CAIAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE





26




COMMUNITY ASSOCIATION
Law Seminar

- *Florida*
 - Extinguishes certain zoning requirements or building or development permits
 - Specific process for property owners' associations to file a notice of interest in land
 - Process by which certain property owners' associations and owners of property who are not subject to a homeowners association may revive extinguished restrictions

@CAISocial @CAIAAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE


27



COMMUNITY ASSOCIATION
Law Seminar

- *Indiana*
 - Equitable restrictions or servitudes on the use of land do not qualify as “visible easements”
 - Specific process by which equitable restrictions or servitudes can be preserved for platted subdivisions that have an association or other governing body

@CAISocial @CAIAAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE



28

- *Kansas*
 - Does not extinguish use restrictions or area agreements which are part of a plan for subdivision development

- *Michigan*
 - Notice of interest must specifically refer to liber and page or county-assigned number; otherwise, the notice is ineffective

29

- *Minnesota*
 - Notice of interest must state whether the interest is mature or immature
 - Does not apply to registered real property
 - Does not apply to actions to enforce rights or interests arising out of certain private covenants and restrictions, such as those in a community association's governing documents

30




Law Seminar

- *North Carolina*
 - Notice of interest must specifically refer to book and page of record
 - Does not apply to real property registered under Torrens Law
 - Does not extinguish covenants that restrict property to residential use only
 - Does not apply to condominiums, cooperatives, and certain planned communities

©CAISocial ©CAIAAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE



31



Law Seminar

- *Ohio*
 - Notice in interest recorded as an affidavit that identifies the name of each record owner of the land that is affected by the notice, along with their address, the recording information of the instrument by which each record owner acquired title to the land, and a description of the nature of the claims to be preserved
- *Oklahoma*
 - Does not extinguish use restrictions or area agreements which are part of a plan for subdivision development
 - Permits a county clerk to refuse to record a notice of interest if the clerk believes it constitutes “sham legal process” or is being presented to slander title to land

©CAISocial ©CAIAAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE

32



COMMUNITY ASSOCIATION
Law Seminar

Marketable title acts' negative impacts on community restrictions

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE




33



COMMUNITY ASSOCIATION
Law Seminar

- Upset long-held expectations about communities based on recorded documents
- Nonuniform communities

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE




34

COMMUNITY ASSOCIATION
Law Seminar



Affeldt v. Lake Court Beach Association, 2015 WL 405761 (Mich. Ct. App.)


- Subdivision owners lose recreational easement to access and use Lake Michigan beach

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE



35


COMMUNITY ASSOCIATION
Law Seminar



David v. Paulsen, 137 N.E.3d 689 (Ohio Ct. App. 2019)

- Shed gets to stay, despite the fact it did not receive approval from building committee

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE



36

- Individualized review of chains of title for each property
- Monitoring recorded transactions of properties
- Very few acts exclude restrictive covenants/community restrictions
- Very few include detailed processes for community associations to record notices of interest
- Threat of slander of title/false claim penalties
- Changing notice and preservation requirements

37

- 2018 amendment to Michigan's Marketable Record Title Act
 - Set forth nature of claim
→
 - Specific references by liber and page or other county-assigned identifying number



38



COMMUNITY ASSOCIATION
Law Seminar


Combating the negative impacts of marketable title acts

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE



39





COMMUNITY ASSOCIATION
Law Seminar

Federal constitutional law

- Contracts Clause
- *Wichelman v. Messner*, 250 Minn. 88 (1957)

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE

40

COMMUNITY ASSOCIATION
Law Seminar



State legislation

MARKETABLE RECORD TITLE POLICY

Policy
CAI supports legislation that permits the recorded governing documents of community associations to be enforceable in perpetuity, including restrictions on the nature of the community even where there is no community association. Certain states have adopted legislation known as the Marketable Title Act or the Marketable Record Title Act (the "Marketable Title Acts") that automatically eliminate encumbrances on title to real property, including restrictive covenants, after the passage of statutory time periods. Almost all of these statutes contain an exception allowing restrictions limiting real estate to residential use to continue in force. However, these statutes can create uncertainty over the continued enforceability of restrictions on the nature of the community and the governing documents of community associations. CAI supports legislation that clearly supports the continuing and perpetual enforceability of such restrictions unless and until amended by the property owners subject to them, especially the governing documents of community associations.

About the Community Association Housing Model
Although community associations come in many forms and sizes, all associations share three basic characteristics: (1) membership in the association is mandatory and automatic for all property owners; (2) certain

- CAI's Marketable Record Title Policy
- North Carolina


©CAISocial @CAIAdvocacy #WeAreCAI #CAI50

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE

COMMUNITY ASSOCIATIONS INSTITUTE

41

COMMUNITY ASSOCIATION
Law Seminar



State common law

- Easements/servitudes
- Doctrine of reciprocal negative easements

©CAISocial @CAIAdvocacy #WeAreCAI #CAI50

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE

50th Anniversary logo and Community Associations Institute logo.

42

COMMUNITY ASSOCIATION
Law Seminar

Other ideas?

50th Anniversary
COMMITTED TO COMMUNITY
CAI Institute

©CAISocial @CAIAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE community ASSOCIATIONS INSTITUTE

43

COMMUNITY ASSOCIATION
Law Seminar

Practical steps

50th Anniversary
COMMITTED TO COMMUNITY
CAI Institute

©CAISocial @CAIAdvocacy #WeAreCAI #CAISO © 2023 COMMUNITY ASSOCIATIONS INSTITUTE community ASSOCIATIONS INSTITUTE

44

COMMUNITY ASSOCIATION
Law Seminar

1. Advocate/lobby for exceptions and amendments to marketable title acts that exempt community restrictions
2. Educate your clients on marketable title acts in their state and the importance of being proactive in preserving their community restrictions
3. Employ creative federal and state legal arguments

©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE

community ASSOCIATIONS INSTITUTE

45

COMMUNITY ASSOCIATION
Law Seminar

Questions?



©CAISocial @CAIAAdvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE

community ASSOCIATIONS INSTITUTE

46



COMMUNITY ASSOCIATION
Law Seminar

Thank you!

©CAISocial @CAIAdvocacy #WeAreCAI #CAISO

© 2023 COMMUNITY ASSOCIATIONS INSTITUTE



NOT SO FAST: COMBATING MARKETABLE TITLE ACTS TO PRESERVE COMMUNITY RESTRICTIONS

by

Kayleigh B. Long, Esq.
Hirzel Law, PLC
Farmington, Michigan

Nicholas J. Meinert, Esq.
Kaman & Cusimano, LLC
Cleveland, Ohio

INTRODUCTION

In 2015, several homeowners within a Michigan subdivision located just off the shores of Lake Michigan lost their presumed right to an easement that granted them, and others within their subdivision, coveted, recreational access to a Lake Michigan beach.¹ In 2019, an Ohio subdivision owner was permitted to maintain an unapproved shed on their property, despite restrictions that required approval from the subdivision’s building committee.²

In both cases, the expectations of homeowners, based on recorded documents within their chains of title, were defeated, not under theories of abandoned or terminated easements or equitable defenses of waiver, equitable estoppel, or laches—Instead, they were defeated by marketable title legislation that had been enacted in their states.

In this paper, we will explore this unique piece of legislation and the negative impacts it has on community restrictions. We will first discuss the marketable title acts themselves, including their underpinnings and the several acts across the United States that currently are in effect. Next, we will consider the negative impacts that marketable title legislation can, and does, have on community restrictions and the problems communities may encounter when trying to preserve their recorded restrictions. Finally, we will discuss the different tools that community associations and their attorneys can utilize to preserve their restrictions despite the presence of marketable title acts in their states.

First, let’s explore what “marketable title” is and the purpose behind marketable title acts, where they exist, and what they say.

WHAT ARE MARKETABLE TITLE ACTS?

What is “marketable title?”

¹ *Affeldt v. Lake Ct. Beach Ass’n*, No. 315277, 2015 WL 405761 (Mich. Ct. App. Jan. 29, 2015).

² *David v. Paulsen*, 137 N.E.3d 689 (Ohio Ct. App. 2019).

To understand the intent behind marketable title acts, an initial understanding of “marketable title” is first necessary. As extensively explained in *American Jurisprudence Proof of Facts*:

Although no single, universally-employed definition exists for the term “marketable title,” its meaning is easily gleaned from the multitude of similar definitions formulated by the courts, all of which, in one form or another, are usually comprised of the same key components [. . .] One of the most comprehensive and cogent definitions of the term marketable title was expressed by the Supreme Court of Virginia:

A marketable title is one which is free from liens and encumbrances; one which discloses no serious defects and is dependent for its validity upon no doubtful questions of law or fact; one which will not expose the purchaser to the hazard of litigation or embarrass him in the peaceable enjoyment of the land; one which a reasonably well-informed and prudent person, acting upon business principles and with full knowledge of the facts and their legal significance, would be willing to accept, with the assurance that he, in turn, could sell or mortgage the property at its fair value.

Embodied in this definition are the primary factors relied upon by the courts for evaluating marketability of title. These factors form the basis for several inquiries or tests that the courts have fashioned for determining whether a title is marketable, which may be summarized in general terms as follows:

1. Whether the title is one that would be acceptable to a reasonably prudent person who has full knowledge of the facts and their legal significance.
2. Whether the title is so free from encumbrances and defects that there can be no reasonable doubt as to its validity.
3. Whether the title is one that will not expose a purchaser to an unreasonable possibility of litigation to remove a defect.
4. Whether the title is one that may freely be resold, or mortgaged as security for a loan, at its fair value. [. . .]

The widely accepted rule is that title is only marketable if it can be readily sold to a reasonably prudent person who is familiar with the facts [. . .] The title need not be perfect to be marketable, nor actually be bad in order to render it unmarketable. Marketability is not determined on the basis of “whether title ultimately might be adjudged free of defects. Rather, it is ‘whether a reasonably prudent [person], familiar with the facts and apprised

of the question of law involved, would accept the title in the ordinary course of business.”³

“The primary purpose of requiring marketable title is to protect the purchaser of real property from having to undertake the burden of litigation to remove or defend against real *or* apparent defects in the title.”⁴

Whether title is marketable or not can present questions of both fact and law, but the chief focus of the analysis will be on whether the chain of title raises questions as to the person’s possession of the land and any interest or encumbrances on that land. For example, in *Mattson Ridge, LLC v. Clear Rock Title, LLP*, the Minnesota Supreme Court held that title was not marketable when the legal description within a deed included a reference to “Charles Magnuson’s place in Sunrise City” because it was unclear whether Charles Magnuson’s “place” was a home or a business or whether he had more than one place in Sunrise City.⁵ On the other hand, in *Humphries v. Ables*, the Indiana Court of Appeals held that the possible presence of pollutants and contaminants on a piece of land was not enough to render title unmarketable, noting that the risk of litigation contemplated by “marketable title” must be related to ownership and possession of the land.⁶

Why do marketable title acts exist?

With a generally clear consensus among the state courts as to what marketable title is and with offices that keep copies of recorded conveyances of and interests against property in every state, why do marketable title acts exist? The short and simple answer is that they make title searches easier.

Marketable title acts operate similar to statutes of limitation and are designed to “simplify and facilitate land title transactions by allowing persons to rely on record title [. . .] to extinguish stale claims and ancient defects against the title to real property, and, accordingly, limit the period of title search.”⁷ In doing so, marketable title acts extinguish claims, restrictions, and encumbrances that precede the title search window and have not

³ 52 AM. JUR. 3D *Proof of Facts* § 429, Westlaw (database updated Nov. 2022) (footnotes omitted). See also BLACK’S LAW DICTIONARY (11th ed. 2019) (defining “marketable title” as “[a] title that a reasonable buyer would accept because it appears to lack any defect and to cover the entire property that the seller has purported to sell; a title that enables a purchaser to hold property in peace during the period of ownership and to have it accepted by a later purchaser who employs the same standards of acceptability”); **Appendix 1**, which includes common law definitions for “marketable title” in each state that currently has a marketable title act.

⁴ *Mattson Ridge, LLC v. Clear Rock Title, LLP*, 824 N.W.2d 622, 628 (Minn. 2012) (emphasis original).

⁵ *Id.*

⁶ *Humphries v. Ables*, 789 N.E.2d 1025, 1032 (Ind. Ct. App. 2003).

⁷ 54 C.J.S. *Limitations of Actions* § 85, Westlaw (database updated Nov. 2022).

been properly preserved.⁸ As explained by one legal scholar, not shortening these title search windows means that “claims of a bygone era cling like barnacles to land titles and encumber them long after they should have been scraped clean ... We need to replace this negative approach by a positive one which will make the marketability of titles depend solely upon their state during some recent interval of time rather than upon their entire history.”⁹

As technology continues to develop, though, title searches have, and will continue to, become significantly less burdensome and the need for legislation that limits the scope of those title searches will decrease. For example, many Michigan and Ohio counties make land records indexes available online and these quick and easy record keeping and viewing capabilities will only continue to improve in the future. Yet, as explained below, marketable title acts continue to exist across the United States.

Where do marketable title acts exist? How do they work?

The Model Marketable Title Act and how it operates

Marketable title acts have been around for decades, but the first attempt to establish a uniform approach to them occurred in 1960 when the American Bar Association and University of Michigan Law School published the Model Marketable Title Act.¹⁰ Later, in 1977, the Model Marketable Title Act appeared as part of the Uniform Simplification of Land Transfers Act, until 1990 when the National Conference of Commissioners on Uniform State Laws published the act as its own piece of legislation.¹¹

The Model Marketable Title Act, as published in 1990 (but later withdrawn in 2015 as “obsolete”), creates a “root of title,” or a:

conveyance or other title transaction, whether or not it is a nullity, in the record chain of title of a person, purporting to create or containing language sufficient to transfer the interest claimed by that person, upon which that

⁸ *Id.* See also RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 7.16 cmt. a (AM. L. INST. 2000) (explaining that “[m]arketable-title acts are designed to decrease the costs of title assurance by limiting the period of time that must be covered by a title search.”).

⁹ PAUL E. BASYE, CLEARING LAND TITLES 539 (1953).

¹⁰ MODEL MARKETABLE TITLE ACT (1990) (UNIF. L. COMM’N, withdrawn 2015). The Model Marketable Title Act also is sometimes referred to as the “Uniform Marketable Title Act.” On July 15, 2022, the Uniform Law Commission announced that it appointed a study committee to determine the need for and feasibility of updating the Model Marketable Title Act.

¹¹ MODEL MARKETABLE TITLE ACT (1990) (UNIF. L. COMM’N, withdrawn 2015).

person relies as a basis for marketability of title, and which was the most recent to be recorded as of a date 30 years before marketability of title.¹²

Once the root of title is established, title will be considered marketable if there is an unbroken record chain of title for 30 years or more.¹³ The chain of title is considered “unbroken” if:

official public records disclose a conveyance, or other title transaction, of record not less than 30 years before the time marketability is determined, and the conveyance or other title transaction, purports to create the interest in or contains language sufficient to transfer the interest to the person claiming the interest or some other person from whom [. . .] the purported interest has become vested¹⁴

By way of example, in 2023, Lee is purchasing 123 Main Street in a state that has adopted the Model Marketable Title Act. A title search of 123 Main Street is performed, and it is discovered that in 1993, Rece conveyed 123 Main Street to Kirk via a recorded deed, and in 1996, Kirk conveyed 123 Main Street to Desmond via a recorded deed. Then, in 2016, Desmond conveyed 123 Main Street to Pat, and now, Lee is purchasing 123 Main Street from Pat.¹⁵ In this scenario, the root of title is the recorded 1993 deed from Rece to Kirk and the subsequent recorded transfers leading up to Lee create the 30-year unbroken record chain of title. For those who are visual learners:



¹² MODEL MARKETABLE TITLE ACT (1990) § 1(14) (UNIF. L. COMM’N, withdrawn 2015).

¹³ MODEL MARKETABLE TITLE ACT (1990) § 3(a) (UNIF. L. COMM’N, withdrawn 2015).

¹⁴ MODEL MARKETABLE TITLE ACT (1990) § 3(b) (UNIF. L. COMM’N, withdrawn 2015).

¹⁵ Example derived from REAL PROP. L. SECTION, STATE BAR OF MICH., MICH. LAND TITLE STANDARDS, Standard 1.3, Problem C (6th Ed. 2022).

Under the Model Marketable Title Act, though, title to the property still remains subject to any interest or defect that is apparent in the root of title or subsequent documents¹⁶ or any interest that is properly preserved by a notice recorded within the 30-year record chain of title.¹⁷ As a continuation of our example, if Rece included a building restriction on 123 Main Street within the recorded deed he gave to Kirk and in 1996 and 2016, Kirk and Desmond also conveyed 123 Main Street subject to the 1993 building restriction, in 2023, Lee would take title to 123 Main Street subject to the restriction.

On the other hand, under the Model Marketable Title Act, title to the property will not be subject to any interests, claims, or charges occurring before the date of the root of title.¹⁸ Further continuing our example, let's say that a different building restriction was recorded against 123 Main Street in 1989 but none of the documents in the 30-year record chain of title, including the 1993, 1996, and 2016 deeds, incorporate or reference the 1989 building restriction. In 2023, the 1989 building restriction recorded against 123 Main Street will be considered extinguished and Lee will not be bound by it.

All of this seems pretty straightforward, right? The wrinkle, though, comes in when an interest or defect arises before the date of the root of title but is incorporated or referenced in one or more of the documents within the 30-year record chain of title. To address this wrinkle, the Model Marketable Title Act clarifies that general references “to an easement, restriction, encumbrance, or other interest created before the effective date of the root of title is not sufficient to preserve it unless a reference by record location is made in the muniment to a recorded title transaction that created the easement, restriction, encumbrance, or other interest.”¹⁹ The Model Marketable Title Act explains that insufficient general references include the following:

- Subject to the terms of a deed dated July 4, 1976, from A to B
- Subject to a mortgage from A to B
- Subject to existing encumbrances
- Subject to easements of record
- Subject to mortgages of record.²⁰

Consequently, when Lee purchases 123 Main Street in 2023, what happens to the 1989 building restriction if it is referenced somewhere in the property's 30-year record chain of title? As lawyers love to answer, it depends. If the documents within the 30-year

¹⁶ Or “muniments.”

¹⁷ MODEL MARKETABLE TITLE ACT (1990) § 4(1) (UNIF. L. COMM'N, withdrawn 2015).

¹⁸ MODEL MARKETABLE TITLE ACT (1990) § 5(b) (UNIF. L. COMM'N, withdrawn 2015).

¹⁹ MODEL MARKETABLE TITLE ACT (1990) § 4(1) (UNIF. L. COMM'N, withdrawn 2015).

²⁰ MODEL MARKETABLE TITLE ACT (1990) § 11(b) (UNIF. L. COMM'N, withdrawn 2015).

record chain of title contain specific references to the 1989 building restriction, such as its recording number, then Lee will purchase 123 Main Street subject to the restriction. If, on the other hand, the documents within the 30-year record chain of title only generally state that they are “subject to restrictions of record,” then, under the Model Marketable Title Act, the 1989 building restriction will have been extinguished by 2023.

Importantly, the Model Marketable Title Act also clarifies that attempts to preserve an interest after it has already been extinguished by later recording a notice of interest in land will not revive the interest.²¹ For example, in 2022, Pat’s neighbor, David, also is subject to the 1989 building restriction and he wants to make sure that 123 Main Street will remain equally subject to the restriction so he files a notice of interest in land to preserve the restriction with the county records. If the 1989 building restriction had not been incorporated or specifically referenced in 123 Main Street’s chain of title since it was recorded in 1989, though, David’s recorded notice in 2022 will not revive the restriction.

And to add one last nuance to the Model Marketable Title Act, title to the property also is subject to any “restriction that is clearly observable by physical evidence of its use” or “use or occupancy that would have been revealed by reasonable inspection or inquiry.”²² For our final example, in 1943, an electric company installed utility poles and above-ground power lines along the southern edge of 123 Main Street pursuant to an easement agreement recorded that same year; however, since 1943, none of the conveyances of 123 Main Street specifically reference the recorded easement agreement and no notices of interest in land regarding the easement agreement have ever been recorded. Notwithstanding these deficiencies, in 2023, title to 123 Main Street will still remain subject to the electric company’s easement based on the clearly observable physical evidence of its use.

Marketable title acts in the United States

Presently, 17 states²³ have adopted their own versions of marketable title acts, affecting nearly one-third of the population in the United States. While none of the states have necessarily adopted the Model Marketable Title Act wholesale, they all have adopted a similar skeletal framework, including a statutory chain of title, specifications as to what interests are subject to and excluded from the effects of the act, and a process by which notices of interest in land can be recorded to preserve those interests.

²¹ MODEL MARKETABLE TITLE ACT (1990) § 5(c) (UNIF. L. COMM’N, withdrawn 2015).

²² MODEL MARKETABLE TITLE ACT (1990) § 7(1)-(2) (UNIF. L. COMM’N, withdrawn 2015).

²³ Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, Vermont, and Wyoming. See **Appendix 1** for additional information on each state’s marketable title act.

There are some additional throughlines in the 17 marketable title acts currently in effect in the United States. For instance, a plurality of the states have adopted a 40-year record chain of title,²⁴ though North Dakota has the shortest record chain of title with 20 years and Indiana has the longest record chain of title with 50 years.²⁵ Nearly all of the states' marketable title acts specifically indicate that their terms are to be liberally construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing individuals to rely on a limited record chain of title.²⁶ Two-thirds of the states' marketable title acts note that their provisions do not apply to certain easements or interests in the nature of an easement.²⁷ And more than half of the states' marketable title acts incorporate slander of title or false claim penalties for any notices that are wrongfully recorded against a property.²⁸

There are, of course, several states who have adopted their own unique provisions within their marketable title acts, including the following:

1. Florida

Florida's Marketable Record Title Act extinguishes any zoning requirement or building or development permit that occurred before the date of root of title, unless it operates independently of any matters recorded in the official records.²⁹ The act, however, does not extinguish "any recorded covenant or restriction that on the face of the first page of the document states that it was accepted by a governmental entity as part of, or as a condition of, any such comprehensive plan or plan amendment; zoning ordinance; land development regulation; building code; development permit; development order; or other law, regulation, or regulatory approval."³⁰ In order to properly preserve an interest in the 30-year chain of title, Florida's Marketable Record Title Act requires that a recorded

²⁴ Connecticut, Iowa, Michigan, Minnesota, Ohio, Utah, Vermont, and Wyoming.

²⁵ See **Appendix 1**.

²⁶ Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Utah, and Wyoming.

²⁷ Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Michigan, North Carolina, Ohio, Oklahoma, Utah, and Wyoming. Some provisions require that the easements be visible or have physical evidence of their use while others are specific to pipes, valves, utilities, etc. Only Kansas and Oklahoma except easements and interests in the nature of easements generally, with no requirements of visible or physical evidence of their use.

²⁸ Florida, Indiana, Kansas, Michigan, Nebraska, North Carolina, North Dakota, Oklahoma, South Dakota, and Wyoming.

²⁹ FLA. STAT. ANN. § 712.04(1) (West 2022).

³⁰ FLA. STAT. ANN. § 712.04(2) (West 2022).

notice of interest in land include a specific reference to the official book and page number, instrument number, or plat name of the interest.³¹

Florida's Marketable Record Title Act also provides a detailed process by which a property owners' association can file a notice of interest in land within the 30-year record chain of title to preserve its community's restrictions, stating that the association can attach an affidavit indicating that certain statutory statements were mailed or hand delivered to members, instead of having to include the name and mailing address of all its members in the notice.³²

Finally, Florida's Marketable Record Title Act also provides statutory processes by which certain property owners' associations and owners of property who are not subject to a homeowners association may revive covenants and restrictions that otherwise have been extinguished under the act.³³

2. *Indiana*

Similar to other marketable title acts, Indiana's Marketable Title for Real Property Act states that it does not necessarily extinguish visible easements; however, it also specifies that "equitable restrictions or servitudes on the use of land are not considered easements or interests in the nature of easements as that phrase is used in this section."³⁴ Instead, Indiana's Marketable Title for Real Property Act provides a detailed process by which equitable restrictions or servitudes may be preserved for platted subdivisions that have an association or other governing body.³⁵

3. *Kansas*

Kansas's Marketable Record Title Act does not extinguish "use restrictions or area agreements which are part of a plan for subdivision development."³⁶

4. *Michigan*

In order to properly preserve an interest in the 40-year chain of title, Michigan's Marketable Record Title Act requires that a recorded notice of interest in land "specifically refer by liber and page or other county-assigned unique identifying number to a

³¹ FLA. STAT. ANN. § 712.03(1) (West 2022).

³² FLA. STAT. ANN. § 712.06(1)(b) (West 2022).

³³ FLA. STAT. ANN. § 712.11, 712.12 (West 2022).

³⁴ IND. CODE ANN. § 32-20-4-3(b) (West 2022).

³⁵ IND. CODE ANN. § 32-20-4-1(c) (West 2022).

³⁶ KAN. STAT. ANN. § 58-3408 (West 2022).

previously recorded document that created the divestment;”³⁷ otherwise, the notice is considered ineffective and the claim remains unpreserved.³⁸

5. *Minnesota*

Any recorded notice of interest in land under Minnesota’s Marketable Title Act must state whether the right, claim, interest, encumbrance, or lien is “mature or immature.”³⁹ The act does not apply to any real property that is “registered” under Minnesota law⁴⁰ or to “actions to enforce rights, claims, interests, encumbrances, or liens arising out of certain private covenants, conditions, or restrictions,”⁴¹ which include those created by a condominium’s, cooperative’s, or community association’s governing documents.⁴²

6. *North Carolina*

Similar to Florida’s and Michigan’s Marketable Record Title Acts, North Carolina’s Real Property Marketable Title Act requires notices of interest in land to specifically identify the interest by reference to the book and page of record.⁴³ North Carolina’s Real Property Marketable Title Act also does not extinguish any “[r]ights, estates, interests, claims or charges with respect to any real property registered under the Torrens Law”⁴⁴ or any “covenants applicable to general or uniform scheme of development which restrict the property to residential use only.”⁴⁵ It also does not apply to condominiums, cooperatives, or planned communities to which any provisions of North Carolina’s Planned Community Act Apply.⁴⁶

7. *Ohio*

³⁷ MICH. COMP. LAWS ANN. § 565.102(2) (West 2022).

³⁸ MICH. COMP. LAWS ANN. § 565.105(1) (West 2022).

³⁹ MINN. STAT. ANN. § 541.023(1) (West 2022).

⁴⁰ MINN. STAT. ANN. § 541.023(2a) (West 2022).

⁴¹ MINN. STAT. ANN. § 541.023(2)(c) (West 2022).

⁴² MINN. STAT. ANN. § 500.20(2a) (West 2022).

⁴³ N.C. GEN. STAT. ANN. § 47B-4 (West 2022).

⁴⁴ N.C. GEN. STAT. ANN. § 47B-3(12) (West 2022). As explained by *Black’s Law Dictionary* (11th ed. 2019), a “Torrens system” is “[a] system for establishing title to real estate in which a claimant first acquires an abstract of title and then applies to a court for the issuance of a title certificate, which serves as conclusive evidence of ownership.”

⁴⁵ N.C. GEN. STAT. ANN. § 47B-3(13) (West 2022).

⁴⁶ N.C. GEN. STAT. ANN. § 47B-3(14) (West 2022).

Ohio's Marketable Title Act requires a notice of interest in land to be recorded as an affidavit that identifies the name of each record owner of the land that is affected by the notice, along with their address, "the recording information of the instrument by which each record owner acquired title to the land,"⁴⁷ and a description of the nature of the claims to be preserved.

8. *Oklahoma*

Similar to Kansas's Marketable Record Title Act, Oklahoma's Marketable Title Act does not extinguish "use restrictions or area agreements which are part of a plan for subdivision development."⁴⁸ Notably, though, Oklahoma's Marketable Title Act permits a county clerk to refuse to record a notice of interest in land "if the clerk believes that the instrument constitutes sham legal process, as defined by Section 1533 of Title 21 of the Oklahoma Statutes, or if the clerk believes the notice is being presented for the purpose of slandering the title to land."⁴⁹ The act does provide a judicial petition process to follow if a notice is wrongfully refused by the county clerk.⁵⁰

With this background of marketable title acts in mind, let's now discuss the negative impacts that these acts have on community restrictions.

MARKETABLE TITLE ACTS' NEGATIVE IMPACT ON COMMUNITY RESTRICTIONS

Community associations in states that have marketable title acts face numerous challenges to preserve their restrictions, obligations, and benefits, particularly as their neighbors and members engage in numerous property transactions over decades. The risks posed by the marketable title acts are highlighted by the cases showcased in the introduction of this paper.

*Affeldt v. Lake Court Beach Association*⁵¹ involved the Lake Court and Hollywood subdivisions in the state of Michigan. The Lake Court subdivision is located next to Lake Michigan and bordered on its east by Lakeshore Drive.⁵² The Hollywood subdivision is located across from Lakeshore Drive and, therefore, does not have access to Lake Michigan; however, in 1926, all present and future owners of any property within the Hollywood subdivision were granted a pedestrian access easement, via a recorded quitclaim deed, over a portion of the Lake Court subdivision to recreationally use the Lake

⁴⁷ OHIO REV. CODE ANN. § 5301.52(A)(4) (West 2022).

⁴⁸ OKLA. STAT. ANN. tit. 16, § 16-76(A) (West 2022).

⁴⁹ OKLA. STAT. ANN. tit. 16, § 16-75(B) (West 2022).

⁵⁰ OKLA. STAT. ANN. tit. 16, § 16-75(C) (West 2022).

⁵¹ *Affeldt v. Lake Ct. Beach Ass'n*, No. 315277, 2015 WL 405761 (Mich. Ct. App. Jan. 29, 2015).

⁵² *Id.* at *1.

Michigan beach.⁵³ Decades later, a dispute arose between some owners in the Hollywood subdivision and the Lake Court subdivision homeowners association, Lake Court Beach Association, regarding whether or not the Hollywood subdivision owners could continue accessing the beach.⁵⁴

The Michigan Court of Appeals held that the Hollywood subdivision homeowners no longer held an easement over the Lake Court subdivision to access the Lake Michigan beach, despite the recorded quitclaim deed, in part, under the state's Marketable Record Title Act, reasoning:

The Hayden quit claim deed creating the easement now asserted by plaintiffs was recorded in 1926. In 1929, the Legislature enacted the MRTA, which provides that “[a]ny person ... who has an unbroken chain of title of record to any interest in land for ... 40 years ... shall at the end of the applicable period be considered to have a marketable record title to that interest.” A person has an unbroken chain of title to an interest in land when the official public records disclose “[a] conveyance or other title transaction not less than ... 40 years ..., which conveyance or other title transaction purports to create the interest in that person, with nothing appearing of record purporting to divest that person of the purported interest.” A “conveyance” is any “instrument in writing, by which any estate or interest in real estate is created, aliened, mortgaged, or assigned; or by which the title to any real estate may be affected in law or equity [. . .]” All claims that affect the interest and which arise out of any act, transaction, event, or omission that antedates the 40-year period are extinguished, unless a notice of claim has been filed.

In 1932, an assessor's plat of the Lake Court Subdivision, known as “Heneveld's Supervisor's Plat No. 6,” was recorded. The plat shows Lake Court Drive as a private road and does not reference any easement rights over it or any other part of Lake Court Subdivision. Defendants argue that the Heneveld Plat conveyed a fee interest in the property at issue to the property owners in the Lake Court Subdivision and the MRTA would extinguish any other claims to that property unless a claimant filed a record notice asserting an easement or other competing interest within 40 years.

The Heneveld Plat was a “conveyance.” When a plat is recorded, the purchaser of platted lands receives not only the interest described in the deed, but also whatever rights are indicated in the plat. Accordingly, because a purchaser of land in the Lake Court Subdivision would receive whatever rights are indicated in the plat, the Heneveld Plat is an instrument in writing by which title to any real estate may be affected [. . .]

⁵³ *Id.*

⁵⁴ *Id.*

As the trial court noted, the question is not whether the Heneveld plat extinguished the easement described in the Hayden quit claim deed. Indeed, it could not do so. However, the plat was recorded subsequent to the Hayden quit claim deed and after the passage of the MRTA. As a result, because neither plaintiffs nor their predecessors in interest recorded a competing claim in the 40 years following the recording of the plat, the Heneveld plat “extinguish[es] all [other] claims that affect or may affect the interest” of the property at issue.⁵⁵

In *David v. Paulsen*,⁵⁶ restrictive covenants had been recorded against all the property in the Woodland Estates subdivision in 1964, requiring prior approval from the building committee before the construction of a shed.⁵⁷ Around 2016, the owners of a lot within the Woodland Estates subdivision, Catherine A. and Olen D. Moore, erected a shed without the building committee’s approval and, in 2016, two members of the building committee filed a lawsuit seeking the removal of the unapproved shed.⁵⁸ In 2019, the Ohio Court of Appeals held that these restrictions had been extinguished against the Moores’ property and, therefore, they would be permitted to keep their shed, stating:

Here, the Declaration of Restrictions for the Woodland Estates subdivision was recorded with the Ottawa County Recorder at volume 11, page 353, on February 18, 1964. An amendment was recorded at volume 12, page 133, on July 30, 1968. According to the title documents that were properly made part of the record in this case, the following transfers took place with respect to Lot 10, none of which specifically reference the restrictions:

- May 13, 1969: The Estate of Robert Cashen transferred title to Lot 10 to Edna Cashen, recorded at volume 242, page 168.
- September 19, 1972: Edna Cashen transferred title to Lot 10 to Blue Ridge Homes, Inc., recorded at volume 254, page 776.
- July 3, 1973: Blue Ridge transferred title to Lot 10 to Eugene and Nancy Paulsen, recorded at volume 257, page 064.
- February 9, 2009: Nancy Paulsen acquired title to Lot 10, recorded at volume 1262, page 674, following the death of her husband.
- February 9, 2009: Nancy Paulsen quitclaimed Lot 10 to her daughters, Catherine Moore and Carol Quillet, recorded at volume 1262, page 676, but maintained a life estate.

⁵⁵ *Id.* at *3-4 (citations omitted).

⁵⁶ *David v. Paulsen*, 137 N.E.3d 689 (Ohio Ct. App. 2019).

⁵⁷ *Id.* at 691.

⁵⁸ *Id.*

- February 17, 2017: Catherine Moore and Carol Quillet quitclaimed Lot 10 to Catherine Moore and Olen Moore, recorded at volume 1622, page 187 [. . .]

David and Sanders filed the complaint on December 14, 2016. Forty years before this date would be December 14, 1976. The July 3, 1973 conveyance of Lot 10 from Blue Ridge to Eugene and Nancy Paulsen is the most recent title transaction before December 14, 1976, and is therefore the root of title.

The restrictions are not specifically stated or identified in the deed recorded on July 3, 1973, or in one of the muniments of the chain of record title within forty years after the root of title. There is also no evidence that the restrictions were recorded pursuant to R.C. 5301.51 and 5301.52 within forty years after the July 3, 1973 title transaction. Accordingly, to the extent that the restrictions were referenced in any title transactions that occurred before the root of title, they would have been extinguished by the MTA.

Here, the evidence indicates that none of the title transactions—either before or after the root of title—reference the restrictions. According to an affidavit of a title agent attached to the Moores’ summary-judgment motion, the restrictions are also not referenced on the plat for the subdivision or incorporated into the deeds [. . .]

Because the restrictions are not identified in the deeds to the property or referenced in the subdivision plat, and because the record evidence indicates that the Moores were unaware of the restrictions, we must conclude that they lacked either actual or constructive notice and the restrictions may not be enforced against them. Thus, even if the date for determining marketability of title was earlier, as David and Sanders argue, the result here would be the same. Either way, the restrictions cannot be enforced against the Moores in this case.⁵⁹

As exemplified by both *Affeldt* and *David*, marketable title acts lurk in the background and can catch homeowners and community associations off guard, most of whom will never have heard of their marketable title act and are not closely scrutinizing every recorded transaction to verify that restrictions are being properly preserved. What results from these marketable title acts, then, is both an upset in homeowners’ long-held expectations about their community based on the documents within their extended chains of title and nonuniform communities, in which some lots or units remain subject to the recorded restrictions while others do not based solely on what was recorded within their individual chains of title.

⁵⁹ *Id.* at 693-95 (citations omitted).

Community associations face numerous challenges in trying to combat the adverse effects of marketable title acts. As illustrated by *David*, an analysis of whether recorded restrictions and covenants are still in effect or have been extinguished by the state's marketable title act will require an individualized review of the chain of title of each property within the community. Moreover, only a handful of marketable title acts exclude some subdivision or residential use restrictions from their application. This means that nearly every community association in a state with a marketable title act will need to undertake an initial review of the chains of title of all the properties within their communities and then continue to monitor the recorded transactions involving those properties across time to verify that restrictions have not been removed and ensure notices of interest in land are timely recorded. The difficulty of this process for volunteer board members, who are not paid and may not be well-versed in drafting or reviewing recordable real estate documents, is further heightened by the inconsistency among the acts regarding what language and information must be included in a document within a chain of title in order to preserve the restrictions—In some states, general references may be sufficient, but in other states, precise, specific information may be required.

When it comes to recording notices to preserve restrictions, even fewer marketable title acts outline a streamlined or detailed process by which a community association can record a notice of interest in land to preserve its restrictions. As highlighted by Ohio's Marketable Title Act, this can be an especially daunting project when the notice must include extensive information, such as the recording information of the instrument by which each lot or unit owner acquired title to their property. This means expensive legal bills that an association's board of directors did not budget for, possibly resulting in increased maintenance fees or a special assessment. Furthermore, volunteer board members may be wary about recording these notices in states whose marketable title acts contain slander of title or false claim penalties, particularly if one or more of their owners has attempted to remove the restrictions or wants them to be extinguished.

Even more difficulties arise when you consider the fact that marketable title acts are pieces of legislation and, therefore, are subject to change. The potential vulnerabilities community associations may face when provisions under their state's marketable title act change is illustrated by an amendment in 2018 to Michigan's Marketable Record Title Act.

Prior to 2018, Michigan's Marketable Record Title Act only required a notice of interest in land to set "forth the nature of the claim" but did not require it to include any specific recording information in order to preserve a prior interest.⁶⁰ Consequently, it was common practice throughout the state of Michigan for deeds to simply indicate that they were "subject to building and use restrictions of record," "subject to easements and

⁶⁰ H. R. Substitute S. B. 671, 2017-2018 Legis. Sess. (Mich. 2018).

restrictions of record,” or other similar language and these references were sufficient to incorporate prior recorded restrictions into the property’s chain of title.

However, the 2018 amendment to Michigan’s Marketable Record Title Act added a new subsection, stating that:

[f]or purposes of this section, [. . .] a conveyance or other title transaction in the chain of title purports to divest an interest in the property only if it creates the divestment or if it specifically refers by liber and page or other county-assigned unique identifying number to a previously recorded conveyance or other title transaction that created the divestment.⁶¹

Revisions to a later subsection also clarified that “failure to include the liber and page or other county-assigned unique identifying number renders the recording ineffective and the claim unreserved.”⁶² The Michigan legislature’s stated purpose for these amendments was:

Despite these provisions, there are times when an extensive investigation or litigation is necessary to determine whether there are limitations on a title or whether old restrictions remain valid. It has been suggested that this is due to a lack of clarity in the Act regarding what must be specified in a claim to preserve an interest. Evidently, it is common for deeds or purchase agreements to contain generic statements such as “subject to anything of record” or “subject to existing use restrictions, if any”, which may or may not preserve title restrictions. Reportedly, land title companies are reluctant to issue title insurance in these situations, which can impede development. To address these issues, some have recommended that the Act should require a person who wants to preserve an interest in property to refer specifically to the document that created it, when conveying title to the property, and require a person who wants to claim an interest to include particular information in the notice that must be recorded.⁶³

All of a sudden, decades of standard practice in preserving restrictive covenants in real estate transactions was upended and the 2018 amendment to Michigan’s Marketable Record Title Act only offered a two-year window, ending March 29, 2021,⁶⁴ when notices that complied with the act’s new requirements could be filed to avoid an extinguishment

⁶¹ *Id.*

⁶² *Id.*

⁶³ S. FISCAL AGENCY, MARKETABLE RECORD TITLE, S.B. 671: ANALYSIS AS PASSED BY THE SENATE, S. B. 671, 2017-2018 Legis. Sess. (2018).

⁶⁴ Pub. L. No. 18-572 (Mich. 2018), codified at MICH. COMP. LAWS ANN. § 565.101 *et seq.*

of interests that had otherwise been considered preserved.⁶⁵ As a result, it became imperative for community association practitioners throughout the state of Michigan to immediately educate their clients about the Marketable Record Title Act itself, along with its new notice requirements, and begin lobbying the Michigan legislature to both extend the time period for compliant notices to be filed and remove restrictive covenants that form condominium and restricted communities from the effects of the act.

With an understanding of the potentially devastating effects that these acts can have on community restrictions, let's now discuss the different ways in which we, as community association practitioners, and our clients can combat the negative effects of marketable title acts.

COMBATING THE NEGATIVE IMPACTS OF MARKETABLE TITLE ACTS

Federal Constitutional Law

The Contract Clause of the United States Constitution, which states that “[n]o State shall [. . .] pass any [. . .] Law impairing the Obligation of Contracts,” appears to unambiguously prevent states from adopting legislation that impairs contractual obligations.⁶⁶ The Contract Clause, then, would seem to make marketable title acts, which extinguish contractual obligations like use restrictions and maintenance fees payments, unconstitutional, particularly when the restrictions were in existence before the respective state codified its marketable title act; however, over the years, the United States Supreme Court’s interpretation of the Contract Clause has forced the rule to relent.

Deferring to a state’s police power, the United States Supreme Court has held that “[i]t is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from exercising such powers as are vested in it for the promotion of the common welfare, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected [. . .] In other words, that parties by entering into contracts may not estop the legislature from enacting laws intended for the public good.”⁶⁷ Additional early case law resulted in the police power being applied to recording statutes that required deeds to be recorded, lottery regulations, alcohol sale laws, and employment laws.⁶⁸

⁶⁵ This window was later extended to March 29, 2024 through an additional amendment to Michigan’s Marketable Record Title Act. See Pub. L. No. 20-294 (Mich. 2020), codified at MICH. COMP. LAWS ANN. § 565.101 *et seq.*

⁶⁶ U. S. CONST. art. I, § 10.

⁶⁷ *Manigault v. Springs*, 199 U.S. 473, 480 (1905).

⁶⁸ *Jackson v. Lamphire*, 28 U.S. 280 (1830); *Stone v. Mississippi*, 101 U.S. 814 (1880); *Beer Co. v. Massachusetts*, 97 U.S. 25 (1878); *New York Cent. R.R. v. White*, 243 U.S. 188 (1917).

In 1957, the Minnesota Supreme Court evaluated the constitutionality of its Marketable Title Act and found the law to be constitutional for two reasons.⁶⁹ First, the law allowed nine months for any outstanding interest to be protected by the easy expediency of recording a notice.⁷⁰ Second, the court cited public good, stating that “economic advantages of being able to pass uncluttered title to land far outweigh any value which the outdated restrictions may have for the person in whose favor they operate” and that the laws “must be construed in the light of the public good in terms of more secure land transactions which outweighs the burden and risk imposed upon owners of old outstanding rights to record their interests.”⁷¹

Eventually, the United States Supreme Court developed a four part test to determine whether a state law that impairs contracts will be upheld as necessary and reasonable:

- (1) Does the law deal with a broad generalized economic or social problem?
- (2) Does it operate in an area already subject to state regulation at the time the contractual obligations were entered into?
- (3) Does it effect simply a temporary alteration of the contractual relationship?
- (4) Does the law operate upon a broad class of affected individuals or concerns?⁷²

To date, no marketable title act has been found unconstitutional; however, as technology continues to advance, the “economic problem” of secured land transactions becomes less and less of a problem. Counties across the United States are continuously improving their recording indexes, with many available on the Internet. As this technology continues to improve, the “economic problem” that marketable title acts presume to resolve will be so significantly reduced that it will reach an inflection point as compared to the burden it creates for those seeking to maintain the “outdated restrictions.” Moreover, 33 other states in the United States do not have marketable title acts that necessarily limit the scope of title searches yet still are capable of producing millions of real estate transactions backed by title insurance, raising the question of who the actual beneficiaries of marketable title acts are—property owners or the real estate and title insurance industries?

The likelihood, though, that state courts will recognize marketable title acts as a harmful solution to an evaporating “problem” before many community associations have their restrictions extinguished is low so a more immediate solution may require

⁶⁹ *Wichelman v. Messner*, 83 N.W.2d 800 (Minn. 1957).

⁷⁰ *Id.* at 822.

⁷¹ *Id.* at 825.

⁷² *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

advocating for amendments to marketable title acts that expressly carve out community restrictions.

State Legislation Adoption & Modification

Because marketable title acts are enacted through legislation, there remain opportunities for community association practitioners and their clients to advocate for legislation that is tailored or amended to account for community restrictions. On December 17, 2020, the Board of Trustees of the Community Associations Institute adopted a Marketable Record Title Policy, supporting “legislation that permits the recorded governing documents of community associations to be enforceable in perpetuity, including restrictions on the nature of the community even when there is no community association [. . .] unless and until amended by the property owners subject to them”⁷³ The policy also “supports legislation that clearly provides that (1) restrictions on residential use or additional development and (2) covenants establishing a community association continue in perpetuity unless and until amended by the property owners subject to such restrictions and covenants.”⁷⁴

These advocacy efforts have been successful in at least one state, providing a roadmap for community association attorneys in other states. Specifically, the North Carolina CAI Legislative Action Committee began its efforts to advocate for exclusions for condominiums and planned communities in North Carolina’s Real Property Marketable Title Act in 2019, but in 2021, two court cases increased the urgency for reform. One of those cases, *C Investments 2, LLC v. Auger*, involved a 50-year-old development that attempted to use an exception to North Carolina’s Real Property Marketable Title Act, which exempts residential use restrictions from being extinguished, to avoid having all nine of its use restrictions extinguished.⁷⁵ The North Carolina Court of Appeals, though, held that the exception only applied to the restriction that required the property in the development to be used for residential purposes—the other eight use restrictions were extinguished.

After significant efforts, the North Carolina CAI Legislative Action Committee was able to align with the North Carolina Association of Realtors, the title insurance industry, and the North Carolina Bar Association to quickly and effectively pass legislation to protect North Carolina community associations.⁷⁶ This effort also involved directly reaching out to legislators of influence and persistently pushing to get the committee’s

⁷³ *Marketable Record Title Policy*, CMTY. ASS’NS INST., <https://www.caionline.org/Advocacy/PublicPolicies/Pages/Marketable-Title.aspx> (last visited Nov. 29, 2022).

⁷⁴ *Id.*

⁷⁵ *C Inv. 2, LLC v. Auger*, 860 S.E.2d 295 (N.C. Ct. App. 2021).

⁷⁶ Leslie Blum, *New Legislation Protects Homeowner and Condo Association Rights*, N.C. CHAPTER CMTY. ASS’NS INST. (JULY 15, 2022), <https://www.cai-nc.org/news/611439/New-Legislation-Protects-Homeowner-and-Condo-Associations-Rights.htm> (last accessed Nov. 29, 2022).

proposal acted upon.⁷⁷ On June 29, 2022, Governor Roy Cooper signed North Carolina Session Law 2022-12 into law, which means that North Carolina's Real Property Marketable Title Act no longer applies to condominiums created under the Condominium Act or Unit Ownership Act, cooperatives (as defined in the Planned Community Act), or residential planned communities to which any provisions of the Planned Community Act apply.⁷⁸

However, these advocacy efforts are not without their challenges. For example, since the 2018 amendment to Michigan's Marketable Record Title Act went into effect, Michigan community association practitioners have been advocating for amendments to the act that would exclude from its effects "any provision contained in or referred to in a recorded master deed for a condominium and its recorded amendments" and subdivision restrictions.⁷⁹ Both of those efforts, though, failed to make it out of Michigan's House of Representatives. Meanwhile, legislation to amend Michigan's Marketable Record Title Act to protect the interests of public utility companies recently passed in the Michigan's House of Representatives just 20 days after being introduced and is expected to pass before the end of the 2021-2022 legislative session.⁸⁰

Community association practitioners and their clients face uphill battles in impressing upon their state legislatures the importance of excluding community restrictions from the impacts of marketable title acts and many times face opposition from larger lobbying groups supporting the real estate and title insurance industries. North Carolina's CAI Legislative Action Committee provides a great example of how unifying special interest groups can assist with passing meaningful legislation in any state. If similar efforts to amend a state's marketable title act are not effective, though, and communities' restrictive covenants are hurtling toward possible extinguishment, how else can their restrictive covenants possibly be saved?

State Common Law

Community restrictions are easements/servitudes excepted from marketable title acts

As explained by Section 1.1 of the *Restatement (Third) of Property: Servitudes*, community restrictions, whether affording rights or imposing obligations that run with the land, are considered servitudes:

⁷⁷ Jim Slaughter, *NC Community Association Legislative Update – June 21, 2022: Adopted Bill Has Important HOA/Condo Fixes and Changes to How Condos Are Created*, L. FIRM CAROLINAS (June 21, 2022), <http://lawfirmcarolinas.com/blog/nc-community-association-legislative-update-june-21-2022> (last accessed Nov. 29, 2022).

⁷⁸ *Id.*

⁷⁹ H.B. 5260, 2019-2020 Legis. Sess. (Mich. 2019); H.B. 6332, 2019-2020 Legis. Sess. (Mich. 2020).

⁸⁰ H.B. 6370, 2021-2022 Legis. Sess. (Mich. 2022).

“Servitude” is the generic term that describes legal devices private parties can use to create rights and obligations that run with land. Rights and obligations that run with land are useful because they create land-use arrangements that remain intact despite changes in ownership of the land. Servitudes permit the creation of neighborhoods restricted to particular uses, providing a private alternative to zoning [. . .]

The servitudes covered by this Restatement are easements, profits and covenants that run with the land [. . .]

The servitudes covered by this Restatement include equitable servitudes, negative easements executed parol licenses, and other irrevocable licenses. They are not separately listed, however, because the servitudes they describe are either easements, profits, or covenants, as those servitudes are defined in this Restatement, and the differences that formerly caused them to be separately categorized are no longer important

Under the Model Marketable Title Act and two-thirds of the states’ marketable title acts, easements, servitudes, and interests in the nature of an easement or servitude are excepted from extinguishment under the act.⁸¹ Consequently, community restrictions, which are considered easements/servitudes, arguably should fall outside the purview of marketable title acts; however, this argument remains susceptible to challenges depending on the actual language used within each act. Some marketable title acts preserve easements/servitudes of any kind,⁸² while others only preserve easements or servitudes that are clearly observable, and at least one explicitly states that easements do not include equitable servitudes, such as community restrictions.⁸³

And for those states that only protect clearly observable easements/servitudes, the question then naturally arises as to what constitutes a “clearly observable” easement/servitude that is worthy of preservation? While it may include exterior appearance and architectural restrictions, does it also include less clearly observable restrictions, such as mandatory membership within a community association and the obligation to pay dues or assessments, or restrictions relating to nuisance behaviors, pets/animals, parking, garbage collection, smoking, leases/rentals? Even under this exception, there still exists the very real potential for fractured communities, where observable restrictions remain in force against all the lots or units but non-observable restrictions are severed and extinguished.

⁸¹ Connecticut, Florida, Illinois, Indiana, Iowa, Kansas, Michigan, North Carolina, Ohio, Oklahoma, Utah, and Wyoming.

⁸² Kansas and Oklahoma.

⁸³ Indiana.

The doctrine of reciprocal negative easements⁸⁴

In the United States, restrictions that form community associations and restricted communities, such as building, use, and occupancy restrictions, generally are considered to be valuable property rights that should be enforced so long as they remain of value to those seeking to enforce them.⁸⁵ These restrictions typically are recorded within a property's chain of title, run with the property, and bind current and subsequent owners of the property;⁸⁶ however, in many jurisdictions, property can be burdened by restrictions, even if they do not appear in the property's record chain of title, under the doctrine of reciprocal negative easements.⁸⁷

States that have adopted a broad construction of the doctrine of reciprocal negative easements may impose restrictions against a property, even if they are not within the record chain of title, if the following general conditions are satisfied:

- (1) There is a common owner of related parcels of land;

⁸⁴ Also sometimes referred to as the doctrine of implied reciprocal negative servitudes or the implied reciprocal covenants doctrine.

⁸⁵ See, e.g., 20 AM. JUR. 2D *Covenants, Etc.* § 148, Westlaw (database updated Nov. 2022) (stating “[r]estrictive covenants are designed to enhance the value and marketability of property; they are intended to be binding conditions of mutual benefit to both the grantor and grantee. Indeed, one of the purposes of restrictive covenants is to maintain or enhance the value of land by controlling the nature and use of lands subject to a covenant’s provisions, and such covenants often involve restrictions intended to promote aesthetics.”); 20 AM. JUR. 2D *Covenants, Etc.* § 149, Westlaw (database updated Nov. 2022) (stating “a covenant creates enforceable property rights and obligations that may run with the land”); *Bates v. Webber*, 257 S.W.3d 632, 638 (Mo. Ct. App. 2008) (stating that “[r]estrictive covenants are intended to preserve the aesthetic and residential nature of the subdivision.”) (quotation marks and citations omitted); Shauna Cully Wagner, *When Is Tract Subject to “General Plan of Development” so As to Subject All Parcels in Tract to Restrictive Covenants Included in General Plan*, 119 A.L.R. 5th § 519 (originally published in 2004) (stating that “subdivision restrictions are not intended wholly to deprive the grantees of some specified beneficial use of their property but are intended primarily to redound to the mutual benefit and profit of the owners of the land.”); 21 C.J.S. *Covenants* § 1, Westlaw (database updated Nov. 2022) (stating “[a] covenant is a contract created with the intention of enhancing the value of property and is a valuable property right.”).

⁸⁶ 20 AM. JUR. 2D *Covenants, Etc.* § 20, Westlaw (database updated Nov. 2022) (stating “covenants that run with the land bind not only the current holder, but also successors in title or subsequent owners, even if the covenant is not referenced in the subsequent owner’s deed.”).

⁸⁷ 20 AM. JUR. 2D *Covenants, Etc.* § 36, Westlaw (database updated Nov. 2022) (stating “[r]estrictive covenants may apply to lots in a planned development under an implied covenant theory, even if the developer failed to comply with all formalities, as long as the landowner had knowledge of the restrictive covenants at the time he or she purchased the property.”); 21 C.J.S. *Covenants* § 2, Westlaw (database updated Nov. 2022) (stating “[w]here an owner of land subdivides it into lots for the purpose of sale, under a general plan or scheme restricting the lots to certain uses, restrictions that are embodied in such general plan or scheme may in a proper case be imposed upon the lots beyond the express restrictions contained in the deeds to the purchasers on the theory of implied covenants.”).

- (2) When the common owner conveyed parcels of the land, they included at least one restriction⁸⁸ for the benefit of the land they retained;
- (3) The restriction(s) evidence a plan, scheme, or the common owner's intent that the entire tract of land be similarly treated; and
- (4) The party against whom the restriction is sought to be enforced had notice of the restriction.⁸⁹

Property owners may have actual notice of restrictions that fall outside their record chain of title, such as when neighboring owners raise objections to a nonconforming use, when they have knowledge of recorded restrictions on other lots, or when they acquiesce in being governed by a community association and its restrictions, despite the lack of restrictions against their property.⁹⁰ Property owners also may have constructive notice of restrictions, including when they are found in the majority of the deeds of other related parcels (even if the property owner does not actually know this) or when there are signs or other visible cues throughout the community that evidence the existence of a community association or restrictions.⁹¹

⁸⁸ The restrictions need not necessarily be identical or uniform but they should be similar enough that it is apparent that there is a uniform subdivision scheme. See, e.g., 20 AM. JUR. 2D *Covenants, Etc.* § 160, Westlaw (database updated Nov. 2022).

⁸⁹ See, e.g., 20 AM. JUR. 2D *Covenants, Etc.* § 156, Westlaw (database updated Nov. 2022); 21 C.J.S. *Covenants* § 4, Westlaw (database updated Nov. 2022); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.1 cmt. c (AM. L. INST. 2000) (noting that “[i]f the circumstances surrounding conveyance of property covered by a recorded declaration indicate that the property is conveyed subject to the general plan, an express reference to the recorded declaration in the instrument of conveyance is not necessary to create the servitude,” appearing to contradict some marketable title acts’ requirements that these restrictions be expressly referred to in conveyances); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 5.1 cmt. b (AM. L. INST. 2000) (stating “no instrument of transfer is necessary to pass servitude benefits and burdens to successors to the benefited or burdened property interests: they pass automatically on transfer of the property to which they are appurtenant. The Statute of Frauds does not require that an appurtenant servitude be mentioned in the instrument of transfer.”).

⁹⁰ See, e.g., *Smith v. First United Presbyterian Church*, 52 N.W.2d 568, 574 (Mich. 1952) (applying the doctrine of reciprocal negative covenants and holding that “[i]t is undisputed that defendants were given notice by plaintiffs that the properties were restricted to single residential purposes”); *The Waterfront, LLP v. River Oaks Condo. Ass’n, Inc.*, 651 S.E.2d 481, 483 (Ga. Ct. App. 2007) (holding that purchaser of a fourth phase of a condominium project was bound by third amendment limiting the phase to no more than 30 units, even though there may not have been compliance with all formalities, because the amendment was recorded within the chain of title); *Castle Point Homeowners Ass’n, Inc. v. Simmons*, 773 S.E.2d 806, 809-10 (Ga. Ct. App. 2015) (holding that a question of fact remained as to whether an implied covenant should be imposed when a homeowner voluntarily joined an association and paid its dues, along with having constructive notice from a recorded plat that common areas and detention ponds would be owned and maintained by an association).

⁹¹ *Seaview Ass’n of Fire Island, N.Y., Inc. v. Williams*, 510 N.E.2d 793, 794 (N.Y. 1987) (holding that property owners were required to pay for an association’s services and facilities, even without recorded restrictions, because “[t]he issues of notice given by plaintiff and actual or constructive knowledge of

The survival of the doctrine of reciprocal negative easements, even in states that have adopted marketable title acts, is highlighted by the fact that some state courts continue to impose restrictions against a property, even when no restrictions appear in the record chain of title. For example, in 2006, well after Michigan’s initial adoption of its Marketable Record Title Act, the Michigan Court of Appeals applied the doctrine of reciprocal negative easements in *Civic Association of Hammond Lake Estates v. Hammond Lake Estates No. 3 Lots 126-135*, involving a property owner’s association that administered the use of Hammond Lake for several subdivisions.⁹² Each subdivision, except for one (Hammond Lake Estates No. 3), included a deed restriction that prohibited the use of motorboats on Hammond Lake. Eventually, the association filed a lawsuit seeking to prohibit the use of motorboats on Hammond Lake by the lot owners in Hammond Lake Estates No. 3.

Even though no lot within that subdivision contained a deed restriction prohibiting the use of motorboats, the restriction still applied to that subdivision because it was part of a larger common scheme or plan developed by a common grantor and the other subdivisions, which were part of that common scheme or plan, did have the deed restriction. The Michigan Court of Appeals explained:

In *Dwyer v. City of Ann Arbor*, 79 Mich App 113, 118-119; 261 NW2d 231 (1977), *rev’d on other grounds* 402 Mich 915; 387 NW2d 926 (1978), this Court recognized that the rationale of the doctrine of reciprocal negative easements “is based upon the fairness inherent in placing uniform restrictions upon the use of all lots similarly situated, notwithstanding that less than all of the deeds contain an express restriction. Thus, the implied restriction arises from the express restriction.” The essential elements of a reciprocal negative easement are: “(1) a common grantor; (2) a general plan; and (3) restrictive covenants running with the land in accordance with the plan and within the plan area in deeds granted by the common grantor.” *Cook v Bandeen*, 356 Mich 328, 337; 96 NW2d 743 (1959).

defendants, gained from familiarity with the area, from signs or from other sources, are largely factual [. . .] There is ample evidence in the record [. . .] that defendants knew the nature of the community and by their purchase—indeed, successive purchases—impliedly accepted the conditions accompanying ownership of property in Seaview.”); *Goodnow Flow Ass’n Inc. v. Graves*, 23 N.Y.S.3d 710 (N.Y. App. Div. 2016) (reaching a similar result as *Seaview Ass’n*); *Dill v. Loiseau*, 823 S.E.2d 642, 645 (N.C. Ct. App. 2019) (holding that a lot in a seven-lot subdivision was subject to restrictive covenants recorded against five other lots in the subdivision and, therefore, a general plan of development had been established); *Grange v. Korff*, 79 N.W.2d 743, 749 (Iowa 1956) (holding that a lot was subject to residential restrictions within their chain of title, even though three other lots in the subdivision did not include similar restrictions, because the general plan or scheme of the community “should have indicated to them the presence of some character of building restrictions.”); *Rowe v. May*, 101 P.2d 391, 398 (N.M. 1940) (holding that a purchaser who did not have actual notice of a uniform restrictive covenant common in the subdivision’s deeds but did have notice of uniform physical appearance remained bound by the restriction).

⁹² 721 N.W.2d 801 (Mich. Ct. App. 2006).

The trial court correctly ruled that the motorboat restriction generally applies to HLE No. 3 under the doctrine of reciprocal negative easements. Defendants concede that there existed a common grantor, Hammond Lake Realty Company. Further, a general plan existed as evidenced by the HLE plat recorded in 1954, which showed all the HLE lots in phases No. 0 through No. 7. Also, the deed restrictions for all the subdivisions were recorded in either 1954 or 1955 and the Hammond Lake Estates Corporation, plaintiff's predecessor, was formed in 1955 for the protection and improvement of a majority of the subdivisions in Hammond Lake Estates. Thus, Hammond Lake Estates was developed pursuant to a general plan. Finally, the deed restrictions for Hammond Lake Estates contain restrictive covenants running with the land in accordance with the plan in deeds granted by the common grantor. Indeed, the restrictions for all the subdivisions are nearly identical. Thus, the trial court correctly determined that the motorboat restriction generally applies to HLE No. 3.⁹³

While the doctrine of reciprocal negative easements may provide a mechanism in which community restrictions extinguished under marketable title acts are reimposed on lots or units to maintain uniformity throughout the community, several states have either expressly rejected the doctrine of reciprocal negative easements or have adopted very narrow applications of it,⁹⁴ still leaving community associations and their attorneys without a bulletproof shield against marketable title acts.

⁹³ *Id.* at 137-38.

⁹⁴ See *Martin v. Ray*, 173 P.2d 573, 576 (Cal. Ct. App. 1946) (holding lot owners with uniform restrictions could not enforce them against others, despite evidence of a general plan or scheme, because the restrictions did not state they were for the benefit of the other properties); *McCurdy v. Standard Realty Corp.*, 175 S.W.2d 28, 30 (Ky. Ct. App. 1943) (stating that the doctrine of reciprocal negative easements "ought to be used and applied with extreme caution, for it involves difficulty and lodges discretionary power in a court of equity, in a degree, to deprive a man of his property by imposing a servitude through implication."); *Popponesset Beach Ass'n, Inc. v. Marchillo*, 658 N.E.2d 983, 986-87 (Mass. App. Ct. 1996) (refusing to apply the doctrine of reciprocal negative easements and noting that "Massachusetts decisions take the more limited view that the common scheme burden arises only when a seller of land binds that vendor's remaining land with restrictions by means of a writing."); *Cejka v. Korn*, 127 S.W.2d 786, 790 (Mo. Ct. App. 1939) (stating that "[s]imilar or identical restrictions are not sufficient of themselves to establish the existence of a general scheme, or that the restrictions in the deed under which the plaintiff claims were intended for the benefit of any other lot or lots conveyed by the common grantors [. . .] The infirmity in plaintiff's petition is that there is no allegation connecting the covenants in the deeds under which defendant and plaintiff hold title, so as to enable plaintiff to maintain her suit for enforcement of the covenant."); *King v. James*, 97 N.E.2d 235, 238 (Ohio Ct. App. 1950) (holding that the doctrine of reciprocal negative easements "ha[d] never been applied in Ohio. The rationale of the decisions in Ohio run counter to the application of this doctrine."); *Land Dev., Inc. v. Maxwell* 537 S.W.2d 904, 913 (Tenn. 1976) ("Further, the doctrine of negative reciprocal easements, while well recognized in the law of property, is to be applied with great care.").

CONCLUSION AND PRACTICAL STEPS

Marketable title acts pose significant problems for community associations, particularly as their restrictions approach the statutory deadline in their respective states. As explained above, unfortunately, there is not a single or one-size-fits-all solution to combat the negative impacts of marketable title acts. Instead, community associations and their attorneys will need to deploy a multi-faceted approach, from the legislative to the judicial landscapes and on the ground within the communities themselves, to avoid extinguishment of community restrictions. For community association law practitioners in states with marketable title acts, and for practitioners in states that may later consider enacting marketable title acts, we recommend employing the following three-pronged approach:

1. Advocate/lobby for exceptions and amendments to marketable title acts that exempt community restrictions.

The tool that carries the most potential impact is legislation that removes community restrictions from the application of marketable title acts entirely, whether that exception be included within the act from the very beginning or included later through an amendment. While marketable title acts are presented to legislators by the real estate and title insurance industries as a solution to a supposed problem, community associations and their attorneys and advocates have an opportunity to reframe the apparent problems presented by the real estate and title insurance industries and educate those same legislators as to the unintended consequences that flow from these acts when they do not expressly protect community restrictions.

As explained above, the purpose behind marketable title acts is to make title searches easier by shortening the title search window. While this purpose made sense when marketable title acts first came on the scene in the early 20th century and title searches required individual review of paper indexes, this apparent problem has dwindled as technological advances have moved recorded property transactions into the digital, online world, making title searches easier, faster, and more reliable. Moreover, 33 states, including states with large populations such as California, New York, and Texas, remain capable of facilitating real estate transactions backed by title insurance, despite lengthier title search windows and older property records.

On the other hand, the growing prevalence of community associations throughout the United States, including in states with marketable title acts, presents a compelling argument as to why the restrictions which form those communities should not be subject to marketable title acts. While in 1970 there were approximately 10,000 community associations in the United States, as of 2021, that number jumped to 358,000, with homeowners associations accounting for 58-63% and condominium associations

accounting for 35-40% of this number.⁹⁵ Over a third of community associations are located in states with marketable title acts,⁹⁶ and the possible piecemeal or complete extinguishment of community restrictions in those states, along with the accompanying disruptions within and outside those communities, presents a compelling argument as to why they should be excepted from marketable title acts entirely. And this argument is not just being advanced by two community association attorneys, who obviously have an interest in this fight—it is also put forward in Section 7.16 of the *Restatement (Third) of Property: Servitudes*, which states, in pertinent part, the following:

This section identifies servitudes that, at a minimum, should be exempted from extinguishment under marketable-title acts [. . .] Most marketable-title statutes provide exemptions for a variety of easements, but few mention covenants. Courts faced with similar exemptions in tax-sale statutes have frequently interpreted the term “easements” to include covenants when sound public policy suggested that covenants as well as easements should survive a tax-foreclosure sale (see § 7.9).

Marketable-title acts are designed to decrease the costs of title assurance by limiting the period of time that must be covered by a title search [. . .]

Exempting servitudes created by notation on a plat map or by declaration for a subdivision or common-interest community will not increase the costs of title searches and will preserve interests that frequently add significant value to property. Requiring the re-recording of subdivision or common-interest-community servitudes creates the risk of piecemeal extinguishment of servitudes within a community because the root of title for each parcel will be different and the deeds to individual parcels will not necessarily include a reference to the servitudes sufficient to preserve them. Although an association might periodically record notices sufficient to preserve the servitudes, the burden of doing so may be considerable, and there are risks that mistakes will lead to exemption of some parcels from community obligations. The costs of subjecting common-interest communities and subdivisions with covenants to the marketable-title act requirements far exceed any benefit to the land-transfer system.

Recent efforts by CAI and community association attorneys and advocates in North Carolina show that lobbying efforts to preserve community restrictions within marketable title legislation is possible, and attorneys and advocates should continue pushing for

⁹⁵ See *2021-2022 U.S. National and State Statistical Review, U.S. Community Associations, Housing Units, and Residents*, FOUND. CMTY. ASS'N RSCH., <https://foundation.caionline.org/wp-content/uploads/2022/09/2021-2CAIStatsReviewWeb.pdf> (last visited Nov. 29, 2022).

⁹⁶ Florida (49,420 associations), Illinois (19,010 associations), North Carolina (14,440 associations), Ohio (8,620 associations), Michigan (8,550 associations), Minnesota (7,850 associations), Indiana (5,080 associations), Connecticut (5,000 associations), Utah (3,570 associations), Iowa (between 2,000 and 3,000 associations), Kansas, Nebraska, Oklahoma and Vermont (between 1,000 and 2,000 associations), and North Dakota, South Dakota, and Wyoming (fewer than 1,000 associations). See *id.*

reforms that expressly protect community restrictions in perpetuity until amended or terminated by the property owners themselves.⁹⁷

2. Educate your clients on marketable title acts in their state and the importance of being proactive in preserving their community restrictions.

Community association law practitioners must also engage in concerted efforts to educate their clients about the marketable title acts in their state and the importance of being proactive in preserving their community restrictions. These efforts can include generalized educational campaigns, such as short, explanatory articles on websites, in blog articles, and in newsletters provided to clients, and brief portions of seminars provided to new clients, property managers, and/or board members. They also can include more individualized services, such as highlighting for an association when their restrictions may be running up against the statutory deadline, assisting associations in drafting and preparing notices of interest, and developing systems for associations to monitor property transactions in their communities that can be employed even as boards and property management companies change over time.

3. Employ creative federal and state legal arguments.

If legislative efforts to protect community restrictions have not been successful and a community association's restrictions have arguably been extinguished under the state's marketable title act, community association attorneys will need to look for creative, legal arguments available in their state that may be able to either avoid the application of the marketable title act or reimpose restrictions on properties to maintain the uniformity of the community. Depending on the particular state at issue, those arguments could include those that we have highlighted in this paper, such as impairment of contracts, exemption of easements/servitudes from the act, and the doctrine of reciprocal negative easements; however, the arguments we have provided in this paper are not necessarily exhaustive and we encourage attorneys to continue thinking outside the box for other arguments that may be successful.

As numerous community associations and their attorneys continue to battle marketable title acts, there will be more success stories and new approaches developed. We hope as you encounter this issue in your own state and craft ways to preserve community restrictions that you will share those successes and ideas with this community.

⁹⁷ *Marketable Record Title Policy, CMTY. ASS'NS INST.,* <https://www.caionline.org/Advocacy/PublicPolicies/Pages/Marketable-Title.aspx> (last visited Nov. 29, 2022).

Appendix 1

Connecticut	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>A marketable title is one that can be sold ‘at a fair price to a reasonable purchaser or mortgaged to a person of reasonable prudence as a security for the loan of money.’ A title is not unmarketable because the vendee is unwilling to accept it or because it is unsatisfactory to his attorney. It must be subject to more than suspicion. To render a title unmarketable, the defect must present a real and substantial probability of litigation or loss.</i></p> <p><i>Frank Towers Corp. v. Laviana, 97 A.2d 567, 571 (Conn. 1953) (citations omitted)</i></p>
	<p style="text-align: center;">Marketable Title Act</p> <ul style="list-style-type: none"> • https://www.cga.ct.gov/current/pub/chap_821.htm#sec_47-33b • 40 years
Florida	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>A marketable title is one free from reasonable doubt in law or fact as to its validity.</i></p> <p><i>Winkler v. Neilinger, 14 So.2d 403, 404 (Fla. 1943) (citations omitted)</i></p>
	<p style="text-align: center;">Marketable Record Title Act</p> <ul style="list-style-type: none"> • http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0700-0799/0712/0712.html • Recently amended in 2022: http://laws.flrules.org/2022/171 • 30 years

Appendix 1

Illinois	<p>Common law definition of “marketable title”</p> <p><i>As a general rule, every purchaser of land has a right to demand a title which shall put him in all reasonable security against loss or annoyance by litigation. He should have a title which will enable him not only to hold his land, but to hold it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw will come up to disturb its market value. He has a right at least to a marketable title having no defects which would materially impair its marketable quality. An agreement to sell and convey land is in legal effect an agreement to make a good title, and a merchantable title specified in this contract means such a title that a person of reasonable prudence will accept it as not subject to a doubt or cloud that would affect its market value.</i></p> <p><i>Firebaugh v. Wittenberg</i>, 141 N.E. 379, 381 (Ill. 1923) (citations omitted)</p>
	<p>Marketable Title Act</p> <ul style="list-style-type: none"> • https://www.ilga.gov/legislation/ilcs/ilcs4.asp?DocName=073500050HArt%2E+XIII+Pt%2E+1&ActID=2017&ChapterID=56&SeqStart=101200000&SeqEnd=103700000 • 40 years
Indiana	<p>Common law definition of “marketable title”</p> <p><i>“[T]itle ‘which has no defects of a serious nature, and none which affect the possessory title of the owner, ought to be adjudged marketable.’” One who contracts for the purchase of real property is not bound to accept a doubtful title, or one that would likely be involved in litigation, even though it may ultimately be adjudged to be good.</i></p> <p><i>Humphries v. Ables</i>, 789 N.E.2d 1025, 1032 (Ind. Ct. App. 2003) (citations omitted)</p>
	<p>Marketable Title for Real Property</p> <ul style="list-style-type: none"> • https://iga.in.gov/legislative/laws/2022/ic/titles/032#32-20 • 50 years

Appendix 1

Iowa	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>A merchantable or marketable title has been defined as one that later can be sold to a reasonable purchaser, ‘* * * a title that a man of reasonable prudence, familiar with the facts and apprised of the questions of law involved, would in the ordinary course of business accept’</i></p> <p><i>Tesdell v. Hanes</i>, 82 N.W.2d 119, 121 (Iowa 1957) (citations omitted)</p> <hr/> <p style="text-align: center;">Marketable Title Act</p> <ul style="list-style-type: none"> • https://www.legis.iowa.gov/law/iowaCode/sections?codeChapter=614&year=2022 • 40 years
Kansas	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>On numerous occasions this court has discussed what is meant by a marketable title. In Newell v. McMillan, 139 Kan. 94; 30 P.2d 126, the term is defined in this fashion:</i></p> <p><i>‘ . . . The rule is a just and familiar one that a marketable title is one which is free from reasonable doubt; and under this rule a title is doubtful and therefore unmarketable if it exposes the party holding it to the hazard of litigation [. . .] ‘ . . . It is not necessary to show that a title is bad in fact in order to render it unmarketable or nonmerchantable. It is sufficient if there be doubt, based on reasonable grounds, which would impel a reasonably prudent man familiar with the facts, to reject it in the ordinary course of business’</i></p> <p><i>Darby v. Keeran</i>, 505 P.2d 710, 715 (Kan. 1973)</p> <hr/> <p style="text-align: center;">Marketable Record Title Act</p> <ul style="list-style-type: none"> • http://www.kslegislature.org/li/b2021_22/statute/058_000_00_00_chapter/058_034_0000_article/ • 25 years

Appendix 1

<p>Michigan</p>	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>‘A marketable title, however, is one of such character as should assure to the vendee the quiet and peaceable enjoyment of the property, and one which is free from incumbrance.’</i></p> <p><i>A title may be regarded as unmarketable if a reasonably careful and prudent man, familiar with the facts, would refuse to accept the title in the ordinary course of business. It is not necessary that the title be actually bad in order to render in unmarketable. It is sufficient if there is such a doubt or uncertainty as may reasonably form the basis of litigation.</i></p> <p><i>Bartos v. Czerwinski</i>, 34 N.W.2d 566, 568 (Mich. 1948) (citations omitted)</p>
	<p style="text-align: center;">Marketable Record Title Act</p> <ul style="list-style-type: none"> • http://www.legislature.mi.gov/%28S%28q2v3kticyzr1fdj02zikwueg%29%29/documents/mcl/pdf/mcl-act-200-of-1945.pdf • 40 years
<p>Minnesota</p>	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>A marketable title is “one that is free from reasonable doubt; one that a prudent person, with full knowledge of all the facts, would be willing to accept.” The primary purpose of requiring marketable title is to protect the purchaser of real property from having to undertake the burden of litigation to remove or defend against real or apparent defects in the title. The requirement of marketable title thus protects purchasers of real property from actual and apparent defects in the title—the latter of which occurs when title is “so clouded by apparent defects ... that prudent men, knowing the facts, would hesitate to take it.”</i></p> <p><i>Mattson Ridge, LLC v. Clear Rock Title, LLP</i>, 824 N.W.2d 622, 628 (Minn. 2012) (citations omitted)</p>
	<p style="text-align: center;">Marketable Title Act</p> <ul style="list-style-type: none"> • https://www.revisor.mn.gov/statutes/cite/541.023 • 40 years

Appendix 1

<p>Nebraska</p>	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>The terms “marketable” and “merchantable” title are practically synonymous, and mean a title in which there is no doubt involved, either as to matter of law or fact, and a purchaser who contracts for a marketable title will not be required to take it if there be color of outstanding title and he may encounter the hazards of litigation.</i></p> <p><i>Holoubek v. Romshek, 749 N.W.2d 901, 908-09 (Neb. Ct. App. 2008) (citations omitted)</i></p>
	<p style="text-align: center;">Marketable Title Act</p> <ul style="list-style-type: none"> • https://nebraskalegislature.gov/laws/statutes.php?statute=76-288 • 22 years
<p>North Carolina</p>	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>A ‘marketable title’ is one free from reasonable doubt in law or fact as to its validity.</i></p> <p><i>Pack v. Newman, 61 S.E.2d 90, 92 (N.C. 1950) (citation omitted)</i></p>
	<p style="text-align: center;">Real Property Marketable Title Act</p> <ul style="list-style-type: none"> • https://www.ncleg.gov/Laws/GeneralStatuteSections/Chapter47B • 30 years
<p>North Dakota</p>	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>Good and marketable title means “title in fee simple, free from litigation, palpable defects, and grave doubts, a title which will enable the owner not only to hold it in peace but to sell it to a person of reasonable prudence.”</i></p> <p><i>Hartman v. Grager, 964 N.W.2d 482, 495 (N.D. 2021) (citation omitted)</i></p>
	<p style="text-align: center;">Marketable Record Title</p> <ul style="list-style-type: none"> • https://www.ndlegis.gov/cencode/t47c19-1.html • 20 years

Appendix 1

Ohio	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>As a result of the numerous expressions of the courts on this subject, it may be conservatively stated that a marketable title is one which imports such ownership as insures to the owner the peaceable enjoyment and control of the land, as against all others. It has also been defined as one which is sufficient to support or defend an action of ejectment. It should show a full and perfect right of possession in the vendor. It should appear reasonably certain that the title will not be called in question in the future, so as to subject the purchaser to the hazard of litigation with reference thereto. It must in any event embrace the entire estate or interest sold, and that free from the lien of all burdens, charges, or incumbrances which present doubtful questions of law or fact.</i></p> <p><i>McCarty v. Lingham, 146 N.E. 64, 66 (Ohio 1924)</i></p>
	<p style="text-align: center;">Marketable Title Act</p> <ul style="list-style-type: none"> • https://codes.ohio.gov/ohio-revised-code/section-5301.47 • 40 years
Oklahoma	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>We therefore hold that a marketable title is one free from litigation, palpable defects, grave doubts, and consists of both legal and equitable title fairly deducible from the record.</i></p> <p><i>Pearce v. Freeman, 254 P. 719, 721 (Okla. 1927)</i></p>
	<p style="text-align: center;">Marketable Title Act</p> <ul style="list-style-type: none"> • https://law.justia.com/codes/oklahoma/2021/title-16/ • 30 years

Appendix 1

<p style="text-align: center;">South Dakota</p>	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>In 22 Am. & Eng. Enc. of Law, 948, the rule is laid down that “the vendor must be ready and able to convey a marketable title, which has been defined to be a title that is free from reasonable doubt to all the land he has bound himself to sell.” It is further said in a note: “A marketable title is one that is free from reasonable doubt. The purchaser is not compelled to take property the possession of which he may be compelled to defend by litigation. He should have a title that will enable him to hold his land in peace, and, if he wishes to sell, be reasonably sure that no flaw or doubt will arise to disturb its market value.”</i></p> <p><i>Godfrey v. Rosenthal</i>, 97 N.W. 365, 366-67 (S.D. 1903) (citation omitted)</p>
	<p style="text-align: center;">Marketable Title to Real Estate</p> <ul style="list-style-type: none"> • https://sdlegislature.gov/Statutes/Codified_Laws/2065495 • 22 years
<p style="text-align: center;">Utah</p>	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>Marketable title is title that “may be ‘freely made the subject of resale’ and that can be sold at a ‘fair price to a reasonable purchaser or mortgaged to a person of reasonable prudence as security for the loan of money.” Moreover, marketable title must be “as free from apparent defects as from actual defects, one in which there is no doubt involved either as a matter of law or fact. Every title is doubtful which invites or exposes the party holding it to litigation.”</i></p> <p><i>Mostrong v. Jackson</i>, 866 P.2d 573, 577-78 (Utah Ct. App. 1993) (citations omitted)</p>
	<p style="text-align: center;">Marketable Record Title</p> <ul style="list-style-type: none"> • https://le.utah.gov/xcode/Title57/Chapter9/C57-9_1800010118000101.pdf • 40 years

Appendix 1

<p>Vermont</p>	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>Marketable title is defined as “title that will enable [the purchaser] to hold the land purchased free from the probable claim by another, a title which, if he wished to sell, would be reasonably free from doubt.”</i></p> <p><i>Trinder v. Conn. Att’ys Title Ins. Co., 22 A.3d 493, 498 (Vt. 2011) (citation omitted)</i></p>
	<p style="text-align: center;">Marketable Record Title</p> <ul style="list-style-type: none"> • https://legislature.vermont.gov/statutes/section/27/005/00601 • 40 years
<p>Wyoming</p>	<p style="text-align: center;">Common law definition of “marketable title”</p> <p><i>A purchaser may not be compelled to accept a title which will subject him to a lawsuit or which will require him to expend substantial sums of money in order to comply with the law.</i></p> <p><i>Bethurem v. Hammett, 736 P.2d 1128, 1133 (Wyo. 1987) (citation omitted)</i></p>
	<p style="text-align: center;">Marketable Titles</p> <ul style="list-style-type: none"> • https://wyoleg.gov/NXT/gateway.dll?f=templates&fn=default.htm • 40 years