

RESOLUTION 08-07-2008

DIGEST

Real Property: Commercial Use Restrictions

Amends Civil Code sections 888.010, 888.020, 888.030, and 888.040 to require parties enforcing use restrictions to prove that proposed uses have a greater competitive benefit than anticompetitive effect.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Civil Code sections 888.010, 888.020, 888.030, and 888.040 to require parties enforcing use restrictions to prove that proposed uses have a greater competitive benefit than anticompetitive effect. This resolution should be approved in principle because it favors a balancing of community interests that is not required in existing law.

As California’s population grows, the availability of real property for commercial usage diminishes. Thus national chain outlets such as Wal-Mart and Costco have an unfair advantage over independent retailers in challenging contractual use restrictions. In arguing that by mere scale, larger retailers can more favorably benefit communities, an anticompetitive outcome results that disfavors ‘mom and pop’ vendors. To address this legal gap, proponents point out that the “big box” retailers should be required to also measure the potential anticompetitive effect of their proposed commercial usage in a community to affect a balancing of interests that would more likely “level the playing field” when competing with smaller and more specific business usages.

Adoption of this resolution would require those seeking to enforce contractual use restrictions to consider not only the potential economic benefits, but also the anticompetitive impacts of their presence in communities. The balancing of interests this resolution forces is not currently required by existing law and for this reason, it should be approved in principle.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Civil Code sections 888.010, 888.020, 888.030 and 888.040 to read as follows:

- 1 § 888.010
- 2 For purposes of this chapter, "restriction" shall have the meaning of the word
- 3 restriction as defined in Section 784 of the Civil Code, which section is incorporated herein
- 4 by reference.
- 5

6 § 888.020

7 No restriction on the commercial use of real property shall be enforceable which
8 would prohibit a use otherwise permitted by any zoning ordinance applicable to such
9 property unless the party enforcing the restriction establishes by a preponderance of the
10 evidence that the restriction has a greater competitive benefit in the geographic market in
11 which the real property is located than the anticompetitive effect of the restriction;
12 provided the foregoing shall not prohibit an exclusive use provision in a lease of real
13 property in favor of a tenant operating a business from a single location of not more than
14 10,000 square feet. Tenant shall mean any person together with any other persons
15 controlled by, controlling or under common control with such person.

16
17 § 888.030

18 Restrictions permitted by subdivision (a) of § 888.020 shall expire on the date 20
19 years after created, or preserved as provided in this section, unless within the six month
20 period prior to such date, notice to preserve the restriction is given by a person entitled to
21 enforce such restriction to each owner of real property effected by the restriction and
22 recorded of record in the official records of the county in which the real property restricted
23 is located. For purposes of this section, restrictions created prior to the date of the
24 enactment of this section shall be deemed created on the date of enactment of this section.

25
26 § 888.040

27 This chapter shall be effective for any restrictions created, renewed or extended
28 after the effective date of this statute.

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Diego County Bar Association

STATEMENT OF REASONS:

Existing Law: Is vague and inconsistently interpreted by courts as it applies to use restrictions affecting real property.

This Resolution: Clarifies that use restrictions on commercial property are not enforceable unless the party seeking to enforce the restriction proves by a preponderance of the evidence that the restriction has a greater competitive benefit in the geographic market in which the real property is located than the anticompetitive effect of the restriction.

The Problem: So-called big box retailers and national chain outlets seek to monopolize regional markets through contractual use restrictions. These use restrictions not only have an anticompetitive effect, but also are discriminatory, by prohibiting minority and locally owned businesses that the national tenants find "incompatible" with their business. The types of business permitted in an area should be governed by zoning laws and unrestricted supply and demand economic forces.

IMPACT STATEMENT:

This resolution does not affect any other law, statute or rule.

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RESPONSIBLE FLOOR DELEGATE: Bob Blanchard

COUNTERARGUMENT

BAR ASSOCIATION OF NORTHERN SAN DIEGO COUNTY

This Resolution appears to be intended to prevent shopping center landlords from agreeing to restrict the uses in the balance of the center for the benefit of a lessee who is engaged in a specific business and is concerned about the effect of direct competition in the same shopping center. This Resolution should be disapproved because developers of such centers should have the freedom to prescribe compatible uses consistent with the theme of the center, and the parties should have the freedom to negotiate their own lease terms. A lessee has the freedom to either accept such restrictions, or reject them and do business elsewhere. This Resolution would do nothing more than create a trap for the unwary, given its specific renewal requirements, and permit lessees to institute uses detrimental to the other lessees, without properly contracting for the same.