

ARTICLE:**STATUTORY OVERRIDES OF “RESTRICTIVE COVENANTS” AND OTHER PRIVATE LAND USE CONTROLS: THE ACCELERATING TREND TOWARDS LEGISLATIVE OVERWRITING OF CONTRACTUAL CONTROLS OF THE USE AND DEVELOPMENT OF REAL PROPERTY**

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The use of private covenants governing the use, improvement, and occupancy of real property has a long and sometimes checkered history in California, as it does throughout the nation. Beginning in the late 19th century, the proliferation of larger real estate developments and subdivisions in growing metropolitan areas was accompanied by a proliferation of deed restrictions, restrictive covenants, and reciprocal covenants or equitable servitudes of various kinds. Often quite detailed, these recorded instruments typically were imposed by the developer or subdivider, rather than negotiated with individual purchasers or governmental agencies. They served to delineate roads, easements, rights of way, and landscaped areas, parklands, and other amenities and common facilities, and also to limit and prescribe the size, construction costs, height, setback areas, design features, uses, and occupancies of individual lots and the residences to be constructed on those lots.

For the most part, these restrictions were intended to create and define the neighborhood character and ambiance of the development, which was part of the product that was being developed and sold in the marketing of the project. Often, as part of this objective, they contained explicit restrictions on the race or ethnicity of “permitted” purchasers or occupants of the property. Even if they were race-neutral on their face, the restrictions often deliberately targeted a particular socio-economic stratum and price range, and were oriented to a particular notion of conventional owner-occupant nuclear families and segregation of single-family uses and rental properties from multi-family or commercial and industrial uses, similar to the restrictions of Euclidean zoning ordinances that were also being formulated and enacted by municipal governments in roughly the same era.

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From the beginning, the enforceability of such private restrictions was often contested, as a significant body of case law in California considered the right of a grantor or subdivider of real property to exert continued controls on the use, development, and occupancy of the property after conveying it to a third party. This case law, although technically founded on arcane provisions of the Civil Code governing covenants running with the land and the principles of equity and judicial enforcement remedies, ultimately involved competing notions of freedom of contract and free use of one's own land, i.e., the rights of private parties in the marketplace to define and delineate their respective rights and remedies in real property transactions.¹

In the first half of the 20th century, the enforcement of private restrictions was not generally considered to entail significant issues of public policy, with one exception—exclusionary racial restrictions, although initially upheld, were understood to raise constitutional issues and to implicate the public interest from early on, and were vigorously contested in some cases. Eventually, in 1948, in the landmark civil rights case of *Shelley v. Kraemer*,² the United States Supreme Court held that the enforcement of racially restrictive covenants by state courts constituted “state action” that deprived the members of particular ethnic or racial minorities of the equal protection of the laws in violation of the Equal Protection Clause of the Constitution. This case was immediately followed by the California Supreme Court in *Cumings v. Hooker*,³ also in 1948, where the California court summarily reversed several lower court decisions purporting to enforce restrictions that limited ownership or occupancy to “members of the Caucasian race” on the basis that *Shelley v. Kraemer* prohibited enforcement of racially restrictive covenants of this nature.

While some racially restrictive covenants may still have been recorded after 1948, the fact that they were unenforceable was generally known and acknowledged in the real estate industry by the mid-1950's. With the California Legislature's enactment of the Unruh Civil Rights Act in 1961,⁴ any restrictions on the conveyance, leasing, mortgaging, or encumbrance of real property, or its use and occupation, on the basis of race, ethnicity, national origin, or religion were explicitly made void and unenforceable as a matter of statutory law.⁵ The number of protected categories or characteristics of people protected from discriminatory covenants under the Unruh Civil Rights Act has grown over time, but the basic notion of non-enforceability of such discriminatory restrictions has been well understood now for many years.

Unfortunately, the taint of racism deriving from this history of discriminatory restrictions probably gave all “restrictive covenants” a bad name, even where their objectives were non-discriminatory and race-neutral, and in any case legislative tinkering with existing contractual restrictions has become increasingly common. Over time, the California Legislature has adopted a number of laws deliberately intended to prevent the application or enforcement of private restrictions where they conflict with numerous other public policy objectives having little or nothing to do with civil rights and the Unruh Act. These include the designation of particular types of uses that are authorized to be constructed and occupied, regardless of any private restrictions or zoning limitations of such uses in any area, which now include small residential care facilities or group homes for families, adults, or children unable to care for themselves,⁶ small residential care facilities for the elderly,⁷ small child day care facilities,⁸ employee housing for six or fewer persons, whether or not located in an agricultural area,⁹ and employee housing for up to 36 beds in group quarters or 12 units for single-family or households when located in an agricultural area.¹⁰ The Legislature also has provided that solar energy systems must be allowed on any residential lot or common interest development regardless of any deed restrictions or covenants to the contrary, within reason,¹¹ and that common interest development restrictions must be amended to allow at least one pet animal per unit.¹² In addition, the Legislature has enacted provisions for the redaction and rewriting of discriminatory covenants through procedures that literally alter the written words of previously recorded instruments, setting forth the restrictions without requiring the consent or agreement of the affected property owners.¹³

Most of these statutory limits and modifications of private restrictions have been in existence for a number of years, but the past year’s legislative session has produced an unusually high number of such limitations and directives, including revision of some of the foregoing laws, so that analyzing the scope and enforceability of any existing recorded restriction now involves the interpretation of a complicated and wide-ranging set of disparate statutory provisions in addition to the language of any existing restrictions of record.

One of the new bills (Assembly Bill 1466) further revised and strengthened the existing law providing for removal and redaction of record of all existing discriminatory restrictive covenants that involve any of the numerous protected categories under the Unruh Act and the Fair Housing Law.¹⁴ The original Unruh

Act has been amended many times before, so it now includes substantially all of the protected characteristics included in the Fair Housing and Employment Act, not solely race, ethnicity, religion, or national origin.¹⁵ While such discriminatory restrictions were already unenforceable and void as a result of these earlier amendments, after AB 1466 the law now not only requires virtually any person involved in a transaction where a discriminatory covenant involving several of these prohibited categories is identified to take proactive steps to cause the removal of the discriminatory provision,¹⁶ but also requires county recorders to implement a program to identify and remove these provisions without regard to whether current transactions are occurring.¹⁷ The scope of provisions affected by this law, while readily apparent in the case of racial restrictions, may be difficult to project with respect to some of the other categories of protected classifications, such as gender, sexual orientation, source of income, or immigration status, which typically have not been directly or overtly mentioned in the covenants, conditions, and restrictions commonly found in California subdivisions and common interest developments.

Additionally, the Legislature enacted several bills in 2021 that restrict the enforceability of facially non-discriminatory design, density, residential use, height, and lot coverage restrictions that are commonly found in residential subdivision restrictions and in some negotiated deed restrictions. These unprecedented new laws include: (1) Assembly Bill 1524, which preempts and renders unenforceable deed restrictions and other private covenants that limit or exclude the construction of accessory units and junior accessory units in single-family areas, including those in common interest developments and mobilehome parks, with mandatory requirements to rewrite existing declarations of covenants, conditions, and restrictions, management documents, and other restrictions to redact and remove the preempted restrictions,¹⁸ (2) Assembly Bill 721, which provides for the redaction and rewriting of any private covenants or deed restrictions that regulate the size, number, or location of residences or the number of persons or residents who may occupy property to the extent that they “render infeasible” an affordable housing development sought to be approved for that parcel of property,¹⁹ and (3) Senate Bill 363, which preempts and makes unenforceable any deed restrictions and other private covenants in common interest developments that impose maximum floor area ratios and lot size restrictions conflicting with state-mandated standards, or that otherwise “unreasonably restrict or prohibit” a housing development project of up to ten

residential units that is compliant with specific state standards on lot size and floor area ratios.²⁰

The number and extent of these 2021 legislative measures suggest that public decisionmakers at this point believe private occupancy, use, and development restrictions of all types are fair game for legislative revision, irrespective of any investment-backed decisions private landowners may have made in reliance on such restrictions. The three bills that prevent enforcement of private restrictions on density, scale, and intensity of development, in particular, take the notion of legislative preemption of private restrictions to a new level, effectively allowing the development of properties without regard to private restrictions in order to accomplish nothing other than an increase in the housing supply. While no omnibus legislation thus far has purported to supplant such private restrictions entirely where they conflict with state-mandated housing requirements under governmentally enacted zoning and planning laws, it would not be too far-fetched to think such a law may be enacted sooner than later.

By definition, it is hard to anticipate all of the potential issues posed by the increasing legislative incursions on the right to maintain or enforce recorded development restrictions. But some issues can be anticipated. For example, the recent decision in *Kumar v. Ramsey*,²¹ reported in this issue of the *Miller & Starr, Real Estate Newsalert*,²² involved the application of a “reservation of coverage transfer rights” associated with Tahoe Regional Planning Authority’s conditional approval of development rights transfers in connection with a land use entitlement process. In effect, this was a “transferrable development rights” scheme implemented through a governmentally-prescribed private restriction on the intensity of development mandated by the TRPA entitlement process and implemented through deed restrictions and covenants limiting future development of land whose development rights had been transferred or of those lands to which the development rights were transferred. How state-mandated limitations on enforceability of restrictions on minimum lot sizes, coverage ratios, and floor area ratios such as those posed by SB 363 would affect such a reservation of coverage transfer rights is hard to gauge, but could be a subject of dispute and litigation at some point in the future if made applicable to a project within TRPA’s jurisdiction. Although the Legislature had the foresight to exempt some public conservation easements from the operation of AB 721 (the bill allowing the rewriting of existing restrictions to accommodate an affordable housing project),²³ there is no similar exclusion in SB 363. This is just one of

many possible areas in which the drafters of “commonsense” or “straightforward” incursions on private restrictions may find things to be more complicated and difficult to administer than they might have anticipated, leaving landowners, homeowners, and courts to determine the actual import of their legislation.

It can also be anticipated that some of the new bills will face opposition when applied to particular projects, and homeowners associations or property owners adversely affected by limitations on their right to enforce existing restrictions will resist the legislation by litigation. This is not likely in the case of the “deletion of discriminatory covenant” statute—the notion that fair housing laws and other anti-discrimination provisions somehow impinge on private property rights or constitutional safeguards against impairment of contract has been rejected long ago. But the clear and generally incontestable constitutionality of laws against the creation, maintenance, or enforcement of *discriminatory* restrictive covenants may have blinded some policymakers and legislators to the fact that not all restrictive covenants are discriminatory or exclusionary in the same sense, and not all are subject to regulation without regard for the rights of the private landowners and contract parties who have created them. At some point, there is a valuable property right embodied in the right to enforce restrictions on the intensity of development and the types of uses against neighboring properties, and property owners impacted by the destruction of these rights through legislative fiat might have a remedy in some cases.

The California Supreme Court in a related context has emphasized the importance of covenants, conditions, and restrictions for the homeowners in common interest developments, for example, noting that such restrictions are relied upon by purchasers to define the nature of the development and the value of their individual units, and stressing the importance of settled expectations with respect to restrictive covenants governing such developments.²⁴ Some legislation that summarily alters or disregards existing covenants, conditions, and deed restrictions outside the classic rubric of anti-discrimination laws may be vulnerable to attack under the Contracts Clause of the United States Constitution or the Takings Clause of the Fourteenth Amendment, although this is not a sure thing in many cases.

The Contracts Clause (a portion of Section 10 of Article I of the United States Constitution) provides simply that “No State . . . shall pass any . . . Law impairing the Obligation of Contracts. . . .”²⁵ Case law applying the Contract Clause to legislation that impairs existing contract rights has developed

a three-part test for determining whether a particular statute, ordinance, or regulation “impairs” contract rights: (i) there must be an existing contractual relationship that involves the specific matter affected by the law, (ii) there must be a change in the law that impairs that existing contractual provision, and (iii) that impairment must be substantial.²⁶ Even if, under this three-part test, a substantial impairment of existing contract rights has occurred, there is another layer of inquiry, which is whether the substantial impairment is justified or outweighed by a legitimate interest of the state in the exercise of its police power for the advancement of some important public policy or objective.²⁷ In other words, a substantial impairment of existing contract rights may nevertheless be upheld if the legislature has reasonably determined that an adjustment of existing contractual relationships is necessary to address an important social or political problem.²⁸ This standard has been characterized as a deferential one; a legislative enactment must be upheld “even if it is a substantial impairment of contractual relations, if its ‘adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation’s adoption.’ ”²⁹ In this regard, the courts will not second-guess the legislature’s determination that a particular approach is necessary to address an important public policy objective or concern.³⁰

When subjected to a Contracts Clause analysis, the argument that limiting building or occupancy restrictions to promote an important public objective (such as the development of housing) is an unjustifiable impairment of legitimate contract rights is doubtful. One California court of appeal decision considered this question in the context of the statute authorizing “small child day care facilities” in residential areas. In that case, *Barrett v. Dawson*,³¹ the court of appeal readily found that Health & Saf. Code, § 1597.40, by overriding private covenants limiting property to residential uses, had a “substantial effect” on the contract rights of the property owners who benefitted from the private land use restrictions, but it also found the purpose of the law (allowing for child day care facilities in residential areas) was a broad and legitimate public purpose which did not benefit only a narrow private interest, and that the means adopted by the legislature (capping the size of facilities at 12 children) was an appropriate adjustment of private rights in light of the public purpose of the legislation.³²

Another decision, *Hall v. Butte Home Health, Inc.*,³³ applied a Contracts

Clause analysis to uphold the constitutionality of the 1993 amendments to Health & Saf. Code, § 1566, by which the Legislature intentionally made the statute apply retroactively to preempt restrictive covenants that would otherwise have prevented the establishment of smaller residential care facilities or group homes for disabled persons in a single-family neighborhood. The homeowners in one such subdivision, known as Shirley Park, had filed an action challenging the statute on the grounds that it impaired their contractual rights under the subdivision restrictions. The court of appeal concluded that there was not even a “substantial impairment” of the rights of neighboring property owners under the three-part test for violation of the Contracts Clause:

The record is devoid of evidence that plaintiffs have suffered anything more than a minimal alteration of what is assuredly a long-standing, beneficial property right. The stipulated facts fail to show that suspension of the Shirley Park restrictive covenants to accommodate defendant’s six-person residential care facility has had any discernible impact on plaintiffs’ property rights. No manufacturing or sales occur at the facility, and no signs or billboards announce the facility’s presence. The home is maintained in a manner visually consistent with the single-family character of the subdivision. There is no evidence the operation of the facility has had any effect on property values in the area, nor is there any evidence the quality of life in the Shirley Park subdivision has been degraded by the presence of defendant’s group home. Plaintiffs have not established defendant’s facility involves any more burdensome use of the land than would be the case if a single family were living in the residence.³⁴

The *Barrett* and *Hall* cases both involved limited exceptions to prevent enforcement of existing private single-family residential use restrictions against small care facilities under legislation tailored to minimize the impact on surrounding residences while serving an important public need. A different analysis might apply to the more recent legislation that limits enforcement of setback, size, and use restrictions and other non-discriminatory building restrictions to accommodate more intensive multi-family development in single-family areas, but a Contracts Clause challenge still is unlikely to prevail in many cases. The overriding objective of these more recent statutes is to facilitate the creation of more housing of various types. The shortfall of housing production to meet demand in California is well-documented. Whether the covenants and restrictions that are being preempted by the new laws have contributed to the shortfall is debatable, and whether the lifting of these restrictions is justified and reasonably calculated to increase the supply of housing is also debatable. Ultimately, whether these impingements on existing covenants and restrictions are upheld under a Contracts Clause analysis will depend on the amount of deference

given to legislative judgments of necessity, coupled with the arguably minor effect on existing property owners' contractual rights to enforce restrictions on other properties in their neighborhoods. A viable Contracts Clause defense to some of these statutes may exist in specific factual circumstances where the negative impact on surrounding properties can be demonstrated, but it is hard to see much of an argument for a facial challenge to any of these laws in the abstract.

The Takings Clause of the Fourteenth Amendment to the United States Constitution provides generally that private property cannot be taken without due process of law, and the Fifth Amendment prohibits a taking of private property for a public use without just compensation to the owner.³⁵ A Takings challenge to statutory preemption of development restrictions and other restrictive covenants is even more problematic than a Contracts Clause analysis. By definition, a restrictive covenant of any sort (whether purporting to restrict the identity of owners, users, or occupants, or to restrict the purpose, scale, intensity, or area of use of property), is a right possessed by one property owner or group of owners to limit the right to use or improve other property owned by some other person. All such property is subject to the state's "police power," i.e., the power to legislate for the health, safety, and welfare of the community or the public generally.³⁶ A statute that "takes away" portions or all of such a right does not deprive the covenantee or benefitted property of any right of use or improvement of their own property. At most, it takes away one small part of the "bundle of sticks" that comprise the covenantee's property interests. A statute that prevents enforcement of such a covenant is likely to be upheld as a valid exercise of the police power if the usual multifactor "*Penn Central*" test for a regulatory taking is applied, i.e., the degree of impingement of the rights of the covenantee is outweighed by the public interest in restricting those rights for the benefit of the health, safety, or welfare of the community.³⁷ This deferential test would generally sustain the regulation limiting enforcement of a covenant.

Cases involving the government's deliberate abrogation of private restrictions have sometimes found the action to be an unlawful taking, but the case law is not uniform. When taken directly by an action in eminent domain, California case law requires compensation to the benefitted property owners in the same manner as for the taking of an easement requires compensation to the dominant tenement owner, measured by the diminution in value of the dominant tenement.³⁸ Also, by statute, the holder of a contingent future interest or

remainder estate in real property is entitled to compensation for a taking of the use restriction or other contingency that would trigger the future interest, where the taking is in the context of an eminent domain action.³⁹ In the context of an inverse condemnation action based on a regulatory taking, however, there is no clear authority. Both the *Hall* and the *Barrett* cases briefly addressed the possibility of a Takings claim arising from legislative preemption of private use restrictions for particular purposes, and both dismissed the argument as lacking substance. In *Barrett*, the court refused to get involved in the “metaphysics” of what constitutes “property” that can be “taken,” concluding that the Contracts Clause, rather than the Takings Clause, was the appropriate analysis:

While it is possible that the *enforcement* of CC&R’s under certain circumstances might constitute sufficient state action to implicate the 14th Amendment to the United States Constitution [citation omitted], the neighbors have not referred us to any authority for the counterintuitive proposition that the *absence* of the enforcement of a particular restrictive covenant against *another* owner’s property amounts to a governmental expropriation of one’s *own* property.⁴⁰

In *Hall*, the court found the Takings argument lacking for a similar reason—lack of substantial impairment of any property interest:

In light of our determination plaintiffs’ contract rights have not been substantially impaired, and that in any event there is a compelling state interest in providing suitable and affordable housing for the disabled, plaintiffs’ due process argument necessarily fails.⁴¹

Courts in some other states have found a compensable taking when the government’s action in derogation of a private covenant is merely for the benefit of an individual property owner and does not serve an identifiable and important public interest,⁴² but other cases focus on whether the governmental action interferes with a property owner’s investment-backed expectations and other factors considered under the multi-factor *Penn Central* test in determining whether a non-regulatory taking has occurred.⁴³ The *Barrett* decision, while finding no significant Takings issue, suggested that a denial of the right to enforce a covenant was, at most, a regulatory taking of an ancillary right, in light of the minimal effect of the regulation on the current property owner.⁴⁴ Also, the United States Supreme Court has usually applied an “entire parcel” test to determine if a regulatory taking has occurred; in other words, if the entire property has a remaining economic use, the fact that a particular land use regulation reduces the value of the property, taken as a whole, by making a portion of it unusable or undevelopable, it is not likely to constitute a taking.⁴⁵

These principles likely would be applied to uphold most of the statutes that have been enacted to limit or eliminate restrictive building restrictions, as such.

Even if a statute removing the right to enforce a restriction against some other property is analyzed as a “physical taking” of one of the “sticks” in the “bundle of sticks” comprising the property of the covenantee, it likely would not rise to the level of a compensable taking, much less a basis for not enforcing the statute. Some might argue that takings law has evolved since the 1990s, when the *Barrett* and *Hall* cases were decided, and suggest that even a partial taking of an interest such as the right to enforce a restrictive covenant is a categorical taking without due process that is invalid or requires compensation. The most recent Supreme Court takings decision, *Cedar Point Nursery v. Hassid*,⁴⁶ found a regulation mandating the landowner’s allowance of entry by union representatives to be invalid because it effected a “taking” of one of the three essential components of “property,” the right to exclude others. But the right to enforce a covenant restricting the use or improvement of some other property does not involve any of the three core elements of “property,” i.e., the right to possess and use one’s own property, the right to exclude others from that property, and the right to dispose of that property.⁴⁷ At most, it is a restriction on an expectation involving someone else’s property, which is ancillary to one’s interest in one’s own real property. Under the multifactor test usually applied to regulatory takings, such a regulation does not extinguish a “fundamental ownership interest”⁴⁸ or deprive the owner of its “primary expectations” of ownership.⁴⁹

In most cases, a regulation limiting enforcement of a restriction on adjoining or neighboring property while not affecting the benefitted owner’s use and enjoyment of its own property is unlikely to gain traction as a “taking”—particularly if both properties are treated similarly by the regulation, as is the case with the statutory limits on restrictions against accessory dwelling units and junior accessory dwellings in AB 1524. Some direct regulations superseding and preventing enforcement of building restrictions may have such an impact on nearby properties benefitted by the restrictions that they require compensation in order to be valid. However, California regulatory takings law generally upholds any regulation of property that leaves an owner with the ability to realize an economic use, even if less profitable or less valuable than without the regulation.⁵⁰ Likewise, one of the United States Supreme Court’s regulatory taking cases, *Keystone Bituminous Coal Ass’n v. DeBenedictis*, directly held that a governmental regulation abrogating a private covenant allowing the mineral

estate holder to cause subsidence damage without liability to the surface owner was not a compensable taking, because the mineral estate owner was still able to profitably conduct its mining activities despite the loss of the liability protection.⁵¹ If this analysis is applied to the current crop of statutes, it seems unlikely any of them would be found invalid as a “taking” of a compensable interest in real property under the federal or state constitutions.

In summary, the most recent legislation limiting enforcement of private restrictions in some narrowly defined circumstances is probably sustainable against constitutional challenges, although specific factual circumstances might lead to a different conclusion in some cases. It should be recognized, however, that legislative preemption of specific controls on height, bulk, density, and occupancy that have been established through private land use restrictions is a significant extension of previous legislation of this nature. The existing laws (other than those making void and deleting discriminatory covenants) have been limited to narrow allowances of smaller care facilities and employee housing in single-family residential areas, where the overall effect of the laws is to maintain consistency with the single-family neighborhood character of the restrictions, a point explicitly relied on in the few cases that have considered the issue. The newer bills go beyond this, to directly enable construction and occupancy of projects that potentially change the physical character of the neighborhoods by lifting density, height, and bulk restrictions in significant ways. While these laws currently are narrowly drafted and seem likely to pass muster if challenged on constitutional grounds, that is not to say all private development controls can be overridden by legislation without concern for the rights of the property owners who benefit from the restrictions. At some point, if the legislative trend continues to make further inroads on such development controls, there is a significant possibility for such laws to be found invalid as applied to particular development restrictions, although where that point is may be hard to gauge.

ENDNOTES:

¹See the extended historical discussion in *Nabrstedt v. Lakeside Village Condominium Assn.*, 8 Cal. 4th 361, 372-377, 33 Cal. Rptr. 2d 63, 878 P.2d 1275 (1994). See also *Citizens for Covenant Compliance v. Anderson*, 12 Cal. 4th 345, 47 Cal. Rptr. 2d 898, 906 P.2d 1314 (1995); *Marra v. Aetna Const. Co.*, 15 Cal. 2d 375, 101 P.2d 490 (1940); *Werner v. Graham*, 181 Cal. 174, 183 P. 945 (1919); *Los Angeles Terminal Land Co. v. Muir*, 136 Cal. 36, 68 P. 308 (1902), for these developments.

²*Shelley v. Kraemer*, 334 U.S. 1, 20-21, 68 S. Ct. 836, 92 L. Ed. 1161 (1948).

³*Cummings v. Hokr*, 31 Cal. 2d 844, 846, 193 P.2d 742 (1948).

⁴Civ. Code, §§ 51, 52, 53, as enacted, Stats. 1961, Ch. 1877 (the “Unruh Civil Rights Act”).

⁵Civ. Code, § 53.

⁶Health & Saf. Code, §§ 1566, 1566.3, 1566.5.

⁷Health & Saf. Code, §§ 1569.2, subd. (k), 1569.70, 1569.85, 1569.87.

⁸Health & Saf. Code, §§ 1597.40, 1597.41.

⁹Health & Saf. Code, §§ 17021, 17021.5.

¹⁰Health & Saf. Code, §§ 17021, 17021.6.

¹¹Civ. Code, § 714.

¹²Civ. Code, § 4715.

¹³Civ. Code, § 4225, Gov. Code, §§ 12955, 12956, 12956.1, 12956.2.

¹⁴Stats. 2021, Ch. 359 (AB 1466), adding Gov. Code, §§ 12956.3, 27388.2, and amending Gov. Code, §§ 12956.1, 12956.2, 27282, 27388.1.

¹⁵See current Civ. Code, §§ 51, subds. (b), (e), 53, subds. (a), (b). In addition to the original protected classifications of race, color, national origin, and religion, these now also include age, ancestry, disability, marital status, sex, sexual orientation, gender, gender expression, source of income, employment status, immigration status, veteran or military status, citizenship, primary language, or genetic information, as well as familial status.

¹⁶Health & Saf. Code, §§ 12956.1, 12956.2.

¹⁷Gov. Code, § 12956.3.

¹⁸Stats. 2021, Ch. 360 (AB 1524), amending, inter alia, Civ. Code, §§ 714.3, 798.56, 4741.

¹⁹Stats. 2021, Ch. 349 (AB 721), adding Civ. Code, § 714.6.

²⁰Stats. 2021, Ch. 363 (SB 478), adding Civ. Code, § 4747 and Gov. Code, § 65913.11, and amending Gov. Code, § 65585.

²¹*Kumar v. Ramsey*, 71 Cal. App. 5th 1110, 286 Cal. Rptr. 3d 876 (3d Dist. 2021).

²²See page 347, below.

²³See Civ. Code, § 714.6, subd. (g).

²⁴*Nahrstedt v. Lakeside Village Condominium Assn.*, 8 Cal. 4th 361, 373-375, 381, 33 Cal. Rptr. 2d 63, 878 P.2d 1275 (1994).

²⁵U.S. Const., Art. I, § 10.

²⁶*General Motors Corp. v. Romein*, 503 U.S. 181, 186-187, 112 S. Ct. 1105, 117 L. Ed. 2d 328 (1992): “Generally, we . . . ask whether the change in state

law has ‘operated as a substantial impairment of a contractual relationship.’ ” *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244, 98 S. Ct. 2716, 2722, 57 L. Ed. 2d 727 (1978); *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411, 103 S. Ct. 697, 704, 74 L. Ed. 2d 569 (1983). “This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. Normally, the first two are unproblematic, and we need address only the third.”

²⁷*Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 434, 54 S. Ct. 231, 239, 78 L. Ed. 413 (1934).

²⁸*Sveen v. Melin*, 138 S. Ct. 1815, 1821-1822, 201 L. Ed. 2d 180 (2018) (“If such factors show a substantial impairment, the inquiry turns to the means and ends of the legislation. In particular, the Court has asked whether the state law is drawn in an ‘appropriate’ and ‘reasonable’ way to advance ‘a significant and legitimate public purpose’ ”); *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412-413, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983) (“Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of ‘the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation’s] adoption. . . . As is customary in reviewing economic and social regulation, . . . courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure.’ ” [Citations omitted]).

²⁹*Apartment Association of Los Angeles County, Inc. v. City of Los Angeles*, 10 F.4th 905, 913-914 (9th Cir. 2021), quoting *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412-413, 103 S. Ct. 697, 74 L. Ed. 2d 569 (1983).

³⁰*Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 512, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987).

³¹*Barrett v. Dawson*, 61 Cal. App. 4th 1048, 71 Cal. Rptr. 2d 899 (4th Dist. 1998).

³²*Barrett v. Dawson*, 61 Cal. App. 4th 1048, 1054-1055, 71 Cal. Rptr. 2d 899 (4th Dist. 1998).

³³*Hall v. Butte Home Health, Inc.*, 60 Cal. App. 4th 308, 70 Cal. Rptr. 2d 246 (3d Dist. 1997).

³⁴*Hall v. Butte Home Health, Inc.*, 60 Cal. App. 4th 308, 320, 70 Cal. Rptr. 2d 246 (3d Dist. 1997).

³⁵U.S. Const. Amends., Arts. V, XIV.

³⁶*Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 392, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816 (1926).

³⁷*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

³⁸*Southern Cal. Edison Co. v. Bourgerie*, 9 Cal. 3d 169, 176, 107 Cal. Rptr.

76, 507 P.2d 964 (1973) (building restriction); *Redevelopment Agency v. Tobriner*, 153 Cal. App. 3d 367, 374, 200 Cal. Rptr. 364 (1st Dist. 1984) (use restriction).

³⁹Civ. Proc. Code, § 1265.410.

⁴⁰*Barrett v. Dawson*, 61 Cal. App. 4th 1048, 1053, 71 Cal. Rptr. 2d 899 (4th Dist. 1998).

⁴¹*Hall v. Butte Home Health, Inc.*, 60 Cal. App. 4th 308, 323, 70 Cal. Rptr. 2d 246 (3d Dist. 1997).

⁴²E.g., *Pulos v. James*, 261 Ind. 279, 302 N.E.2d 768 (1973); *Riverbank Improvement Co. v. Chadwick*, 228 Mass. 242, 117 N.E. 244, 246 (1917). See also *Clem v. Christole, Inc.*, 582 N.E.2d 780, 784 (Ind. 1991) (finding no important public purpose served by law invalidating private restriction to allow the developmentally disabled in residential area). But see *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240, 104 S. Ct. 2321, 81 L. Ed. 2d 186 (1984) (finding “public purpose” for Hawaiian statute authorizing condemnation of fee interests for conveyance to residential ground tenants as justifiable by the legitimate public interest in breaking up a land oligopoly and redistributing ownership to residents).

⁴³See discussion in *Blakeley v. Gorin*, 365 Mass. 590, 313 N.E.2d 903 (1974); *Pulos v. James*, 261 Ind. 279, 302 N.E.2d 768 (1973).

⁴⁴*Barrett v. Dawson*, 61 Cal. App. 4th 1048, 1054, 71 Cal. Rptr. 2d 899 (4th Dist. 1998).

⁴⁵*Murr v. Wisconsin*, 137 S. Ct. 1933, 1949-1950, 198 L. Ed. 2d 497 (2017).

⁴⁶*Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021).

⁴⁷See discussion of these three elements of “property” in *Miller & Starr, California Real Estate 4th*, § 9:2 (2021 ed.), at pages 9-6 to 9-9, and cases cited.

⁴⁸See *Agins v. City of Tiburon*, 447 U.S. 255, 262, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980), citing *Kaiser Aetna v. U. S.*, 444 U.S. 164, 179, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979).

⁴⁹*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 125, 136, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

⁵⁰E.g., *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 774, 66 Cal. Rptr. 2d 672, 941 P.2d 851 (1997).

⁵¹*Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 501-506, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987).