

Enforcement of Restrictive Covenants

Art. 781. Termination; liberative prescription

No action for injunction or for damages on account of the violation of a building restriction may be brought after two years from the commencement of a noticeable violation. After the lapse of this period, the immovable on which the violation occurred is freed of the restriction that has been violated.

Cases

Statute setting two-year limit for instituting lawsuit based on violation of a building restriction is peremptive; upon expiration of the prescribed period, cause of action or substantive right no longer exists to be enforced. *Webb v. Johnson*, App. 3 Cir.1996, 95-1518 (La.App. 3 Cir. 4/3/96), 671 So.2d 1120.

Provision regarding time periods within which lawsuit based upon violation of building restriction must be instituted, LSA-C.C. art. 781, created peremptive time period for instituting suits for injunctive relief or damages arising out of violation of building restrictions which peremption could be asserted by court on its own motion and could not be interrupted. *Nepveux v. Fitzgerald*, App. 3 Cir.1985, 480 So.2d 346.

Where owner owns several lots, each lot must be considered independently in determining whether they are freed from restrictive covenants by virtue of liberative prescription. *Harris v. Landry*, App. 3 Cir.1977, 345 So.2d 242, writ denied 347 So.2d 262.

Owners of subdivision lots were barred by LSA-R.S. 9:5622 (repealed; see, now, C.C. art. 780 and this article) from enforcing restrictive covenant prohibiting trucks in excess of 3/4 ton to park on streets, driveways, or lots of subdivision overnight, where ministerial trucks and buses had been parking on subdivision lots for more than three years. *Snoddy v. Mayall*, App. 2 Cir.1975, 309 So.2d 395, writ denied 313 So.2d 602.

Restrictive covenant limiting subdivision lot to residential uses would be enforced, where action to enforce covenant was brought within two years of conversion of the lot from parsonage into recreation center and private church school. *Snoddy v. Mayall*, App. 2 Cir.1975, 309 So.2d 395, writ denied 313 So.2d 602.

Where building restrictions or covenants are violated, parties within a subdivision may have that activity enjoined and may enforce the restrictive covenants; however, if violation continues for more than two years, prescription will bar any attempt to enforce the provisions of restrictive covenants. *Oak Ridge Builders, Inc. v. Bryant*, App. 3 Cir.1971, 252 So.2d 169, writ denied 259 La. 945, 253 So.2d 384.

Commencement of prescription

Once a violation of building restrictions becomes noticeable, a person aggrieved must file suit within two years. Audubon Trace Condominium Ass'n, Inc. v. Smith, App. 5 Cir.1998, 97-1082 (La.App. 5 Cir. 11/25/98), 722 So.2d 1114.

3. Commercial use restrictions, in general

Land subject to title provision prohibiting commercial establishments from being erected or maintained was freed of restriction by use of land as entrance-exit for trailer sales business on adjacent tract for more than prescriptive period, under LSA-R.S. 9:5622 (repealed; see, now, C.C. art. 780 and this article), of two years. LeBlanc v. Bowen, App. 4 Cir.1970, 238 So.2d 369.

Where more than two years had elapsed from time landowners began operating office in home in violation of subdivision building restriction until bringing of suit to force compliance with building restriction suit had prescribed under LSA-R.S. 9:5622 (repealed; see, now, C.C. art. 780 and this article). Fatjo v. Mayer, App. 3 Cir.1964, 162 So.2d 356, writ granted 246 La. 584, 165 So.2d 482, judgment reinstated 247 La. 327, 170 So.2d 859.LA C.C. Art. 781

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No action for injunction or for damages on account of the violation of building restrictions may be brought after two years from the commencement of the noticeable violation. LSA-C.C. art. 781; former LSA-R.S. 9:5622. After the lapse of this period, the immovable on which the violation occurred is freed of the restriction that has been violated. This two-year liberative prescriptive period does not merely bar actions for the enforcement of building restrictions as sui generis real rights; rather, it extinguishes the real right itself in the same way that prescription of nonuse extinguishes the right of a servitude. LSA-C.C. art. 781, Comment (b). Upon completion of the prescription, the restriction is treated as if it never existed on that particular piece of land. LSA-C.C. art. 781, Comment (c), referencing Edwards v. Wiseman, supra.

Prescription of one type of restriction on a particular lot, however, does not free that lot from other restrictions nor other lots from restrictions of the type that has been violated, unless there has been a general abandonment of the restrictive plan or of particular restrictions. LSA-C.C. art. 782; LSA- C.C. art. 781, Comment (d), referencing Edwards v. Wiseman, supra; Olivier v. Berggren, 136 So.2d 325 (La.App. 4th Cir.1962); Sherrouse Realty Co. v. Marine, 46 So.2d 156 (La.App. 2d Cir.1950). Nevertheless, when the entire restrictive plan is abandoned, the affected area is freed of all building restrictions. LSA-C.C. art. 782. When a particular restriction is abandoned, the affected area is freed of that restriction only. Id.

Abandonment of the entire restrictive plan is ordinarily predicated on a great number of violations of all or most restrictions. LSA-C.C. art. 782, Comment (b). Abandonment of a particular restriction is predicated on a sufficient number of violations of that restriction in relation to the number of lots affected by it. Id.; Marquess v. Bamberg, 188 So.2d 721 (La.App. 2d Cir.1966); Guyton v. Yancey, 240 La. 794, 125 So.2d 365 (1960).

[1] Whether a general waiver or relinquishment of a restriction has occurred by common consent or universal acquiescence, depends upon the facts of each case. Edwards v. Wiseman,

supra. Where violations are general or have been universal without protest, so as to substantially defeat the object of the general scheme or purpose of the building restrictions, the restriction is considered waived or relinquished and cannot subsequently be enforced. See *Id.*; *Antis v. Miller*, 524 So.2d 71 (La.App. 3d Cir.1988); *Marquess v. Bamburg*, supra; *Robinson v. Donnell*, 374 So.2d 691 (La.App. 1st Cir.1979), writ den., 375 So.2d 958 (La.1979); *Cook v. Hoover*, 428 So.2d 836 (La.App. 5th Cir.1983).

[2][3][4] Whether acquiescence to violations is sufficient to cause abandonment of a restriction depends upon the character, materiality and number of the violations and their proximity to the objecting residents. *Guyton v. Yancey*, supra; *Gwatney v. Miller*, 371 So.2d 1355 (La.App. 3d Cir.1979); *Ritter v. Fabacher*, 517 So.2d 914 (La.App. 3d Cir.1987); *East Parker Properties, Inc. v. Pelican Realty Co.*, 335 So.2d 466 (La.App. 1st Cir.1976), writ den., 338 So.2d 699 (La.1976). When frequent and substantial violations of a restriction pass without objection, the restriction is regarded as abandoned if the property owner against whom abandonment is asserted knew, should have known or had a duty to know of the alleged violation. *East Parker Properties, Inc. v. Pelican Realty Co.*, supra. See also *Lakeshore Property Owners Ass'n v. Delatte*, supra. Insubstantial, technical or infrequent violations of a restriction, which are not subversive to the general plan or scheme, weigh little towards establishing an abandonment. *Id.*; *Guyton v. Yancey*, supra; *Marquess v. Bamburg*, supra; *Cook v. Hoover*, supra; *Gwatney v. Miller*, supra; *Antis v. Miller*, supra.

Doubt as to the existence, validity or extent of building restrictions is resolved in favor of the unrestricted use of the immovable. LSA-C.C. art. 783; *Camelot Citizens Ass'n v. Stevens*, supra; *Salerno v. De Lucca*, 211 La. 659, 30 So.2d 678 (1947).

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APPLICATION OF PRECEPTS TO THE FACTS

A. The Association's Right of Action

[5] Delatte contends the Association does not have standing to enforce the recorded restrictive covenants affecting West Lakeshore Subdivision because the restrictions are personal and not property rights. We disagree. The restrictions are sui generis real rights and every landowner in West Lakeshore Subdivision, as well as an association composed of those landowners, has a substantive right and procedural capacity to enforce West Lakeshore Subdivision's building restrictions.

[6][7][8] The peremptory exception raising the objection of no right of action is the proper device for challenging a plaintiff's interest in judicially enforcing the right asserted. *Teachers' Retirement System of Louisiana v. Louisiana State Employees' Retirement System*, 456 So.2d 594 (La.1984). The want of interest raised by the objection relates primarily to whether the particular plaintiff falls as a matter of law within the general class in whose favor the law grants the cause of action asserted by the suit. *Id.*, citing *Bielkiewicz v. Rudisill*, 201 So.2d 136 (La.App. 3d Cir.1967). The factual evidence admissible on the objection is restricted to evidence on whether this particular plaintiff does or does not fall within the general class having a legal interest to sue upon the cause of action asserted. *Id.*

The Articles of Incorporation for the Lakeshore Property Owners Association, Inc., [FN6] set forth that its membership shall be composed of two types, owner members who are owners of real estate in Lakeshore Subdivision, and associate members who are residents in Lakeshore Subdivision and/or lessees of business establishments in Lakeshore Subdivision who are not owners. The articles also set forth, in part, the purposes for which the non-profit corporation is

formed are "... to strive for the enforcement of building and other legal restrictions as contained in the titles to land in Lakeshore Subdivision; to require prospective builders in Lakeshore to strictly adhere to the said restrictions ..."

Case: Lakeshore Property Owners Ass'n, Inc. v. Delatte

Excerpt from: 579 So.2d 1039, *1042 to 579 So.2d 1039, *1044

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[16][17][18][19] Although other functions have been held at Longue Vue, the record details only the 1979 ABA parties, the 1982 Loria party, the 1983 Moss wedding reception, the Pettit parties in 1984 and 1986, and the 32 functions in 1987. After the series of ABA parties, Murphy Moss and Max Nathan wrote a 1979 letter to Longue Vue at the request of the other residents complaining primarily about public use of Garden Lane. Similarly, the 1984 Diefenthal letter complained primarily of violations of the use of Garden Lane by guests and service persons attending a 1983 wedding. In addition, Moss, who is not a plaintiff, testified he complained about commotion created when filming was done at Longue Vue and on other occasions when he was disturbed by amplified music. All these complaints were made before Moss moved from Garden Lane in 1986; he claimed that Ms. Treadway was "very solicitous and always heard what we had to say and indicated she would do what she could." More recently, there is evidence Loria complained to Treadway about the increasing disturbance created by the functions at Longue Vue and was also assured that his concerns would be addressed.

An examination of the record shows that violations of the 1977 agreement have been regularly protested. Defendants' recurring assurances in response to this request constitute acknowledgment sufficient to interrupt prescription. C.C. art. 3464. [FN10] Suit was thus timely filed. Furthermore, given the continuous nature of the violations of the agreements, prescription could not have run. [FN11]

FN10. Prescription is interrupted when one acknowledges the right of the person against whom he had commenced to prescribe. C.C. art. 3464. As explained in comment (d), this article served to legislatively overrule dicta in *Goldsmith v. McCoy*, 190 La. 320, 182 So. 519 (1938), which declared that only the prescription of nonuse running against continuous and apparent servitudes could be interrupted by tacit or informal acknowledgment. Thus art. 3464 represents a return to traditional concepts, in accord with the spirit of recent legislation dealing with servitudes. The longstanding rule, with which until *Goldsmith* Louisiana courts were in accord, is that an acknowledgment interrupting the prescription of nonuse can be express or tacit, written or oral, and formal or informal. C.C. art. 3464, comment (d); *Gillis & Co. v. Nelson and Donalson*, 16 La. Ann. 27 (1861).

FN11. The question of prescription might be significant if this were an action for damages. Cf. *South Central Bell Telephone v. Texaco, Inc.*, 418 So.2d 531, 533 (La.1982). Plaintiffs sought damages and injunctive relief. Prior to trial, the issue of damages was deferred pending a ruling on the suit for injunction. In brief to this Court, plaintiffs have said they no longer seek damages. Case: *Diefenthal v. Longue Vue Management Corp.*
Excerpt from: 561 So.2d 44, *54 to 561 So.2d 44, *55

Statutory Remedies-from LA Civil Code

Art. 667. Limitations on use of property

Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.

Art. 668. Inconvenience to neighbor

Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.

Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors's [neighbor's] house, because this act occasions only an inconvenience, but not a real damage.

See also *Rodrigue v. Copeland*, 475 So.2d 1071, 1078 (La.1985)